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THE
PARSON'S COUNSELLOR;

WITH THE
LAW OF TITHES OR TITHING.

IN TWO BOOKS.

The First shows the Order every Parson, Vicar, &c. ought to observe in obtaining a spiritual Preferment, and what Duties are incumbent upon him after taking the same; and many other Things necessary for every Clergyman to know and observe.

The Second shows in what Manner all Sorts of Tithes, Offerings, Mortuaries, and other Church Duties are to be paid, as well in London as elsewhere, and as well by the Canon as Common and Statute Laws; and in what Courts and Manner they may be recovered, what Charges they are subject to, and many other Things concerning the same necessary for Clergymen and all others to know.

James Barstow.

BY SIR SIMON DEGGE, KT.

THE SEVENTH EDITION, WITH GREAT ADDITIONS,

BY CHARLES ELLIS, ESQ.

OF LINCOLN'S-INN, BARRISTER AT LAW.

LONDON:

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ADVERTISEMENT

TO THE

SEVENTH EDITION.

THE Parson's Counsellor, after having passed through six editions, has not been republished since 1703; other productions of a similar nature have since made their appearance, most of which have borrowed from this work, or referred to it as an authority: these have in their turn become obsolete; and, with the exception of the more voluminous work of Dr. Burn, there is at present no modern book affording a combined view of the law on ecclesiastical subjects.

Of the merits of this compilation it may be sufficient to say, that it is collected from the best sources, comprehends much in a single volume, and points out, as its title page de-

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clares, "things necessary for all clergymen to know and observe."

Under this impression the editor thought that a republication of it, with the addition of the subsequent decisions and statutes, and a notice where any alteration may have been effected by them, would not be useless either to the clerical profession or his own.

In making these additions he has endeavoured to preserve what he conceived to be the intention of the author, by inserting what is likely to be generally useful in practice, in preference to minuter and more special points, while at the same time he has, by giving one or more references, pointed out those sources where ampler information may be obtained. He has collected and arranged the most material cases on the subject of dilapidations; he has added the statutory law relative to Queen Anne's bounty, and the recent acts concerning the clergy, together with those relative to briefs, parochial registers, and marriage.

He has been enabled to give some original information on points of ecclesiastical cogni-

zance, by the aid of Dr. Phillimore's Reports, a work which promises to supply a deficiency long felt in legal literature; and in the second part he has annexed the material additions, and noticed the alterations of the law upon the subject of Tithes.

He has introduced this supplemental matter by way of notes rather than insertion into the text, in order that the identity of the old and new editions might be preserved for purposes of reference; and to prevent the interruptions caused by their frequent recurrence, he has, in some instances, consolidated many together, where, but for that reason, they might seem more pertinent if dispersed.

How far he has succeeded in this attempt it is for the public to decide. For those errors which may be discovered, he has to solicit the indulgence of the professions for whose use it is designed. Where the materials, as in this instance, are frequently scanty, and generally dispersed, a compiler is not often satisfied with his own performance, he can still less hope to satisfy others, unless a consideration of these

circumstances accompany them in their perusal
of it.

Experientia mentis

Paullatim docuit pedetentim progredientes.

Sic unum quicquid paullatim protrahit ætas

In medium, ratioque in luminis eruit oras.

Lucr. Lib. 5.

*2, Stone Buildings, Lincoln's Inn,
December 1, 1819.*

TO
THE RIGHT HONOURABLE
AND
RIGHT REVEREND FATHER IN GOD,
T H O M A S,
LORD BISHOP OF LICHFIELD AND COVENTRY.

MY LORD,

I THOUGHT to have sent this trifle into the world without patron or author's name to it, but it is well known how scandalous it is to that child whose parent is ashamed to own it; I therefore resolved to run the censure of a critical world: and then observing how ancient dedications have been, both by Greek and Latin authors, and that they are continued to this day throughout all Christendom, I resolved not to be singular. And considering that this little undertaking was performed at the request of some reverend clergymen of your lordship's diocess, and that it was nursed up to what it is now presented to your lordship

there likewise, I conceived it could not challenge the patronage of any other more properly than of your lordship; and therefore, such as it is, I here humbly present it to your lordship.

My lord, at first I designed no more but the second part of what it now is; but observing your lordship's diligent and great care, at your lordship's primary visitation at Derby, against simony, dilapidations, and non-residence, the three great pests in the church, I added three chapters upon those subjects; and after adding one thing after another, it came to make a distinct part of this work alone.

My lord,—Your lordship has had many honourable and worthy predecessors, and I cannot forbear to mention to your lordship your immediate predecessor, my Lord Bishop Hacket; with what indefatigable industry did he repair, or rather re-edify, the church at Lichfield, which he happily lived to finish! A work that could hardly have been performed by any other. How circumspectly, prudently, and diligently did he govern his church, never absenting himself unless in his Majesty's and country's service! How constantly did he

visit and preach through his diocess! A religious pattern for all his clergy. What great insight had he both in the civil, canon, and common laws that related to the church government! How oft did he sit in his consistory to see justice done! Nay, what did he neglect that became a worthy prelate to do! And for his deep and profound learning in his function, certainly few exceeded him, if I have any judgment. My lord, I have observed three things perpetuate men's memory to posterity; children, learned writings, and public and eminent buildings;—he was fortunate in them all: he has left a worthy son to inherit his name, virtue, and temporal estate; he has left many learned works for the benefit of posterity, whereof some are already made public; and he has made himself no less eminent by his public buildings, witness his cathedral church at Lichfield, and Trinity-College in Cambridge, where he had his education; besides many other works of piety and charity in those few years he was bishop.

My lord, God hath not yet blest you with children, but may in good time, to preserve

your name: and I have heard, your lordship intends some eminent works for the public; and that your lordship hath resolved to go on, where your predecessor left, in building a palace for yourself and successors; I have great reason to believe, having heard your lordship so often declare you would do it; and having laid your hand to the plough in preparing some materials towards it, I know you will not look back: I have heard your lordship declare how much you delight in hospitality, which can never be so splendid as in a palace of your own building: and hereby your lordship will make yourself as eminent in the next age, as your worthy predecessor is in the present, than which nothing can be greater satisfaction to all, but chiefly to,

My honoured good lord,

Your lordship's most dutiful son,

And most obedient servant,

S. DEGGE.

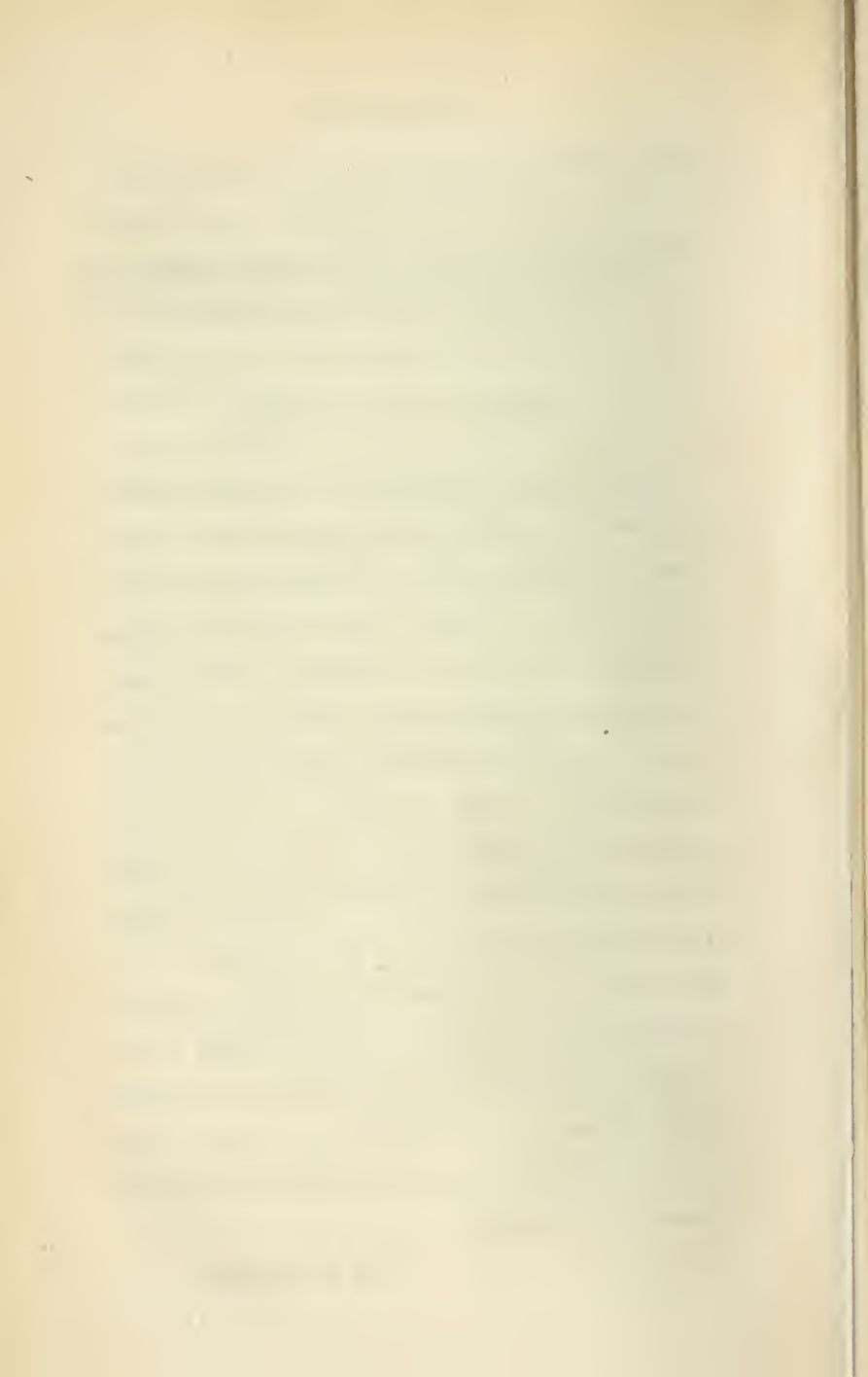
TO THE
PARSONS, VICARS, AND THE REST OF
THE REVEREND CLERGY

OF THE
CHURCH OF ENGLAND.

YOUR kind acceptance of the former impressions of this book has encouraged me this sixth time to appear in public. The first was hurried to the press so hastily, that I had not time seriously to peruse it, whereby some things were slipt in the copy; and my being far from the press occasioned many mistakes by the printer. In this, and the latter, something more care has been taken. The only essential oversight in the first impression (which I have yet discovered) was in the sixth chapter of the first book, which I must still desire may be corrected by this. I added many things to the second, third, and fourth editions, with three whole chapters; and many things to this. Your continued kind acceptance makes me think my labour well bestowed.

Et sic Valete.

S. D.



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By 59 Geo. 3. c. 134. s. 14. a clause is added to the act for building new churches, to the following effect: that it shall be lawful for the churchwardens of any parish, with the consent of the vestry, or persons possessing the power of vestry, and with the consent of the bishop and incumbent, to borrow, upon the credit of the church rates, or of any rate made under the said recited act, or of any such parish, such sums of money as shall be necessary for defraying the expense of repairing any churches or chapels; and they are required, in any case in which such money shall have been borrowed, to raise by a rate a sum sufficient, from time to time, to pay the interest of the money so borrowed, and not less than ten per cent. of the principal sum borrowed out of the produce of such rates, until the whole of the money so borrowed shall be repaid.

THE
PARSON'S COUNSELLOR.

PART I.

CHAPTER I.

Who may, or who may not, be a Parson, Vicar, &c.

HAVING taken upon me to be the Parson's Counsellor, it is necessary, in the first place, to shew who may be a parson, vicar, &c.

By a statute made in the 14th year of King Charles the Second, all are made incapable of being admitted to any parsonage or vicarage, benefice or other ecclesiastical promotion, preferment or dignity whatsoever, unless such person have episcopal ordination; and if any shall presume to be admitted, not having such ordination, or shall presume to administer the Sacrament of the Lord's Supper, not being so ordained, he is to forfeit an hundred pounds. 14 Car. 2. c. 4.
Promotion.

By divers ancient canons of the church, no man was to be a deacon before he was twenty-five years of age, nor a priest before he should attain the age of thirty years; but notwithstanding the canons, they were frequently dispensed with. [2]
Concil. Arelat.
Can. 1. Concil.
Const. cap. 4. &
15. Concil.
Neocæsar. cap.
11.
Callis Lect. 253.
Vid. Co. 2 Inst.
632.
13 Eliz. c. 12.

And by a statute made in the 13th year of Queen Elizabeth, it is enacted, That none shall be made minister or admitted to preach or administer the sacraments, being under the age of twenty-four years; nor unless he first bring to the bishop of that diocess, from men known to the bishop to be of sound religion, a

By implication this statute allows a man to be made a priest at twenty-four, whereas by the canons he could not be a priest before thirty years of age.

testimonial both of his honest life, and of his professing the doctrine expressed in the thirty-nine articles; and unless he be able to answer and render to the ordinary an account of his faith in Latin, according to the said articles, or have a special gift and ability to be a preacher: nor shall be admitted to the order of deacon or ministry, unless he shall first subscribe to the said articles.

And all dispensations in this case are made void by the same statute.

So that, upon the whole matter, none can be a priest before he is four and twenty years of age, nor none can be a parson before he is a priest (1).

(1) By the 44 *Geo.* 3. c. 43. it is enacted, that no person shall be admitted a deacon before he shall have attained the age of three and twenty years complete, and that no person shall be admitted a priest before he shall have attained the age of four and twenty years complete: and in case any person shall, from and after the passing of this act, be admitted a deacon before he shall have attained the age of three and twenty years complete, or be admitted a priest before he shall have attained the age of four and twenty years complete, that then, and in every such case, the admission of every such person, as deacon or priest respectively, shall be merely void in law as if such admission had not been made; and the person so admitted shall be wholly incapable of having, holding, or enjoying, or being admitted to any parsonage, vicarage, benefice, or other ecclesiastical promotion or dignity whatsoever, in virtue of such his admission as deacon or priest respectively, or of any qualification derived, or supposed to be derived, therefrom: provided always, that no title to confer or present by lapse shall accrue by any avoidance or deprivation, *ipso facto*, by virtue of this statute, but after six months notice of such avoidance or deprivation given by the ordinary to the patron. s. 1.

But nothing herein contained shall extend, or be construed to extend, to take away any right of granting faculties heretofore lawfully exercised, and which now are lawfully exercised by the archbishops of *Canterbury* and *Armagh*.

And by divers ancient canons, and by canons of our own, none ought to be ordained a priest before he have a title, that is, a presentment to a parsonage, vicarage, or a curacy.

And by another provincial canon of our own, those that have been guilty of homicide, or that have been advocates in *causa sanguinis*; those that are guilty of simony, or makers or solicitors of simoniacal contracts, witchcraft, burners of churches, cannot be priests without special dispensation, nor by consequence parsons or vicars.

And by another provincial canon of our own, those that are guilty of simony, homicide, persons excommunicated,* usurers, sacrilegious persons, incendiaries, vel † falsarios, may not be admitted into holy orders, and by consequence may not be parsons, vicars, &c.

And by a canon in³ the council of Nice, a man that voluntarily castrated himself might not be a priest; but if it were done by enemies, or by the advice of physicians for health's sake, it was no disability.

Bastards cannot be priests without dispensation, nor by consequence parsons ‡ (2).

(2) Though this is classed in the books among the causes of refusal, no one need apprehend that his preferment would be impeded in these times by any demerit but his own. Black. Com. 1. 389. See note 25.

And these exceptions, in general, may be now considered obsolete; the requisites for obtaining orders, so far as they concern a man's capacity, learning, piety, and virtue, are included in the following directions in the preface to the form of ordaining deacons, which is in some degree an enlargement of the restrictions mentioned in the text, viz. the bishop knowing, either by himself or by sufficient testimony, any man to be a person of virtuous conversation, and without crime; and, after examination and trial, finding him learned in the Latin tongue, and sufficiently instructed in holy Scripture, may admit him a deacon.

Can. Jac. 33. distinct. 70. cap. Nemine.

[3]

Cap. imprimis.
Co. 2 Inst. 632.

Cap. cum quanta.

Co. 2 Inst. 632.

* Distinctio

47. Co. 5. 58. a.

† Perjury, forgery, dist. 50.

si Episcopus.

38 E. 3. 2. a.

Cap. cos qui de non. Dyer 293.

5 H. 7. 20. a.

14 H. 7. 28. b.

15 H. 7. 7. b.

5 H. 7. 20. a.

Co. 5. 58. a.

Bro. Present. 54.

‡ Tyrrel's

2 Hist. 457.

29 E. 3. Fizh.

Qu. Imp. 192.

Bro. Clergy, 22.

Co. 2 Inst. 632.

Swinb. of Wills,

310.

Co. 2 Inst. 632.

A villain cannot be a parson, and if he be presented to a living, the bishop may refuse him.

A miscreant that does not believe the truth, an infidel that does not believe at all, a Jew, schismatic or heretic, that do not believe aright, ought not to be parsons, and if indicted, ought to be deprived; and so if the party

And by Can. 34. the direction is this: No bishop shall admit any person into sacred orders except he hath taken some degree of school in either of the two universities, or at the least except he be able to yield an account of his faith in Latin, according to the thirty-nine articles.

And with respect to priests orders in particular, it is thus directed by the statute of the 13 El. c. 12. None shall be made minister unless it appear to the bishop that he is of honest life, and professeth the doctrine expressed in the thirty-nine articles; nor unless he be able to answer and render to the ordinary an account of his faith in Latin, according to the said articles, or have special gift, or ability to be a preacher.

So that if these requisites be observed, the others are not now required, further than they agree with these.

And the ordinary way by which all this must appear to the bishop must be by a written testimonial, concerning which it is directed by Can. 34. aforesaid, with respect both to deacon's and priest's orders, that no bishop shall admit any person into sacred orders except he shall then exhibit letters testimonial of his good life and conversation, under the seal of some college of Oxford or Cambridge, where before he remained, or of three or four grave ministers, together with the subscription and testimony of other credible persons, who have known his life and behaviour for the space of three years next before.

And with respect to priest's orders in particular, it is enacted by the aforesaid statute of the 13 El. c. 12. that none shall be made minister, unless he first bring to the bishop of that diocese, from men known to the bishop to be of sound religion, a testimonial both of his honest life, and of his professing the doctrine expressed in the thirty-nine articles. 3 Burn's Eccl. Law, 32. 3.

be irreligious or illiterate, so if the party presented be mere laicus or outlawed.

And the bishop may refuse a clerk quia criminosus, for any of the crimes aforesaid, though the party be not convict, so the bishop be certain of the truth thereof.

And all things that are just causes to deprive a clerk, are just causes to refuse a clerk when presented. Stillingfl. Eccles. Cases, 73.

[4]
Co. 5. 58. a.
Regula.

But it is no good cause to refuse a clerk, because he is a player at unlawful games, or a haunter of taverns : because these are not malum in se, but malum prohibitum.

Ibid. Exceptio.

And the son cannot, without a dispensation, be parson of the same church that his father was incumbent of the next before him.

Co. 4 Inst. 337.
Linwood, cap.
Cum à jure in-
hibitum. Conc.
Lateran. Can.
31.

A man that cannot speak such language as the parishioners understand, ought not to be admitted parson of such a parish, but may be refused by the bishop : for to be illiterate, and not to be understood, is all one to the parishioners : and when the blind leads the blind, both fall into the pit (3).

Albany vers.
Evesque Lichf.
M. 26 & 27 El.
C. B. rot. 2023.
Cro. Eliz. 119.
Lucas vers.
Evesque Bath.
P. 3. El. per
Beudloes.

The bishop cannot refuse a clerk, because he wants a testimonial. See Stillingfl. Eccles. Cases, 74, 75 (4).

(3) A cause of refusal was, that the presentee could not speak Welsh, the service of the church being in that tongue, and it was held a good cause. Cro. El. 119.

(4) The case of Palmer and the Bishop of Peterborough, T. 33 El. upon the authority of which this statement seems to be made, was decided upon the pleadings in that cause, in which the bishop charged, that the person refused did not bring letters testifying his abilities, which the court seems to have understood as of his ability in learning, which the bishop might have judged of by examination : the bishop ought to have set forth, that he did not produce letters missive or testimonial of his good life and behaviour. 1 Burn's Eccl. Law, 154—5.

4 Inst. 338.

1 Leonard, 130.

Dyer, 293. b.

Mich. 16 & 17

El. per Harper.

But it seems that if the bishop does admit and institute any person into a living that lies under any of these incapacities, the church is full de facto till sentence of deprivation, nullity, &c. as the case requires, and no lapse incurs.

4 Inst. 338.

Stat. 3 R. 2. c. 3.

7 R. 2. cap. 12.

5 R. 2. nu. 91.

6 R. 2. nu. 31.

10 R. 2. nu. 20.

1 H. 5. cap. 7.

Can. 23.

An alien born at this day cannot be a parson, vicar, &c. nor is capable of any spiritual preferment, without the king's special licence, and the bishop may deny to admit and institute him, as Sir Edward Coke conceives.

By a canon in the third council of Lateran, under Alexander the Third, it was decreed that none should be parson of a parish under twenty-five years of age.

[5]

Outlawry and laity are disabilities. Co. 2 Inst. 632.

Vide Levit. cap. 21. ver. 17, 18, 19, 20, and 21, what bodily blemishes disabled priesthood under the law.

Where the right of nominating is in A. and of presenting in B., B. is to judge of the qualification of the person nominated in the same manner as a bishop does; but if the person presenting object to the nominee on the ground of immorality, that must be tried by a jury. 3 T. R. 646.

CHAPTER II.

*How one qualified to be a Parson, ought to behave himself
in obtaining a Living.*

A PARSON qualified as the law requires, must, without any corrupt or simoniacal contract, obtain a presentation from the right and undoubted patron of the church, whereof he designs to be parson; which may be in this form:

“ Reverendo in Christo patri et domino T. divina permissione L. et C. episcopo, ejusve vicario in spiritualibus generali A. B. armiger, indubitatus patronus ecclesiæ parochialis de C. in comitatu D. salutem in domino sempiternam. Ad ecclesiam de C. prædictam vestræ diocesis, modo per mortem,” (if void by the death of the last incumbent; but if it be by resignation, then you must say, “modo per resignationem;” but if the church be void by the last incumbent’s being made a bishop, or by taking a second living, not being qualified, then you may say, “per cessionem,” or as the special matter is; or if by deprivation, then you must say, “per deprivationem,” and then proceed,) “E. F. ultimi incumbentis ibidem jam vacantem, et ad meam donationem pleno jure spectantem, dilectum mihi in Christo G. H. clericum in artibus magistrum, paternitati vestræ præsentò, humiliter supplicans, quatenus præfatum G. H. ad dictam ecclesiam admittere, cumque rectorem ejusdem ecclesiæ instituere cum suis juribus et pertinentiis universis, cæteraque expedire et peragere, quæ vestro in hac parte incumbunt officio pastoralis, dignemini cum favore. In cujus rei testimonium his præsentibus sigillum meum apposui: datum primo die M. anno regni domini nostri Caroli Secundi, Dei

The form of a presentation. See other forms of presentations. Regist. orig. 301.

gratia, Angliæ, Scotiæ, Franciæ, et Hiberniæ, regis, fidei defensoris, etc. vicesimo octavo, annoque Domini 1675.”

1 Inst. 120. b.
F. Qu. Imp. 60.

And note, that the king, or any other patron, may present by word of mouth, or by letter, and it is as good and effectual as one in form (5).

How to proceed upon the presentation.

22 H. 6. 29. b.
Doct. & Stud.
1. 2. c. 31.

Dyer, 327. p. 7.
Rol. 2. 364. b. f.

What time the bishop may take to examine a clerk.

Lindw. chap.
Cum secundum apostolum.

1 H. 7. 9. b.

As soon as a clerk has obtained such presentation, it behoves him with all convenient speed, and within six months after the church became void by death, creation, or cession of the last incumbent, of which avoidances the patron is at his peril to take notice, or within six months after notice legally given to the patron by the ordinary of the church becoming void by deprivation or resignation, to tender his presentation to the bishop of that diocese within which the church is, or to his vicar-general, or in the vacation, when there is no bishop of such diocese, to the guardians of the spiritualities, to

(5) But since the statute of frauds, 29 Car. 2. c. 23. it is necessary that all presentations should be in writing; and by the several stamp acts, it is implied that they should be in writing, and not otherwise; for thereby it is enacted, “That for every skin, or piece of vellum, or parchment, or sheet of paper, upon which any presentation or donation, which shall pass the great seal of England, or upon which any collation to be made by any archbishop, or other bishop, or any presentation or donation to be made by any patron whatsoever, of or to any benefice, dignity, or ecclesiastical promotion, shall be ingrossed or written, shall be paid 20*l.* stamp duty: provided that such benefice, dignity, or promotion be of the yearly value of 10*l.* or above in the king’s books; but if under that, it is only 10*l.*”—In 2 Ves. 429. Attorney-General *v.* Brereton, is a dictum of Lord Hardwicke to the contrary, “a presentation to a church need not be in writing, but may be by parol. 1 Sid. 426. Co. Lit. 120.” It may be observed that both the authorities cited by his lordship are antecedent in time to the statute of frauds. Presentations are now made out in English, by analogy probably to proceedings in law, regulated by 4 Geo. 2. c. 26.

whom the law allows a reasonable time to examine the abilities of the clerk: for the ordinary is not bound as soon as a clerk tenders his presentation to despatch his business;* but if he be busy about the affairs of his church, he may make the clerk to stay till he hath done, or may appoint him a convenient time to attend him for his approbation.

† By the ancient canons, the bishop had two months time to consider of the ability and disability of the clerk; but by a canon made in the time of King James, that time is abbreviated to one month.

Then if the ordinary, &c., upon the examination of the clerk, find him fit in all points, as above in the first chapter is directed, then he admits him in these words, "Admitto te habilem," &c. And thereupon the ordinary institutes him in these words, "Instituo te rectorem ecclesiæ parochialis de C. et habere curam animarum: et accipe curam tuam et meam." And this the bishop may do as well out of his diocese as within it; for as to this matter, it is not local, but follows the person of the bishop whithersoever he goes. When the bishop has instituted the clerk, the ordinary, or, &c. makes a mandate under seal to the ‡ archdeacon of the place, § or to such other clergymen as he pleases, to induct the clerk. And it may be made ¶ by the dean and chapter, but not by the patron. For though by the institution the church is full against all persons, save the king, yet he is not complete parson till induction; for by the institution he is admitted ad officium to pray and preach, yet he is not intitled ad beneficium, until he be formally inducted, which may be done by the delivering of the ring of the church door, or latch of the church gate, or by delivery of a clod or turf, and twig of the glebe; but the most common and usual way is, and therefore the safest, by delivery of the bell-rope to the new instituted clerk, and he tolling the bell: and the archdeacon, if he do it, is to take but 40*d.* for doing of it.

[7]

* Hob. 317.
15 H. 7. 7. b.

† Canon 95.
The canon law allows two months, but the common law, which in all these cases is to be preferred, allows only convenient time.
Admission and institution.

Co. 4. 79. a.
32 H. 6. 28. b.
33 H. 6. 24. a.
38 H. 6. 15. a.
Knowles versus Dobbins, P.
21 Jac. C. B.
Carter v. Crofts,
27 El. C. B.

Who may make induction.

‡ Selden de Dec. 385. 394.
§ Callis v. Launt.
¶ 11 H. 4. 9. b.
Parson Denny's case.

H. 6 Jac. 10.
190. b. B. R.
Plowd. 528. b.
How induction is to be made.
Lindsey versus Dodson, M.
9 Jac. C. B.

[8]

Selden de Dec. 86.
33 H. 6. 24. 2.
Lindwood cap.
Item quia archidiaconi, &c.

III. 45 El. C. B.
F. N. B. 74, II.
56. b.
26 H. 8. 3. per
Knighly.

And an action of the case will lie against the archdeacon if he refuse or neglect to do his duty, or the clerk may compel him to do his duty in the ecclesiastical court; and note, that the church is full against every body but the king, by the institution, but not against the king till induction. Co. 1 Inst. 119. b. 344. a. Cro. Jac. 463. And some hold that the queen has the same prerogative. See Co. 1 Inst. 133. a.

Ylvert. 100.
Co. 6. 61. b.
62. a. 2 Inst.
361.

Now note, that the six months, within which the patron is to present, are to be accounted by 182 days, and not by 28 days to the month.

Selden de Dec.
389.
Hughes' Parson's
Law, 67.
What's to be
done after in-
duction.

And note, that the clerk is to do many things more at the time of the institution, and after his induction, to secure himself in his living, which he will find in the sixth chapter following, to which I refer him, and wherein very great care is to be taken, that all things be duly performed and observed.

From what time
the six months
shall commence.

There hath been some dispute, whether the six months shall commence from the time of the death of the last incumbent, or other avoidance, or from such time as the patron could reasonably have notice, considering the distance of place; and more particularly, where the patron or incumbent should happen to be beyond the seas at the time of the avoidance.

[9]
Rol. 2. 363. q.

And there hath been a canon, "Quod tempus semestre non incipit versus patronos, nisi à tempore scientiæ mortis personæ."

But by the common law of England, I conceive the patron is bound to take notice of the death, creation, or cession, as aforesaid.

Regist. orig. 42.

And this is proved by the register, where in a prohibition it is said, "Quia secundum legem et consuetudinem regni nostri Angliæ episcopi, etc. beneficia vacantia per lapsum temporis ante sex menses vacationum eorundem transactos conferre non debent, nec conferre consueverunt, aliquibus temporibus retroactis." So that it appears by this writ, that the time of the six months to collate by lapse commences from the va-

What time the
patron is to
present.

cancy, and not from the notice: but this must be intended of such avoidances, whereof the patron is bound to take notice as aforesaid.

And it is also to be observed, that if the patron do present his clerk, which is refused by the ordinary, because he is illiterate, criminous, &c. there the patron shall have no longer time to present but six months from the time of the avoidance, where the patron is bound to take notice of it, and six months from the time of notice, where the ordinary is bound to give notice of the avoidance.

But note, that in all cases, if a church lapse to the bishop or archbishop, and the patron present his clerk before the bishop or archbishop have collated; the bishop, &c. is bound to admit the clerk of the true patron, and cannot take advantage of the lapse. But the canonists, as should seem, hold the contrary; but the common law in this, as in other things, is to be preferred.

But if the bishop collate, and the patron present before induction, he comes too late.

But the great question is, if the church lapse to the king, and the patron presents before the king takes advantage of the lapse, whether this shall avoid the king's title by lapse? It is made a quære by Dyer; but Hobart seems to be clear in it, that the king shall not have the benefit of the lapse; but divers * authorities are against him, ideo quære. Rolls 2. 368. b. 27 E. 3. 84. b. Co. 7. 28. Doct. and Stud. lib. 2. cap. 31 (6).

There have been some opinions amongst the canonists, that a lay-patron should have but four months to pre-

Kelw. 50. b.
34 H. 7. 21. a.
14 H. 7. 21. a.
Dyer 227. p. 7.
The patron presents after lapse incurred.
13 E. 4. 3. b.
11 H. 4. 80. a.
Hob. 154.
Hutton 24.
32 E. 3. 2.
11 H. 4. 80.
43 E. 3. 11.
Lindwood.
Si aliquo evincente, &c. verba injuria.
[10]
B. Plenarty
15 Doct. &
Stud. 1. 294.

Dy. 277. p. 56.

Quære.

Dy. 277. p. 55.
Hob. 151.
Hut. 24.
* Cro. El. 119.
Cro. Jac. 216.
Owen 3 and 5.

What time the patron has to present.

(6) By others it is said, the turn is by lapse so vested in the king, that if the patron's or other person's clerk be admitted to a church, after it is come to the king by lapse, the king by quære impedit may recover the presentment, and remove such clerk, and this latter opinion is taken to be the law. Wats. c. 12.

Screne regiam
majestatem.
10. b.
Chap. Quoniam
verbum devol-
vatur.
Selden de De-
cimis, 390.

Doct. & Stud.
ubi supra
Co. 6. 19. b.
Cro. El. 119.
Dyer, 328. a.

[11]

Dyer, 346. a.
Co. 6. 29. b.
Dyer, 346. b.
Harp. 3 & 4 El.
Dyer, 237.
P. 29. 255. p. 5.
13 EL c. 12.

sent, but an ecclesiastical person shall have six months; and so it is said is the law of Scotland; but the common law, which rules the point here, and with more reason, gives the patrons in both cases six months.

In the cases of deprivation and resignation, where the patron is to have notice before the church can lapse, the patron is not bound to take notice from any body but the bishop himself, or other ordinary; which must be given personally to the patron, if he live in the same county; but if the patron live in a foreign county, then the notice may be published in the parish church, and affixed on the church door. And such notice must express in certain the cause of the deprivation, &c. and it must be “*verè, propriè, personalitèr, et non fictè,*” by the ecclesiastical laws. There are several other ways that a church may become void, of which the patron is at his peril to take notice, as union, not payment of tenths, &c.

But no lapse shall incur by any deprivation ipso facto by the statute of 13 Elizabeth until six months after notice (7).

(7) A donative remaining void never goes in lapse, unless it be especially provided for by the foundation, or by composition afterwards; but the ordinary may compel the patron to fill the same by ecclesiastical censures. Wats. c. 12. 2 Burn's Eccl. L. 363.

But if it is augmented by the governors of Queen Anne's bounty, it will lapse in like manner as presentative livings. 1. G. A. 2. c. 10. s. 7.

CHAPTER III.

In what case it is necessary that the Bishop have a Jure Patronatus, and how the same is to be proceeded in, and what is the effect and fruit of the same.

IF two patrons present to one and the same church by several titles, the church is become litigious; because the bishop knows not which hath the very true and rightful title to the same, and by consequence knows not which clerk to admit. And I take it, the church is not less litigious, though they both present the same person; because when the bishop admits him as the clerk of the one, he puts the other out of possession, and consequently to his action; and the bishop becomes a disturber, if he who is put out of possession prove to have a better title (8).

In what cases a church shall be said litigious. Doct. & Stud. 116. a.

[12]

Now the bishop, in this case, to secure himself ought to award a jure patronatus to inquire of the right; which is merely an inquest of office in nature of a writ de proprietate probanda, and does not at all * bind the title or right of the party.

Where a jure patronatus is necessary, and how to be proceeded in. Infra 19. * 34 H. 6. 38. b. 35 H. 6. 18. b. 19. a.

But it seems a question in our books, whether the bishop is bound to sue the jure patronatus at his own cost and peril, or only at the prayer, and at the cost of the party that prays it, or of both parties? But the better opinion seems to be, and so is the practice, that the same is to be sued at the prayer, and at the cost of one of the parties that prays it, or of both the parties if they join.

(8) If the right of nomination be in one and of presentation in another, and either impede the other in his right, quare impedit lies. Cross v. Salter. 3 T. R. 640.

34 H. 5. 11. a.
Hob. 317.
34 H. 6. 38.
5 H. 7. 22. a. it
is made a quære.

Now whereas the church may become litigious by double or plural presentations, so it may become more litigious by the jure patronatus; for if two patrons present, and each of them prays a jure patronatus by himself (as they may) and the one jury gives a verdict for the one's title, and the other for the other's title; here the bishop receives no direction at all, but the church still remains litigious.

Callis Read. 3.
21 H. 6. 44. a.
quære.

[13]

But here arises another great question, whether the bishop in this case may let the church lapse and collate, or whether he be not bound to admit one of the clerks at his election, or at his peril. Mr. Serjeant Callis, in his reading, was of opinion, he might refuse both clerks in this case, and suffer the church to lapse; and so is the book in 21 H. 6. by Newton and Paston. Tamen inde quære.

41 H. 6. 45. a.

And as a church may become litigious by a jure patronatus; so it may become litigious after a jure patronatus, and a verdict given for one of the parties; for if a jure patronatus be awarded, and a verdict given for one of the parties, and before the patron presents, for whom the verdict was given, and prays admittance of his clerk (as he ought to do, before the bishop is bound to admit his clerk) another presents; here the church is become litigious de novo, and the bishop in this case, as it seems, may award a new jure patronatus to determine the right of patronage between the new and the old patron, for whom the title was found in the former.

21 H. 6. 44.
Callis reading
29.
Hob. 318.

But some have thought, that though the church be not litigious by double or plural presentations, yet the bishop, if he doubt of the patron's title that presents, may award a jure patronatus, and inquire of such patron's title, and by that means prevent the surprize that may happen to other pretenders by sudden admission of the clerk; and in case the right of patronage be found for * a stranger, the bishop may admit his clerk.

* 34 H. 6. 44. a.
Hob. 317.

But it seems, that if the bishop admit the clerk that is presented before the church becomes litigious by a second presentation, the bishop acquits himself thereby from being a disturber; but by this means the bishop may do great wrong in surprising other patrons that have right: and the law doth not so hasten the bishop's proceeding, but that, as hath been said, he may take convenient time to examine the clerk, that other pretenders may take notice of the vacancy.

[14]

But though the church, by any of the means above-said, be become litigious, yet I think there is no doubt, but that the bishop may admit either clerk without a *jure patronatus*; but then he doth it at a double peril; for if the patron, whose clerk he admits, have not a good title, or having a good title, do not make it out in a *quare impedit*, or other action brought for the church, the bishop will be made a disturber.

Hob. 317.

And the bishop may thereby do great wrong to the true patron, by putting him out of possession of his church, and forcing him to an action that may turn much to his charge and trouble, besides great damage to his clerk, and oft to the loss of the advowson; therefore bishops ought in this case to be very tender to proceed according to justice. But if the patron fear any foul play from the bishop, and be not resolved of his clerk, he may enter a caveat with the bishop, not to admit the clerk of any other; and though this do not so bind up the bishop, that he cannot * admit the clerk of another person, yet if the bishop will presume to do it without a *jure patronatus*, he may be punished by his superior.

Rolls 2. 361.
m. 3.

* *Contra Poph.*
143.

But in case the bishop delay to admit the true patron's clerk, he may sue a *duplex querela* out of the Arches, to command the bishop to admit his clerk; and then if the bishop do not admit the clerk within nine days, or the space assigned by the *duplex querela*, or return a legal cause why he does it not, the metropolitan may admit the clerk in the ordinary's default.

Seiomor.
Zouch versus
Evesque Peter-
borough & al.
T. 38 Eliz. B. R.

[15]

Bendl. 2. 293.
M. 10.
2 Roll. 293.
M. 10.

If the archbishop institute in the bishop's default, and the bishop appeal after induction, a prohibition lies.

But the bishop may return, if the truth be so, that the church is litigious, and that he cannot admit the clerk till the right be determined in a *jure patronatus*, which will excuse him.

F. N. B. 37. f.

But the surest and safest way in this case is, if the bishop delay the true patron, immediately to sue a *quare impedit*, and thereupon a *ne admittas* to the bishop, and then, if the bishop, after the receipt of such writ, admit the clerk of any other person without a verdict in a *jure patronatus*, the true patron may have a writ called *quare incumbavit* against the bishop, and may therein recover the presentment with damages.

N. B. 4. S. g. h.
Ibid. l. 21. E. 3.
3. a.

F. N. B. 48. h.

And it should seem this writ lies, in case the bishop admit the clerk of the adverse patron, notwithstanding he hath obtained a verdict in a *jure patronatus*; but this must be intended, I conceive, where such patron is defendant in the *quare impedit*.

Cr. Jac. 463.

And note, that a caveat entered in the life of the former incumbent, is of no force.

Can. 95.

And note, that by a canon made in the time of King James, the patron or clerk cannot have a *duplex querela* till twenty-eight days are expired from the time the clerk was presented.

[16]
How far the bi-
shop is bound
by a verdict in
a *jure patronatus*.
34 H. 6. 11. b.
Hob. 318.

And it seems likewise, that the bishop is not so bound by the verdict in a *jure patronatus*, but that he may admit the contrary clerk, if he see cause, or be satisfied he has the better title; but this seems to be against justice, and the true intent of the law.

Hob. 318.

And Sir Henry Hobart was of opinion, that an action of the case lies against the bishop by the patron that is so disturbed, if in a *quare impedit* he prove to have the better title, and recover his damages by reason of the delay and trouble the bishop hath thereby put the patron to; but then the bishop must not be made a defendant in the *quare impedit*: but of this *quare*.

Quere.

Now the manner and form of proceeding in a *jure patronatus*, is thus: The bishop issues forth a commission under his seal to his chancellor, or some other persons, whom he pleases, that are expert in the canon and ecclesiastical laws. In which commission (since the title of patronages is determinable at the common law) it were not amiss to join some common lawyer of eminent learning and integrity; and these commissioners are by him authorised to summon a *jure patronatus*, and to proceed to the determination thereof, and then the commissioner or commissioners so authorised issue out a mandate to some officer of their own to summon a jury, which must be one half clerks, and the other half laymen; and if they refuse, being duly summoned, to appear, the commissioners may proceed against the clergymen by sequestration, and the laymen by ecclesiastical censures to compel an appearance.

The manner of proceeding in a *jure patronatus*.

22 H. 6. 29. b.

[17]

When a full jury of clergymen and laicks appear, which must be six of each at least, the commissioners are to swear first a clergyman, and then a layman, till twelve be sworn at least of the jury. But the commissioners may swear a greater number than twelve of the jury, if they please, or see cause, so always that there be an equal number of laymen and clergymen sworn in the whole.

The points inquirable by this commission are five:

Callis Read. 29. The points inquirable in a *jure patronatus*.

1. Si ecclesia vacat, et quomodo vacavit?
2. Quis patronus ultimo præsentavit?
3. Quis est verus et indubitatus patronus?
4. Quis præsentare debet ad ecclesiam nunc vacantem?
5. De idoneitate personæ præsentatæ.

Vide Lindwood per nostram provinciam verbo inquisitionem.

But the civilians vary in their articles at pleasure.

But the main and chief points are the third and fourth; the last resting wholly in the judgment of the bishop.

21 H. 6. 45. a.

After the jury is sworn and charged, the counsel and advocates of both parties are to shew their respective client's titles, and produce their evidences to prove the same. And after the evidence is given on both sides, and counsel fully heard, the jury may give their verdicts forthwith, or the commissioners may give them time to consider of their evidence, and may assign them another time and place for the giving their verdict, as in other inquests of office; but I like much better (to avoid being tampered with) that they give their verdicts forthwith before they part, unless new evidence be expected.

[18]

22 H. 6. 29. b.

The effect of a
jure patronatus.

The effect of this suit is no more but for the bishop's security, that he may avoid being a disturber; for the verdict of this jury is a sufficient warrant for the bishop to admit and institute his clerk, for whose title the verdict is given, and the bishop for so doing shall never be made a disturber, though the other patron against whom the verdict is given, shall after recover in a quare impedit, or other action.

What is to be
done if the jury
will not give a
verdict.
35 H. 6. 18. b.
&c.

But suppose the jury will not agree of their verdict, and the one half be for the one patron, and the other half for the other patron; or, that they refuse to give any verdict at all; or if they find a special verdict, as I suppose they may; the bishop in all these cases is left to proceed at his peril, as though no jure patronatus had issued at all; or perhaps in this case he may discharge the jury, and summon a new jure patronatus.

34 H. 6. 12. a.
Callis Read. 29.

And it is to be observed, that after a verdict found in a jure patronatus for the patron, the patron must again request the bishop to admit his clerk; otherwise, if the church lapse after six months, the bishop may collate (9).

[19]
What is to be
done where coparceners, joint
tenants, or tenants in common
present severally.

But if two coparceners present several clerks by the same title, this doth not make the church litigious, but

(9) It should seem from the authority cited, that the clerk, instead of the patron, is to make this request.

the bishop is bound to admit the clerk of the elder sister. But this is to be intended where the eldest sister presents alone, and not jointly with any other of the co-heirs (10).

But if two joint tenants or tenants in common present several clerks, that makes not the church litigious; for the bishop may admit the clerk of which he pleases. Or if they do not agree and join in presenting a clerk within the six months, the bishop may collate.

Parceners made partition to present by turn, and usurpation was made in the turn of them, the court inclined that it should put all out of possession (11).

Doct. and Stud.
115. b.
C. 1 Inst. 243. a.
21 H. 6. 45. a.
per Ascue.
34 H. 6. 40.
5 H. 7. 8. causa.
16 q. 7. considerandum est.
11 H. 4. 53.
33 H. 6. 32.
1 Inst. 186. b.
Doct. and Stud.
115. b.
Kite v. Evesque
Bristol.
P. 7 Jac. C. B.
1 Inst. 186. b.
6 Ed. 4. 10. b.
34 H. 6. 40. b.
Ubi supra.

(10) The privilege of an elder sister to present first in turn not only descends to her heir, but goes to her assignee. *Buller v. the Bishop of Exeter*. M. 1749. 1 Ves. 340.

Where there are several cestui que trusts of a presentation, they must all agree, or there can be no nomination; so in case of joint tenants before severance, but where parceners in an advowson cannot agree, the Court of Chancery will, in a partition case, direct the parceners to draw lots who shall have the first presentation. *Seymour v. Bennett*, M. 1742. 2 Atk. 482.

A. B. and C., three sisters, are coparceners of an advowson. A. marries D. on whom A.'s third is settled; B. marries E., and C. dies, having devised her third to F., the son of B. and E. D. E. and F. being thus intitled, under or in right of the several original coparceners, a quare impedit is brought by G. a stranger, against D. and E. E. dies pending the writ, and the share of B. (previously deceased) thereupon descends to F. in addition to the share devised to him by C. D. suffers judgment by default. This judgment against D. is a bar to a quare impedit brought by D. and F. (in which D. is summoned and severed,) to recover the same presentation; but is not a bar to F.'s right to recover on the next avoidance in his turn. *Barker v. Bishop of London*, 1 H. Blackstone, 412.

(11) By the statute 7 Anne, c. 18. no usurpation shall displace the estate or interest of the patron, or turn it to a mere right; but that the true patron may present upon the

Pasch. 35.
Car. 2. C. B.
2 Ventr. 39.

If the commis-
sioners neglect
their duties.
22 H. 6. 30. a.

And note, that the bishop needs not to make commissioners to inquire de jure patronatus; but he may, if he pleases, do the same himself: and therefore, if his commissioners neglect to do their duties, it shall not excuse him, because it was his folly to name such commissioners. But the opinion of the civilians seems otherwise: for they say, that the party shall name the commissioners; and if they neglect their duties, it shall be at the peradventure of the party that names them. And though they make a false return, or no return at all, it shall excuse the bishop; and the party grieved is left to his action against the commissioners.

Verdict does
not bind.
21 H. 6.
[20]
34 H. 6. 38. b.
Supra 12.

And, as has been said, the verdict in a jure patronatus does not bind the adverse party's title, though it may be some evidence for him whose title is found to be the best.

22 E. 4. 66.
13 H. 8. 12.
35 H. 6. 62.

If there be three jointenants of an advowson, the church whereof becomes void, it has been a question, if two of the jointenants may present a third, Dyer, 304. b. 14 H. 82. Moor, p. 14. Bendl. 34 (12).

next avoidance. But that act is not retrospective. Attorney-General v. Bishop of Litchfield. E. 1801. 5 Ves. jun. 828.

(12) As the writ of quare impedit is now the only action used in case of the disturbance of patronage, it may not be improper to describe it in the clear language of Blackstone. "The writ of the quare impedit commands the disturbers, the bishop, the pseudo-patron and his clerk, to permit the plaintiff to present a proper person (without specifying the particular clerk) to such a vacant church, which pertains to his patronage; and which the defendants, as he alleges, do obstruct; and unless they so do, then that they appear in court to shew the reason why they hinder him.

"Immediately on the suing out of the quare impedit, if the plaintiff suspects that the bishop will admit the defendant's or any other clerk, pending the suit, he may have a prohibitory writ, called a ne admittas; which recites the contention begun in the king's courts, and forbids the bishop to

admit any clerk whatsoever till such contention be determined. And if the bishop doth, after the receipt of this writ, admit any person, even though the patron's right may have been found in a jure patronatus, then the plaintiff, after he has obtained judgment in the quare impedit, may remove the incumbent, if the clerk of a stranger, by writ of scire facias; and shall have a special action against the bishop, called a quare incumbravit; to recover the presentation, and also satisfaction in damages for the injury done him by incumbering the church with a clerk, pending the suit, and after the ne admittas received. But if the bishop has incumbered the church by instituting the clerk, before the ne admittas issued, no quare incumbravit lies; for the bishop hath no legal notice till the writ of ne admittas is served upon him. The patron is therefore left to his quare impedit merely, which, as was before observed, now lies (since the statute of West. 2.) as well upon a recent usurpation within six months past, as upon a disturbance without any usurpation had.

“ In the proceedings upon a quare impedit, the plaintiff must set out his title at length, and prove at least one presentation in himself, his ancestors, or those under whom he claims; for he must recover by the strength of his own right, and not by the weakness of the defendants: and he must also shew a disturbance before the action brought. Upon this the bishop and the clerk usually disclaim all title: save only, the one as ordinary, to admit and institute; and the other as presentee of the patron, who is left to defend his own right. And, upon failure of the plaintiff in making out his own title, the defendant is put upon the proof of his, in order to obtain judgment for himself, if needful. But if the right be found for the plaintiff, on the trial, three farther points are also to be inquired:—1. If the church be full; and if full, then of whose presentation: for if it be of the defendant's presentation, then the clerk is removeable by writ brought in due time. 2. Of what value the living is: and this in order to assess the damages which are directed to be given by the statute of Westm. 2. 3. In case of plenarty upon an usurpation; whether six calendar months have passed between the avoidance and the time of bringing the action: for then it would not be within the statute, which

permits an usurpation to be devested by a *quare impedit*, brought *infra tempus semestre*. So that plenarty is still a sufficient bar in an action of *quare impedit*, brought above six months after the vacancy happens, as it was universally by the common law, however early the action was commenced.

“ If it be found that the plaintiff hath the right, and hath commenced his action in due time, then he shall have judgment to recover the presentation; and if the church be full by institution of any clerk, to remove him: unless it were filled *pendente lite* by lapse to the ordinary, he not being party to the suit; in which case the plaintiff loses his presentation *pro hâc vice*, but shall recover two years’ full value of the church from the defendant the pretended patron, as a satisfaction for the turn lost by his disturbance; or in case of insolvency the defendant shall be imprisoned for two years. But if the church remains still void at the end of the suit, then whichever party the presentation is found to belong to, whether plaintiff or defendant, shall have a writ directed to the bishop *ad admittendum clericum*, reciting the judgment of the court, and ordering him to admit and institute the clerk of the prevailing party; and, if upon this order he does not admit him, the patron may sue the bishop in a writ of *quare non admisit*, and recover ample satisfaction in damages.”—3 Bla. Com. 247. et seq.

There must be a disturbance to maintain this action: in a *quare impedit*, the patron declared on a disturbance of him to present Nov. 1; the incumbent pleaded, that, May 1 next after, the presentation devolved on the queen by lapse, and she presented him to the church, &c. and on the demurrer the plea was held ill; because the defendant had not confessed and avoided, nor traversed the disturbance set forth in the declaration; and though by the demurrer the queen’s title was confessed, it appearing that it was already executed, and the defendant having lost his incumbency by ill pleading, the writ shall not be awarded to the bishop for the queen to present again, but for the patron. 1 Leon. 194.

It is a rule proper to be adopted in equity, that a *quare impedit* cannot issue after six months, where a parson has been presented to a living by one who has not a right, because it is the general one, that equity follows the law, whether originally

a resolution of the common law, or introduced by statute. The statute of Westminster 2. (13 Ed. 1. c. 5.) was intended to secure the peace of the church, and being considered as a statute of limitation, it is a bar of an equitable as well as a legal right, and therefore a plea of a plenarty of six months and upwards will be allowed. S. C. et vide *Gardener v. Griffith*, 2 P. W. 404.

Trustees had an advowson, with directions to present in a certain time. This is directory only, and they may do it afterwards, but they must join in the presentation. General disusage is evidence of a consent to lay aside that part of their constitution, which arose by consent. *Attorney-General v. Scott*, 1 Ves. 415.

Where trustees have a power to elect a vicar, they must all join or the bishop may refuse their nominee, and he shall not, by quare impedit, be compelled to institute him. So election as well as presentation being requisite on the part of the trustees, they shall give notice of their meeting; and if the election be not fair, the court will not then compel all the trustees to join in the presentation. *Wilson v. Dennison*, Ambl. 82. Where by neglect the number of trustees to present to a living was not filled up at the time of an avoidance, the court would not by an injunction prevent the effect of a presentation, under the legal title of the heir of the surviving trustee, without special ground, but the court will take care that the trust shall be properly filled up in future. S. C.

Where the trust of an advowson is to present some fit person, such as the inhabitants and parishioners, or the major part of the chiefest and discreetest of them, should nominate, the right of election is in the inhabitants, above the age of twenty-one, paying the church and poor rates, and a popular election by a majority of such voters, and others not so qualified, was in this case established. *Fearon v. Webb*, 14 Ves. 13.

A bill was filed to have a presentation to a living on the next avoidance delivered up, charging the defendant with gross misconduct in obtaining it, and otherwise while a private tutor in the family. General demurrer to the bill was allowed, for the court said no bishop will ever institute such a clergyman. *Macnamara v. ———*, 5 Ves. jun. 824.

CHAPTER IV.

How the Law stood concerning Pluralities before the Statute of 21 H. 8. cap. 13. Who are qualified within that law to have Pluralities; and how qualified persons ought to behave themselves in taking the second Livings, so that the former may not be void.

What a plurality is.

Co. 4. 90. b.
Co. Mag. Chart.
626. Vide the records there cited.

[21]
Hob. 149.
Concil. tom. 4.
221. ca. 29.
Concil. Lat. 4.
1215. cap. 29.
Concil. Lat. 3.
1180. ca. 13.
Canon against pluralities.
Co. 4. 79. a.
Clement tit. a.
cap. 3. gloss.
Beneficia quæ
requirunt resi-
dentiam sunt
incompatibilia.

* Can. 5.
Note, Those livings are said to be incompatible that have cure of souls, or are forbid to be held together by some canon.

A PLURALITY is, where one and the same person obtains two or more spiritual preferments with cure of souls, or without; against which there have been several canons, and they have been always discountenanced at the common law, and several complaints have been made against them in parliament; yet the Pope held them up by his dispensations. How agreeable these dispensations were to God's service; nay, how prejudicial they have been to the advance of the christian religion, and are, I leave others to judge; it being no part of my undertaking. And though I find a great judge of this nation defending of them; yet I find a canon in the general council of Lateran against them, in the year 1215, in these words: "Statutum est quod, quicumque receperit aliquod beneficium habens curam animarum annexam, si prius tale beneficium obtinebat, eo sit jure ipso privatus, et si forte illud retinere contenderit, alio etiam spoliatur. Is quoque, ad quem prioris spectat donatio, illud post receptionem alterius conferat cui merito viderit conferendum."

And by another council there held under Leo the 10th, anno Dom. 1123, it is further decreed, that "dispensationes autem ad plura *incompatibilia ultra duo, nisi qualificatis juxta formam juris communis non concedantur, nisi ex magna et urgente causa."

And now let me tell you the fruits of pluralities out of another council, which is delivered in these words: “*Res ipsa loquitur, plura beneficia, potissimum quibus cura animarum submissa est, non sine gravi ecclesiarum damno ab uno obtineri; cum unus in pluribus ecclesiis ritè officia persolvere, aut rebus earum necessariam curam impendere, nequeat.*”

Tom. 5. 368. cap. 64.
The effect of pluralities.
Co. 4. 79. b.
Clement. 1. 3. tit. 2. ca. 3.
Gratian. causa 21. q. 1. Mag.

Yet the canonists allow of pluralities in six cases:

1. When the churches are so poor, that either by itself will not maintain a minister.
2. In such cases as the bishop dispenses with them.
3. Where there is a scarcity of clerks.
4. Where the clerk has one by title, and the other by commendam.
5. By grant from the Pope.
6. Where two churches are united, or depend the one upon another.

[22]

Which Hostiens. renders thus:

*Ecclesias plures nullus de jure tenebit.
Dependens, tenuis, rarus, vel gratia Papæ.
Utilitas urgens, et commendatio justa.*

But, as I take it, the council of Lateran reduces all these qualifications to the Pope's dispensations. The canon is as follows:

Conc. Lateran. sub Alex. 4. 1180.

“*Cum fuit in hoc concilio prohibitum ut nullus diversas dignitates ecclesiasticas, et plures ecclesias parochiales reciperet contra sacrorum canonum instituta. Hoc idem in personalibus decernimus observandum, addentes, ut in eadem ecclesia nullus plures dignitates habere præsumat, aut personatus, etiamsi curam non habeant animarum. Circa sublimes tamen et literatas personas, quæ majoribus sunt beneficiis honorandæ (cum ratio postulaverit) per sedem apostolicam poterit dispensari, &c.*”

Can. 29.
Vide decretals Gregor. de præbendis, &c. Lib. 3. tit. 5. cap. ad hæc.

And upon this canon, Goodman, dean of Wells, was deprived of his deanery, because he had accepted the prebend of Wiveliscome in the same church, in the

Dyer, 273. p. 35.

time of E. 6. And note, These presentments were not within the statute of pluralities, but are left as they were upon the canon law; for the statute only extends to livings with cure of souls (13).

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I might enlarge much more upon this subject; but it being collateral to what I design, this taste shall serve. And if any body desire further satisfaction upon this subject, I commend him to the history of the council of Trent; where he will find, that by the greater and better opinion of that council, residence by him that hath a preferment in the church with cure of souls is of divine right; and that therefore the Pope had no power to dispense with non-residence, the consequence of which is, that it is against divine right for any to take more benefices than one with cure of souls, because the same person cannot be resident in two places at one and the same time, to discharge his duty; which requires a constant attendance.

Conc. Trident.
496.

More, 119.

But as the Pope by stratagem made the endeavours of all the good men in that council ineffectual, so by his frequent dispensations to take pluralities without

(13) It may not be inapplicable to give some account of the canon law. The canons of 1603, which relate to clandestine marriages, are the 62d, 101st, 102d, 103d, and 104th; but none of them affect the parties contracting, except the last clause of the 104th, which relates to persons married by colour of false pretences: the court, however, held in this case, that the canons of 1603 not being confirmed by parliament do not proprio vigore bind the laity; and there is no canon since 1603, which can bind a layman, though made in full convocation. Yet canons that have been allowed by general consent within the realm, and are not repugnant to the laws, shall still be in force as the king's ecclesiastical laws. The necessity of parliamentary confirmation to bind the laity has existed ever since the reformation. *Middleton v. Crofts.* 2 *Atk.* 650. (*Append.*) *Ca. Temp. Hardw.* 57. 2 *Str.* 1056. 2 *Kel.* 148.

number or measure, he made the canons of the church of no other effect than to increase his own revenue by dispensations.

And it should seem the council of Lateran was received and approved (as to that point) in this kingdom, and the law was always taken, that he that had one living with cure of souls, and without dispensation accepted another with cure of souls, made the first void: so that the patron of the first church might present a new clerk, and needed not to stay till the former clerk should be legally deprived.

But in this case the church doth not lapse till the end of six months, to be accounted from the time the patron hath legal notice of the vacancy from the bishop; but after induction, the patron, as it should seem, is bound to take notice at his peril. And as to all others, but the patron, the church remained full till induction into the second living; and so are all the books, that seem *prima facie* to differ, reconciled.

But the parliament of England, that in all ages made bold with his holiness, and to restrain the exorbitances of the Pope and court of Rome, as the reader may see, if he please to satisfy himself by the several acts of parliament mentioned in the margin against provisions suing at Rome, impeaching judgments given at the common law, aliens being beneficed within this realm, privileging religious orders from payment of tithes, and many other things; and I cannot forbear to observe to the reader the boldness of the parliament in the sixth year of H. 4. with his holiness, where they restrain the giving of exorbitant and unjust fees for the investitures of bishops.

The act begins thus:

“Whereas there is a damnable custom in the court of Rome, to take more for the investiture of bishops,” &c.

Certainly these brave parliamenteers never expected his holiness's indulgence or pardon, this seeming a sin as high as that against the Holy Ghost, to charge their

Acceptance of a second living makes the first void.

24 E. 1. 29. b.
25 E. 3. 49. a.
55 b.

11 H. 4. 60. a.
per Hill.

14 H. 8. 17. a.

[24]

Co. 4. 95. b.

44 E. 3. 22. a.

9 E. 3. 22. a.

10 E. 3. 1.

14 H. 8. 17. a.

14 H. 7. 28. b.

F. N. B. 34. L.

15 E. 3. 9.

11 H. 4. 37.

Cro. Car. 357.

Several acts to restrain the Pope.

27 E. 3. cap. 1.

3 R. 2. cap. 3.

7 R. 2. cap. 12.

2 H. 4. cap. 4.

38 E. 3. cap. 1.

16 R. 2. cap. 5.

6 H. 4. cap. 1.

25 E. 3. of provisions; and

27 E. 3. cap. 1.

6 H. 4. cap. 1.

[25]

holy father with a damnable custom in his court, to use extortion and simony.

Can. 8.

And the council of Lateran, under Leo the 10th, anno Dom. 1523, dealt almost as plainly with his holiness, speaking of simony; that council has it, “*Ut nefariæ simoniæ labe et pestis non solum *à Romana curia, sed etiam ab omni christiana ditione, in perpetuum dejiciatur, constitutiones per antecessores nostros etiam in sacris conciliis nostris editas contra hujusmodi simoniacos, innovamus; easque inviolabiliter observari præcipimus.*”

* Nota.

The act against pluralities. 21 H. 8. c. 13. Co. 4. 79. b. This is a confirmation of the canon where the living is above eight pounds per annum, but does not annul the canon law in other cases; so that the effect of this law is, that it takes away dispensations in this case, but leaves the smaller livings, as they were before.

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But to return: The parliament, to prevent the mischiefs of these dispensations, made a law in the twenty-first year of H. 8. “*That if any person or persons, having (that is, being instituted) one benefice with cure of souls, being of the yearly value of eight pounds or above, shall accept and take any other with cure of souls, and be instituted and inducted into the possession of the same, that then, immediately after such possession had thereof, the first benefice should be void.*”

“*And that it should be lawful to every patron having the advowson thereof to present another, and the presentee to have the benefit of the same, as though the incumbent had died or resigned, and that any license, union, or other dispensation contrary to that act should be void.*”

If this act had gone no further, it had been an excellent law. But there are so many qualifications in this law that wholly defeat the benefit of it, since the nobility are grown so numerous as they are at this day; so that the grievance is now become as great as ever, if not greater, and deserves a new and stricter reformation; for almost all the greatest and best livings of the kingdom are now held by pluralists, and served by mean curates.

But now let me return to the act, and observe:

That this act has only provided a remedy, where the first living is of the yearly value of eight pounds or above, which must be understood according to the valuation taken in the twenty-ninth year of King Edward the First, till the twenty-sixth of Henry the Eighth; and after that time, according to the valuation then returned into the exchequer, and now made use of in the first-fruits office. * But many former opinions and books have been, that the valuation ought to be according to the true value. Ideo quære.

This point was moved in Shute and Higden's case, Vaughan 130, but was not settled, so it remains a quære still. Vide Vaughan, Shute v. Higden.

But in case the first living be under the yearly value of eight pounds, or a sine cura, then the party may accept a second, as he might have done before this act, with a dispensation, which he needs not now to go to Rome for, although he be not qualified within this law.

But I conceive, if an incumbent of a living under the value, take a second living without a dispensation, that the first living is void by the canon law, though it be not so by the statute (14).

Stillingfl. Eccl. Cases 99.
Cro. 6. ca. 45.
P. 19 Jac. C. B.
Evesque Durham v. Evesque Peterborough.
Roy v. Evesque Br. and Handly T.
44 El. B. R.
Rot. 564.
The court was divided.
* Dyer, 237.
p. 29.
Cro. Eliz. 853.
Quære.
Bushy v. Smith. T. 40 Eliz.
Rot. 123.
Noy, 38.

[27]

(14) And if an incumbent of a church, with cure, under eight pounds a year, take a second benefice with cure, in which he is also instituted and inducted (no dispensation being obtained for the holding of them both) by which the first is void against the patron, so that he may present; but before the patron presents upon such avoidance, the archbishop, by force of this statute, grants to the clerk a license perinde valere, to hold the first with the second benefice; this is not a good license (although confirmed according to the statute) to take away the patron's presentment, though his church was only void by force of a canon and not by statute: for by the canon the first benefice was so void, that the patron might have presented before any deprivation; and after the patron hath once a title to present, this title cannot be taken away

Who are qualified to have pluralities.

But by this act there are several persons qualified to have and retain pluralities; and those are of three sorts:

1. By service.
2. By their birth. And,
3. By dignities.

And first of those that are qualified by service.

Qualifications.

1. All the king's chaplains, (which are not of his council), and of the queen, prince, princess, and brethren and sisters, uncles and aunts of the king.
2. Eight chaplains of every archbishop.
3. Six chaplains of every duke.
4. Five chaplains of every marquis and earl.
5. Six chaplains of every bishop.
6. Four chaplains of every viscount.

from him by a subsequent license, unless such a license could make a void church full. Wats. C. 2. 3 Burn's E. L. 96.

If an incumbent in possession of above eight pounds per annum, in the king's books, accepts a second living under that value, and takes a second without a dispensation, the first is absolutely void; if being in possession of a living under eight pounds, he accept a second without a dispensation, the first is voidable at the election of the patron. 3 Atk. 455. 1 Bla. Com. 392. note 33.

A perpetual curacy is not an ecclesiastical benefice, but is tenable with any other benefice: by the ecclesiastical law the acceptance of an ecclesiastical benefice of ever so small value, makes a former benefice void, *Weldon v. Green, 1772*, from a MS. note of Serjeant Hill communicated by Sir W. Scott. But now by stat. 36 Geo. 3. perpetual curacies, augmented by Queen Anne's bounty, are made benefices presentative, and a license to them shall render other livings voidable, in the same manner as institution to presentative benefices.

7. Three chaplains of the lord chancellor, and of every knight of the garter and baron.

8. Two chaplains of every duchess, marchioness, countess, and baroness, being widows.

9. Two chaplains of the treasurer and comptroller of the king's house; the king's secretary, the king's almoner, clerk of the closet, and master of the rolls.

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10. One chaplain of the chief justice of the King's Bench, and warden of the cinque ports for the time being.

All these, in respect of their services, may purchase license or dispensations, and take, receive, and keep two parsonages or benefices with cure of souls, notwithstanding this act.

But those of the king's chaplains, that are sworn of the king's council, may purchase license or dispensations, and take, receive, and keep three parsonages, or, &c. with cure of souls.

2. The second qualification is by birth; that is, the brothers and sons of all temporal lords and of knights, born in wedlock, may purchase license or dispensations, and take, receive, and keep two parsonages, &c. with cure of souls.

Qualification by birth.

In which qualification it is to be observed, that no provision is made for bastards, nor for the sons of bishops, abbots, priors, &c.

And note, in this case the sons and brothers of knights have greater privilege than the sons and brothers of baronets.

3. The third qualification is of certain persons dignified in the universities; and of that sort are all doctors and bachelors of divinity, doctors and bachelors of the canon laws, which shall be admitted to any of those degrees by any of the universities of this realm, and not by grace only. All which may purchase licenses

[29]
Qualification by dignity.

or dispensations, and take, receive, and keep two parsonages, &c. with cure of souls (15).

Proviso, That above the number shall not be advanced.

And in this act there is a negative proviso to this effect, that no person or persons to whom any number of chaplains, or any chaplain by the provisions aforesaid is limited, shall in any wise, by colour of the same provisions, advance any spiritual person or persons above the number to them appointed, to receive or keep any more benefices with cure of souls, than is above limited.

Proviso, That they must have testimonials.

There is another proviso, that the chaplains so purchasing, taking, receiving, and keeping benefices with cure of souls, as aforesaid, shall be bound to have and exhibit, where need shall be, letters under the sign and seal of the king, or other their lord or master, testifying whose chaplains they be, or else not to enjoy any plurality of benefices by being such chaplains. Upon this clause some question has been made, whether a chaplain can be retained within the meaning of this law by parol; and it seems he may, so that they have such testimonial, when they pray their dispensation; but the safest way is to have it in writing, and it must be under hand and seal.

Roy versus Savaere. T. 28 El. C. B. Rot. 1130. Hughes, p. 41. Roy v. Evesque Lincoln et alios.

[30]
T. 31 El. Rot. 725. C. B.

Now having shewed what persons are qualified within this statute, I will in the next place show how the clerk, that would have the benefit of his qualification within this law, ought to proceed in the taking a second living, so that the first may not be void, which is in this manner:

How to proceed in the taking of a second living.

The parson that falls within any of the qualifications

(15) Henry 8th, in the 27th year of his reign, issued a mandate to the University of Cambridge, that no one in future should take a degree in the canon law. Both universities have since discontinued that kind of degree. Vide 1 Bla. Com. 392. Mr. Christian's note.

within this law, which makes him capable of a plurality, and having obtained a presentation to a second living, must carry his testimonial or retainer under the hand and seal of his lord or master, to the master of the faculties, who is to make out his dispensation or license to accept the second benefice; which being obtained, he must next have it confirmed under the great seal of England: and after he hath thus obtained his dispensation, and has it confirmed under the great seal, then, and not before, he is to apply himself to the bishop of the diocess where the living lies, for his admission and institution.

But these things taking some time in the doing, I advise the clerk immediately to enter a caveat with the bishop and his vicar-general, and carry his presentation to the bishop, and acquaint him with it, and with the reason of this delay, lest he should be surprised.

Though by the letter of the act, the first living is not void until induction into the second living; the words whereof are as follow: "If the party be instituted and inducted in possession of the second living, that then the first shall be void." Yet to avoid the great inconvenience that otherwise would ensue, it has been held that the first living is void upon the bare institution into the second living; and so it should seem the law was before the making of this act, where the party had no dispensation.

And it is to be observed upon this law, that in case any lord, or other person, whose chaplains are qualified within this law to have two or more livings incompatible, do retain his full number of chaplains, and after, one or more above his number; that in that case the supernumerary chaplains, that were retained after such lord, or other person, had retained his full number allowed by the statute, are not qualified by this law to have pluralities of livings, although the supernumerary

It should seem that the king might dispense with a plurality at common law. 11 H. 4. 60. b. Stat. 25 H. 8. cap. 21.

[31
First living void by institution into the second.

Co. 4. 79. b.
Hob. 166.

Which chaplains shall be qualified, where above the number is retained. More, 561. Co. 4. 50. a. and 118. a. R. v. Evesque Glouc. and Savescr. Anderson, 200.

chaplains be preferred before the other that were first retained.

Dyer, 312.
P 88

But if a chaplain qualified within this law be legally inducted into a second living with a dispensation, as he ought, although his master be attainted, degraded, or removed from his office, yet he shall retain his plurality during his life.

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The master dies,
&c. before preferment. Co. 4.
117. b.

But if one be retained chaplain to any lord or other person, whose chaplains are qualified within this law, and his master dies, is attaint, degraded or displaced before his chaplain be preferred to a second living: or if such lord or other person discharge such a chaplain (as he may), in all these cases the chaplain loses his qualification to have plurality of livings incompatible.

Co. 4. 118. b.
The mistress marries.

But if a duchess, marchioness, countess, or baroness do retain a chaplain, and after marries, this shall not take away the qualification of such a chaplain, but that he may have plurality of livings incompatible within this law, as he might have done before.

That is, having cure of souls.

Co. 4. 119. a.

And if such duchess, &c. retains chaplains, and after marries, and after becomes a widow again; yet the first retainer stands good, and was not countermanded by the marriage or death of the husband.

And note, that there is a proviso in this act, that though a duchess, marchioness, countess or baroness do marry an husband under the degree of a nobleman or baron, that yet, nevertheless, she may retain two chaplains, which shall be qualified within this law.

What preferments are not within this law.

[33]

And it is declared by this act, that deaneries, archdeaconries, chancellorships, treasurerships, chaunterships or prebendaries in any cathedral or collegiate church, or any parsonage that hath a vicar endowed, or any benefice perpetually impropriated, are not to be esteemed benefices with cure of souls within this act.

And if any duke, lord, or other person, whose chaplains are qualified within this law, shall have a double

capacity to qualify his chaplains; as if a duke, &c. be made lord-warden of the cinque ports, or a baron, master of the rolls, knight of the garter, &c. In all these cases such duke, baron, &c. can but qualify his number of chaplains, according to his best qualification only.

Co. 4. 118. a.

And if the eldest son of a duke, marquis, &c. retain chaplains in the lifetime of his father, who after dies, and the honour descends upon such son; yet this retainer will not qualify his chaplains to have pluralities within this statute, because at the time of the retainer he was not capable to qualify them. "Et quod ab initio non valet, tractu temporis non convalescit."

Chaplains retained in the life of the father. Co. 4. 90.

If a duke, marquess, &c. retain his full number of chaplains which are advanced, and then discharge them; yet he cannot, during their lives, qualify any other within this statute.

Lord discharges chaplains after they are preferred. Co. 4. 90. a.

But if a duke, marquess, &c. that has power within this act to qualify chaplains, at one instant of time retain his double number of chaplains, or any super-numerary chaplains; in that case, those only shall have the benefit of qualification that are first preferred. "Quia in æquali jure melius est conditio possidentis."

A great number of chaplains retained together. Co. 4. 90. a. Dyer, 312. p. 98.

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If one that is qualified within this statute take a second living incompatible, and be instituted or inducted into the same before he have obtained a dispensation, the first is void, though Dyer makes a quære of it.

Co. 4. 79. b. Dyer, 312. p. 98.

And note, that it hath been resolved, that the king himself cannot dispense with this law. Dyer 351. p. 2. 327. 2. p. 4. Trin. 18 El. C. B. Coxe's Case.

This law is not dispensable.

If a parson have a living under the value of eight pound, and take another without dispensation, the first is void; and if he do not read the thirty-nine articles, or do not do the other things prescribed in the sixth chapter of the first book, whereby the second living is

Vaughan's Rep. 129. Shute v. Higden.

void; yet that helps not, but that the first living is void, and the patron may present; but no lapse will incur until a legal deprivation and notice to the patron.

But if one that is qualified within this law to have two livings incompatible, shall neglect at the time of his institution to subscribe to the thirty-nine articles of religion, though he be after inducted into the second living; yet this shall not make the first void, for his institution and induction were both void ab initio: but if such parson had subscribed the articles at the time of his institution, and had after neglected to read them within two months after his induction into the second living, this makes both livings void (as was lately adjudged) because for two months he was complete parson of the second living (16).

And if a parson, &c. that is qualified within this statute to have plurality of livings incompatible, be made

(16) By stat. 23 G. 2. c. 28. it is enacted, that whereas it may happen, through sickness or other lawful impediments, that divers persons may be hindered from reading the said articles, and making the said declaration within the two months; and yet such person, after such sickness or other lawful impediment removed, hath read or may read the said articles, and hath made or shall make the said declaration, and it is reasonable that such persons should be deemed to have complied with the true intent and meaning of the said act: every person who hath read or shall read the said articles, and hath made or shall make the said declaration at the same time that he did read or shall read the morning and evening prayer, and declare his unfeigned assent and consent thereunto, according to the statute of the 13 and 14 C. 2. c. 4. shall be, and is hereby declared and adjudged to have complied with the true intent and meaning of the said act of the 13 El. although the same were not or may not be read within the space of two months after such person's induction into any benefice with cure; and every such person shall be freed and discharged from any deprivation or other forfeiture by virtue of the said act,

A pluralist neglects to subscribe or read the 39 articles. Dyer, 377. b. Co. 5. 102. Hob. 157. a.

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Vaughan, 129. &c.

Hob. 157.

a bishop, his qualification ceases, so that after he cannot take two benefices incompatible by force of such qualification; but if he had two livings before he was made bishop by qualification and dispensation within this statute, he may retain them by commendam: and although he were the king's chaplain, it alters not the case; for by the acceptance of a bishopric, he ceases to be the king's chaplain within this law.

And if a parson have one living incompatible, he cannot obtain another with cure to be united, unless he be qualified and have a dispensation, but that first will be void.

Parson's Law,
l. 2. 14 and 15.
Uniting a living
is a plurality.

Mr. Hughes, in his Parson's Law, puts two cases, which he is of opinion are out of the danger of this law. The first is, where there is a parsonage or vicarage endowed, and the parson without dispensation or qualification accepts the vicarage: and he conceives, that notwithstanding that these are two several advowsons and benefices, and that several *quare impeditis* may be brought of them, and that several actions are maintainable by the parson and vicar concerning their possessions; that yet, nevertheless, the presenting of one person to both is no plurality within this statute or the canon; because the parson and vicar have both but one cure of souls. Besides, there is a proviso in the act, that no parsonage with a vicarage endowed, shall be accounted a benefice with cure of souls within that act.

Parson and vicar
of the same
church, Si, &c.

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But his other case seems more doubtful, and it is put where a church has two rectories, and each has cure of souls *per se*, and are incompatible, and one person obtains both these livings without qualification or dispensation.

Two rectories
in one church.

This case he conceives to be both out of the danger of this act and the canon:

1. Because it is not in *pluribus ecclesiis*.

2. When there are several advowsons in one church, neither parson hath the whole cure of souls; and the words of the statute are, Having no benefice with the cure of souls of the value of eight pounds, takes and accepts another benefice with cure of souls, &c.

But here the church is one and the same, and the cure of souls the same; and therefore, as he conceives, neither within the danger of the statute or canon: but in a private report that I have, this very point came in question in the latter end of the queen's time; and the reporter says, that Walmesly and Beaumont were of opinion, that this case was within the statute: but Anderson doubted, and seemed to incline to the contrary. Ideo quære inde.

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By the resolutions of the several cases before-mentioned, it is worth observation how the judges of the common law have endeavoured to advance this law, and restrain the qualifications: and yet when all is done, this law produces little more effect, than the transferring the power of dispensations in this case from the pope, and scattering it amongst the nobility and others. And how many pluralists are there in England, that hardly see either of their livings in a year? So that generally the best livings in the kingdom are served with poor curates, and no hospitality kept: a thing worth the consideration of a parliament.

There are now a thousand qualifications at least in England by service, besides the chaplains of the king, queen, princes of the blood, and dowagers, and probably as many more by birth and dignities; and there are about four thousand three hundred livings in England of ten pound per annum in the king's books, and upwards; and it is not the least livings the pluralists catch at, though at first they crept into the church where the livings were so small they were not able to maintain a minister; and, if the 41 Canon of King James were observed, many mischiefs in this case might be prevented. Co. 2 Inst. 627.

The Lord Chancellor Ellesmere at the conference at Hampton Court, affirmed, he never gave any of the king's livings to pluralists. A worthy precedent. Fuller's Eccles. Hist. lib. 10. p. 16.

And it is to be hoped that our noble lords, when they consider the great damage the church suffers by pluralities; the many poor souls that are neglected, in danger to perish; the great discouragement it is to learned men, when they see many of meaner worth enjoy two livings a piece, besides prebends, deaneries, sine cura's, &c. and the abler and better man, for want of friends, is never able to rise higher than a poor

curacy of twenty or thirty pounds a year, when they consider how great a scandal it is to our church, and it is to be feared, attended with a curse: I say, it is to be hoped their lordships will become so much self-deniers, as to lay down this privilege where they received it: certainly a blessing and the prayers of the poor clergy would attend it; and if advantage should be reckoned in the case, I know none their lordships enjoy by it: for I am bound to say that, for their lordships honour, that I do not know a lord, within the compass of my knowledge, that keeps a beneficed clerk for his domestic chaplain, but have chaplains of their own, and allow them honourable stipends and preferments in due time; but if their lordships should not be willing to lay aside this privilege, the archbishops that have the power of dispensation might remedy it in part, or in all; or his sacred majesty, in denying confirmation. God grant all may be done for the good of the church (17).

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The archbishop can refuse no person a dispensation without just and reasonable cause. See the penalties against him, and remedy for the party grieved, Stat. 25 H. 8. c. 21. § 17. (18).

(17) The application of the first fruits and tenths to the augmentation of small livings, called Queen Anne's bounty, the parliamentary grants of money, and the recent statutes for the maintenance of stipendiary curates, have tended much to lessen these grounds of complaint. Vide in Part 2, Chap. 2, note 75, an account of Queen Anne's bounty, and in Part 1, Chap. 7, note 31, the statute 57 Geo. 3. c. 99. inter alia for the relief of curates.

(18) By stat. 25 H. 8. c. 21. § 17. if the archbishop or guardian of the spiritualities shall refuse or deny to grant any licenses, dispensations, faculties, instruments, or other writings, to any person that ought, upon a good, just, and reasonable cause, to have the same, then the chancellor of England, or lord keeper of the great seal, on complaint thereof made, shall direct the king's writ to the said archbishop or guardian,

enjoining him, upon a certain pain therein to be limited, that he shall in due form grant the same, or else signify to the king, in a court of chancery at a certain day, for what cause he refused to grant the same; and if it shall appear to the said chancellor or lord keeper, upon such certificate, that the cause of refusal was reasonable, just, and good, then it so being proved, by due search and examination, shall be admitted and allowed. And if it shall appear upon the said certificate that the cause of refusal was not just and reasonable, then the king being thereof informed, after due examination had, that the same may be granted without offending the law of God, shall have power to send his writ of injunction under the great seal out of the chancery, commanding the archbishop or guardian to make grant thereof by a certain day, and under a certain pain, in the said writ to be contained. And if the said archbishop or guardian, after receipt of the said writ, refuse or deny to grant the same as enjoined by the said writ, and shew no just cause why he should do so, then he shall forfeit such pain and penalty as shall be limited and expressed in the said writ of injunction; and the king may give power, by commission under the great seal, to two such spiritual prelates or persons as will do and grant the same; and though the archbishop have authority to grant dispensations to hold two livings, they must be confirmed under the great seal. 1 Bla. Com. 381. n. 13. and 25 H. 8. c. 21. § 11.

By 4 Can. 41. 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 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.

Formerly a dispensation might be obtained from the crown

to hold two livings beyond the distance of thirty miles, but since the bill of rights, 1 Will. 3. Sess. 2. c. 2. the power of suspending laws by regal authority, without the consent of parliament, has been declared illegal. Gibs. 911. 3 Burn's E. L. 105.

In the common pleas; in a quare impedit on the presentation to the rectory of Adderley, St. Peter, in the county of Salop, being a benefice of above eight pounds value in the king's books; the declaration stated, that Clive, being incumbent of Adderley, had accepted the vicarage of Clun, at more than thirty miles distance from Adderley, whereby the latter became void. Clive pleads a dispensation under the great seal, and denies that the livings are more than thirty miles distant: and upon that, issue is joined. On the trial it was proved, by an actual admeasurement along the turnpike road, that the distance from church to church was forty-eight miles, from parish to parish forty-three miles; that the direct horizontal distance from church to church was forty-two miles, from parish to parish thirty-eight miles; but that by computation in the country, the two livings were but twenty-nine miles distant, and this was the usual method of computing distances upon such dispensations. Of which opinion was the judge who tried the cause, and a special jury, who found a verdict for the defendant. It was moved for a new trial, alleging that the measured distance was the only one the law could take notice of; and the stat. 35 El. c. 6. was cited, wherein a mile is declared to contain eight furlongs, each furlong forty poles, and each pole sixteen feet and a half. On shewing cause against a new trial, it was argued, that the distance of the parishes is a matter merely regulated by the canons of the church, which may be directory in such cases to the archbishop, but is not taken notice of in the statute of dispensations, nor ever called in question in the king's temporal courts, therefore the issue is immaterial; but if material, the ecclesiastical laws must be the rule in this case, and there the uniform practice has been to go by computed miles. And the court were clearly of opinion, that by the temporal law, the distance of the churches is immaterial; and they discharged the rule for a new trial. *The King v. Clive*, Bla. Rep. 968. 3 Burn's E. L. 105.

By 48 Geo. 3. c. 149. For every skin or piece of vellum or parchment, or sheet or piece of paper on which any dispensation to hold two ecclesiastical dignities or benefices, or both a dignity and a benefice, shall be ingrossed or written, there shall be paid a stamp duty of thirty pounds, where either of them shall be above the yearly value of ten pounds in the king's books, and in all other cases twenty pounds.

By the 1 Will. 3. c. 26. If the universities shall present or nominate to any benefice with cure, prebend, or other ecclesiastical living (the presentation or nomination to which is in a popish recusant convict), any person who shall then have any other benefice with cure of souls; such presentation shall be void.

CHAPTER V.

[39]

What Simony is, and who shall be said to be guilty of it, and what are the Dangers ensuing thereupon.

HAVING shewed my clerk how to obtain a benefice, and likewise those which are qualified, how to take a second living; it rests, that I should shew them what is to be done after induction to confirm them in their benefices: but because simony is not only scandalous to the clerk that is guilty of it, but also very dangerous; and I told my clerk in the second chapter, that he must obtain his presentation without any corrupt or simoniacal contract; I thought it fit by the way to let my clerk know, not only what simony is, but likewise the danger that attends it.

Simony, by the canonists and schoolmen, is defined to be, “*Studiosa voluntas emendi vel vendendi aliquid spirituale aut spirituali annexum opere subsecuto.*”

And Thomas Aquinas says, “*Quod simonia dici videtur à Simone Mago, qui donum spiritus sancti emere voluit, ut ex venditione signorum quæ per eum fierent multiplicatam pecuniam lucraretur; et sic illi spiritualia vendunt, conformantur Simoni Mago in intentione, in actu vero illi qui emere volunt: illi autem qui vendunt in actu imitantur Giezi discipulum Helisæi, de quo legitur 4 Reg. c. 5. quod accepit pecuniam à leproso mundato, unde venditores spiritualium possunt dici, non solum simoniaci, sed etiam Giezatæ.*”

And St. Gregory says, “*Quicumque sacros ordines vendunt aut emunt, sacerdotes esse non possunt, ut scriptum est. Anathema danti, anathema accipienti, hæc est simoniaca hæresis: quomodo ergo, si anathema-*

What simony is, Panormit. c. Nemo extra eo, &c.

Chaucer, 109. a. Tho. Aq. 2o. 2x. q. 100. art. 1. Cro. El. 789. Tho. Aq. ibid. art. 4.

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Hovenden in his History of H. 2. mentions a canon made by Richard, archbishop of Canterbury, that the patron that presents by simony should lose his advowson for ever. Speed, 505. a. In Regist. hab. l. q. 1a. canon, quicumque.

Ibid. Canon.

Presbyter.

It hath been held, that a patron that presents by simony, should lose his patronage for ever. Hoveden, H. 2. p. 310. Speed, 505. a. Act. Apost. c. 8. v. 21, &c.

tisati sunt, et sancti non sunt, sanctificare alios possunt? Et cum in Christi corpore non sunt, quomodo Christi corpus tradere vel accipere possunt? Qui maledictus, benedicere quomodo potest?" And the same holy father further says, "Si presbyter per pecuniam ecclesiam obtinuerit, non solum ecclesia privetur, sed etiam sacerdotii honore spoliatur."

And it appears clearly, that the very intention to buy spiritual gifts or preferments, carries with it the guilt of simony, as well as the act itself: and therefore the holy apostle said to Simon Magus, "Cor enim tuum non est rectum coram Deo; pœnitentiam itaque age ab hac nequitia tua, et roga Deum si forte remittatur tibi hæc cogitatio cordis tui." But this is in foro conscientiæ only, and not punishable by any human laws, unless it proceed to the act.

Division.
Canons against
simony.

[41]

Simony by the canonist is distinguished into *simoniace* et *simoniacus*: the first is where the clerk comes in by simony, whereunto he is not party or privy: *simoniacus* is he which obtains a spiritual preferment by a corrupt and simoniacal contract, to which he is party or privy, and consenting.

Selling of tithes is called simony in some passages of popes about A. Dom. 1095. Selden de Dec. 135.

Against this corruption in the church many church canons have been made, amongst which I shall instance only two, and those provincial ones of our own nation.

Vide Hoveden,
p. 310.

Lindw. c. Nulli
liceat Eccle-
siam, &c.
fol. 152. a.
Vide the Ap-
pendix 1. to
this chapter.

The first was made in the time of Henry the Second, by Richard, archbishop of Canterbury, and is as follows:

"Nulli liceat ecclesiam nomine dotalitatis ad aliquem transferre, vel pro præsentatione alicujus personæ pecuniam vel aliquid aliud emolumentum pacto interveniente recipere: quod si quis fecerit, et in jure convictus vel confessus fuerit, ipsum tam regia quam nostra freti autoritate patronatu ejusdem ecclesiæ in perpetuum privari statuimus." But it was not sufficient by a canon, to deprive a man of his freehold or inheritance,

Vide Stillingsf.
Eccles. Cases,
page 85.
Lindw. 77. a.
152. a.

be the word in perpetuum taken for life, or for ever, as it imports; neither was this canon ever put in execution, or attempted so to be, that I find.

The other canon I made mention of, I find among the canons of Othobonus, the pope's legate here in England; which is to this effect: Cap. Quia plerumque.

“Quia plerumque evenire didicimus, quod, cum ad vacantem ecclesiam fuit præsentatio facienda, is qui præsentandus est prius cum patrono de certa summa de bonis ecclesiæ sibi annuatim solvenda paciscitur, et sic pactus ad ecclesiam præsentatur. § Nos huic actui tam [42] simoniæ vitium quam ecclesiæ dispendium ingerenti occurrere intendentes, universas promissiones et pactiones hujusmodi penitus revocamus, et eas imposterum fieri districtius inhibemus: et si facti fuerint, vires aliquas decernimus non habere.”

But this canon was of as little effect as the other, as to the making the contracts void, which were only determinable at the common law, where this canon could not be pleaded in bar.

I have mentioned these two canons, not for the validity or use, so much, as to satisfy the reader what provincial canons we have against simony, and to how little effect they were before the statute of 31 Eliz. Cro. El. 788,
789.
Per Warburton.

But there were some general canons of the church of greater force, whereby simoniacè is punished by deprivation, and simoniacus, by deprivation and perpetual disability, * not only as to the church he was presented to upon a simoniacal contract, but also to all others: and being malum in se, it is not dispensable either by the king or any other. *Stillingfl. Eccl. Cases, 85. Rol. 1. Rep. 237. (19).* * Per Bullam Sixtinam privatur ipso facto de omnibus dignitatibus, beneficiis, officiis, et efficitur inhabilis ad omnia. 3 Inst. 154. Tho. Aq. 2o. 2æ. q. 100. Art. 1. sect. 2.

(19) Simony is the more odious (says Lord Coke) because it is ever accompanied with perjury; for the presentee is sworn to commit no simony. 3 Inst. 156. Vide the oath

S. Aug. de hæ-
resibus in prin-
cipio.
S. Greg. in Reg.
hab. 1. q. 1. &c.
d. 1.

[43]
Stat. 31 El. c. 6.
Statute against
simony.

* Relates to
patrons

† This is to bi-
shops.

‡ Donatives.

Bishops.

Penalty.

Against preci-
pitate admission
or institution,
&c.

And it has been held by some of the fathers to be a heresy, if not the sin against the Holy Ghost: but neither the greatness of the sin, nor the severity of the canons, were sufficient to restrain this evil in the church, till the parliament of England took it into their care, and in the 31 of Eliz. it was enacted:

1. That if any person or persons, 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 for any sum of money, reward, gift, profit or benefit whatsoever, directly or indirectly, shall* present or † collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, &c. or ‡ give or bestow the same for or in respect of any such corrupt cause or consideration, that then every such presentation, collation, gift and bestowing, and every admission, investiture and induction thereupon shall be utterly void, &c.

And that the queen, her heirs and successors, to present, collate, &c. for that one turn only.

And that every parson, &c. that shall give or take any such sum of money, &c. or that shall take or make any such promise, &c. shall forfeit and lose the double value of one year's profit of every such benefice. And the person so corruptly taking any such benefice, shall thereupon and from thenceforth be adjudged a disabled person in law, to have and enjoy the same benefice, &c.

2. And further, that if any person shall for any sum of money, reward, &c. (ut supra) directly or indirectly

administered according to canon 40, to every person admitted to any ecclesiastical preferment whatsoever. 3 Burn's Eccl. Law, 347.

In the case of *R. v. Lewes*, M. 4 G. 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. Str. 70.

(other than for small and lawful fees) or for or by reason of any promise, &c. admit, institute, install, induct, invest, or place any person in or to any benefice with cure, &c. that then every person so offending shall forfeit and lose the double value of one year's profit of such benefice, &c. and that the said benefice, &c. shall be eftsoon void, &c. And that the patron or person to whom the advowson, &c. shall and may, by virtue of this act, present or collate, &c. as if the person were naturally dead; but no lapse hereby to incur till six months after notice.

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3. And if any incumbent of any benefice with cure of souls, do or shall corruptly resign or exchange the same, or corruptly take for or in respect of the resigning or exchanging of the same, directly or indirectly, any pension, sum of money, or benefit whatsoever; that then the giver and taker of any such sum, &c. corruptly, shall lose double the value of the sum so given, taken or had; the one half to the queen, &c. and the other moiety to him that will sue for the same, &c. in any of her majesty's courts of record, in which no essoign, &c.

Against corrupt resignations and exchanges.

4. Provided, that this act shall not restrain any censures ecclesiastical, &c.

Ecclesiastical censures saved.

5. And further it is provided, that if any person shall receive or take any money, fee, 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, &c. directly or indirectly, to him or themselves, or any of their, &c. friends (all lawful and ordinary fees excepted) for or to procure the ordaining or making of any minister, &c. giving any order and license to preach, shall lose forty pounds; and the minister so made, ten pounds.

Simony in ordaining and giving orders to preach.

[45]

“ And that if such minister, within seven years next after such corrupt entering into the ministry, &c., shall except or take any benefice, living or promotion, ecclesiastical, the same living, after induction, &c. to be void.

“ And that the patron may present, &c. as if the party so inducted were naturally dead; the one half of the said forfeitures to be to the queen, &c. and the other half to the informer, to be recovered, (ut supra.)”

Canons against
law.

And I do not observe, that the corrupt patrons were in danger to suffer by any law or canon before this law was made; for, as I said before, his right could not be taken away by a mere canon not confirmed by parliament; and before this law was made, the incumbent that came in by simony held the living which he obtained by simony, until he was legally and judicially deprived by sentence ecclesiastical, wherein he often escaped for want of such proof as the spiritual law required. But this statute strikes at the root, and makes as well the presentation, as the admission, institution, and induction, void. So that if this statute had not given the presentation to the queen, the true patron might have presented a new clerk; or in his default the church would have lapsed.

Hob. 167.

But by this act the corrupt patron does not only lose the presentation to the king pro hac vice, but also two years value of the church: not according to the valuation in the king's books in the first fruit office, but according to the true and utmost value of the church.

3 Inst. 154.

[46]

3 Inst. 153.

But if one that has no right to present shall, by means of a corrupt and simoniacal agreement, present a clerk, who is by his presentation admitted, instituted and inducted into a church; yet this shall not entitle the king to present. For though the act of parliament makes all void, yet an usurper cannot forfeit the right of another in whom there is no fault.

Note, That the patron shall lose his presentation within this law, although the clerk be not privy to the corrupt contract. Co. 12. 74.

And it seems by the penning of this act, that the forfeiture of the double value of the church is incurred by the corrupt contract only; but the presentation is not forfeited to the king, unless the clerk de facto is presented or collated upon such corrupt contract.

And it matters not whether the incumbent, that comes in by simoniacal contract, were privy thereunto or not, as to making the church void. Clerk not privy to the simony.

But the greater question is,

Whether the clerk that is presented upon a simoniacal contract, to which he is neither party nor privy, be disabled for that turn, to be presented by the king to that church?

How the canon law stands in this case, see Gratian. Causa, 1. q. 4. and Gregory's Decretals, de Simonia. 1619.

I have seen the report of a case in the latter end of the reign of King James, where it was adjudged, that if a clerk were presented upon a simoniacal contract, to which he was not party or privy, that yet notwithstanding it was a perpetual disability upon that clerk, as to that living.

[47]
Fowler v. Lapthorn.
P. 17 Jac. B. R.

And in the case of Baker and Rogers, M. 42 and 43 El. B. R. The case was, Baker agreed, the church being void, to give the patron 180*l.* for the presentation, who presented his brother, who knew nothing of the corrupt contract till after induction. And though it was clear, that the grant of the presentation during the vacancy was merely void, and that Baker presented as an usurper; that yet notwithstanding the clerk was in by the corrupt contract; because it was not to be intended, that the patron would have suffered the usurpation, had it not been for the corrupt contract: and there it should seem by Mr. Justice Warburton, that the clerk was disabled quoad hanc.

Cro. El. 786.

Cro. Jac. 385.
Bulst. 392.

And in a cause between the king and the Bishop of Norwich, Cole, and Sair, Sir George Croke, who was a counsel in the cause, reports, That Sir Edward Coke affirmed it had been adjudged, that if a church be void, and a stranger contracts for a sum of money to present one who is not privy to the agreement, that notwithstanding the incumbent coming in by the simoniacal contract, is a person disabled to enjoy that benefice, although he obtain a new presentation from the king; for the statute, as to that living, has disabled him during life.

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I must acknowledge, if the law be so taken, it is very severe.

3 Inst. 154.

But let us hear Sir Edward Coke himself speak, and he, in his comment upon this statute, says, that it was adjudged in the before-mentioned case of Baker and Rogers, that where the presentee is not privy nor consenting to any such corrupt contract, as is forbidden by this statute, (because it is no simony in him,) there the presentee shall not be adjudged a disabled person within this act. For the words of the statute are, "And the person so corruptly giving;" so as he shall not be disabled, unless he be privy to the contract: and so (says he there) it was resolved, M. 13 Jac.

Co. 12. 101.
3 Inst. 154.

And Sir Edward Coke, in that book that goes under the name of his Twelfth Report, and without doubt was his own, reports, that it was so adjudged in the case of Dr. Hutchinson, parson of Kenne, in Devonshire, by the whole court, that if a clerk be presented upon a corrupt contract within this statute, although the clerk be not privy thereunto, yet the presentation, admission, and induction are all void within the letter of the statute. For the law intendeth to inflict punishment upon the patron, being the author of this corruption, by the loss of his presentation; and upon the incumbent, who came in by such a corrupt patron, by the loss of his living, although he never knew of the

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corrupt contract; but if the presentee were not cognizant of the corruption, then he is not within the clause of disability within the same statute; and so (says he) was the opinion of all the judges of Serjeant's-Inn, in Fleet-street, M. 8 Jac.

And it seems to me upon the penning of the statute, that this opinion is more rational than the former; for the words of the statute are, That the persons so corruptly taking, procuring, seeking or accepting, shall, &c. from thenceforth be adjudged a disabled person in law, to have or enjoy, &c. And though the incumbent in this case take and accept the benefice upon the corrupt contract, yet as to him it is not corruptly taking.

And that this agrees with the canon law, St. Gregory's Decretals, lib. 1. tit. 7. cap. 59. p. 210. si alicujus; where the gloss puts the case, "Aliquis est in prelatum alicujus ecclesiæ electus per simoniam eo tamen ignorante nec ratum habente: talis electio propterea reprobata est, quæritur utrum episcopus, cum illo poterit dispensare ut iterum ad eandem prelaturam elegatur. Respondetur, quod episcopus illa vice cum illo dispensare non potest, sed cum illo qui ignoranter simplex beneficium per simoniam est adeptus post liberam resignationem potest episcopus dispensare." So that it seems the canon law makes a difference, where the incumbent voluntarily resigns, and where he is deprived.

But this being a point thus controverted, I shall not take upon me to determine, but leave it to the judgment of the more learned.

I shall in the next place shew, what contracts have been held simoniacal within the meaning of this law.

In a cause between Dr. Graunt and one Bowden, it was held (upon an evidence to a jury), that where two parsons agreed to change their livings, and the one promised his patron, that if he would present the other with whom he was to exchange, that he should make the patron a lease of his tithes at such a rent; and this

It should seem that by the canon law one that is simoniacè promoted, may upon a voluntary resignation be dispensed with to have the same living again. Greg. Decret. de translatione Episcop. tit. 7. & lib. 5. tit. 3. cap. 26.

Quære.

[50]
What contract shall be said simoniacal.
Hil. 16 Jac. rot. 667. C. B.

was held simony, although the other was not privy to the contract, he making the lease after.

More, 916.
Cro. El. 685.
Smith v. Shelburne.

The father in the presence of his son, being a clerk, purchased the next advowson of a church, the present incumbent of the church being sick, and not likely to live, who soon after died, and he presented his son; and this was held simony within this statute: but if this had been done in the absence of his son, it had not been simony, because the father is bound to provide for his son. Quære of the difference.

Winch, 63.
Sheldon v. Brett.
Hob. 165.

And by Hutton it was held simony to purchase the next advowson, the incumbent being sick.

In the case of one Winchcombe against the Bishop of Winchester and Puleston, the case was, one Say bargained with the patron (the incumbent being sick) for ninety pounds to present him when the church should be void, and for the better assurance took a grant of the next avoidance to friends in trust: the incumbent died, Say was presented; and this was held simony within this law (20).

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(20) It has been since determined, that the purchase of an advowson in fee, when the incumbent was upon his death-bed, without any privy of the clerk who was afterwards presented, was not simoniacal, and would not vacate the next presentation. In this case De Grey, C. J. who delivered the opinion of the court, observed, "The present case is the purchase of an advowson in fee. No privy of the clerk appears. The church is not actually void, but in great probability of a vacancy; which, however, is by no means equivalent to a certainty. We should go beyond every resolution of our predecessors to determine this to be simony. Suppose this had been the purchase of a manor with the advowson appendant, and the incumbent lying in extremis. What must be done if the present case be simony? Must we have declared the appendancy to be severed, or that the whole manor was purchased corruptly for the sake of the advowson?" 2 Bla. Rep. 1052.

To sell an advowson *ca intentione* that J. S. shall be presented is simony, 2 Ventr. 39.

There is of late time a practice introduced by corrupt patrons, that, if not nipt early in the budding, will make this good law of no effect; I mean the taking bonds for resignation. And this practice took its rise from two cases in Sir George Croke's Reports.

The first was between Jones and Laurence, 8 Jac. Cro. Jac. 248.
274.

But in the case of *Grey v. Hesketh*, Lord Hardwicke observed, that the sale of an advowson during a vacancy is not within the statute of simony, as the sale of the next presentation is, but it is void by the common law, *Ambl.* 268. and the grantee cannot have the benefit of the next presentation. *Cro. El.* 811. *3 Bur.* 1510. If during the avoidance of a church the patron die, the right to that presentation passes to his executor or personal representative, unless it be a donative, in which case the right of donation descends to the heir. *2 Wils.* 150. For a clerk to bargain for the next presentation, the incumbent being sick, and about to die, was simony even before the stat. of Queen Anne. *Hob.* 165. An agreement entered into by a clergyman, by which he is restrained during his incumbency from asserting a claim to tithes by due course of law, and which, as furnishing evidence against his successors, if it is the consideration of his being appointed or presented, is simoniacal. *The King v. the Bishop of Oxford.* *7 East. Rep.* 600.

If a contract be, when a church is full, to give a sum of money for a presentation to it when it shall become void, this is a simoniacal contract. *2 Brownl.* 7. And buying when a church is full, with intent to present a certain person, and the presenting that person when the living becomes void, is simony. *Lane,* 102. *Noy.* 25.

Although it be lawful, except in the cases excepted, to purchase the next avoidance when a church is full, there is great danger of being guilty in *foro conscientiæ* of this offence, and it is right it should be so. *New Abr.* 469. *Jac. Law Dict.* title *Simony*.

The case was thus: Jones had a son which he intended to be a clergyman, and having obtained a presentation from Queen Elizabeth for the church of Streetham, agreed with the defendant that he should be presented, so that he would resign when Jones's son was qualified for the living; whereupon the defendant entered into a bond for a thousand marks penalty to the plaintiff upon this condition (having first recited the agreement), that if the defendant within three months after request should absolutely resign his said benefice, that then, &c.

And in an action of debt brought upon this bond, the defendant pleaded non requisivit, which was found against him; and in arrest of judgment it was moved, that this bond was made for the performance of a simoniacal contract, and therefore void; but notwithstanding the court gave judgment for the plaintiff: and two reasons are given for the judgment; the first was, because there was no averment of the simony; the second, that it was not material as to the bond, because that statute did not make the bond or contract void, but only the presentation, &c. for this I clearly infer from the conclusion of the case.

But I confess the sense of the court was, that, in truth, if a man be preparing a son for the clergy, and have a living in his disposal, which falls void before his son be ready, he may lawfully take a bond of such person as he shall present, to resign, when his son is become capable of such living: and I have nothing to say against that opinion, but it is very just and reasonable, nature obliging that every one should take care for his posterity.

But if a patron take a bond absolutely to resign upon request, without any such cause as the preferment of a son, or to avoid pluralities, or non-residence, or such reasonable cause, but only to a corrupt end and purpose to exact money by this bond from the incumbent, or attempt it, though perhaps the bond may be good

Cro. ubi supra.

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against the person that entered into it: yet I am clear of opinion, for my own part, that the said bond makes the church void, and gives the presentation to the king; and it should seem in Jones and Laurence's case, that if simony had been averred, it would have been left to a jury to have adjudged what the intention of the corrupt patron was.

The other case upon which these subtil simonists build, was between Babington and Wood, 5 Car. 1. B. R. where the case was likewise in debt upon an obligation with a condition, that whereas the plaintiff intended to present the defendant to such a living, that if the defendant upon request after his admission should resign, that then the bond to be void, &c.

Cro. Car. 180.
Hut. 3. Jones,
220.

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Upon oyer of this bond and condition, the defendant demurred, and judgment was given for the plaintiff: but all the court conceived, that if the defendant had averred, that the obligation had been made, with intent to exact money, make a lease, &c. which in itself had been simony, then upon such a plea peradventure it might have appeared to have been simony; and then it might have been a question, whether the bond had been good or no? But upon this demurrer it did not appear there was any simoniacal contract; and such a bond might be made upon a good and lawful design, as the preferment of a son, as in Jones and Laurence's case before, to avoid non-residence, pluralities, &c.

So that it appears by both these cases, that bonds taken upon prudent and just ends to resign, are not simoniacal; but where such bonds are taken upon corrupt designs, and it be made appear by any subsequent practice or action, it is clearly simony, as if the bond had been expressly to pay money; for what difference is there between a bond expressly to pay money, and a bond to resign, which is to pay money, if the patron say, either pay me so much money, or resign; when all the world knows, in such a case the parson must pay the money, or resign and be undone?

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And the world shall never persuade me, that those reverend judges that gave these judgments ever intended further: and I hope that the reverend judges that now supply their places, will discountenance and discourage such practices that tend so much to the ruin of the church and religion; for I know no law that tends more to the advancement of learned and religious men than this law doth, and therefore ought to have a benign construction to the end it was designed.

Noy, 22. T. 15.
Jac. rot. 1051.
C. B.

* Vis infra in
the catalogue of
law books.

Stillingfleet's
Bonds of Re-
signac'. 81.

I find a case reported, I cannot say that it is by an * authentic hand, but such as it is, I will give it the reader; it was between Sir John Pascal and one Clerk, in the fifteenth year of King James, upon evidence to a jury it was held, that such a bond was simoniacal; but the circumstances not appearing in the book, the case can be of no great authority (21).

(21) A bond of resignation is a bond given by the person intended to be presented to a benefice, with condition to resign the same, and is special or general. The condition of a special one is, to resign the benefice in favour of some certain person, as a son, relation, or friend of the patron, when he shall be capable of taking the same. By a general bond, the incumbent is bound to resign on the request of the patron. 4 New Abr. 470. Special bonds of resignation are still held legal. Cro. Jac. 248. 2 Bla. Com. 279. 4 Term Rep. 78. 4 Term Rep. 359. General bonds were so held formerly, 2 Bla. Com. 280. but they are now held illegal since the case of the Bishop of London v. Ffytche. It was then determined by the house of lords, that a general bond of resignation is simoniacal and illegal. The circumstances of that case were briefly these: Mr. F., the patron, presented Mr. Eyre, his clerk, to the Bishop of London for institution; the bishop refused to admit the presentation, because Mr. Eyre had given a general bond of resignation. Upon this Mr. Ffytche brought a quare impedit against the bishop, to which the bishop pleaded that the presentation was simoniacal and void, by reason of the bond of resignation; and to this plea Mr. Ffytche demurred. From a series of

But before I shake hands with these bonds of resignation, it will be convenient I give my young clergyman

judicial decisions, the court of Common Pleas thought themselves bound to determine in his favour; and that judgment was affirmed by the court of King's Bench: but this judgment was afterwards reversed by the house of lords. The principal question was this, viz. Whether such a bond was a reward, gift, profit or benefit to the patron under stat. 31 Eliz. c. 6.? If it were so, the statute had declared the presentation to be simoniacal and void. Such a bond is so manifestly intended by the parties to be a benefit to the patron, that it seems surprising that it should have been ever argued and decided that it was not a benefit within the meaning of the statute; and many learned men have expressed themselves dissatisfied with this determination. It is understood, however, that the lords, to preserve a consistency in their judgments, will not allow a question once decided to be debated again in their house. 2 Bla. Com. 280. in notis. et vide, this case reported in 3 Burn's Eccl. Law, 356.

In subsequent cases it has been determined, that a bond given by an incumbent to the patron on presentation to reside on the living, or to resign if he did not return to it after notice, and also not to commit waste, &c. on the parsonage house, was good. 4 Term Rep. 78.

A question has arisen, whether the ordinary is obliged to accept a resignation on such a bond. Wats. 24. An ordinary is not obliged to accept a resignation on such a bond, unless there be just cause to turn the incumbent out of the benefice. Chanc. Prec. 513. and in the case of Marquis of Rockingham v. Griffith, E. 27 Geo. 2. This among others was made a question in the cause, but no decree was made as to this point. The ordinary, however, did afterwards accept the resignation, Lord Hardwicke having once or twice intimated that he ought so to do. But whatever doubt might arise as to the ordinary's being obliged to accept a resignation on such a bond, two points were determined—that the patron could not present again till he had accepted it; and that whether he did or not, the obligor was liable to the penalty of the bond, if he undertook, as is usually done, for the acceptance of the ordinary. 4 New Abr. 473.

some cautions against them: for it is an old saying, *The resetter is worse than the thief*; for without ressetters there would be few thieves. And,

Advice against
bonds for re-
signation.

1. I hold it a great disreputation for any clergyman to give any such bond, which may have the least tincture of simony; nor do I believe any man of worth will do it, unless it be upon such reasons as aforesaid.

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2. If such bond carry with it a simoniacal corrupt design, it makes the clerk no less guilty of simony than the corrupt patron; and then the clerk not only loses his living by this statute, but is for ever incapacitated to have it by any future presentation, and by the canon law is to be degraded and incapacitated to all other, C. 1. q. 1. *Presbyter si, &c.*

Concil. Remens.
*si quis vendide-
rit. 3 Inst. 153.*
Margine Noy,
72.

Lastly, If he do not resign upon request, he is subject to the whole penalty of the bond; for simoniacal bonds, contracts, &c. are not made void by this act, but only the presentment, &c. And so you may observe a difference between *malum in se*, and *malum prohibitum*, by the statute.

These bonds for resignation are become so frequent, that hardly a living passes, unless by persons of honour, without them, and very ill use is made of them.

There is a poor vicar in my neighbourhood that has a vicarage but of forty pounds per annum, and was forced into one of these bonds to obtain it, and his patron takes from him tithes of half the value of the church, and he dares not question him for them; *opus es medico*. It is time for the clergy to prefer a bill in parliament, not only to make all such bonds void, but likewise all bonds, bills, covenants, promises, judgments, statutes and recognizances, made or entered into upon any simoniacal contract. Certainly no good man would oppose it; a fit undertaking for my lords the bishops.

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What covenants
and agreements
are within this
law.
Cro. Car. 425.

It is now to be considered, what covenants or agreements shall be said to be simoniacal within this law.

If a father-in-law, upon the marriage of his daughter, covenant with his son-in-law without any consideration,

but voluntarily, that when such a church falls void, which is in his gift, that he will present him to it; this is no simony within this law: but it should seem, that such covenant in consideration of marriage, or any other consideration had, made it simoniacal.

So where the patron took a bond from the presentee to pay ten pounds yearly towards maintenance of his predecessor's son, whilst he remained in the university unpreferred, was held no simony: and in that case it was said by Foster, Justice, that it was adjudged in the Earl of Sussex's case, where the patron took a bond of the incumbent to pay five pounds per annum to the widow of his predecessor, it was no simony: these were good charitable resolutions; *sed quære rationem inde*. And Foster said, that notwithstanding great opposition in that case, the parson enjoyed the living at that time (22).

Noy, 142.
Baker v. Mount-
ford.

In the next place it will be fit to consider, what church preferments are within this law; the statute only names benefices with cure of souls, dignities in the church, prebends and livings ecclesiastical. The word

(22) A bond was given by a father to secure an annuity to his son until he should be in possession of a living of a certain value, and an agreement of even date was executed, reciting the bond, and declaring that the son would forthwith enter into holy orders, and accept the living. The Lord Chancellor expressed great doubts as to the validity of this bond, connected as it was with a corrupt agreement for taking holy orders. The policy of the ecclesiastical constitution of this country requires that a man should take orders without any reference to considerations of a pecuniary nature. This case, however, was decided upon the ground that the son had not complied with the condition, having received the annuity nine years, and being still only in deacon's orders, and that therefore the annuity was determinable by the father or his representatives. *Kircudbright v. Kircudbright*, 8 Ves. 53.

3 Inst. 155.

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Lindwood, cap.
ut clerical. verb.
dignit. Duary-
nus de saceris
Eccles. Ministr.
et Beneficiis,
li. 2. c. 6.
Lindw. cap. Esu-
rientes avaritiæ
verb. Dignitate.

benefices with cure of souls, seems chiefly aimed at parsons and vicars in churches parochial: dignities comprehend archbishops, bishops, archdeacons, deans, chancellors, treasurers, chanters, precantors, officials, &c. For dignities ecclesiastical are defined by the civilians to be, “administratio cum jurisdictione aliqua conjuncta.”

And Lindwood tells us, “Dignitas cognoscitur altero de tribus modis, primo quando beneficium habet administrationem rerum ecclesiasticarum cum jurisdictione: secundo ex eo quod habet nomen dignitatis cum prærogativa in choro et capitulo: tertio quando constitutio vel consuetudo ecclesiæ habet, quod beneficium habeatur et reputetur pro dignitate.”

Cap. ut Cleri-
calis verb. Dig-
nitat.
But for authori-
ties at common
law which shall
be dignities.
See 27 H. 6. 5.
25 E. 3. 41.
Br. nosme 25.
17 E. 3. 31.
11 H. 4. 40.
14 H. 6. 14.
27 H. 6. 3.
27 H. 8. 10.
Fletcher v.
Machaller,
T. 7. Car. 1 B.R.

And in another place speaking of dignities, he says, “Proprie loquendo de dignitate ordo episcopalis dicitur dignitas; sic abbates, priores conventuales, et officiales episcopi, dicuntur dignitates, et in inferioribus episcopo jus non imponit nomen dignitatis, nisi archidiaconis et archipresbyteris, propter jurisdictionem, et præeminentiam, quas habent super alios: imo licet (says he) archidiaconi nullam haberent jurisdictionem ex consuetudine, tamen ratione nominis sonat in dignitatem,” &c.

Prebends are particularly named, and livings ecclesiastical are words of a large extent, and draw in donatives within the penalty of this law, as hath been adjudged, though they have no cure of souls (23).

Having held the reader something long in my discourse upon the matters relating to the first paragraph

(23) By 36 Geo. 3. c. 83. all churches and chapels augmented by Queen Anne's bounty, shall be considered as presentative benefices, and the license to them shall render other livings voidable in the same manner as institution to presentative benefices; but yet every clergyman shall continue in quiet possession of any benefices which he held in conjunction with such cures before the passing this act, viz. May 14, 1790.

of this statute, I shall, after some general observations upon it, draw to a conclusion.

And first it is to be observed, that where any clerk is in by simony, or any other dignified person, every stranger as well as the king, may take advantage of it: and therefore if the parson, vicar, or other dignified person, shall bring any action for the tithes, or other things belonging to his church; the defendant may avoid the action, by proving that the plaintiff obtained his preferment by a simoniacal contract (24).

[58]
Who may take advantage of simony, quod nota.

Sir Jo. Rowse v. Wright.
P. 17 Jac. Hob.
167, 168. 177.

Note, in case of simony, the presentation vests in the king without office, 2 Vent. 213.

And note, that a simoniacal contract, where the party is not presented in pursuance of it, is not within the penalty of this law; but it should seem, that if one that has no right present a clerk upon a simoniacal contract, he is within the penalty, though an usurper; but not, as hath been said, to give the king the presentation.

Contract not executed.

Hob. 167.

It hath been a question, if the clerk which comes in by simony die in possession of the church, whether the king should lose his presentation? But it hath been resolved, that he shall not; for the statute makes the presentation, admission, institution, and all void; so that the church was never full of an incumbent, et nullum tempus occurrit regi. But if the king suffer an usurpation by the patron, or any other, presenting another clerk, who is instituted and inducted, and after dies incumbent, in such case the king loses his presentment; and so it should seem, if the incumbent resign, or be deprived, the church having been once full.

Simonist dies possessed, if the king lose the turn.
Hob. 166.

And note, there may be a simony and neither patron nor clerk consent or be privy to it; and yet the church for that turn is by statute given to the king: if the clerk

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Simony, and patron and clerk free.
Bath v. Porter,
P. 7 Jac. B. R.

(24) In an action by the incumbent, for the use and occupation of his glebe, the defendant cannot give in evidence the simoniacal presentation of the plaintiff. 5 T. R. 4.

be presented by the means of such corrupt contract, though neither patron nor clerk were privy or consenting to it; so the king, though he himself cannot be guilty of simony, may present upon a simoniacal contract between others, and such presentation is void by this act.

Pardon of simony the effect. *Lea v. Smith*, M. 40 & 41 El. C. B. contra.

Hob. 167.

Suppose a clerk be presented upon a simoniacal contract, and then the king or parliament, that is, the king in parliament, with the assent of his lords and commons, pardons all simony by express or general words, though this may pardon the penalties, yet the church remains void.

De ministeriis et hab. 1. q. 1. Canon cum ordinat.

I shall now conclude this paragraph with the saying of a holy father of the church, viz. St. Ambrose, upon this subject; "Cum ordinaretur episcopus, quid dedit? Aurum fuit: quid perdidit? Anima sua fuit: cum alium ordinaret, quid accepit? Aurum fuit: quid dedit? Lepra fuit."

4 Inst. 135. The reason of the paragraph against precipitate admissions.

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I am now come to the second paragraph of this statute, which Sir Edward Coke (who was a member of this parliament) tells us, was added to avoid hasty and precipitate admissions, institutions, and inductions, &c. to the prejudice of those that have right to present, and thereby putting them to their actions to recover their rights, and there are seldom bribes (as I may say) in this case given, where the patron has a good and sure title.

The taking or giving above the usual fees in this case, is as well dangerous to the clerk as the officer; for the church shall be void, so that the patron that has right to present, may present again; and the usurper and officer that takes more than his fees for such expedition, forfeits double the value of the benefice for a year, not according to the rate in the First-fruits office, but according to the very true value: but upon this clause no disability rests upon the incumbent, but that

he may by the true patron be presented again; nor lapse, till after six months from the time of notice, given by the bishop, &c.

And observe the penning of this clause; it is not that the church shall be ipso facto void, or that the institution, &c. should be void; but that it should be eftsoons void, and that the patron shall present, as if the person were naturally dead: so that it should seem the church is once full by this institution and induction; and hence there may some doubts arise, whether the church shall be void ipso facto, or whether it must be avoided by ecclesiastical sentence of deprivation. But it seems to me, that the patron may present immediately, without any sentence ecclesiastical.

When the church shall be void.

3. The third paragraph of this statute is made against such as shall corruptly for money, pension, or other benefit, resign or exchange their livings with any other: in that case, as well the giver as the taker forfeits double the sum of money, &c. given and received; but this clause works no avoidance or disability in the person that is guilty.

Resignation and exchanges simoniacal.

[61]

The fourth paragraph 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.

The ecclesiastical jurisdiction saved.

Cro. El. 788, 789.

But I know no reason, why those corrupt patrons that take bonds for resignation without any reasonable cause apparent, may not be called to an account before the ordinary, and punished by ecclesiastical censures, if it appear they were taken to any corrupt end, or if afterwards he shall endeavour to exact money by colour of any such bonds.

Corrupt giving
orders and li-
censes to preach.

[62]

I am now come to the last paragraph of this statute, which is also a two-edged law, that punishes as well the giver as taker of greater fee or reward, than the ordinary and just fees for, or for procuring any person to be ordained or made a minister, or giving any order or licence to preach, &c. but this is more severe upon the clergyman, than the officer: for the officer only forfeits forty shillings, but the clergyman forfeits ten pounds, and all the livings he shall take within seven years are made void by this law after induction; so that for seven years an incapacity lies upon the clerk: how careful ought clergymen to be, what fees they give for their orders! And note the manner of the penning of this paragraph, that the church shall not be void till after induction.

The first paragraph makes the presentation, institution, and induction, and all void: so that the church in that case is never full.

The second paragraph makes it void, not till after the corrupt admission, institution, installation, induction, investiture or placing; and this not till after induction; by which means the grantee of the next avoidance, that presents such clerks, cannot present again: and so it is where the patrons present by turn, the presenting such a clerk will satisfy a turn, if inducted.

Co. 5. 162. a.

How the forfeitures are to be recovered.

Gregory's case,
Co. 6. 20.

Dyer, 236.

Cro. Eliz. 737.

Cro. Car. 112.

146.

Mo. 421. contr.

Co. 12. 99.

4 Inst. 164.

Hale's Pl. of the
Crown, 161.

Quære.

Lastly, Observe all pecuniary forfeitures and penalties within this statute are given the king and informer, and are to be recovered by bill, plaint, action of debt, or information in any of his majesty's courts of record; that is, the Chancery, King's Bench, Common Pleas, and Exchequer at Westminster; but not in any inferior court of record, and no essoign, privilege, protection or wager of law is to be allowed: but I conceive the privilege or protection of parliament are not intended in these general words, but the common protections and privileges of officers and courts. Ideo quære inde.

It is not proper for this discourse to examine by what authority any thing at all is taken for giving orders, admissions, institutions, &c. since our Saviour says, "Gratis accepistis, gratis date:" however, since it is a thing (I doubt) too much practised, use has made it seem lawful, by which means it is swallowed as a due fee without examination of the matter; I shall therefore put them that are concerned in mind of two other canons, and then leave the matter to further consideration, and amongst those canons that are called the canons of the apostles, I find one to this effect:

[63]
See a canon against it, and what fees shall be taken by the clerks.
Lindw. c. sæva et miserabilis.
Matt. 10. 8.

"Si quis episcopus, aut presbyter, aut diaconus, per pecuniam hanc obtinuerit dignitatem, dejiciatur, et ipse ordinator ejus à communione omnibus modis abscindatur." Can. 30.

And in the council of Chalcedon to the same effect, which follows:

"Si quis episcopus per pecuniam ordinationem fecerit, et pretium redegerit Spiritus Sancti gratiam quæ vendi non potest, ordinaveritque per pecuniam, presbyterum, aut diaconum, vel quemlibet de hiis, qui cognominantur in clero, promoverit, et dispensatorem aut defensorem, vel quemlibet qui subjectus est regulæ, pro sui turpissimi lucri commodo, is qui hoc attentare probatus fuerit, proprii gradus periculo subjacebit, et qui ordinatus est, nihil ex hac ordinatione, vel promotione quæ est pro negatione facta proficiat, sed sit alienus à dignitate, vel sollicitudine, quam pecuniis acquisivit, &c. Concil. Cabilonense, c. 16. ad eandem sententiam."

[64]

But it may be it will be said, that these canons are against selling of orders, but not against ancient and just fees; to which bear what the council of Orleans says:

"Ne quis episcopus quibuslibet causis vel episcoporum ordinationibus cæterorumque clericorum aliquid accipere præsumat, quia sacerdotem nefas est cupiditatis venalitate corrumpi." Can. 3.

And the council of Lateran under Pope Innocent the Can. 63.

Third, decreed, "Ne pro consecrationibus episcoporum, aut benedictionibus, aut ordinibus, aliquid accipiatur."

And to the like effect is the council of Braga, cap. 4.

Cap. sæva et miserabilis.

And our own canons are to the same effect, and limit the clerk's fees to twelvecence for letters of institution and collation, and sixpence for letters of orders: but he that has a mind to satisfy himself herein further, let him read that most excellent history of the council of Trent, which is faithfully translated by Sir Nathaniel Brent, where this point is excellently discussed pro and con, where I will leave my reader, and conclude this chapter, and in the next place shew my parson, vicar, &c. what he is to do before, at, and after his admission, institution, and induction (25).

See Stillingfleet's Cases, 85.

[65]

Hoved. 310. b.

Hobart, 167.
31 El. cap. 6.

In the former impressions of this book, ch. 5, page 35, I mentioned a canon to be made anno 1229, in the time of Richard Wethershead, archbishop of Canterbury, therein following the error of the learned Lindwood; which in truth was made in the time of another Richard archbishop of Canterbury, who lived in the time of Henry II., at a synod held at London, 1175, in the presence of two kings, viz. Henry II. and his son that was crowned in his father's life-time, and confirmed the same, which made that no more than a canon, which I do affirm could not deprive any body of his freehold or inheritance. And my Lord Hobart, in his argument of Winchcombe's case against the Bishop of Winchester and Puleson, affirms as much, that if the statute had not given the presentation to the king, where the church was void by simony, the patron ought to have presented; which proves he had not lost his patronage.

And as to the canon of Othobon, which I vouch in

(25) Vide a table of fees in Burn's E. L. 266. and Ayl. parerg. 551.

the next page, which makes all simoniacal contracts void, I affirm it to be of as little force as the former, as to making a simoniacal contract void: and of the same opinion was my Lord Hobart, who says, that a simoniacal contract is, "Contractus ex turpi causa et contra bonos mores," and so is against the law, and void by the statute, not by the canon.

Hobart, 167.

Since this book was last printed, in the first of W. and M. there was an act made, that after the death of a person simoniacally presented, the offence or contract of simony should neither by way of title in pleading, or in evidence to a jury, or otherwise, hereafter 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, metropolitan or otherwise, unless the person simoniac or simoniacally presented, or his patron, was convicted of such offence at the common law, or some ecclesiastical court, in the life-time of the person simoniac or simoniacally promoted or presented, any law, statute, &c.

That 1 W. & M. relief for leases made by simoniacs. Cap. 16.

[66]

And by the same act it is further provided, that no lease or leases really and bona fide made, or then after to be made by any person as aforesaid, 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 unto, or having notice of such simony; but shall be good and effectual in the law, the said simony notwithstanding.

See the statute at large, for confirming leases made by simoniacs (26).

(26) By the 12 Ann. st. 2. c. 12. it is enacted, that whereas some of the clergy have procured preferments for themselves by buying ecclesiastical livings, and others have been thereby discouraged; 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 and turn only; and the person so corruptly taking, procuring or accepting any such benefice, dignity, prebend or living, shall thereupon, and from thenceforth, be adjudged 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.

This statute having been understood as only prohibiting clergymen from purchasing livings for themselves, the intention thereof may be easily frustrated by employing others to purchase for them; but surely this falls within the oath required by canon 40. 3 Burn's E. L. 371.

CHAPTER VI.

[67]

What a Clerk is to do before, at, and after his Admission, Institution and Induction, to make him a complete Parson.

No man at this day is capable to be parson, vicar, &c. before he is a priest in orders, which he cannot be before he is four and twenty years of age, as has been said; and if any person shall be admitted, instituted and inducted into any living before he is in holy orders, his admission, institution and induction are void by the late act of uniformity.

Every parson and vicar must be a priest.

Stat. 14 Car. 2. cap. 4.

Secondly, he must make his subscription according to the said act, and have a certificate from the bishop, or, &c. under his hand and seal, that he hath so done; and then within two months after he is inducted, he must, during divine service (that is, after some part of the divine service of the church for that day appointed is read, and before the whole is finished), read the nine and thirty articles of religion in the parish church, &c. into which he shall be inducted, and declare his unfeigned assent and consent to all that is therein contained; and in default herein, the church is ipso facto void without any sentence declaratory; and it is not enough for him to declare his assent to them so far as they are agreeable to the word of God, or with any qualification, but positively.

Subscription and certificate.

13 El. ca. 12. Read prayers.

Read the articles.

Stat. supra.

Co. 6. 29. b.

[68]

4 Inst. 324.

And he must likewise upon some Sunday or Lord's day, within two months after actual possession of such benefice, &c. (which is intended within two months after induction or installation, &c.) read the book of Common Prayer (i. e. the whole service of the church appointed for that day, as it is there appointed) and

Stat. supra.

Declaration.

in like manner declare his assent and consent to all the matters and things therein contained, in these words: I, A. B. do declare my unfeigned assent and consent to all and every thing 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 or manner of making, ordaining and consecrating of Bishops, Priests, and Deacons.

Stat. 14 Car. 2.
cap. 4.

And such parson, vicar, &c. must within three months after his institution, upon some Lord's day, during divine service (that is, as hath been said, after some part of it be read, and before all be read) publicly and openly read his certificate from the bishop, &c. of his subscription to the declaration following; and he must at the same time read the declaration or acknowledgment itself in the church where he is to officiate, before the congregation there assembled. The declaration follows:

[69]
This part is repealed by a statute made by K. William and Q. Mary, 24th day of April, 1683.

I, A. B. declare, [that it is not lawful upon any pretence whatsoever, to take arms against the king: and that I do abhor that treasonable position of taking arms by his authority against his person, or against those that are commissioned by him:] and that I will conform to the liturgy of the church of England, as it is now by law established. [And I do declare, that I do hold, there lies no obligation upon me, or on any other person, from the oath commonly called, the solemn league and covenant, to endeavour any change or alteration of government, either in church or state; and that the same was in itself an unlawful oath, and imposed on the subjects of this realm against the known laws and liberties of this kingdom.]

This part is expired.

If any parson, vicar, &c. fail in the doing of any of these things before-mentioned, or any of these things

be neglected, the church becomes void; and the clerk that makes such failure, in case he shall sue for his tithes, or any other church duty, or other thing belonging to his church, if the defendant insist upon it, must prove the doing of all these things. But usually the judges in favour of the clergy, after they have been in possession of their livings ten or twenty years, or any considerable time, will presume all these things regularly done, and will not put the parsons, &c. to the precise proof of them (27).

Dyer, 346. p. 7.
Co. 6. 39. b.

And it is observed, that the parsons, vicars, &c. must upon the acceptance of every new living or ecclesiastical preferment within this law, repeat all these things; for the performance of all these things upon the taking of one living, will not satisfy for any other.

Advice to the clergy.

[70]

I shall give my reverend clergymen therefore this caution, that if any of them have accepted any ecclesiastical preferments, and have negligently omitted any of these things, and that thereby they may be lapsed to the king, that they obtain presentations from the king ad corroborandum; and that thereupon they perfect all their former neglects; or they may obtain letters patents of confirmation, which may be pleaded in bar of any quare impedit after brought by the king.

Rastal's Entries.
Quare Imped.
Roy, 22. Flo.
528. b.
11 H. 4. 9. a.
Hob. 302.
Dy. 392. p. 70.
14 H. 4. 36. b.
25 E. 3. 47. a.
Flo. 528. b.
Rast. Entries.
Quare Imped.
in Roy, 22.

And for the future I advise them, that they first have some credible witnesses present, when they make their subscriptions before the bishop; and that they attest the bishop's certificate; and that they get two books of articles; and that when they read the thirty-nine articles, they give one of those books of articles to some credible

(27) In the case of Woodcock and Smith, T. 1718, it was declared by the whole court of exchequer, that although at law they hold a parson or vicar to the proof of his admission, institution and induction, and reading the articles, yet they never do in equity. Bunb. 25, et vide Powell v. Milbank, Black. Rep. 851.

parishioners to read with them, and then attest the book, that they were present, and heard the clerk read the said thirty-nine articles during the time of common prayer, and declare his unfeigned assent and consent to all the matters and things therein contained, by subscribing their names thereunto; and that the clergyman keep safely the said book of articles with this attestation.

[71] And I advise, that when he reads the book of common prayer, which must (as above is said) be read morning and evening, in all things which is prescribed therein, within two months after induction; that he likewise make some intelligent parishioners to read with him, and give them a copy of the declaration aforesaid, and at the foot of it make an attestation under their hands, of his reading the said book of common prayer and declaration, which may be done in this form :

First in a fair legible hand write the declaration aforesaid; then write under to this effect: Memorandum, That upon Sunday the day of in the year of our Lord A. B. parson of D. in the county of D. read common prayers in the parish church of D. aforesaid, both in the forenoon and afternoon of the same day, according to the form and order prescribed and directed 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, the form or manner of making, ordaining and consecrating of Bishops, Priests and Deacons: And immediately after reading the same, make a declaration of his unfeigned assent and consent, to all the matters and things therein contained in the form and words above written. And then let the witnesses hereunto subscribe the same certificate; which the clerk is to keep carefully with his institution, in-

duction and certificate, with the book of articles attested, as is before directed. And in these things I advise all the clergymen to be very tender and careful (28).

[72]

There was an act made in the thirteenth year of Queen Elizabeth, that none should be admitted to any benefice, unless he were three and twenty years of age, and a deacon at least, and should subscribe the thirty-nine articles before he should be admitted; and that none should be admitted to preach or administer the sacraments, unless such persons were twenty-four years of age at least. But this law is in part altered by the before-mentioned new Statute of Uniformity; for now none can be admitted to any living till he is a priest in holy orders, which he cannot be by this statute, till he is twenty-four years of age.

13 El. cap. 12.
What age a parson ought to be of.

And by the same statute it is enacted, that none shall be admitted to any benefice with cure of souls, of the value of thirty pounds or upwards in the king's books, unless he be a batchelor of divinity at least, or a preacher licensed by some bishop, or one of the universities of this kingdom; and if not so qualified, his institution to be void.

Who may be admitted to a benefice of 30*l.* per annum in the king's books.

(28) Finally, he shall, within six months after his admission, take the oaths of allegiance, supremacy and abjuration, in one of the courts at Westminster, or at the general quarter sessions of the peace, on pain of being incapacitated to hold the benefice, and of being disabled to sue in any action, or to be guardian, or executor, or administrator, or capable of any legacy or deed of gift, or to bear any office, or to vote at any election for members of parliament, and of forfeiting 500*l.* 1 G. A. 2. c. 13. and 9 G. 2. c. 26. By 6 G. 3. c. 53. the form of the oath of abjuration is altered. 1 Burn's E. L. 184.

By stat. 23 G. 2. c. 28. an indulgence is granted as to the time of reading the articles, and making the declaration, in cases of sickness or other lawful impediment. Vide Part 1, Chap. 4, Note 16.

Otley v. Shepherd, circa
13 Car. 1. C. B.
in Qu. Imp.

If one be instituted into a benefice under the age of twenty-three years, whereby it is made void within the statute of 13 Eliz. yet no lapse shall incur, because the presentment is not made void.

It may be a question, whether parsons, vicars, &c. are within the late act for preventing dangers which may happen from popish recusants; therefore it is a safe way to receive the sacrament, take the oaths, and make the subscriptions prescribed by that act; *cautela abundans non nocet.*

CHAPTER VII.

[73]

The Duty of the Parson, Vicar, &c. after Induction, and the former Ceremonies performed; and treats of Non-residence, and the Penalties thereof, and for what Reasons the same may be excused.

HE that has orderly, as aforesaid, obtained an ecclesiastical preferment in the church of England, must be conformable to the government and orders thereof, and must not use any other public form of prayer than what is prescribed by the book of Common Prayer before-mentioned, neither must he administer the sacraments of Baptism and the Lord's Supper in any other manner or form, than what is therein and thereby directed and prescribed.

Parsons, &c. must be conformable. Stat. 1 Eliz. c. 2.

And if any incumbent be resident upon his living (as he ought to be), and keep a curate, he is bound by the act of Uniformity once every month at least, to read the common prayers of the church, according as they are directed by the book of common prayer, in his parish church in his own person, or he forfeits five pounds for every time he fails therein. See the statute how he is to be convicted, and the penalty to be levied.

St. 14 Car. 2. c. 4. When, and how oft he must read the common prayers.

And the common prayer by that statute is to be read before every lecture; and it is not sufficient to read a piece here, and a piece there, where the party pleases; but they must read the whole appointed for the day orderly, as it is appointed, with all the circumstances and ceremonies of kneeling and standing, as is prescribed, otherwise it is no reading of common prayers within this law; quod nota.

Before every lecture.

[74]

And note, that by the late statute of Uniformity, the former statutes of Uniformity and penalties therein, are

St. 14 Car. 2. c. 4.

extended to this book of common prayer now lately established.

St. 2 Eliz. c. 2.

And by the statute of 1 Eliz. it is enacted, that if any minister that ought or should sing or say common prayer, &c. refuse to use the same common prayers, or to administer the sacraments, &c. in such order and form as they are mentioned and set forth in the Common Prayer book, or shall wilfully or obstinately standing in the same, use any other rite, ceremony, order, form or manner of celebrating the Lord's Supper, or other open prayers, or shall preach, declare or speak any thing in derogation or depraving of the same book, or any thing therein contained, &c. upon conviction, the party guilty of any of these offences forfeits the profits of all his living and spiritual promotions for a year, and is to suffer imprisonment for six months without bail or mainprise; and upon a second conviction for the like offence, he is to suffer imprisonment for a whole year, and be deprived ipso facto of all his spiritual promotions; and upon a third conviction for the like offence shall be imprisoned during his life, and lose all his spiritual promotions, if he have any: and if such person have no spiritual promotions, then for the first offence he is to be imprisoned for a year, for the second during life without bail or mainprise.

The penalty for using other forms of prayer, &c.

[75]

I have been the briefer in these matters upon the statutes of Uniformity, because they are printed at large before the book of Common Prayer, to which I refer the reader for his fuller satisfaction; and they are so plain and full, that they need no comment, but to advise all clergymen to read and observe them cautiously.

13 Eliz. c. 12.

I shall only give the reader this further caution, that if any parson, vicar, &c. shall maintain any doctrine, contrary to the thirty-nine articles of religion, it is cause of deprivation; or if he administers the sacraments in any other form than is prescribed by the book of Common Prayer, he forfeits 100*l.* by a statute made

in the 13th year of Queen Elizabeth. And by the new statute of Uniformity this penalty is extended to such as do it contrary to the present book of Common Prayer now used.

The next duty incumbent upon the parsons, vicars, &c. is, that they be resident upon their cures, a duty incumbent upon every one that hath the cure of souls in the church of Christ: for, as Padre Paulo in his most excellent History of the Council of Trent observes, that in the first 700 years after Christ there was not any such thing known in the western church, that any man should have an office or title in the church, and not do the duty; and many canons and decrees have been made against non-residence: and in the Council of Trent it was held by much the greater and better number of the prelates and fathers in that council, that residence was *jure divino*, and undoubtedly had been so decreed, if the pope had not used all his old stratagems against it; but whilst the pope had power to dispense with residence, all the canons and decrees of that church were of little greater effect, than to fill his coffers with money; for in this kingdom, how many bishoprics, abbies, priories, &c. were enjoyed (I mean the profits of them) by foreigners, that never saw them, or took any care of their duties? I should be glad if it were much better now.

The commons of England often complained against pluralities and non-residence, and in the parliament held 2 H. 4. the commons prayed, that all such as procured from Rome (for in those days they came from Rome) any bulls for pluralities or non-residence, should incur the pain of provisoes; except the chaplains of archbishops and bishops, and scholars; and those that had any bulls should cancel them.

And in the parliament held 8 H. 4. the commons petitioned, that the king might have a moiety of the

Page 217, in the English translation.

Non-residence, when it came into the church.

The same list. p. 217, &c. 486, &c. 509, &c. 496.

[76]
Residence *jure divino*.

Selden de Decimis, 106, 107, 496.

The exact abridgment of records, nu. 50.

Ibid. H. 4. num. 113.

profits of all benefices where the incumbent was non-resident.

Ibid. 9 H. 4.
num. 70.

The like was prayed in the parliament in 9 H. 4.

Ibid. 4 H. 6.
num. 38.

In the parliament 4 H. 6. it was prayed by the commons, that all parsons and vicars, and others having cures, and not being resident thereupon, should forfeit their benefices, the one half to the king, and the other half to the patron.

[77]
Ibid. 4 H. 6.
num. 31.

In the parliament held the same year, the commons prayed, that for the non-residence of the incumbent, the patron might present a new clerk; and great reason in my judgment, and very agreeable to the rules of the common law, where a temporal officer loses his office for non-user: and I know no reason why it should not be so in spiritual offices, where the souls of a many poor people are neglected. But these had none of them the good fortune to be reduced into laws; but I presume these complaints in parliament so awakened the pope and clergy, that there was some reformation; for I find no more complaints in parliament concerning this matter, till the 21 H. 8. In which parliament it was enacted;

21 H. 8. cap. 13.
Act against non-residence.

That as well every spiritual person then being promoted to any archdeaconry, deanery or dignity in any monastery or cathedral, or other church conventual, or collegiate, or being beneficed with any parsonage or vicarage; as all and every spiritual person, which then after should be promoted to any of the said dignities or benefices with any parsonage or vicarage from the feast of St. Michael then next following, should be personally resident and abiding in, at, or upon his said dignity, prebend or benefice, or one of them at the least; and that if any such person wilfully absented himself from his said benefice, &c. by the space of a month at one time, or two months at several times in any one year to be accounted at several times, that such person so absenting himself should forfeit ten pounds for every such

default, the one half to the king, the other half to the informer, to be recovered, as is expressed in the act (29).

[78]

And by the same act, there is a proviso worth mentioning, though now out of date, to this effect :

That if any person should procure any dispensation from Rome, or elsewhere, to be non-resident, the party guilty should forfeit twenty pounds.

By this and other statutes mentioned in this book it is evident, that the parliaments of England, even when the pope was in full power, often made bold with his holiness, to correct his and his court's corruption.

Certainly this was an excellent law, if there had been no more in it but the dispensing with such persons as by the same law are qualified to have two livings : and the persons capable to qualify chaplains to have pluralities had not been grown so numerous, that there are but few of the best livings but they are held by pluralists, and they either by colour of attending their lords, their deaneries or prebends, find an excuse to be non-resident, which has made this law of little effect ; nay, I doubt I may say, that we are now in a far worse condition than before the making of this act : for dispensations from Rome (as all other things there) were costly, came slowly, being far to fetch ; that I presume there's ten dispensations for pluralities now, for one then ; and few of those dispensed with were non-residents upon both livings, as now they be : two great parishes in many places being left to the care of two boys that came but the other day from school, and perhaps fitter to be there still, whilst the shepherd that takes the fleecce, either feasts it out in his lord's family, or takes his ease upon a prebend or deanery.

[79]

(29) This act is now repealed, and new penalties for non-residence are substituted by 57 G. 3. c. 99. given at length in this chapter, note 31.

The end of this law.

This good law principally aimed at three ends or effects :

To do their duties.

1. That every clergyman might attend his duty in reading the public prayers of the church, administering the sacraments, preaching, inspecting the behaviour of his flock, and performing all sacred and divine offices, like a good and faithful shepherd: and I do wonder, with what conscience any clergyman can expect his dues from his parishioners, that does not perform his duty in the first place.

To avoid dilapidations.

2. The second end of this good law, is to avoid dilapidations in the buildings belonging to their livings: for you shall seldom see a non-resident, but he is also a dilapidator, and it is no wonder that he that neglects the flock, lets the sheepfold go to ruin.

To maintain hospitality.
St. 15 R. 2. c. 6.
& 4 H. 4. c. 12.

3. The third end of this good law, was to maintain hospitality: and I would wish every clergyman to remember, that the poor have a share in the tithes with him.

Can. 4.
Vide appendix
at the end of
this chapter.
[80]

Pope Sylvester, in the beginning of the fourth century, decreed, that the revenues of the church should be divided into four parts: "Quarum una cedat pontifici ad sui sustentationem; altera presbyteris et diaconis, et omni clero: tertia templorum et ecclesiarum reparationi; quarta pauperibus et infirmis, et peregrinis."

Can. 24.
Lamb. 132.

And by a canon of our own, made in the time of king Alfred, it is decreed, that the tithes should be delivered to the priest, who should divide them into three parts: "Unam partem ad ecclesiæ reparationem; alteram pauperibus erogandam; tertiam vero ministris Dei qui ecclesiam ibi curant."

Cap. in decimis.

And by a provincial canon of our own, it is ordered; "Quod religiosi beneficia ecclesiastica obtinentes, secundum hujusmodi beneficiorum facultates annis singulis pauperibus parochianis beneficiorum eorundem certam eleemosynæ quantitatem, ordinariorum ipsorum locorum moderandam arbitrio, per ipsos episcopos distribuere

compellantur, &c. By all which it appears, that originally the poor had a share in the tithes (30).

And to this end the statute enjoins the clergyman to be resident in and upon his living, that is, his parsonage or vicarage-house, if he have any, and not at any other house in the parish; but imprisonment without fraud, or removing for health* without fraud, or not having a house upon his glebe, excuses his residence for the time; for the words of the statute are, “ that he that wilfully absents himself.”

Co. 6. 21. b.
More, 540. du-
bitatur.
* Lindw. 67. b.
accord.

So if any parson, vicar, &c. shall be in the king's service beyond sea, or in any pilgrimage, or shall without †fraud abide in any university within this realm to study, or is a chaplain qualified within this statute, to have plurality of benefices, or the chaplains of any of the judges of the King's Bench or Common Pleas, chancellor or chief baron of the Exchequer, of the king's attorney and solicitor, and the chaplains of the

† But by the
stat. of 28 H. 8.
c. 13. this law is
restrained to
such as are
under 40 years
of age, and do
the exercises of
the university.

[81]
Who may be
non-residents.

(30) If all tithes were in the possession of the incumbents of their respective parishes, the distribution above alluded to might be fair and useful; but when it is recollected, that a large part of the great tithes throughout the kingdom are impropriated in lay hands, or appropriated to ecclesiastical or eleemosynary corporations, and that vicarages are endowed with a small comparative share, it can no longer be considered a duty on incumbents in general to expend the fourth part of their incomes in charity and hospitality.

The residence of the clergy has been regulated by several recent statutes, the 43 G. 3. c. 84. 54 G. 3. c. 54. 54 G. 3. c. 175. continued by 56 G. 3. c. 123. and 57 G. 3. c. 99. which embraces and repeals the rest. As they are of considerable length, the editor has thought it more advisable to place them at the end of this chapter, in the order of their dates. He has given a short abstract of the repealed statutes, as in some degree affording a history of ecclesiastical affairs for a few preceding years, and he has set out the statute 57 G. 3. c. 99., as being an important one, at full length. Vide note 31.

25 H. 8. c. 16.
33 H. 8. c. 28.

chancellor of the Duchy of Lancaster, of the augmentations, first-fruits and tenths; of the master of the wards, the surveyor general; of the treasurer of the chamber and augmentations, and groom of the stole, whilst such chaplains abide and are attendant in the households of their masters; and the master of the Rolls, the dean of the arches, and the chancellors and commissaries of archbishops and bishops, and the twelve masters of the Chancery, so long as they shall continue in their places, may be non-resident: but the chaplains of the chancellor of the duchy, augmentations, first-fruits, master of the wards, surveyor general, treasurer of the chamber and augmentations, and groom of the stole, are to be resident twice in a year at least, eight days at each time; and the king may give license to any of his own chaplains to be non-resident. And any ecclesiastical person, to attend any suit in the Chancery or Star Chamber without fraud, may be non-resident for so long time, &c.

21 H. 8. c. 13.

33 H. 8. c. 28.

9 E. 2. c. 8.

21 H. 8. c. 13.

Master dies, &c.
Co. 6. 119. a.
Co. 6. 21.

There is another proviso in this statute that enables the king to give his chaplains as many livings as he pleases, and to dispense with their own residence.

But if a chaplain be qualified in respect of his service to have a plurality, and his lord or master die, be attaint of treason, felony, or removed from his place, it will not serve the chaplain's turn to be resident upon one of his livings without the king's special licence, with a non obstante.

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Regist. Orig.
55. b.
F. N. B. 44. g.

And here I must not omit an ancient prerogative of the kings of England, practised in the height of Popery, that where any clergymen were employed in the king's service, he might dispense with their non-residence; and if the spiritual judges went about to censure or punish them by ecclesiastical censures for such non-residence, the kings of England have sent their writs mandatory, commanding them to surcease.

Concil. gener.
Const. Can. 80.

But bishops and archbishops are not within this law, but not exempt from this duty; there being several

canons that require it. And bishops may be compelled hereunto by ecclesiastical censures by their superiors; and the king may compel them by seizing their temporalities.

A notable precedent whereof we have in the time of Henry III. when Popery was at highest, and the king not looked upon as head of the church; yet that king sent his writ mandatory to the bishop of Hereford, to be attendant upon his bishopric, otherwise he would seize of all his temporalities. Which writ, as well for the rarity as also for the religious grounds upon which it was granted, will not be ungrateful to the reader to see, and for whose satisfaction I shall give it him as I find it recorded by Sir Edward Coke, and wish there were no cause to make use of it in these days.

Concil. Sardi.
Can. 15. Const.
Othon. Quid
ad venerabiles
patres.
Bishops' resi-
dence requira-
ble.
2 Inst, 625.

“Rex episcopo H. salutem. Pastores gregibus præponuntur, ut diei, noctisque vigilias exercendo, oves famelicæ in fertilitatis pascua introducant: Errantes vero per verbum salutis, et virgam correctionis in unius ovis conservare studeant indissolubilem unitatem. Sed sunt nonnulli qui hanc doctrinam damnabiliter contemnescentes, et sua ab aliis pecora distinguere nescientes, lac et lanam tollunt, qualiter dominicus grex alatur non curantes, temporalia rapiunt. Et quis in parochia fame pereat, aut periclitetur in moribus, non attendunt; qui non pastores, sed mercenarii potius dici promerentur. Hoc siquidem dum hiis diebus ad disponendum de regni nostri præsiidiis in partes marchia nos transferemus in ecclesia vestra, (dolenter referimus) nos invenisse, quam adeo invenimus pastoris solatio destitutam ut nedum episcopum, sed nec officialem haberet, vicariam aut diaconam qui quicquam spiritualitatis exercere possit in eadem. Sed ecclesia ipsa quæ olim deliciis affluere consuevit, et canonicis qui ibidem nocturnis et diurnis officiis vacare, et opera charitatis exercere deberent, eam deserentibus et longe degentibus in remotis, stola jucunditatis exuta cecidit in terram, viduitatis suæ detri-

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menta deplorans, nec est qui consoletur eam ex omnibus curis ejus. Sane dum hæc vidimus, et consideramus diligenter, pietatis, aculeus viscera nostra commovit, et compassionis gladius intima cordis nostri acrius vulneravit, ut tantam ecclesiæ matris nostræ injuriam ulterius dissimulare non possimus, nec pertransire incorrectam. Quapropter vobis mandamus firmiter injungentes, quatenus ad ecclesiam vestram prædictam, occasionibus quibuscunque postpositis, cum ea qua poteritis celeritate vos transferri curetis, commissum vobis in eadem cura pastoralis officium personaliter executor, etc. Alioqui scire vos volumus pro constanti, quod si istuc fieri non curaveritis, bona temporalia, et omnia quæ ad baroniam ipsius ecclesiæ pertinent, quæ donatione constat eidem fuisse collata, et quæ hactenus colligi et salvo custodire præcipimus in commodum et utilitatem ipsius ecclesiæ convertenda, cessante jam causa in manu nostra totaliter capiemus, nec ulterius sustinebimus, quod temporalia metat, qui spiritualia ad quæ ex officii sui debito tenetur, irreverenter subtrahere non formidat, aut quod emolumenta percipiat, qui incumbentia ejusdem onera subire recusat, &c. Teste," &c.

This writ was sent by Henry the Third, to Peter de Egueblanke, a Savoyard, then bishop of Hereford, who, as the history of those times relate, had never a good, but many bad qualities, that constantly attend men that are negligent of their duties to God and man in this kind; how little care soever he took of duty, you hear, lac et lanam sustulit, temporalia rapuit, by which means he was grown intolerable rich; and mark what came of his wealth: the rebellious barons seized on him in his cathedral church at Hereford, and took all his goods and treasure, and divided it amongst their soldiers. Even so may it fare with all such bishops!

Now my hand's in, I will beg the reader's patience, to inform him what Pope Damasus, one of the better

sorts of popes, said in an epistle of his to such bishops; and it was thus:

“Primum quod curam sibi commissam negligent, cum Dominus dicat; bonus pastor animam suam ponit pro ovibus suis, mercenarius autem videt lupum venientem, et demittit oves, et fugit, etc. Secundo, illi episcopi qui talia præsumunt, videntur mihi (ait) esse meretricibus similes, quæ statim ut pariunt, infantes suos aliis nutricibus tradunt educandos, ut suam citius libidinem explere valeant. Sic et isti infantes suos, id est, populos sibi commissos aliis educandos tradunt, ut suas libidines expleant, id est, pro suo libitu sæcularibus curis inhient, et quod unicuique visum fuerit, liberius agunt. Pro talibus enim animæ negliguntur, oves pereunt, morbi crescunt, hæreses et schismata prodeunt, ecclesiæ destruuntur, sacerdotes vitiantur, et reliqua mala proveniunt. Non taliter Dominus docuit, nec apostoli instituerunt, sed ipsi qui curam suscipiunt, ipsi peragant et ipsi proprios manipulos Domino representant. Nam ipse ovem perditam diligenter quæsit, ipse invenit, ipse propriis humeris reportavit, nosque ad ipsum facere perdocuit. Si ipse pro ovibus tantam curam habuit, quid nos miseri dicturi sumus, qui etiam pro ovibus nostris commissis curam impendere negligemus, et aliis eas educandas tradimus? Corrigantur hæc (fratres) necesse est, quia, qui plus laborat, majorem mercedem accipiet.”

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And now I have done with non-residence, one of the pests of the church: I will in the next place shew what dilapidations are, and the several ways the same are punishable; this being often the effect and fruit of non-residence.

Whereas in the former impressions of this book, Chap. 7. page 67. I cite a canon of Pope Sylvester, whereby it is decreed, that the revenues of the church should be distributed into four parts, one to the bishop,

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a second to the clergy, a third to the repairs of the church, and a fourth to the poor, and to the infirm, and pilgrims. There is a learned person that has published a book in defence of pluralities, but is endowed with so much modesty, that he is ashamed to tell his name; yet is not ashamed to reflect upon me for writing against them, who in the beginning of his third chapter, page 155, says, "It remains in the third place to be manifested, that the use of pluralities, as now practised, is not inconvenient to the church.

"These inconveniences, as they are urged and exaggerated by the oppugners of pluralities, may be reduced to these four heads." And after he has named the four heads, page 158. he charges, "That the author first named (meaning me) hath affirmed many things which are downright false, in other things hath betrayed a gross ignorance. The other author is a person of too great worth and learning, to be guilty either of fraud or ignorance; but only has suffered himself to be herein transported with too much heat and zeal before he well considered the case; so that wheresoever in the following answer I shall charge fraud or ignorance upon the objections, I desire it may be referred to the first objector."

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So you see this nameless author hath done me the credit to place me in honourable company; but charges me to have affirmed many things that are downright false, and in other things to have betrayed a gross ignorance, but charges nothing in particular that is false.

But page 166. he saith, "That it is something shameful for a professor of law to cite the decrees of Pope Sylvester as genuine, which were forged almost 500 years after his death."

This learned gentleman might have done well to have made some proof of this assertion, for the better information of my ignorance. Pope Sylvester is reported to have been a very good man, and lived about the end of the third century. And Caranza, a famous

canonist, mentions this canon to be made by a council of 275 bishops, held *intra Thermas Domitianas* at Rome, and confirmed by Constantine the emperor, and the empress Helena his mother.

And that good pope Sylvester, and Padre Paulo the author of the history of the council of Trent, does affirm, that such a division of the church revenues was made in the year 470; but concludes, that some do attribute this devotion to pope Sylvester, who was 150 years before that time: but why any body should forge this canon 500 years after Sylvester's death, which must be in the end of the eighth century, I know no reason, the matter being, 300 years before that time, settled first by a decretal epistle of pope Simplicius to Florentinus, Equitius and Severus, bishops, which lived about the latter end of the fifth century; who says, "De reeditibus ecclesiæ vel oblatione fidelium quid deceat nescienti nihil licere permittat, sed solo episcopo ex his una portio remittatur: duæ ecclesiasticis fabricis et erogationi peregrinorum et pauperum profuturæ à Bonargro presbytero sub periculo sui ordinis ministrentur; ultima inter se clericis pro singulorum meritis dividatur."

In his treatise
De rebus benefi-
ciariis, 26.

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Causa 12. q. 2.
de Reditibus.

And Gregory the First, in his answer to the first question made to him by Augustine, first archbishop of Canterbury, about the end of the fifth century, tells him, "Mos est apostolicæ sedis ordinatis episcopis præceptum tradere, quod de omni stipendio quod accedit quatuor fieri debeant portiones, una videlicet episcopo et famulæ ejus propter hospitalitatem et susceptionem, alia clero, tertia vero pauperibus, quarta ecclesiis reparandis."

De Epist. lib.
15.

So that upon the whole matter it appears, by what is now and heretofore said, there was no need in the eighth century to forge a canon for this purpose in Sylvester's name; nor is there any doubt, but that by the canon law the poor ought to have a share in the revenues of

the church. Which was all I endeavoured to prove (31).

(31) Several actions having been brought for penalties incurred under statute 21 Hen. 8. for non-residence, proceedings under it were from time to time stayed by statutes 41 G. 3. c. 102. and 42 G. 3. c. 30. 86. At length the statute 43 G. 3. c. 84. was passed, by which incumbents were permitted to be absent three months without any penalty. If they were absent between three and six months, they forfeited one third of the annual value of the benefice after all deductions except the curate's stipend; between six and eight months one half; between eight and twelve months two thirds, and the whole year three fourths to any one who would sue: sinecure rectories were excepted. All who were exempted from non-residence before were still to be exempted: and the statute extended the exemption to several others therein specified, to all public officers in either university, and to tutors and public officers in any college. Students in the university were exempted till they were thirty years old only.

The person of the incumbent was not to be taken in execution if the penalties could be raised by sequestration. The bishop's certificate to be evidence of the annual value. No person was to have the benefit of an exemption unless he made a notification of it every year, within six weeks from the 1st of January, to the archbishop or bishop of the diocese. The bishop might at his discretion grant a licence for non-residence, for the illness or infirmity of the incumbent, his wife or child; and where there was not a fit house of residence (if the unfitness was not caused by the incumbent's own neglect), if he lived in his own or any relation's house in the parish; if he served another church as curate or preacher, or if he was master or usher of an endowed school, and licensed by the bishop, these and some other were grounds of the grant of a licence, and if the bishop refused, the incumbent might have applied to the archbishop. The bishop might grant licences for causes not enumerated in the statute, but they were afterwards to be allowed by the arch-

bishop. Licences might be revoked, and if not revoked were in force only for two years. A list of all exemptions and licences for non-residence was to be transmitted every year to the king in council, and lists of the exemptions and licences were to be kept by the register of each diocese; any person might inspect them by paying two shillings. The bishop might compel residence by a monition and censure in his court, but not unless the non-residence exceeded three months in one year. If an action for the penalties was commenced, and the bishop issued his monition before the commencement of the action, it was a bar to the action. If the bishop's monition to reside was not complied with within thirty days, he might sequester the profits of his living till it was complied with. The profits sequestered might be applied by the bishop to the improvement of the parsonage house, or to the fund of Queen Anne's bounty. Vicars were no longer to take an oath that they would reside. If an incumbent was called into residence by the bishop, and there was any tenant residing in the parsonage house, a copy of the order was to be served upon the tenant by one of the churchwardens, and if he did not quit the premises on the day specified in the order, he was to forfeit forty shillings for every day he continued afterwards on the premises; all contracts with the incumbent were to be void. The king's prerogative to grant dispensations for non-residence was not affected.

This act gave occasion to many vexatious prosecutions against the clergy at the suit of a common informer, in consequence of which the statutes 54 G. 3. c. 6. and 54 G. 3. c. 44. to stay proceedings, and 54 G. 3. c. 54. to discontinue proceedings in certain actions already commenced, and to continue stat. 54 G. 3. c. 44. were passed.

Then followed the statute 54 G. 3. c. 175. to explain and amend several acts relating to spiritual persons holding farms, and for enforcing the residence of such persons on their benefices, in England, for one year, and from thence until six weeks after the meeting of the then next session of parliament.

At length the statute 57 G. 3. c. 99. was passed, entitled an act to consolidate and amend the laws relating to spiritual persons holding of farms, and for enforcing the residence of spiritual persons on their benefices, and for the support and

maintenance of stipendiary curates in England. This act comprises the provisions of 43 Geo. 3. c. 84. as to non-residence, consolidates the enactments of several statutes upon the subject of spiritual persons holding farms, and the maintenance of curates, introduces some new provisions, and repeals the former statutes on those subjects: as it is therefore very important and useful, it is here given verbatim.

“ An act to consolidate and amend the laws relating to spiritual persons holding of farms; and for enforcing the residence of spiritual persons on their benefices; and for the support and maintenance of stipendiary curates in England.

[10th July, 1817.]

- 21 H. 8. c. 13. “ Whereas an act passed in the twenty-first year of the reign of his majesty King Henry the Eighth, intituled ‘ An act against pluralities of benefices, taking of farms by spiritual men, and for residence:’ and whereas another act passed in
- 28 H. 8. c. 13. the twenty-eighth year of the reign of his said majesty King Henry the Eighth, intituled ‘ An act for compelling spiritual persons to keep residence upon their benefices:’ and whereas
- 13 Eliz. c. 20. another act was passed in the thirteenth year of the reign of her majesty Queen Elizabeth, intituled ‘ An act touching leases of benefices, and ecclesiastical livings with cure:’
- 14 Eliz. c. 11. and whereas three several acts passed in the fourteenth,
- 18 Eliz. c. 11. eighteenth and forty-third years respectively of the reign of
- 43 Eliz. c. 9. her said majesty Queen Elizabeth, for explaining and amending the said recited act of the thirteenth year aforesaid; and
- 3 C. 1. c. 4. which were made perpetual by an act passed in the third year of the reign of his majesty King Charles the First, intituled ‘ An act for the continuance and repeal of divers statutes:’ and whereas another act was passed in the forty-
- 43 G. 3. c. 84. third year of the reign of his present majesty, intituled ‘ An act to amend the laws relating to spiritual persons holding of farms, and for enforcing the residence of spiritual persons on their benefices in England:’ and whereas another act
- 43 G. 3. c. 109. passed in the forty-third year of the reign of his present majesty, intituled ‘ An act to rectify a mistake in an act made in this present session of parliament, intituled ‘ An act to amend the laws relating to spiritual persons holding of farms, and for enforcing the residence of spiritual persons

on their benefices in England, and to remove a doubt respecting the title of the statute of the twenty-first year of King Henry the Eighth therein mentioned:’ and whereas an act was passed in the twelfth year of the reign of her late majesty Queen Anne, intituled ‘An act for the better maintenance of the curates within the church of England, and for preventing any ecclesiastical persons from buying the next avoidance of any church preferment:’ and whereas an act was passed in the thirty-sixth year of the reign of his present majesty, intituled ‘An act for the further support and maintenance of curates within the church of England, and for making certain regulations respecting the appointment of such curates, and the admission of persons to cures augmented by Queen Anne’s bounty, with respect to the avoidance of other benefices:’ and whereas another act passed in the fifty-third year of the reign of his present majesty, intituled ‘An act for the further support and maintenance of stipendiary curates:’ and whereas doubts have arisen upon the construction of some of the provisions of the said acts; and it is therefore necessary that such provisions of the said acts should be explained, and other provisions made, and that the several laws relating to spiritual persons holding of farms, and to buying and selling, and for enforcing of residence and the maintenance of stipendiary curates, should be consolidated in one act:’ may it therefore please your majesty that it may be enacted; and be it enacted by the king’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, that from and after the passing of this act, so much of the said several recited acts passed in the reign of his majesty King Henry the Eighth, and so much of the said acts of the reign of her majesty Queen Elizabeth, and of the said recited act of his majesty King Charles the First, as relates to spiritual persons holding of farms, and to leases of benefices and livings, and to buying and selling, and to residence of spiritual persons on their benefices; and also so much of the said recited act of her majesty Queen Anne, and of the said recited act of the thirty-sixth year of the reign of his present majesty, as relates to the maintenance of curates within the church of

12 Ann. stat. 2.
c. 12.

36 G. 3. c. 83.

53 G. 3. c. 149.

Recited acts re-
pealed.

England, and making provision for appointing stipends for such curates, and all the said several other recited acts passed in the reign of his present majesty, shall be and the same are respectively hereby repealed.

Spiritual persons taking to farm for occupation above eighty acres without consent of bishop.

“ II. And be it further enacted, that from and after the passing of this act it shall not be lawful for any spiritual person having or holding any dignity, prebend, canonry, benefice or any stipendiary curacy, or lectureship, to take to farm, for occupation by himself, by lease, grant, words or otherwise, for term of life or term of years, or at will, any lands, exceeding in amount in the whole eighty acres, for the purpose of occupying or using or cultivating the same, without the consent in writing of the bishop of the diocese in which such dignity, canonry, prebend, benefice, stipendiary curacy or lectureship shall be locally situate, specially given for that purpose; and every such permission to any spiritual person to take to farm, for the purpose of occupying the same, any greater quantity of land than eighty acres, shall specify the number of years, not exceeding seven, for which the permission is given; and every such spiritual person as aforesaid who shall, without such permission as aforesaid, take to farm any greater quantity of land than eighty acres, shall forfeit for every acre of land above the quantity of eighty acres so taken to farm, the sum of forty shillings for each and every year during or in which he shall so occupy, use, cultivate or farm such land contrary to the provisions of this act, to be recovered by and to the use of any person who may inform and sue for the same.

What such consent is to express.

Penalty.

Spiritual person beneficed, or performing ecclesiastical duty, engaging in trade, &c.

“ III. And be it further enacted, that no spiritual person having or holding any dignity, prebend, canonry, benefice, stipendiary curacy or lectureship, shall by himself, or by any other for him or to his use, engage in or carry on any trade or dealing for gain or profit, or deal in any goods, wares or merchandize, by buying and selling for lucre, gain or profit, in any market, fair or other place, upon pain of forfeiting the value of the goods, wares and merchandizes, by him or by any to his use, bargained and bought to sell again contrary to the provisions of this act; and that every bargain and contract so made by him, or by any to his use, in any such trade or dealing, contrary to this act shall be utterly void and of none effect; and the one half of every

Penalty,

and contracts void.

such forfeiture shall go to his majesty, and the other half to him that will sue for the same.

“ IV. And be it further enacted, that nothing in this act contained in relation to being engaged in trade or dealing, or buying or selling, shall extend or be construed to extend to, or to 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 act, matter or thing in the conduct of, or carrying on, or 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 or things of any description, which shall, without fraud or covin, be bought, to the intent and purpose, at the buying thereof, to be used and employed 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 or things, the 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 any advanced price beyond that which may have been given for the same; or for any buying or selling again for any lucre, gain or profit of any manner of cattle or corn, or other matters or things whatever, necessary, proper 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, farms, lands, tenements 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: provided always, that nothing herein contained shall extend or be construed to extend to authorize any such spiritual person to sell any cattle or corn, or other matters or things as aforesaid, in person, in any market, fair, or place of public sale.

Proviso for spiritual persons engaged in keeping schools, or as tutors, &c. in respect of any thing done, or any buying or selling in such employment; and for selling any thing bona fide bought for the use of the family; or occupying any glebe, &c.

“ V. And be it further enacted, that from and after the passing of this act every spiritual person holding any benefice, who shall, without any such licence or exemption as is in this act allowed for that purpose, wilfully absent himself therefrom for any period exceeding the space of three

Non-residence.

Penalties according to time.

months together, or to be accounted at several times in any one year, and make his residence and abiding at any other place or places except at some other benefice, donative, perpetual curacy, or parochial chapelry of which he may be possessed, shall, when such absence shall exceed such period as aforesaid, and not exceed six months, forfeit and pay one third of the annual value (deducting therefrom all outgoings, except any stipend paid to any curate) of the benefice, donative, perpetual curacy, or parochial chapelry from which he shall so absent himself as aforesaid; and when such absence shall exceed six months and not exceed eight months, one half of such annual value; and when such absence shall exceed eight months, two thirds of such annual value; and when such absence shall have been for the whole of the year, three fourths of such annual value, to be recovered by action of debt, bill, plaint, or information in any of his majesty's courts of record at Westminster, or the courts of great sessions in Wales, wherein no essoign, privilege, protection or wager of law, or more than one imparlance, shall be allowed; and the whole of every such penalty or forfeiture shall go and be paid to the person or persons who shall inform and sue for the same, together with such costs of suit as shall be allowed, according to the practice of the court in which such action shall be brought.

Where no house belonging to benefice, &c. residence within limits of parish, &c. legal residence.

“ VI. And be it further enacted, that every spiritual person having any benefice, and who shall not have any house of residence thereon, and who shall have resided nine months in the year within the limits of his benefice, or within the limits of the city, town, place or parish in which his benefice may be situated, provided such last mentioned residence be within the distance of two miles from the church or chapel of his benefice, shall not be liable to any penalties on account of non-residence, nor be obliged to take out any licence in respect thereof, but that the same shall be deemed a legal residence to all the intents and purposes of this act; and in all returns made by the bishops, persons so residing shall be returned as resident.

In what case houses purchased by governors of Queen Anne's bounty to be deemed residences.

“ VII. ‘ And whereas the governors of Queen Anne's bounty have in some instances purchased and may hereafter purchase houses not situate within the parishes for which they are purchased, but so contiguous 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 by writing under his hand and seal, and duly registered in the registry of the diocese, shall be deemed houses of residence appertaining to such benefices to all intents and purposes whatsoever.

“ VIII. And be it further enacted, that in all cases of rectories having vicarages endowed, the residence of the vicar in the rectory house shall be deemed a legal residence to all intents and purposes whatever; provided that the vicarage house be kept in proper repair, to the satisfaction of the bishop.

Rectories having vicarages endowed.

“ IX. And be it further enacted, that it shall be lawful for the bishop, in every case in which there shall not be a house of residence belonging to any benefice within his diocese, to allow and adjudge any fit house within the limits of such benefice and belonging thereto, or any fit house belonging thereto, not within the limits, but so contiguous as to be sufficiently convenient for the purpose, to be the house of residence thereof; and such allowance and adjudication in writing under the hand and seal of such bishop shall thereupon be registered in the registry of the diocese from time to time; and such house shall thenceforth be deemed the house of residence for the time being to all intents and purposes whatsoever.

Power in bishop to allow any fit house belonging to the preferment to be a house of residence.

Such allowance to be registered.

“ X. And be it further enacted, that no spiritual person, being chancellor, vice-chancellor, or commissary of either of the universities of Oxford or Cambridge, or being warden, dean, provost, president, rector, principal, master, or other head ruler of any college or hall within the said universities, and no spiritual person having or holding any professorship or any public readership in either of the said universities, being actually resident within the precincts of the university and reading lectures therein; and no scholar under the age of thirty years, abiding for study without fraud at either of the said universities; and no chaplain of the king's or queen's most excellent majesty, or of any of the king's or queen'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, or of any temporal

In what case the following persons exempted from penalties for non-residence. Chancellor, &c. in the universities;

Royal chaplains;

Chaplains of peers, &c.;

lord of parliament, or of any other person or persons authorised by law to appoint any chaplain or chaplains, during so long as such chaplain or chaplains shall abide and dwell and daily attend in the actual performance of his duty as such chaplain in the household to which he shall so belong; and no spiritual person actually serving as a chaplain of the house of commons, or as clerk of his majesty's closet, or as a deputy clerk thereof, or a clerk of the closet of the heir apparent, or as a deputy clerk thereof, or as a chaplain general of his majesty's forces by sea or land, or chaplain of his majesty's dock-yards, while such spiritual person shall be actually attending and performing the duties of such office respectively; or as a chaplain in the household of any British ambassador residing abroad, during the time of his performing the duties of such his office; or as chancellor or vicar general, or as commissary, whilst exercising the duties of their offices respectively; or as an archdeacon, while upon visitations or otherwise engaged in the exercise of his functions; and no spiritual person being a minor canon or vicar choral, or priest vicar, or any such other public officer, in any cathedral or collegiate church, during the times for which such spiritual person shall actually reside within the precincts of the cathedral or collegiate church to which he shall belong, or within the city or town in which the said cathedral or collegiate church is situate or the suburbs thereof, and shall actually perform the duties of his office; or as a dean or subdean, or priest or reader, in any of his majesty's royal chapels at Saint James's or Whitehall, or as a reader in his majesty's private chapels at Windsor or elsewhere, whilst residing and actually performing the duty of any such office respectively; or as a preacher in any of the inns of court or at the Rolls; or as bursar, treasurer, dean, vice president, subdean or public tutor or chaplain, or other such public officer in any college or hall in either of the universities of Oxford or Cambridge, during the period for which he may respectively be required, by reason of any such office, to reside and perform the duties of any such office, and actually shall reside and perform the duties of the same; or as public librarian or public registrar or proctor, or public orator, or other such public officer, in either of the said universities, during the period for which he may respectively be

Chaplain of the house of commons;
Clerk of the closet;

Chaplains in the forces and dock-yards;

Chaplains of ambassadors, &c. abroad;

Archdeacons;

Minor canons, &c.;

Dean, &c. at St. James's or Whitehall;
Reader in the king's private chapels;
Preacher in inns of court or the rolls;
Bursars, &c. of college;

Public librarian, &c. in the universities;

required by reason thereof to reside and perform the duties of any such office, and actually shall reside and perform the duties of the same; or as fellow of any college in either of the universities, during the time for which he may be required to reside by any charter or statute, and shall actually reside therein; or as warden, provost, or fellow of Eton or Winchester college, or the master of the Charter house, during the time for which he may be required so to reside and shall actually reside therein respectively; or within the city or town, or suburbs of the city or town within or near to which the said colleges are respectively situate; or as a master or usher in the said colleges of Eton or Winchester, or as a master or usher of Westminster school, or as principal or professor of the East India college; or who shall be specially exempt from residence under the provisions of any act or acts of parliament not repealed by this act, shall be liable to any of the pains, penalties, or forfeitures in this act contained, for or on account of any non-residence, during any such period as aforesaid, on any benefice; but every such spiritual person shall, with respect to residence under this act, be entitled to account such period as if he had legally resided on some other benefice; any thing in this act contained to the contrary notwithstanding.

“ XI. And be it further enacted, that it shall be lawful for any spiritual person being dean, during such time as he shall reside upon his deanery, or being prebendary or canon, or holding any other dignity or dignities in any cathedral or collegiate church or churches, who shall reside any period not exceeding four months altogether within the year upon such dignity or dignities, to account such residence as if he had legally resided on some benefice: Provided always, that it shall be lawful for any spiritual person having or holding any prebend, canonry, or dignity in any cathedral or collegiate church, 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, 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 four months in the year, as reckoned from the first of January to the

Fellows of colleges;

Warden, &c. of Westminster and Eton and Winchester; Master of the Charter house;

Principal, &c. of the East India college.

Proviso for dignitaries residing at cathedral churches, &c. for certain periods.

Cases in which the year of residence at cathedrals commences at any other period than the 1st of January.

thirty-first of December, as if he had legally resided on some benefice; any thing in this act contained to the contrary notwithstanding.

Bishop may licence for a longer period, if the duties of a cathedral or collegiate church require it.

“ XII. And be it further enacted, that it shall be lawful for the bishop of the diocese in which any benefice shall be locally situate to licence any longer period of non-residence upon any such benefice of any prebendary, canon, or other person holding any dignity in any cathedral or collegiate church, in any case in which it shall appear to such bishop, from his own knowledge, if such cathedral or collegiate church is locally situate within his own diocese, or if not, by the certificate of the bishop of the diocese in which the cathedral or collegiate church shall be locally situate, to be required for the performance of any duties in any such cathedral or collegiate church; provided that every such spiritual person shall during such period reside on such prebend, canonry, or dignity.

Proviso for prebendaries, &c. appointed before this act.

“ XIII. Provided always, and be it further enacted, that no spiritual person appointed to any prebend, canonry, or dignity in any cathedral or collegiate church before the passing of this act, shall be subject to any penalty or forfeiture for non-residence upon any benefice during the period of his actually residing upon such prebend, canonry, or dignity.

Persons having house of residence on their benefice, and not keeping it in repair,

“ XIV. And be it further enacted, that every spiritual person having any house of residence upon his benefice, who shall not reside thereon, 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 that every such spiritual person who shall not keep such house of residence in repair, and who shall not, upon monition issued by the bishop of the diocese in which the same shall be locally situate, put the same in repair, according to the requisition of such monition, within the time specified therein, to the satisfaction of the bishop of the diocese, and to be certified to the bishop upon such survey and report as shall be required by the bishop in that behalf, shall be liable to all penalties for non-residence, notwithstanding any exemption or licence, during the period of such house of residence remaining out of repair, and until the same shall have been put in good and

Penalty.

sufficient repair, to the satisfaction of the bishop of the diocese.

“ XV. And be it further enacted, that from and after the passing of this act it shall be lawful for any bishop, upon application made for that purpose, by petition in writing, by any spiritual person, or by any fit and proper person on behalf of any spiritual person, having or holding any benefice locally situated within his diocese, upon such proofs as to any facts stated in any such petition as any such bishop may think necessary, and shall require by affidavit made before any ecclesiastical judge or his surrogate, or any justice of the peace or magistrate, or any master extraordinary in Chancery (which oath any such ecclesiastical judge or surrogate or justice of the peace or magistrate, or master extraordinary in Chancery, is hereby authorized and required to administer), to grant in such cases as are in this act enumerated, in which, upon due consideration of all the circumstances stated in any such application, and verified to the satisfaction of the bishop as aforesaid, such bishop shall in his discretion think it fit to grant the same, a licence in writing under his hand, expressing the cause of granting the same to such spiritual person to reside out of the parish, or out of the proper house of residence of his benefice, for the purpose of exempting such person from any pecuniary penalty or forfeiture in respect of any non-residence thereon; (that is to say), to any spiritual person who shall be prevented from residing in the proper house of residence, or in the parish, by any actual illness or infirmity of body of himself, or of his wife or child, making part of and residing with him as part of his family; and also to any spiritual person having or holding any benefice whereupon or 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 in repair to the satisfaction of the bishop; and also to any spiritual person having or holding any benefice, and occupying in the parish of the same respectively any mansion or messuage, to reside in such mansion or messuage, such spiritual person keeping the house of residence, and other buildings

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

belonging thereto, in good and sufficient repair and condition, and producing to the bishop proof to his satisfaction, at the time of granting and renewing any such licence, of such good and sufficient state of repair; and also to any spiritual person having or holding any benefice of small value, and serving as a licensed stipendiary curate elsewhere, and providing for the serving of such his benefice, to the satisfaction of such bishop; and also to any master or usher of any endowed school duly licensed by the bishop, and actually employed in teaching therein; and also to any master or preacher of any hospital or incorporated charitable foundation during the period for which he may be required to reside by any charter or statute of any such hospital or incorporated charitable foundation, or by any other lawful authority in the same, and shall actually reside and perform his duties therein; or to any person holding any endowed lectureship, or endowed chapelry, or endowed preachingship, and performing and executing the duties thereof respectively, with the licence of the bishop in whose diocese he shall so officiate; or to any spiritual person having or holding any benefice of small value, and serving as preacher in any proprietary chapel, in any city or town, with the licence of the bishop in whose diocese he shall so officiate; or to any spiritual person actually serving as chaplain in any of his majesty's garrisons, or as chaplain to the royal military asylum at Chelsea, or royal military college at Sandhurst, or as teacher of the royal military academy at Woolwich, or as chaplain at either of the royal hospitals at Greenwich or Chelsea, or as chaplain to either of the royal hospitals for seamen at Haslar or Plymouth, or as chaplain to the naval asylum, or in his majesty's navy, or as chaplain of his majesty's gaol of Newgate, or of the penitentiary at Milbank, or as chaplain of any British factory, or as principal surrogate or official in any ecclesiastical court of any diocese, or as a librarian of the British Museum, or of Sion college, or as one of the trustees of Lord Crewe's charity, during the time of personal attendance on the duties of such office respectively: Provided always, that the spiritual person obtaining any such licence shall pay to the secretary or officer of the bishop the sum of ten shillings, exclusive of and over and above the stamp duty chargeable thereon, and no more:

Fee for licences.

Provided also, that if any spiritual person applying to any bishop for any such licence shall think himself aggrieved by the refusal thereof, it shall be lawful for such spiritual person to appeal to the archbishop of the province, who shall forthwith, either by himself, or some commissioner or commissioners, appointed from among the other bishops of his province, under his hand, make or cause to be made inquiry into the same, and by writing signed by himself confirm such refusal, or grant a licence under this act, as shall seem just and proper: Provided always that in every such case the spiritual person so appealing shall give security to the bishop for the payment of such reasonable expences occasioned by the appeal as the archbishop or his commissioner or commissioners shall award.

Appeal to archbishop on refusal by bishop of licence.

Security on appeal for payment of expences.

“XVI. And be it further enacted, that it shall be lawful for any such bishop as aforesaid, in any cases not hereinbefore enumerated, in which under all the circumstances of any such case such bishop shall think it expedient to grant to any spiritual person possessed of any benefice a licence to reside out of the parish, or out of the proper house of residence, as the case may be, or as the case may appear to such bishop to require, and to assign in any case in which a stipendiary curate may be employed to do the duty of such spiritual person, such salary as he shall judge fit to appoint, due respect being had to the value of such benefice, and to all other circumstances of the case: And it shall also be lawful for any bishop, in case of the absence from the realm of any spiritual person, to grant any such licence without any application made for that purpose, and from time to time in any such case to renew any such licence as he shall think fit, and in every such case to appoint a stipendiary curate in case no curate duly licensed shall be then employed in serving such benefice, and to assign a salary to such curate; or if any curate shall have been and be then so employed, to assign any additional salary to such curate; and in every and any of such cases to cause such salaries to be paid by sequestration of the profits of the benefice: Provided always, that in every such case respectively, the nature and special circumstances thereof, and the reasons that have induced such bishop to grant such licence as aforesaid, shall be forthwith transmitted to the archbishop of the province

In cases not hereinbefore enumerated, bishops may grant licences and assign salaries to curates employed, as they shall think expedient.

Reasons for granting such licences to be transmitted to the archbishop for examination and allowance.

to which such bishop shall belong, who shall forthwith by himself, or by some commissioner or commissioners appointed for that purpose from among the bishops of such province, by writing under his hand, which commissioner or commissioners is and are thereupon authorized to take upon himself or themselves the execution of the said commission, examine into such case, and make such inquiries as to any particulars relating thereto, as such archbishop or commissioner or commissioners so appointed as aforesaid may think necessary; and after such inquiries made by himself, or where the same shall be made by such commissioner or commissioners, after a return of the substance thereof in writing to such archbishop, such archbishop shall thereupon 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 likewise as to the stipend assigned to the curate, as to such archbishop shall seem fit; and no such licence shall be good, valid, or effectual under this act, for any purpose whatever, unless it shall have been so allowed and approved by such archbishop, such allowance thereof being signified by the signing thereof by such archbishop: Provided always, that it shall not be necessary in such licence to specify the cause of granting the same.

No such licence good until so allowed.

In what case only licences void by death, &c. of grantor.

“XVII. And be it further enacted, that no licence granted under this act shall be made void by the death or removal of the bishop granting the same, but the same shall be and remain good and valid notwithstanding any such death or removal, unless the same shall be revoked by the next or any succeeding bishop, as the case may require.

Application for licence to be in writing and signed, and to state certain particulars.

“XVIII. And be it further enacted, that every application made by or in behalf of any spiritual person holding any benefice, donative, perpetual curacy, or parochial chapelry, to the bishop of the diocese, for any licence for non-residence, shall be in writing, and shall be signed by the person making the same, and shall state whether such spiritual person intends to perform the duty himself, and if he does, where and at what distance he intends to reside; or if he intends to employ a curate, the application shall state what salary he proposes to give to his curate, and whether the curate proposes to reside or not to reside in the parish; and

if the curate intends to reside, then whether in the parsonage house; and if he does not intend to reside in the parish, then the application shall state at what distance therefrom, and at what place such curate intends to reside; and whether such curate serves any other parish as curate or incumbent, or has any ecclesiastical preferment, or holds any donative, perpetual curacy or parochial chapelry, or officiates in any other church or chapel; and such application shall also state the gross annual value of the benefice in respect of which any licence for non-residence shall be applied for; and it shall not be lawful for the bishop to grant any such licence, unless the application shall contain a statement of the several particulars aforesaid; and all such applications and specifications shall be kept and filed by the registrar of the diocese in a separate book, which shall be kept and preserved for that purpose; and such book shall not be open to public inspection, or disclosed, or copies thereof made, except with the leave in writing of the bishop of the diocese.

Otherwise bishop not to grant such licence.

“XIX. And be it further enacted, that during the vacancy of any see, the power of granting licences under this act, subject to the regulations therein contained, shall be exercised by the vicar general of the diocese; or in case such circumstances shall arise as shall disable the bishop from exercising in person the functions of his office, it shall be exercised by such person or persons as is or are lawfully empowered to exercise his general jurisdiction in the diocese.

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

“XX. And be it further enacted, that it shall be lawful for any bishop who shall have granted any licence for non-residence as aforesaid, or for any successor or successors of any such bishop, to revoke any such licence in any case in which it may appear to him or them proper and expedient to revoke the same: provided, that any spiritual person may appeal against any such revocation by the bishop in like manner as is hereinbefore directed in case of any refusal of any licence: provided also, that it shall be lawful for any archbishop to whom such appeal shall be made, to order and direct such reasonable fees and charges to be paid by any spiritual person appealing as aforesaid, in respect of any such proceedings as aforesaid, as he shall in his discretion think fit: provided also, that no licence for non-residence granted aforesaid in the year ending on the last day of December

Licences may be revoked.

Fees may be ordered to be paid by appellant.

Limiting the time of licences.

under this act shall continue in force for more than three years from the granting thereof, or after the thirty-first day of December in the second year after the year in which such licence is granted.

Copies of licences or revocations to be filed in the registry of the diocese, and a list kept for inspection.

“ XXI. And be it further enacted, that every bishop who shall grant or revoke any licence for 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 the sum of three shillings and no more; and a copy of every such licence with respect to any benefice shall be transmitted by the spiritual person to whom the licence is granted, to the churchwardens of the parish, township or place to which the same relates, within one month after the grant of such licence; and every bishop revoking any licence shall cause such revocation to be transmitted to the churchwardens of the parish, township or place to which it relates, which copies shall be by them deposited in the parish chest; and every registrar who shall neglect to enter the same shall forfeit for every neglect of entering any such licence or revocation in any such list the sum of five pounds, to be recovered by and for the use of any person who shall sue for the same in like manner as any penalty may be recovered under the provisions of this act; and a copy of every such licence or revocation shall likewise be produced by the churchwarden, and publicly read by the registrar or other officer at the visitation of the ecclesiastical district within which the benefice in respect whereof the licence shall have been granted, or revocation made, shall be locally situate, immediately next succeeding the granting or revocation thereof.

Fec.

Copies transmitted to churchwardens.

Registrar neglecting.

Penalty 5*l*.

Copy publicly read at the first visitation.

A list of licences allowed by the archbishop, or granted in his own diocese, shall be annually transmitted to his majesty in council, who may revoke licences, &c.

“ XXII. And be it further enacted, that every archbishop who shall in his own diocese grant any licence, or who shall allow or approve, in manner directed by this act, any licence or licences in any case or cases not enumerated in this act, shall annually on or before the thirty-first day of January in each year transmit to his majesty in council a list of all such licences so granted or allowed or approved respectively as

preceding such thirty-first day of January, and shall in every such list specify the reasons which have induced him to grant, allow or approve the said licences, together with the reasons transmitted to him by the bishops for granting any such licences in their respective dioceses; and it shall be lawful for his majesty in council, by an order made for that purpose, to revoke and annul any such licence; and if his majesty in council shall think fit so to do, such order shall be transmitted to the archbishop who shall have granted or allowed or approved such licence, who shall thereupon cause a copy of every such order, made in relation to any licence so allowed or approved, 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 of the parish to which the same relates, in manner hereinbefore directed as to revocation of licences under this act; and every such archbishop shall cause a copy of the mandatory part of every such order, made in relation to any such licence as aforesaid granted by him in his own diocese, to be in like manner filed in the registry of his diocese, and a like copy also to be delivered to the churchwarden of the parish to which such licence shall relate, in manner before mentioned: provided always, that after such licence shall have been so revoked by his majesty in council, the same shall nevertheless, in all questions that shall have arisen or may thereafter arise touching the non-residence of the spiritual person to whom the same shall have been granted, between the period at which the same was granted or allowed or approved, and the time at which the same shall be so revoked as aforesaid, be deemed and taken to be and to have been valid and effectual to all the intents and purposes of this act.

Proceedings on such revocation.

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

“XXIII. And be it further enacted, that on or before the twenty-fifth day of March in every year a return or returns shall be made to his majesty in council by every bishop, of the names of every benefice within his diocese, or subject to his jurisdiction by virtue of this act, and the names of the several spiritual persons holding the same respectively who shall have resided, and also the names of the several spiritual persons respectively who shall not have resided thereon by

On or before 25th March annually, a return to be made by bishop to his majesty in council of every benefice, with names of residents and non-residents, &c.

Non-residents by exemption without licence shall yearly notify to the bishop of the diocese within a certain period.

reason of any exemption under or by virtue of this act, or by reason of any licence granted by such bishop for any and what cause enumerated by this act, and also 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 names of all curates licensed to serve any benefice on which the incumbent is not resident, and whether the gross annual value of such benefice amounts to or exceeds three hundred pounds per annum or not, the amount of the curate's salary and the place of his residence; and every spiritual person who shall be non-resident in any year subsequent to the passing of this act, by reason of residence on any other benefice, or of any exemption under this act and to entitle him to which it is not necessary to obtain any licence under this act, shall, within six weeks from and after the first day of January in every following year, notify the same in writing under his hand to the bishop of the diocese to whose jurisdiction he is subject by this act, or otherwise, in respect of such benefice, specifying the nature of such exemption, and whether the gross annual value of the benefice on which he is non-resident amounts to or exceeds three hundred pounds per annum or not; and every spiritual person who shall have more than one benefice, and who shall reside on one of them, or who shall reside during any period of the year on any dignity, or in the performance of the duties of any office in any cathedral or collegiate church, or who shall be non-resident for any period of the year on account of any of the causes of temporary exemption specified in this act, shall in like manner, and within the like period in each year, notify the same.

Persons neglecting to notify cause of exemption, penalty 20l.

“XXIV. And be it further enacted, that every spiritual person who shall neglect to make such notification as by this act is directed within such period of six weeks as aforesaid, shall forfeit and pay for every such offence the sum of twenty pounds, to be levied, by order of the bishop of the diocese, by sequestration, if not otherwise paid, after monition to pay the same, out of the profits of the benefice in respect of which he shall neglect to make such notification, by the bishop of the diocese to whom the notification ought to be made, to be applied, as such bishop may direct, to useful and charitable purposes: provided always, that it shall be

Power of mitigation or remitting by bishop.

lawful for such bishop to remit or order the repayment of any part of any such penalty, in like manner as is allowed by this act in cases of non-compliance with an order for residence.

“ XXV. And be it further enacted, that nothing in this act contained shall extend or be construed to extend to exempt any spiritual person or persons from any canonical or ecclesiastical censures, or affect any proceeding that shall hereafter be instituted in any ecclesiastical court in order to cause the same to be inflicted, in relation to the non-residence of any spiritual person having or holding any benefice, who shall not have obtained a licence according to the provisions of this act, to be absent therefrom, nor have any other lawful cause of absence: provided always, that no proceeding be admitted in any ecclesiastical court against any spiritual person for non-residence not exceeding three months in any one year, at the suit or instance of any person or persons other than the bishop only of the diocese within which the benefice in respect whereof such non-residence shall have taken place shall be locally situated; any thing in any law or laws, or ecclesiastical canon or canons, to the contrary thereof notwithstanding.

“ XXVI. And be it further enacted, that in every case in which it shall appear to any such bishop as aforesaid, that any spiritual person, having or holding any benefice, and not being licensed according to this act to be absent therefrom, nor having any lawful cause of absence from the same, does not sufficiently reside on the same respectively, it shall be lawful for such bishop to issue or cause to be issued a monition to such spiritual person forthwith to proceed to and reside thereon, and perform the duties thereof; and to make a return to such monition within a certain number of days after the issuing thereof, so as that in every such case there shall be thirty days between the time of delivering such monition to such spiritual person or leaving the same at his then usual or last place of abode, or if not there to be found, with the officiating minister or one of the churchwardens, and also a copy thereof at the house of residence (if any such there be) belonging to such benefice, to which any such spiritual person shall be required by such monition to proceed and reside thereon, and the time specified in

Act not to exempt from censure for non-residence without licence.

Censure for non-residence not to be in force, nor proceedings admitted, except at suit of bishop.

If any unlicensed person does not sufficiently reside, the bishop may issue a monition.

Return to such monition and other proceedings.

Copy filed, and may be inspected.

Fee.

Returns to be made to monitions, which may be required to be upon oath.

Where return shall not be made, or shall not be satisfactory, bishop may order residence, and if disobeyed, may sequester the profits of the benefice, and direct an application of the profit.

such monition for the return thereto; and a copy of every such monition shall immediately on the issuing thereof be filed in the registry of such bishop's court, and shall be open for inspection on the payment of three shillings and no more; and the spiritual person to whom any such monition shall be sent under this act shall, within the time specified for that purpose, make a return thereto into such registry, 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 the oath of such spiritual person or others, to be taken before some surrogate or justice of the peace, or master extraordinary in chancery, which oath any such surrogate or justice of the peace, or master extraordinary in chancery, is hereby authorized and required to administer, on application being made for that purpose; and in every case where no such return shall be made, or where such return shall not state such reasons as shall be deemed satisfactory by such bishop for the non-residence of the spiritual person to whom such monition shall have been sent as aforesaid, or where the same or any of the facts contained therein shall not be so verified as aforesaid when the same shall have been required, then and in such case it shall be lawful for such bishop to issue an order in writing under his hand and seal, to require such person to proceed to and reside as aforesaid, within thirty days after such order in writing, or a copy thereof, shall have been delivered or left in like manner as is hereinbefore required as to monitions; and in case of non-compliance, it shall be lawful for such bishop to sequester the profits of such benefice of such spiritual person as aforesaid, until such order shall be complied with, or such sufficient reasons for non-residence 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 expences of serving the cure, either in the whole or in such proportion as he shall think fit, in the first place, to the payment of such reasonable expences as shall have been incurred in relation to such monition and sequestration, 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 governors of the bounty of Queen Anne, for the augmentation of the maintenance of the poor clergy, to be applied for the purposes of such augmentation as such bishop shall in his discretion under all circumstances think fit and expedient; and it shall also be lawful for any such 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 any such spiritual person any part or proportion of such sequestered profits, or cause the same or any part thereof that shall have been paid or directed to be paid to the governors of Queen Anne's bounty to be repaid to such spiritual person, which repayment the said governors are hereby authorized and required, upon an order under the hand of any such bishop, to make out of any money then in their hands, or if no money shall then be in their hands, out of the next money that shall come to their hands, in any case in which, by reason of the subsequent obedience of any such spiritual person to any such monition or order, or the stating and proving such sufficient reasons as aforesaid, such bishop shall think the same proper: provided always, that when any such spiritual person shall think himself aggrieved by reason of any such sequestration issued by any bishop, it shall be lawful for such spiritual person, within one month after the making any order for any such sequestration as aforesaid, to appeal to the archbishop of the province to which such bishop shall belong, who shall forthwith, either by himself or some commissioner or commissioners appointed from among the bishops of his province for that purpose under his hand and seal, make or cause to be made due inquiry into the same, and make such order therein or relating thereto, or to the profits that shall be so sequestered as aforesaid, for the return to such spiritual person of the same or any part thereof, or otherwise, as shall under all the circumstances of the case appear to such archbishop (after such inquiry made by himself or by his commissioner or commissioners, and in the latter case, after the substance of such inquiry shall have been returned in writing to the said archbishop) to be just and proper: provided always, that the party so appealing

Bishop may within the time herein mentioned remit part of sequestered profits.

Appeal against sequestration to archbishop.

Appellant to give security for payment of expences.

shall give security to the bishop for the payment of such reasonable expences occasioned by the appeal, as the archbishop or his commissioner or commissioners shall award: provided also, that no such order for any sequestration shall be put in force during such appeal as aforesaid, and until the same shall be determined.

Persons who shall return to residence on monition to pay costs.

“ XXVII. And be it further enacted, that every spiritual person to whom any such monition or order in writing shall be sent as aforesaid under this act, who shall be at the time of the issuing thereof absent from residence in or upon his benefice contrary to the provisions of this act, but who shall in obedience to such monition or order forthwith return to due residence, and the profits of whose benefice shall by reason of such return not be sequestered, shall nevertheless pay all costs, charges and expences incurred by reason of the issuing and serving such monition or order, to be levied as any costs may be levied upon any spiritual person by any bishop under any of the provisions of this act.

If any person returning to residence on monition shall, before six months thereafter, absent himself, the bishop may, without monition, sequester the profits of the benefice.

“ XXVIII. And, to the intent effectually to enforce bonâ fide residence according to the intent and meaning of such monition and order as aforesaid, be it further enacted, that if any spiritual person not licensed under this act to be absent from his benefice, nor having other lawful cause of absence from the same, who, after any such monition or order as aforesaid, requiring his residence, 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 six months next after the commencement of such residence, without the leave of such bishop, wilfully in the judgment of such bishop absent himself from such benefice, it shall be lawful for such bishop, without issuing any other monition or making any other order, again 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 such 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 and every of such cases such spiritual person shall be entitled to appeal against such sequestration, in such manner and upon such terms as

hereinbefore is and are mentioned touching appeals respecting sequestration, but nevertheless the same shall be in force during such appeal.

“ ‘XXIX. And whereas it is expedient that bishops should be empowered summarily to punish past non-residence, as well as to compel residence in future;’ be it therefore enacted, that in all cases in which any spiritual person shall have become subject to any penalty or forfeiture for any non-residence, it shall be lawful for the bishop within whose diocese such penalty or forfeiture shall have arisen, to proceed against such spiritual person for such past non-residence, and to levy the penalties incurred thereby by monition and sequestration, and to direct the application thereof in like manner and subject to the same regulations, and with like powers of remitting or ordering the repayment of any part of such penalties, as is directed or allowed in cases of non-compliance with any order for residence.

Bishops empowered to punish past non-residence.

“ XXX. And be it further enacted, that in every case in which any archbishop or bishop shall think proper, under all the circumstances, after proceeding by monition for the recovery of any penalty under this act of more than one third of the 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 his majesty in council, and such bishop shall transmit to the archbishop of the province to which he belongs, a list of such cases as have occurred in his or their respective dioceses, specifying the nature and special circumstances of each case, and the reasons for the said remission, in the same manner as is directed in relation to the licences for non-residence granted in non-enumerated cases; and it shall thereupon be lawful for his majesty in council, or for the said 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 the disallowance of licences for non-residence: provided always, that the decision of the said archbishop, with respect to cases transmitted to him from any such bishop, shall be final.

Penalties, for the recovery of which monition has been issued, may be remitted by the bishop; and special returns made to archbishop of the reasons for such remission.

“ XXXI. And be it further enacted, that if the benefice of any spiritual person shall continue for the space of two years under any sequestration made under the provisions of

If any spiritual person shall continue under sequestration

two years, or incur three sequestrations within that period, benefice to become void.

this act for disobedience to the bishop's monition requiring such spiritual person to reside on his benefice, or shall under the provisions of this act incur three such sequestrations in the said space of two years, the spiritual person not being relieved with respect to any of such sequestrations upon appeal, the benefice in relation to non-residence upon which such sequestration shall have been made shall become ipso facto void; and the bishop of the diocese shall thereupon give notice thereof to the patron or person entitled to present, who shall thereupon present or nominate some clerk thereto other than the spiritual person whose benefice shall have so continued under such sequestration, or who shall have incurred such sequestrations as aforesaid, as if the same had been avoided by the natural death or resignation of such spiritual person.

Contracts for letting houses in which any spiritual persons shall by order of the bishop be required to reside, shall be void.

“XXXII. And be it further enacted, that all contracts or agreements made for the letting of the house of residence, or the buildings, gardens, orchards, and appurtenances necessary for the convenient occupation of the same, belonging to any benefice, to which house of residence any spiritual person shall be required by order of the bishop as aforesaid to proceed and to reside therein, or which shall be assigned or appointed as a residence to any curate by the bishop, shall, upon a copy of such order, assignment, or appointment being served upon the occupier thereof, or left at the house, be null and void; and a copy of every such order, assignment, or appointment, shall immediately on the issuing thereof be transmitted to one of the churchwardens of the parish, or such other person as the bishop shall think fit, and be by him forthwith served on the occupier of such house of residence, or left at the same: And any person continuing to hold any such house of residence, or any such building, garden, orchard, or appurtenances, after the day on which the said spiritual person shall be directed by such order to reside in such house of residence, or which shall be specified in any such assignment or appointment, and after service of such copy as aforesaid, or the same being so left as aforesaid, shall forfeit the sum of forty shillings for every day he shall, without the permission of the bishop in writing for that purpose obtained, wilfully continue to hold any such house, building, garden, orchard, or appurtenances, together

Holding possession after the day appointed for residence,

Penalty.

with the expence of serving such order, in case it shall have been deemed necessary specially to serve such order, to be allowed by the bishop issuing the order, or making such assignment or appointment as aforesaid, and to be recovered and applied in like manner as the penalties for non-residence are directed to be recovered and applied by the provisions of this act; and it shall also be lawful for the spiritual person so directed to reside as aforesaid, or curat e to whom any such residence is assigned, to apply to any justice of the peace or magistrate of the county, riding, province, city, or place, for a warrant for the taking possession thereof; and the justice of the peace to whom any such order for such possession is produced shall and he is hereby required thereupon to give a warrant for such possession, and possession may thereupon be taken of such house under such warrant at any time in the day time, by entering the same by force, if necessary, without any other proceeding by ejectment or otherwise; any thing in any act or acts of parliament or law or laws to the contrary notwithstanding.

And spiritual person directed to reside may have warrant for possession from justice.

“ XXXIII. Provided always, and be it further enacted, that no spiritual person shall be liable to any penalties for not residing in any such house of residence, during such time as such tenant shall continue to occupy such house of residence or other buildings necessary to the occupation of the same.

Not liable to penalty while the tenant shall continue to occupy.

“ XXXIV. And be it further enacted, that from and after the passing of this act, no oath shall be required of or taken by any vicar in relation to residence on his vicarage; any law, custom, constitution, or usage to the contrary thereof notwithstanding.

No oath relating to residence required of vicar.

“ XXXV. And be it further enacted, that no penalty or forfeiture shall be recovered by any proceeding or action against any spiritual person under the provisions of this act, other or further than those which such spiritual person may have incurred during the year ending on the thirty-first day of December immediately preceding the commencement of such proceeding or action.

Penalties not recoverable for more than one year.

“ XXXVI. And be it further enacted, that every penalty for non-residence under this act, in respect of which no proceeding shall have been had by monition before the first day of April next after the year in which the same shall have

What penalties not levied under monition may be recovered by action.

been incurred, may be recovered by action or suit in the manner by this act directed.

When actions for penalties may be commenced.

“XXXVII. And be it further enacted, that no action of debt, bill, plaint, or information against any spiritual person, for the recovery of any penalties and forfeitures under this act, shall be commenced or filed in any of his majesty's courts of record at Westminster, or the court of great sessions in Wales, until the first day of May after the expiration of the year in which the alleged offence shall have taken place.

Commencement and conclusion of the year.

“XXXVIII. And be it further enacted, that for all the purposes of this act 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.

Calendar months to be taken for the purposes of this act.

“XXXIX. And be it further enacted, that 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.

No action to be commenced for any penalty until after one calendar month's notice given to the defendant and bishop of diocese.

“XL. And whereas, notwithstanding the regulations contained in this act, spiritual persons may through inadvertence, and in many cases from unavoidable circumstances and causes, become subject to penalties and forfeitures and vexatious prosecutions, unless provision is made for the prevention thereof; be it therefore enacted, that from and after the passing of this act, no writ shall be sued out against nor any copy of any process at the suit of any informer be served upon any spiritual person, for any penalty or forfeiture incurred under any of the provisions of this act, until a notice in writing of such intended writ or process shall have been delivered to him or left at the usual or last place of his abode, and also to the bishop of the diocese, by leaving the same at the registry of his diocese, by the attorney or agent for the party who intends to sue or cause the same to be sued out, or served one calendar month at the least before the suing out or serving the same; in which notice shall be clearly and explicitly contained the cause of action which such party hath or claimeth to have, and the penalty or penalties for which such person intends to sue, and on the back of which notices respectively shall be endorsed the

What notice to contain, and how endorsed.

name of such attorney or agent, together with the place of his abode; and no such notice shall be given before the first day of April in the year next after any such penalty or penalties shall have been incurred.

“ XLI. And be it further enacted, that no plaintiff shall recover any verdict against any spiritual person for any penalty or forfeiture under the provisions of this act, unless it is proved upon the trial of such action that such notices were respectively given as aforesaid; but in default thereof such spiritual person shall recover a verdict with double costs.

Plaintiff not to recover without proof made that such notices were given.

“ XLII. And be it further enacted, that no evidence shall be permitted to be given by the plaintiff, on the trial of any such action as aforesaid, of any cause of action, except such as is contained in the notices hereby directed to be given.

No evidence of cause of action but such as contained in notices.

“ XLIII. And be it further enacted, that it shall be lawful for any spiritual person against whom any action shall be brought for any penalty or forfeiture under the provisions of this act, by leave of the court in which such actions shall depend, at any time before issue joined, to pay into court such sum of money as he shall see fit; whereupon such proceedings, orders, and judgments shall be had, made, and given in and by such court, as in other actions where the defendant is allowed to pay money into court.

Spiritual person may by leave pay into court before issue joined, such sum he shall think fit.

“ XLIV. And be it further enacted, that the court in which any action, bill, plaint or information shall be depending for the recovery of any penalty or forfeiture for non-residence under this act, may and shall, upon application made for that purpose, require, by rule or order of the said court or any judge thereof, the bishop of the diocese within the limits of which the benefice shall be locally situate, or to whom the same shall be subject according to the provisions of this act, for or by reason of non-residence in, at or upon which the penalties and forfeitures shall be sought to be recovered by such action, bill, or information, to certify in writing under his hand to the said court, and also to the party for that purpose named in the said rule or order, the reputed annual value of such benefice; and upon such rule or order being left with such bishop or the registrar of such bishop, such bishop shall accordingly certify such reputed

The court in which any action shall be depending, may require the diocesan to certify the repeated annual value of benefices, &c.

How far certificate evidence of annual value. annual value; and such certificate shall, in all subsequent proceedings upon such action, bill, plaint, or information, be received and taken as evidence of the annual value of such benefice, for the purposes of this act; without prejudice nevertheless to the admissibility or effect of any such other evidence as may be offered or given respecting the actual value thereof.

Licence may be pleaded in bar of action; and in case of non-suit, &c. full costs.

“ XLV. And be it further enacted, that it shall be lawful for any spiritual person to whom any licence for non-residence shall have been granted, and against whom any action shall be brought for any penalty or forfeiture by reason of any non-residence, or any matter or thing relating whereto any such licence under this act has been granted, to plead such licence in bar of any such action; and if the plaintiff in such suit or action shall discontinue any such suit or action after any plea of licence shall have been pleaded thereto under this act, then and in such case the defendant in such suit or action shall have full costs of suit; and if in any such suit or action a verdict shall be given for the defendant, or the plaintiff shall become nonsuit, the defendant shall have double costs, and have the like remedy for the same as any defendant hath in other cases to recover costs by law; and it shall be lawful for the court, or any judge of the court in which any suit or action shall be commenced, upon any application made in that behalf, to order and direct, if such court or judge shall deem it expedient so to do, that the plaintiff in any such suit or action shall give security for the payment of such costs, and that all proceedings in any such suit or action shall be staid until such security shall be given as to the court or judge to whom any such application shall be made shall seem fit.

In case of verdict for defendant, double costs.

Judge may order plaintiff to give security for costs.

If at the time of filing any motion no notice of action shall have been given, no action shall be afterwards brought, &c.

“ XLVI. Provided always, and be it further enacted, that if at the time of filing any motion requiring any spiritual person to reside on his benefice, or to recover the penalties incurred by past non-residence, no notice of any action for any such penalty or forfeiture shall have been already given in manner aforesaid, then and in such case no such action, suit, bill, plaint, or information shall be afterwards brought for any penalty or forfeiture incurred by reason of any non-residence of such spiritual person before the issuing of such

monition, or during any proceedings that may be had under such monition; and if any such action or suit shall be so commenced, the defendant therein may plead in bar thereof, that such a monition as aforesaid has issued in respect of the same benefice; and such defendant, unless upon application to the court the same shall be dispensed with, shall, upon pleading such matter, file or cause to be filed an affidavit in the said court, thereby stating the period specified in such monition, and that, according to the belief of the defendant, the bishop who has issued or caused such monition to be issued is proceeding upon the said monition, to the intent to make the same effectual to the intents and purposes of this act, otherwise such plea shall not be good or available in the law.

If such action be then commenced,

Proceedings.

“ XLVII. And be it further enacted, that no penalty or costs incurred by any spiritual person by reason of any non-residence on his benefice, shall be levied by execution against the body of any such person, whilst he shall hold the same or any other benefice out of the profits of which the same can be levied by sequestration within the term of three years; and in case the body of any such spiritual person shall be taken in execution for the same, the court in which the same was recovered, or any judge thereof, may and shall, upon application made for that purpose, discharge the party from such execution, in case it shall be made to appear to the satisfaction of such court or judge that such penalty and costs can be levied as aforesaid.

No penalty to be levied against the body where it can be recovered by sequestration within three years.

Body taken may be discharged.

“ XLVIII. And be it further enacted, that if any spiritual person holding any benefice, who does not or shall not actually reside thereon nine months in each year (unless such person shall do the duty of the same, having a legal exemption from residence, or a licence to reside out of the same, or to reside out of the parsonage house or vicarage house, or other usual house of residence belonging to the same), shall for a period exceeding three months absent himself from his benefice, without leaving a curate duly licensed or other spiritual person to perform, and who shall duly perform the ecclesiastical duties of such benefice, or shall for the period of three months after the death, resignation or removal of any curate who has served his church or chapel, neglect to notify such death, resignation or removal

Non-resident incumbents (exception) neglecting to appoint curates, bishop to appoint and license.

to the bishop of the diocese, or to nominate to the bishop of the diocese a proper curate, then and in every such case, and in every case in which no curate shall be nominated to the bishop for the purpose of being licensed by him within such period as aforesaid, the bishop is hereby authorized to appoint and licence a proper curate, with such salary as by this act is allowed and directed, to serve the church or chapel of the parish or place in respect of which such neglect or default shall have occurred: provided always, that the licence shall in every case specify whether the curate is required to reside within the parish or place or not; and if the curate is permitted by the bishop granting the licence to reside out of the parish or place, the grounds upon which the curate is so permitted to reside out of the parish or place shall be specified in the said licence, and the distance of the residence of any curate from any church or chapel which he shall be licenced to serve shall not exceed five statute miles, except in cases of necessity, to be approved by the bishop, and specified in the licences.

What such licence to specify.

Curate to reside on all benefices above 300l. a year, and population 500 persons and upwards.

Proviso for special circumstances.

“ XLIX. And be it further enacted, that in every case where a curate is appointed to serve a benefice upon which the incumbent is non-resident for more than three months in the year from exemption, licence or otherwise, such curate shall be required by the bishop to reside within the parish; provided the gross value of such benefice amounts to three hundred pounds a year or upwards, and the population amounts to three hundred persons or upwards, or provided the population amounts to one thousand persons or upwards, whatever may be the value of such benefice: provided always, that whenever it shall be made out to the satisfaction of such bishop, that from special and peculiar circumstances great inconvenience would arise from such curate being compelled to reside within the parish, it shall be lawful for the bishop to allow such curate to reside in some near and convenient place: provided also, that the licence to be granted to such curate shall specify the special circumstances which have induced the bishop to allow such residence out of the parish, and shall be entered and filed in the registry of the diocese.

If duty inadequately performed, the bi-

“ L. And be it further enacted, that whenever it shall appear to the satisfaction of any bishop, either of his own

knowledge, or upon proof by affidavit laid before him, that by reason of the number of churches or chapels belonging to any benefice locally situate within his diocese, or the distance of such churches or chapels from each other, or the distance of the residence of the spiritual person serving the same from such churches or chapels, or any or either of them, or the negligence of the spiritual person holding the same, that the ecclesiastical duties of such benefice are inadequately performed, such bishop may by writing under his hand require the spiritual person holding such benefice to nominate to him a fit person or persons, with sufficient stipend or stipends, to be licenced by him to perform or to assist in performing such duties, specifying therein the grounds of such proceeding; and if such spiritual person shall neglect or omit to make such nomination for the space of three months after such requisition so made as aforesaid, then and in every such case it shall be lawful for such bishop to appoint a curate or curates, as the case shall appear to such bishop to require, with such stipend or stipends as such bishop shall think fit to appoint, not exceeding in any case in the whole the stipends allowed to curates by this act, nor, except in the case of negligence, exceeding one half of the gross annual value of the benefice, although the spiritual person to whom such churches or chapels shall belong shall actually reside or serve the same: provided always, that such requisition, and any affidavit made to found the same, shall be forthwith filed by the bishop in the registry of his court: provided also, that it shall be lawful for any such spiritual person, who shall think himself agrieved by any such appointment of such curate or curates, to appeal to the archbishop of the province to which such bishop shall belong, in such and the like manner, and under such provisions and directions, as are allowed to any spiritual person thinking himself agrieved by any sequestration issued by any bishop.

shop may require incumbent to appoint curate, and on neglect, may himself appoint a curate.

Amount of stipend in such case.

Appeal for incumbent to archbishop.

“ LI. And be it further enacted, that in all cases where the bishop of the diocese shall deem it proper to enforce the performance of morning and evening service on Sundays, or any other service required by law in any parish church or parochial chapel, or the chapel of any extra parochial place, it shall be lawful for such bishop to enforce the same by

Bishops may enforce performance of morning and evening service.

monition and sequestration, to be issued in the manner by this act provided.

Statement of particulars necessary to be given by persons applying for a licence for non-residence.

“ LII. And be it further enacted, that every bishop to whom any application shall be made for any licence for a curate to serve for any person not duly residing upon his benefice, shall, before he shall grant such licence, require a statement of all the particulars by this act required to be stated by any person applying for a licence for non-residence; and it shall not be lawful for any bishop to grant a licence to any curate to serve the church or chapel of any person as aforesaid, upon any such application as aforesaid, until a statement of all such particulars as aforesaid shall have been delivered to him; and such statement shall be kept and filed and preserved from public inspection, and disclosed only in like manner and in such cases as is before directed as to statements of persons applying for licences for non-residence.

Bishops to appoint salaries to curates.

“ LIII. And be it further enacted, that it shall be lawful for the bishop, and he is hereby required, subject to the several provisions and restrictions in this act contained, to appoint to every curate such salary as is allowed and specified in this act; and every licence to be granted to a stipendiary curate under this act shall contain and specify the amount of the salary allowed by the bishop to the curate; and such licence, or any copy of the register thereof, signed by the registrar of the diocese or his deputy, shall be evidence of the amount of the salary so appointed to any curate in all courts of law or equity; and in case any difference shall arise between any rector or vicar or person holding any benefice, and his curate, touching such stipend or allowance, or the payment thereof, or of the arrears thereof, the bishop, on complaint to him made, may and shall summarily hear and determine the same; and in case of wilful neglect or refusal to pay such stipend, salary or allowance, or the arrears thereof, he shall be and is hereby empowered to proceed by monition and sequestration to sequester the profits of the benefice for and until payment of such stipend or allowance or the arrears thereof: provided always, that the curate obtaining any such licence shall pay to the secretary or officer of the bishop the sum of one pound, exclusive of any stamp duty which may be chargeable thereon; which said sum of

Licence, or copy of registry thereof, evidence of amount of salary.

Bishops may summarily determine differences respecting stipend.

Money in lieu of fees for licence, &c.

one pound shall be in remuneration of all and every fee or fees now demandable by the said secretary or officer for obtaining such licence, or for the signature of any declaration by the said curate in consequence of such licence, or of any certificate of such curate having signed such declaration; and provided also, that from and after the passing of this act, as often as any person shall be licenced to two or more curacies within the same diocese at one and the same time, it shall be sufficient for such person to sign one declaration only, appointed to be signed by an act intituled 'An act of uniformity' (a); and also that it shall be sufficient for such person to produce one certificate only of his having so signed such declaration before the bishop of the diocese.

13 & 14 Car. 2.
c. 4. § 3.

(a) [There does not appear to be any act intituled, 'An act of uniformity.' The act above referred to is taken to be 13 & 14 Car. 2. c. 4.]

“LIV. And be it further enacted, that it shall be lawful for the bishop to appoint for the curate any stipend or allowance not exceeding seventy-five pounds per annum, and also the use of the house of residence, with the gardens and stables belonging thereto, or a further sum of fifteen pounds in lieu of the use of the rectory or vicarage house, or other houses of residence, in case there shall be no house, or it shall not appear to the bishop convenient to allot or assign the house to the curate, in respect of any benefice to which the spiritual person holding the same was instituted or appointed before the twentieth day of July one thousand eight hundred and thirteen; but it shall not be lawful for the bishop to assign any greater stipend or allowance than aforesaid, in respect of any such benefice, during the incumbency of any such spiritual person as aforesaid, unless with the consent of the spiritual person holding the benefice, or in case of neglect to appoint or to nominate to the bishop a proper curate.

Stipends to curates of incumbents before July 20, 1813, not to exceed certain rates.

Exception.

“LV. And be it further enacted, that in every case in which any spiritual person shall have been, after the twentieth day of July one thousand eight hundred and thirteen, or shall hereafter be instituted or inducted, or nominated or appointed to, or otherwise become incumbent or possessed of any benefice, and shall not duly reside thereon, unless such person shall do the duty of the same, having a legal exemption from residence, or a licence to reside out of the same, or to

The salaries payable to curates to be in proportion to the value and population of the benefices.

reside out of the parsonage or vicarage, or other usual house of residence belonging to the same, the bishop shall appoint for the curate licensed to serve such benefice of such non-resident incumbent or person as aforesaid, in his absence, such salary as is hereinafter next mentioned; (that is to say), such salary shall in no case be less than eighty pounds per annum, or than the annual value of the benefice, if the gross value thereof shall not amount to eighty pounds per annum; and such salary shall not be less than one hundred pounds per annum, or than the whole value as aforesaid, if the said value shall not amount to one hundred pounds per annum in any parish or place where the population, according to the returns then last made in pursuance of any act or acts of parliament, shall amount to or exceed three hundred persons; and such salary shall not be less than one hundred and twenty pounds per annum, or the whole value as aforesaid, if the said value shall not amount to one hundred and twenty pounds per annum, in any parish or place where the population shall appear as aforesaid to amount to or to exceed five hundred persons; and such salary shall not be less than one hundred and fifty pounds per annum, or than the whole value as aforesaid, if the said value shall not amount to one hundred and fifty pounds per annum, in any parish or place where the population shall appear as aforesaid to amount to or to exceed one thousand persons: provided always, that the annual value of all benefices of which the value, estimated as is herein provided, does not amount to one hundred and fifty pounds per annum, shall be estimated from the returns made by the bishops of the several dioceses to the governors of Queen Anne's bounty; or from any future returns which may be made by the said bishops to the said governors respecting parishes or places omitted in the said returns, or respecting parishes or places in the actual income of which it shall be made appear to the bishops that any considerable variation has taken place, either by augmentation made by the said governors or otherwise.

How the value of benefices under 150l. per annum, estimated.

Where the benefice exceeds 400l. an allowance may be made to curate of 100l. per annum or more, as herein mentioned.

“LVI. And be it further enacted, that in any parish or place where it shall appear to the satisfaction of the bishop that the actual annual income of the benefice, clear of all deductions, exceeds the sum of four hundred pounds per annum, it shall be lawful for the bishop to assign to the curate

of such parish or place, being resident within the same, and serving no other cure, a salary or allowance of one hundred pounds per annum, notwithstanding the population of such parish or place may not appear as aforesaid to amount to three hundred persons; and that in any parish or place where the actual annual income shall appear to exceed four hundred pounds as aforesaid, and where the population shall also appear as aforesaid to amount to or exceed five hundred persons, it shall be lawful for the bishop to assign to the curate of such parish or place, being resident within the same, and serving no other cure, any larger stipend or allowance, so that the same shall not exceed by more than fifty pounds per annum the amount of the stipend or allowance hereinbefore respectively required to be assigned to any such curate.

“LVII. And be it further enacted, that in every case in which it shall be made out to the satisfaction of the bishop of any diocese, that any spiritual person holding any benefice is or has become non-resident or incapable of performing the duties thereof from age, sickness or other unavoidable cause, and that from these or from any other special and peculiar circumstances of the case great hardship or inconvenience would arise if the full amount of salary specified in this act should be allowed to the curate, then and in such case it shall be lawful for such bishop to assign to the curate any such salary less than the said full amount in this act specified, as shall under all the circumstances appear to him just and reasonable: provided always, that in the licence granted in every such case it shall be stated, that for special reasons the bishop hath not thought proper to assign to the curate the full amount of salary allowed or required to be assigned by this act: provided also, that such special reasons shall be entered fully and at large in a separate book to be kept for that purpose, and to be deposited in the registry of the diocese, which book shall not be open to inspection unless with the leave of the bishop or by other proper authority, as in the cases of application for licences for non-residence.

“LVIII. And be it further enacted, that if any incumbent of two or more benefices, residing bonâ fide, in different proportions of each and every year, on some one or other of such benefices, the full period specified by this act, shall

Smaller salaries to be allowed to curates in certain cases.

What the licence is to state.

Special reasons to be entered.

Salary of curate engaged to serve interchangeably at different places belonging to the same incumbent.

employ a curate to perform ecclesiastical duty interchangeably from time to time upon such of the benefices from which he shall be absent during his own actual residence upon any other thereof, then and in such case it shall be lawful for the bishop to assign to any such curate any salary not exceeding such salary as would be allowed under this act for the largest of such benefices, nor less than would be allowed for the smallest, as to the bishop shall under all the circumstances appear just and reasonable: provided always, that if any such incumbent shall employ a curate or curates for the whole year upon each or any of such benefices, such incumbent so residing *bonâ fide* as aforesaid, then and in such case it shall be lawful for the bishop to assign to either or each of such curates any such salary less than the amount specified in this act, as he shall think fit.

Spiritual persons not to serve more than two churches in one day, except in certain cases, and with special licence for that purpose from the bishop.

“ LIX. And be it further enacted, that from and after the passing of this act no spiritual person shall serve more than two churches in one day, or two chapels, or one church and one chapel, in one day, unless from the local situation of the churches or chapels, or from the value of the benefices to which they belong, or other special causes, it may in the judgment of the bishop be expedient or necessary, for the performance of ecclesiastical duties in such places, to grant licence to any spiritual person to serve three churches or chapels, then and in such case it shall be lawful for the bishop to grant such licence to any spiritual person to serve three churches or chapels, not being distant from each other more than four measured miles: provided always, that in every such case the reasons for granting such licence shall be stated by the bishop in the licence granted for serving the third of such churches or chapels held by such spiritual persons, and such licence shall not be valid or effectual unless the reasons for granting the same are inserted therein as aforesaid: provided always, that the residence of such curate or spiritual person shall be so placed as that it shall not be necessary for him to travel more than sixteen measured miles in one day for the performance of the duties of such churches or chapels.

Reasons for granting such licence to be stated by the bishop.

How salaries adjusted where curate is permitted to serve in an adjoining parish.

“ LX. And be it further enacted, that in every such case where any bishop shall find it necessary or expedient, for the obtaining any proper performance of ecclesiastical duties,

to license any person holding any benefice to serve as curate of any adjoining or other parish or place, it shall be lawful for such bishop to appoint, for such spiritual person so licensed, a salary less by a sum not exceeding thirty pounds per annum than the salary which in the several cases in this act specified the bishop is required to assign and appoint; and in every case where the bishop shall find it necessary or expedient as aforesaid to license one and the same person to serve as curate for more than one parish or place, it shall be lawful for such bishop to direct, that during such time as such curate shall serve such churches or chapels, the salary to be received by him for serving each of the said churches or chapels shall be less by a sum not exceeding thirty pounds per annum than the salary which in the several cases hereinbefore mentioned the bishop is required by this act to assign and appoint.

“ LXI. And be it further enacted, that all agreements and contracts made or to be made between persons holding benefices and their curates, in fraud or derogation of the provisions of this act, and all agreements and contracts whereby any curate shall undertake or in any manner bind himself to accept or be content with any stipend or salary less than that which shall be stated to be allowed in any licence of such curate, shall be void to all intents and purposes in the law whatsoever, and shall not be set up, pleaded, or given in evidence in any court of law or equity; and notwithstanding the payment and acceptance, in pursuance of any such contract or agreement, of any sum less than the sum specified in the licence of such curate, or any receipt, discharge or acquittance that may be given in cases of such payment and acceptance, the curate or his personal representatives shall be and remain entitled to the full amount of what shall remain unpaid of the stipend, salary or allowance specified in his licence; and the payment of what shall so remain unpaid shall, together with treble costs of recovering the same, be enforced by monition, on proof of what shall so remain unpaid to the satisfaction of the bishop, and by sequestration of profits of the benefice, to be issued by the bishop for that purpose: provided that the application of the curate shall in every such case be made to the bishop within twelve months after he shall have quitted his curacy,

Agreements for salaries to curates contrary to this act, void,

notwithstanding payment and acceptance of less sum than mentioned in licence.

Payment may be enforced by monition, with treble costs.

Limitation of application to bishop.

or by the representative of any curate within twelve months after his death; and provided also, that no sequestration shall by virtue of this act affect the profits of any benefice beyond the time during which the benefice shall be held by the person liable to make the payment in respect of which such profits shall be sequestered.

Curate's salary, if of value of benefice, liable to certain charges.

“ LXII. And be it further enacted, that in every case in which any bishop shall appoint for any curate a salary equal to the whole annual value of such benefice, such salary shall be subject to deduction in respect of all such charges and outgoings as may legally affect the value of such benefice, and to any loss or diminution which may lessen such value, without the wilful default or neglect of the spiritual person holding the benefice.

The bishop to allow rector, &c. to deduct from curate's salary, for repairs, to a limited amount in certain cases.

“ LXIII. And be it further enacted, that it shall be lawful for the bishop upon the application of any rector, vicar or spiritual person holding any benefice, the whole profit or income of which shall have been allotted to the curate, to allow such rector, vicar or spiritual person to deduct and retain therefrom, in any or each year, so much money, not exceeding in any case one fourth part of such profits or income, or of the salary assigned to the curate, as shall have been actually laid out and expended during the year in the repair of the chancel, parsonage, vicarage or other house of residence, and premises and appurtenances thereto belonging, in respect of which such rector, vicar or person as aforesaid, or his executors, administrators or assigns, would be liable for dilapidations to the successors; and it shall also be lawful for the bishop, in like manner, to allow any rector, vicar or spiritual person aforesaid, having or holding any benefice the profits or income of which shall not exceed one hundred and fifty pounds per annum, to deduct and retain from the salary allotted to the curate, in each or any year, so much money as shall have been actually laid out and expended in such repairs as aforesaid over and above the amount of the surplus remaining of such profits or income after payment of the salary allotted to the curate, so that the sum so deducted, after laying out such surplus, shall not in any year exceed one fourth part of the salary allotted to the curate.

The bishop may allot parsonage

“ LXIV. And be it further enacted, that it shall be lawful

for the bishop who shall grant any licence to any curate to serve any church or chapel where the rector or vicar or person holding any benefice is not resident for four months in each year, to allot, if he shall think fit, for the residence of such curate, the parsonage or vicarage house, or usual house of residence of the person holding the benefice, with the offices, stables, gardens and appurtenances thereto belonging, if there shall be any such house of residence belonging thereto, or any part or parts thereof, during the time of such curate's serving the cure, or during the non-residence of such rector or vicar or spiritual person; and it shall be lawful for the bishop assigning any such house or residence to any curate, to sequester the profits of the benefice to which the house shall belong, in any case in which possession shall not be given up to the curate, and until such possession shall be given, and to apply or direct the application of the profits arising from such sequestration, or to remit the same or any part thereof, as the bishop shall in his discretion think fit.

house for residence of curate in case of non-residence of incumbents.

Sequestration of possession not delivered.

“LXV. And be it further enacted, that in every case where the bishop shall appoint, for the curate licensed to serve any benefice, a salary not less than the whole gross annual value of the same, and shall, in addition to such salary, direct that such curate shall reside in the parsonage or vicarage house, or usual house of residence of the spiritual person holding such benefice, such curate shall be liable during his serving such cure, to the same taxes and parochial rates and assessments, in respect of such house and the appendages thereof of which he may so be in occupation, as if he had been instituted or inducted or nominated or appointed to the said benefice.

Curates to pay taxes, &c. of parsonage houses in certain cases.

“LXVI. And be it further enacted, that it shall be lawful for the bishop at any time, upon three months' notice in writing, to direct any such curate to deliver up any such parsonage or vicarage house or usual house of residence, and the office, stables, gardens and appurtenances thereto belonging, and such curate shall thereupon peaceably deliver up the possession of the said premises, pursuant to such notice; and in case any such curate shall refuse to deliver up such premises, he shall forfeit and pay to the rector or vicar, or spiritual person holding the benefice, the sum of forty shillings for every day of such wrongful possession to

The bishop may direct curate to give up possession of parsonage.

Not giving up, penalty.

be recovered by such rector or vicar or spiritual person by action of debt in any court of record at Westminster, as any penalties may be recovered for non-residence under this act.

Rector, &c. not to dispossess curate of house without order of the bishop, and three months' notice.

“ LXVII. And be it further enacted, that it shall not be lawful for the rector or vicar or other person holding any benefice, in any case in which the parsonage or vicarage, or usual house of residence shall have been assigned to the curate as a residence, to dispossess such curate, or take possession thereof, until the permission of the bishop shall have been given in writing for that purpose, and three months' notice of such his intention to the curate, who shall thereupon quit the same according to such notice; and every curate who shall reside in the house of residence of any benefice which shall become vacant, shall quit such house of residence within three months after the institution or appointment of any spiritual person thereto, upon being required so to do by the spiritual person instituted or appointed, and having one month's previous notice at the least given to him to quit such house of residence.

Curate to quit in three months after institution to a vacant benefice, on one month's notice.

“ LXVIII. And be it further enacted, that no curate shall quit any benefice to which he shall be licensed, until after three months' notice of his intention to quit given to the person holding such benefice, and to the bishop of the diocese, unless with the consent of the bishop of the diocese, upon pain of forfeiting to the spiritual person holding the benefice a sum not exceeding the amount of his stipend for six months, at the discretion of the bishop, which sum may in such case be retained out of the stipend, if the same or any part thereof shall remain unpaid; or if the same cannot be retained out of the stipend, may be recovered by the spiritual person holding the benefice, as any penalty or forfeiture under this act may be recovered.

Curate not without leave of bishop to quit curacy without three months' notice to incumbent and bishop.
Penalty.

Bishop may license curates employed without nomination, may revoke licence and remove curate.

“ LXIX. And be it further enacted, that it shall be lawful for the bishop of the diocese to license any curate who is or shall be actually employed by the rector, vicar or other incumbent of any church or chapel, although no express nomination of such curate shall have been made to such bishop by the said rector, vicar or other incumbent; and that the bishop shall have power to revoke summarily and without process any licence granted to any curate employed

in his diocese, or subject to his jurisdiction by virtue of this act, and to remove such curate for any cause which shall appear to such bishop to be good and reasonable; subject nevertheless to an appeal to the archbishop of the province, and to be determined in a summary manner.

Appeal to archbishop.

“LXX. And be it further enacted, that every bishop who shall grant or revoke any licence to any curate under this act shall and he is hereby required to cause a copy of such licence or revocation to be entered in the registry of the diocese within which the benefice in respect whereof any such licence shall be granted or revocation made shall be locally situate; and an alphabetical list of such licences and revocations shall be made out by the registrar of each diocese, and entered in a book, and kept for the inspection of all persons, upon payment of the sum of three shillings and no more; and a copy of every such licence and revocation with respect to any benefice shall be transmitted by the said registrar to the churchwardens or chapelwardens of the parish, township or place to which the same relates, within one month after the grant of such licence or revocation thereof, to be by them deposited in the parish chest; and every registrar who shall refuse or neglect or omit to make any such entry, or to transmit any such copy, shall forfeit for every such offence or neglect the sum of five pounds, to be recovered as any penalty or forfeiture may be recovered under this act: provided always, that every such registrar shall, for every such copy transmitted to such churchwardens or chapelwardens as aforesaid, be entitled to demand and have from such churchwardens or chapelwardens a fee of ten shillings and no more; and such fee shall be allowed in the accounts of such churchwardens or chapelwardens.

Licence to curates, and revocations of such licences, to be entered in the registry of the diocese.

Fee for inspection.

Registrar refusing, &c. to make such entry or transmit copy, penalty 5*l*.

Fee to registrar for copy transmitted.

“LXXI. And be it further enacted, that all the powers, authorities, provisions, regulations, penalties, forfeitures, clauses, 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.

Clauses relating to bishops to apply to archbishops.

“LXXII. And be it further enacted, that in all cases wherein the term benefice is used in this act, the said term

Definition of the term benefice.

shall be understood and taken to mean benefices with cure, and no others, and to comprehend therein, for the purposes of this act, all donatives, perpetual curacies and parochial chapelries.

Power of archbishops and bishops as to benefices, &c exempt or peculiar, locally situate within their provinces; and also as to benefices, &c. situate in more than one province or between the limits of two provinces.

“ LXXIII. And be it further enacted, that every archbishop and bishop, within the limits of whose province or diocese respectively any benefice, respectively, exempt or peculiar, shall be locally situate, shall 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 benefice, 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 such dioceses, the archbishop or bishop of the cathedral church, to whose province or diocese the parish church of the same 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 jurisdictions 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 archbishoprick or bishoprick, though locally situate in another diocese, shall 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.

Peculiars subject to archbishop or bishop to whom they belong.

In every case in which jurisdiction is given to bishop, &c. all concurrent jurisdiction to cease.

“ LXXIV. And be it further enacted, that 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 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.

“LXXV. And be it further enacted, that in all cases where proceedings under this act are directed by monition or sequestration, such monition shall issue under the hand and seal of the bishop, and being duly served shall be returned, with a certificate of service, into the registry of the consistorial court of such bishop; and thereupon it shall be competent for the party monished to shew cause by affidavit or otherwise, as the case may require, against the sequestration issuing; and unless sufficient cause be shown to the contrary, the sequestration shall issue under the seal of the said consistorial court, and in such form as is commonly used on that behalf.

Issuing and serving monitions.

Cause may be shewn against sequestration.

“LXXVI. And be it further enacted, that it shall be lawful for the bishop of any diocese in which any spiritual person shall hold any dignity or benefice, or shall serve as stipendiary curate, to recover any penalty incurred under this act, in a summary way, by monition and sequestration, to be issued in the manner by this act directed, with the like powers and authorities, and subject to the like restrictions in respect to the remission and repayment of such penalty, as are by this act particularly provided in respect to penalties for non-residence: provided always, that no spiritual person against whom any such proceeding shall have been had by any bishop for the recovery of any penalty, shall thereafter be subject to any action at law by any informer or other person for the recovery of any penalty for the same offence in respect of which such proceeding shall have been so had by the bishop as aforesaid.

Penalties to be recovered by monition and sequestration.

But party against whom such proceeding had, not subject to action at law.

“LXXVII. And be it further enacted, that any fees, charges, costs or expenses incurred or directed to be paid by any spiritual person 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 the spiritual person liable to the payment thereof, may be recovered by monition and

Recovery of fees, &c.

sequestration, to be issued in the manner directed by this act.

Proviso for licences before 31st December how far not to require any licence before that time.

“ LXXVIII. Provided always, and be it further enacted, that none of the provisions of this act shall extend or be construed to extend to render void or invalid, before the thirty-first day of December next, any licence or exemption which would have been otherwise valid and effectual, nor to require any licence to be taken before the said thirty-first day of December next, which would not have been required by law before the passing of this act.

Commission to administer oaths not to be subject to stamp duty.

“ LXXIX. And be it further enacted, that no commission issued by any bishop to any commissary or commissaries appointed to administer the oaths required to be taken by any curate for the purpose of any licence or licences granted under the provisions of this act shall be subject to any stamp duty; any thing contained in any act or acts of parliament to the contrary notwithstanding.

Proviso for his majesty's prerogative in granting dispensations.

“ LXXX. And be it further enacted, that nothing in this act contained shall extend or be construed to extend to alter or affect his majesty's royal prerogative in the granting of dispensations for non-residence upon benefices, as the same now exists by law.

What parsonage not deemed a benefice.

“ LXXXI. And be it further enacted, that no parsonage that hath a vicar endowed, or that hath a perpetual curate, and having no cure of souls, shall be deemed or taken to be a benefice within the intent and meaning of this act.

Archbishop or bishop not liable to penalties for non-residence.

“ LXXXII. And be it further enacted, that no archbishop or bishop having or who shall have any benefice shall by reason of non-residence upon the same be subject or liable to any penalties or forfeitures: provided always, that any archbishop or bishop who shall hold any benefice in commendam with his archbishoprick or bishoprick, shall nominate and appoint a resident curate, according to the provisions of this act.

Proviso for powers of archbishops and bishops;

“ LXXXIII. And be it further enacted, 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.

“LXXXIV. And be it further enacted, that nothing in this act contained shall extend or be construed to extend to repeal or alter the provisions contained in any act of parliament, or any other provision of law, for the due celebration of divine service in any church or chapel, or for the discharge of any other duty of any rector or vicar, or person holding any benefice, by himself or his curate. and for the due celebration of divine service.

“LXXXV. And be it further enacted, that no provision in this act contained shall extend or be construed to extend to that part of the united kingdom called Ireland. Act not to extend to Ireland.”

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CHAPTER VIII.

What Dilapidation is, and in what manner punishable, and what Remedies the Successor hath.

Dilapidations,
what?

*See the notes
to the 2d. H.*

A DILAPIDATION is the pulling down or destroying in any manner any of the houses or buildings belonging to a spiritual living, or the chancel, or suffering them to run into ruin or decay; or wasting and destroying the woods of the church, or committing or suffering any wilful waste in or upon the inheritance of the church. And certainly 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. I wish our church had not too much reason to complain of both.

There have been divers canons of the church made against this crime, as I may justly call it; but as in others, so in this, I shall confine myself to our own provincials: and I find in a provincial council or synod held under Edmund archbishop of Canterbury, in the year of our Lord 1234, which was, as I take it, about the 18th year of H. 3. a canon to this effect:

“ Si rector alicujus ecclesiæ decedens domos ecclesiæ deliquerit dirutas, de bonis suis ecclesiasticis tanta portio deducatur, quæ sufficiat ad reparandam hæc, et alios defectus ecclesiæ supplendos. Item statuimus circa illos vicarios, qui solvendo modicam pensionem omnes ecclesiæ habent proventus: Nam cum ad præmissa teneatur talis portio deducta, satis poterit et debet inter debita computari: Semper tamen rationabilis consideratio sit habenda ad facultates ecclesiæ, cum portio fuit habenda.”

Canon against
dilapidation.
Lindw. chap.
Si rector alicujus
ecclesiæ.

[90]

Vide canon
Othobon de do-
mibus ecclesia-
rum reficiendis,
in the appendix
in the twelfth
chapter of this
book, hic in fine.

Now if it be demanded what houses are meant within this canon, the gloss tells you, “ Ut puta mansum rectoriæ, vicariæ et alia edificia quæcunque, quorum edificatio sive reparatio spectat ad ipsum rectorem.”

By the letter of this canon the rector is to repair the whole church; but by the custom of England the owners of the houses and lands in every parish are bound to repair the body of the church, and the rector only the chancel; unless by particular custom it hath been otherwise: and in this point the common law is kinder to the parsons, vicars, &c. than the canon law; and the common law being here to be preferred, annuls that part of the canon.

And the gloss upon the word defect' ecclesiæ adds, “ Hæc litera potest intelligi de defectibus ecclesiæ, quæ pertinent ad curatum ipsius ecclesiæ in solidum, sic quod non pertineant ad alios, ut puta, in cancella, et aliis ad onus rectoris de jure vel consuetudine spectantibus.”

But this canon seems only to affect the ecclesiastical goods: and what those might be, deserves the judgment of the gloss, which tells you they are such as “ jure et nomine ecclesiæ obvenientibus; talia enim bona sunt per viam tacitæ hypothecæ ad reparationem hujusmodi faciendum obligatæ.”

And if the goods of the church shall not suffice, then the gloss tells us, “ Si rector bona ecclesiastica expenderit in meliorationem patrimonii sui, vel si propter nimiam diligentiam priorum negotiorum neglexerit negotia ecclesiæ procurare, et sic ecclesia sit damnum passa, tenetur satisfacere de bonis suis patronalibus, si quæ habuerit.”

But there has been made a further question, whether satisfaction for dilapidations should be preferred in payment before debts and legacies? And as the common law prefers the payment of debts before damage for dilapidations; so the ecclesiastical law prefers the damage for dilapidations, before the payment of legacies:

Co. 5, 6, 7.
Cro. Eliz. 659.
Not to repair the church, but chancel.

2 Inst. 653.

A canon for relief against dilapidations.

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Verb. ecclesiasticis.

to which hear what the gloss says; “ Si legatarii tanquam creditores petant legata sibi relicta, et prælatus petat sumptus reparationis edificiorum ecclesiæ; talis prælatus debet præferri cæteris legatariis:” and gives this reason, “ Nam legata solvi non debent nisi prius deducto ære alieno.” So that the ecclesiastical law agrees with the common law in this, that debts are to be preferred before legacies.

Verbo reparand.
hæc.

The next thing considerable is, what repairs are requirable in this case, which is answered by the gloss: “ Et intellige hanc reparationem fieri debere secundum exigent’ et qualitatem rei reparandæ,” &c.

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Thus far I have followed the canon, and gloss thereupon: now in the next place we will shew you what we have relating to this matter amongst the laws and statutes of this realm.

Waste by
bishops.
Co. 11. 49. a.

And first, I find that at a parliament at Carlisle, in the 35th year of Edward the First, a great complaint was made against Anthony, then bishop of Durham, for waste and destruction of the woods belonging to his bishopric, by gift, sale and otherwise, and for erecting forges of iron and lead, and making charcoals of the wood to be spent in their iron and lead-works, to the disinheritance and impoverishing of his church, and in prejudice of the king and his crown, and of the chapter of Durham. To which the answer is, “ Inhibitor per breve de cancellaria episcopo et ministris suis, ne faciant vastum de contentis in petitione.”

Cause of deprivation.

M. 23. Ei inter
adjudicat coram
rege.

Hunts. 83.

* Or in the

King's Bench,

Bulstr. 3. 158.

More, 917.

Rot. Pat. 14 H.

3. m. 8.

Bulstr. 2. 279.

By which it appears, that if a bishop, or any other clergyman, do waste upon the woods or lands of his church, that a prohibition may be sued in * chancery to prohibit him: for “ Ecclesia est infra ætatem et in custodia domini regis, qui tenetur jura et hæreditates ejusdem manu tenere et defendere.”

And the archbishop of Dublin was fined 300 marks for the disafforesting a forest belonging to his archbishopric.

And William, abbot of Westminster, in the 15th year of King John, anno 1213, was deprived, because he had wasted the revenue of his church or abbey.

And it seems by several books of the * common law, † and by the canons of the church likewise, that in case a bishop, abbot, prior, &c. waste the lands, woods or houses of his church, he may be deposed or deprived by his superior (32): so that it appears clearly, that the fault in this case lies heavy upon those that have the visitation and superiority, that do not take care against the wasting and destruction of the building, houses, woods, &c. of the church; and that the successors should not be put to seek remedy against executors and administrators, who are too active in finding shifts to avoid their actions, to avoid which there is a good law made in the 13th year of Queen Elizabeth to this effect:

episcoporum dejiciatur auditus et convictus, et tanquam furti aut latrocinii reus suo privetur honore. Causa 12. q. 2. Apostol.

That if any parson, vicar, &c. shall make any conveyance of his goods to defraud his successor of his remedy, the like suit is given in the spiritual court against the grantee, as the successor should have had against the executors or administrators of the predecessors.

But this act gives no remedy at common law, because by another act made at the same parliament, all such grants, to defraud any person or persons of their just actions, are made void.

Hollingsh. 181. b. 30.

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* 20 H. 6. 46. a.

3 Inst. 204.

2 H. 4. 3. b.

Co. 11. 49. b.

29 E. 3. 16. a.

9 E. 4. 34. a.

† Causa 10. q. 2.

si quis casus,

quæsitum fuit

quam penam

debeat pati

episcopus quum

alienat rem ec-

clesiæ nulla

necessitate

cogente.

The answer was,

Res ipsas eccle-

siæ propriæ re-

staurare cogatur

et in judicio

latrocinii reus suo

Statute against

fraudulent con-

veyances.

St. 13 Eliz. c. 2.

St. 13 Eliz. c. 5.

(32) The Bishop of Durham's case, cited 11 Co. Rep. 49. a. in Liford's case. 3 Bulstr. 158. Viner's Abr. Dilapidations. Dr. W. bishop of L. and C. was suspended by archbishop Sancroft for dilapidations, and the profits of the bishopric were sequestered, and the episcopal palace built out of them. Cited 12 Mod. as the case of Dr. Wood, bishop of Litchfield and Coventry, 1687. Vin. Abr. title Dilap.

F. N. B. 51. f.
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*Wise v. Mather
10 B. H. 299*

Action upon the
case at law for
dilapidations.

T. 8 H. 7. rot.
69. B. R.

T. 18 H. 7. rot.
69. C. B.

P. 12 & 13 H.
8. rot. 126. C. B.

M. 16 H. 8. rot.
306. C. B.

M. 12 H. 8. rot.
730. C. B.

H. 15 Jac. rot.
474, &c.

The custom
upon which the
action is
grounded.

*Mather v. Ruffell
39 B. 503*

*Bryan v. Laid
1. 2. 13. 179.*

So that the plaintiff has equal remedy in both cases: suits for dilapidations are most properly and naturally to be sued in the spiritual courts; and if any prohibition should be granted, the same ought to be superseded by a consultation; but this is intended where the suit is grounded upon the canon law.

But the successor may upon the custom of England have a special action upon the case against the dilapidator, his executors or administrators, whereof there are multitudes of precedents even in the time of popery, whereof the reader has a taste in the margin (33).

By all which it appears, that by the custom of England, which is the common law, "Omnes et singuli prebendarii, rectores, vicarii regni Angliæ pro tempore existentes, omnes et singulas domos et edificia prebendarum, rectoriarum et vicariarum suarum reparare et sustentare, et ea successoribus suis reparata et sustentata dimittere teneantur. Et si hujusmodi prebendarii, rectores et vicarii domus et edificia hujusmodi successoribus suis sic, ut præmittatur, reparata et sustentata non demiserunt et deliquerunt; sed ea irreparata et dilapidata permiserunt, executores sive administratores bonorum et catallorum talium præbendariorum, rectorum et vicariorum post eorum mortem de bonis et catallis decedentium successoribus talium præbendariorum, rectorum et vicariorum, tantam pecuniæ summam quantum pro necessaria reparatione et edificatione hujusmodi domorum et edificiorum expendi aut solvi sufficiet, satisfacere teneantur."

And upon this custom, actions of the case have been frequently brought, both anciently and of later times, and damages recovered.

See this matter debated, and curious learning thereupon. 3 Levins 268. *Mason v. Lambert* 12. 613. 798.

*Wise v
Mather
10 B. H. 299.
5. 1. 1. 22.
Downes v. Hay
4. 1. 1. 176.*

(33) Radcliffe v. Doyley, 2 T. R. 650. Young v. Munby, 4. Maule & Selwyn's Rep. 183.

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And note, that by a statute made in the fourteenth year of Queen Elizabeth, it is expressly enacted, That all the monies and damages that shall be recovered for dilapidations, are to be expended and laid out, in, and about the repair of the houses, &c. dilapidated, wherein the visitors of those churches ought to take care (34).

It will not be altogether improper to conclude this chapter with the statute of 35 E. 1. intituled, "Ne 35 E. 1. rectores prosternant arbores in cæmeterio;" whereby it is enacted, or rather the common law declared in these words :

We do prohibit the parsons of the church, that they do not presume to fell them (viz. the trees in the churchyard) down unadvisedly, but when the chancel of the church wants necessary reparations: neither shall they be converted to any other use, unless the body of the church do want repair; in which case 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. Against cutting the trees in the churchyard.

By this law it appears, that the churchyard and the soil thereof is in the parson, and by consequence the trees are in the parson or rector, that grow therein. But because the trees that grow there are for the most part planted there for the shelter and ornament of the church from tempest and storms; therefore the parlia-

(34) The words of the act are, "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 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." § 18.

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ment has granted a prohibition in this case against the rectors and parsons of churches, that they should not cut down these trees for any other use, but the necessary repairs of the church and chancel, which in truth was no more than what the common law enjoined: for if the rector had gone about to have cut them down for any other use, the patron might have had a prohibition; but now I conceive the rector or impropiator, that cuts down any trees growing in the churchyard for any other cause, than for the repair of the church or chancel, may be indicted and fined upon this statute at the common law; for whatsoever may be prohibited before it is done, may be punished after it is done.

3 Inst. 205.

Cap. Archidiaconi et infra.

If the bishops and archdeacons in their visitations would take care, these dilapidations might easily be avoided, which are a great dishonour to the clergy, and cannot be pleasing to God Almighty or good men: and the canon enjoins the archdeacons and other officials, “*Ut in visitationibus ecclesiarum faciendis diligentem exhibeant considerationem ad fabricam ecclesiæ et maxime cancellus, si forte indigeant reparatione, et si quos invenerint defectus hujusmodi, certum sub pœna præfigant terminum infra quem emendentur vel suppleantur,*” &c. (35)

(35) As the patron only can prevent a rector or vicar, so a bishop can only be prevented by prohibition, or by injunction at the suit of the crown, by its attorney-general, from exercising the right of cutting timber; *Jefferson v. Bishop of Durham*, 1 Bos. and Pull. 120. 129. 3 Merivale's Rep. 427.

And the patron has the same right against a rector, which the crown, or the metropolitan, may exercise in the case of a bishop. *Knight v. Mosely*, Ambl. 176. If a bishop cuts and sells trees, and does not employ them for reparations, a prohibition ought to lie out of B. R. *Mich. 12 Jac. B. R. Stockman v. Wither*. But it seems that the right to cut timber for the purpose of repairs, extends to selling timber, and applying the produce; per Lord Eldon. *Wither v. Dean*,

&c. of Winchester, 3 Merivale's Rep. 428. A bishop is only to fell timber for building, for fuel, and other necessary occasions. The woods are called the dower of the church, per Coke, C. J. 2 Bulstr. 279. A rector may cut down timber for the repairs of the parsonage or the chancel, but not for any common purpose; and this he may be justified in doing under the statute of 35 Ed. 1. stat. 2. intituled, "Ne rector prosternat arbores in cœmeterio."

If it is the custom of the country, he may cut down under-wood for any purpose; but if he grubs it up, it is waste. He may cut down timber likewise for repairing any old pews that belong to the rectory, and he is also entitled to botes for repairing barns and outhouses belonging to the parsonage. *Strachy v. Francis*, 2 Atk. 217.

The patron of a living may obtain an injunction against the incumbent to stay waste for digging stones on the glebe, other than what are necessary for repairing and improving the rectory; and in this case Lord Hardwicke observed, "The parson has a fee-simple qualified and under restrictions in right of the church, but he cannot do every thing that a private owner of the inheritance can. He cannot commit waste, nor open mines, but he may work those already opened: even a bishop cannot. Talbot, bishop of Durham, applied to parliament to enable him to open mines, but was rejected. Parsons may fell timber, or dig stone to repair, and they have been indulged in selling such timber or stone when the money has been applied in repairs. Injunction has been granted even against bishops to restrain from felling large quantities of timber, at the instance of the attorney-general, the patron of bishoprics." (3 Bulstr. 158. *Knowl v. Harvey*, Roll's Abr. 2. 813.) In the same case his lordship observed, "The patron is not entitled to an account, because the patron cannot have any profit from the living." *Knight v. Mosely*, Ambl. 176. But it has been held, that new mines might be opened. Maynard moved for a prohibition to a parson for digging new mines of coal in his glebe, and also for felling trees; but the court held, that it lay not for mines, for if so, no mines in any glebe should now be opened. *Countess of Rutland's case*, 1 Lev. 107. *Lord Rutland v. Greene*, 1 Keble, 557.

Dr. Sands, a prebendary residentiary of the church of Wells, brought a suit in the spiritual court for dilapidations against the executor of Dr. Pierce, his predecessor; and they on the other side shewed, that in that church there are eight residentiary prebendaries, to which, to encourage them to residence, there are eight houses belonging; that to each prebend there is a house belonging, but not any house in certain, the bishop having the privilege of appointing what house he thinks fit to each prebendary, but he must appoint one. They hence inferred, that this house goes not in succession, nor is it part of the prebend, for that he is prebendary and hath one house allotted him, and so was Dr. Sands; and afterwards upon the death of another prebendary another house. But Jones, J. answered, "It is true here are eight houses belonging to eight residentiary prebendaries, whereof each prebendary, *de jure*, is to have one; that no one house is ascertained to any particular prebend, but ought to be assigned to some particular prebend; and when the bishop doth so assign by virtue of his power, and not by virtue of any estate he had in him, then it is part of the prebend, and shall be liable to a suit for dilapidations; therefore there ought not to be a prohibition." Viner's *Abr. Dilapidations*, 35 Car. 2. B. R. Dr. Sands's case.

An action on the case for dilapidations of a prebend house may be maintained by a succeeding prebendary against his predecessor; but when by the statutes of the church the materials are to be supplied out of the church funds, the successor shall recover only the amount of the workmanship necessary for making the repairs. *Radcliffe v. D'Oyley*, 2 T. R. 630.

If a prebendary waste the trees of his prebend the patron can have prohibition. Co. 11. *Liford's case*. An action was brought by a vicar successor against his predecessor for dilapidations, who by taking a second benefice with cure, &c. had lost this vicarage, and the plaintiff had judgment. Carth. 224. E. 4 W. & M. in B. R. *Jones v. Hill*, Viner's *Abr. Dilap.* And the successor may have separate actions against the executor of the late rector for dilapidations to different parts of the rectory. *Young v. Munby*, 4 Maule and Selwyn's Rep. 183. Pending a *quare impedit* if an incum-

bent cuts trees on the glebe, and on the lands of copyholders of a manor, parcel of the rectory, a prohibition lies. 2 Roll's Abr. 813. Hobart's Rep. 51.

In order to prevent dilapidations it is enacted by the 17 G. 3. c. 53. as follows:

Where 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, is desirous to build or improve the buildings belonging to his benefice, which one year's neat income will not be sufficient to put in due repair, he must first procure a certificate from an experienced workman, containing a state of the buildings, the value of the timber, and other materials fit to be employed in building, or repairing, or to be sold; and also a plan or estimate of the work, which must be verified upon oath before a justice of the peace or master in chancery, ordinary or extraordinary; he must also make out in writing, to be signed and verified by him on oath as aforesaid, a particular account of the annual profits of the living.

These must be laid before the ordinary and patron, in order to obtain their consent to such proposed buildings or repairs.

But the ordinary before he gives his consent, shall cause an inquiry to be made of the state and condition of the buildings at the time when the incumbents entered, how long he hath enjoyed the living, what he hath received for dilapidations, and how the same hath been laid out: and if it shall appear that the incumbent hath by wilful negligence suffered the buildings to go out of repair, he shall pay down so much as the damages thereby occasioned shall amount unto, before the ordinary shall give his consent.

If the patron is a minor, idiot, lunatic or feme covert, the guardian, committee or husband respectively may act for them.

If the several parties shall declare their consent by writing under their hands, the incumbent may borrow at interest such sum as the said estimate shall amount unto, after deducting the value of the timber or other materials which may be thought proper to be sold, not exceeding two years value of the living, after deducting all outgoings, except only the salaries to assistant curates where necessary; and as a se-

curity for the money so borrowed, he may mortgage the glebe, tithes and other profits of the living for twenty-five years, or until the principal interests and costs shall be paid.

And the mortgagee shall execute a counter-part of the mortgage, to be kept by the incumbent, and a copy thereof shall be deposited in the bishop's registry; and on failure of payment of principal and interest for forty days after the same shall become due, the mortgagee may distrain in like manner as rents may be recovered by landlords from their tenants.

And a proper person shall be appointed by the ordinary, patron and incumbent, to receive the money borrowed, who shall give bond to apply the same for the purposes intended, and shall make contracts, pay the workmen; and when finished render a due account to be entered in the registry aforesaid.

Where new buildings are necessary, the ordinary, patron and incumbent may purchase any building within one mile of the church, and land not exceeding two acres, if the living is under 100*l.* a year; if above, then not exceeding two acres for every 100*l.* a year; and the purchase money may be raised by sale or exchange of some part of the glebe or tithes.

And every such incumbent shall annually at his own expense, from the time such buildings shall be completed, insure at one of the offices in London or Westminster the said house against accidents by fire, at such sum as the ordinary, patron and incumbent shall agree upon; and on neglect of such insurance, the ordinary may sequester the profits till such insurance shall be made.

And every incumbent successively shall pay the interest (of the principal money due upon such mortgage, yearly, as the same shall become due, or within one month after, and also 5*l.* per centum of the money originally advanced upon such mortgage; 21 G. 3. c. 66.) and if such incumbent shall not reside twenty weeks within each year, computing from the date of the mortgage deed, he shall instead of 5*l.* pay 10*l.* per centum yearly, such payments to be made till the whole principal and interest shall be discharged: and in default of such payment, the ordinary may sequester the profits as aforesaid.

And where there shall be no house, or a very mean one, on a living worth above 100*l.* a year, and the incumbent

shall not reside in the parish twenty weeks within any year ; and he shall not think fit to lay out one year's income where the same may be sufficient, nor to apply in manner aforesaid for two years income, the ordinary, with consent of the patron, may procure such plan, estimate and certificate as aforesaid, and proceed in the execution of the purposes of this act as if the incumbent had consented, and the mortgage executed by the ordinary shall be binding on the incumbent and his successors.

And the governors of Queen Anne's bounty may lend money not exceeding 100*l.* in respect of a living not exceeding 50*l.* a year without interest ; and where the annual value exceeds 50*l.*, they may lend any sum not exceeding two years income, at the interest of 4 per cent.

And colleges and other corporate bodies having the patronage of livings, may lend money for the purposes aforesaid without interest.

For the forms of the instrument, vide 17 G. 3. c. 53. and 21 G. 3. c. 65.

Money given by will to erect a parsonage-house at the end of the garden of the former parsonage-house, is not within the statute of mortmain, no land being to be purchased. *Brodie v. Duke of Chandos*, 1 Br. 444. 2 Burn's Eccl. Law, 155, 156.

Dr. Burn, in vol. 2, 151. has suggested a doubt whether the statute of 13 Eliz. c. 10. is now in force, because it was not together with other statutes continued by 10 C. c. 4. There seems, however, to be little room for such a doubt : upon the face of the statute of Elizabeth there is no appearance of its being temporary, but under an erroneous supposition that it was so, it was continued by statutes 1 Jac. c. 25. and 21 Jac. c. 28. The error being then probably discovered, it was not continued further. At all events, this statute stands in the statute books, and never was expressly repealed ; and the law is liberal in the construction of statutes, *ut res magis valeat quam pereat*. 1 Bla. Com. 89. It is not therefore a reasonable conclusion, that a continuation of a statute made under an erroneous view of it, can by any implication amount to a repeal.

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CHAPTER IX.

For what Causes a Parson, Vicar, &c. may be deprived by any Statute Law; and what matters are allowed for good Causes of Deprivation at the Common Law.

Deprivation and deposition, what.

DEPRIVATION or deposition is, where a man by any statute law, or by any judicial sentence ecclesiastical, that hath proper jurisdiction, is made incapable to hold or enjoy his parsonage, vicarage, or other spiritual promotion or dignity: and the causes of such deprivation or deposition, are properly and naturally determinable by the ecclesiastical laws of this realm.

Where determinable.

But because generally there are estates of freehold dependant upon these promotions and dignities, and annexed to them inseparably, which rest at the sole determination of the common law; the courts of common law do sometimes inspect and regulate the proceedings of the ecclesiastical courts; and where they proceed against the rules of common law, they frequently prohibit them.

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I have therefore thought fit to shew, what causes of deprivation or deposition have been allowed and approved of by the judges and courts of the common law, or by any of the statutes of this realm. But there are many more causes of deprivation by the canons and laws ecclesiastical, which being out of my profession, I shall not presume to discourse of.

2 Brownl. 37.

1 Brownl. 70.

Can. Apost. 42.

Mortimer v.

Parker, 10 Jac.

Simony cause of deprivation.

1. If a parson, vicar, &c. be a common drunkard, it is a just cause to deprive him of his church preferment.

2. The clerk that obtains any preferment in the church by any simoniacal contract or agreement may

be deprived by his ordinary, &c. as it appears at large in the fifth chapter here before upon that subject. *Supra* 45.

3. That if any parson, &c. shall refuse to use the book of Common Prayer, or administer the sacraments in the order there prescribed, or shall wilfully and obstinately, standing in the same, use any other rite or ceremony, order, form or manner of celebrating the Lord's Supper, or other open prayers, or shall preach, declare or speak any thing in derogation thereof, or depraving the same, or any thing therein contained, and having formerly been convicted for the like offence, shall upon his second conviction be deprived *ipso facto* (36).

1 El. c. 2. stat.
14 Car. 2. c. 4.
To use other
forms of prayer,
the third offence.

4. If any parson, vicar, &c. shall not within two months next after induction, upon some Lord's day, openly, publicly and solemnly read the morning and evening prayers appointed to be read the same day, according to the book of Common Prayer; and after such reading, shall not openly and publicly, before the congregation there assembled, declare his unfeigned assent and consent to the use of all the things therein contained, in such manner as is directed before here in

St. 14 Car. 2. c. 4.
Neglecting to
read prayers
within two
months after
induction.
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(36) In a suit in the Arches court, promoted against a vicar, because (among other articles of charge) he had left out portions of holy scripture appointed to be read, acknowledged that he had done so, and declared that he would do so again; and specific instances were adduced of his having done so. And because in the administration of the sacrament he had made use of offensive language to a communicant, the court suspended him from the ministration of his office for a fortnight, decreed a monition against him to refrain in future from offending in the manner charged in the articles, and condemned him in costs. *Newbery v. Goodwin* 1 Phillimore's Eccl. Rep. 282.

the seventh chapter; and if there be any lawful impediment, then if he do not do the same within one month after the impediment removed, such parson, vicar, &c. shall be deprived ipso facto (37).

13 Eliz. c. 12.
To maintain any doctrine against the 39 articles of religion.
5 R. 2. tit. Trial 54.
Miscreants, infidels, schismatics and heretics deprived, f. 3.

5. If any parson, which shall have any ecclesiastical preferment, shall advisedly maintain or affirm directly any doctrine contrary or repugnant to the thirty-nine articles of religion, and being convented before the bishop of the diocese or ordinary, or before the high commissioners, shall persist therein, and not revoke his error; or after such revocation shall eftsoon affirm such untrue doctrine, he may be deprived.

* A misbeliever.
† An atheist, &c.
38 E. 3. 2. b.
Dy. 8. p. 254.
Co. 5. 58. a.
Dy. 293. p. 1, 2.
Slave, villain, illiterate and criminous person may be deprived.

6. If any person shall obtain a preferment in the church, which is a * miscreant, † infidel, schismatic or heretic, he may be deprived.

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* Hob. 121.
Roll. 2. Abr. 222.

7. So if one be made a parson, vicar, &c. that is not of free condition, but a villain, or that is illiterate and not able to perform his duty, or that is guilty of any heinous crime, as murder, * manslaughter, perjury, forgery, or that is merè laicus, and not in holy orders, he may be deprived (38).

(37) By 23 G. 2. c. 28. the ordinary may allow of any lawful impediment for not reading the articles, and making the declaration, within the time limited. The statute 13 and 14 Car. 2. c. 4. contains a provision to the same effect as to reading the morning and evening prayers.

(38) Before the stat. 13 and 14 Car. 2. c. 4. if a layman was presented, instituted and inducted, he was parson de facto; and acts done by him as parson were valid. Cro. Eliz. 775. But by the above statute, no person is capable of being admitted to a benefice who is not ordained priest; and his ecclesiastical promotions are void, as if he were naturally dead.

8. A parson, vicar, &c. may be deprived for being disobedient and incorrigible to their ordinary, &c.

And so is the 54th canon of the Apostles, express.

9. And it was resolved by all the judges of England, 2 Jac. that non-conformity was a good cause of deprivation: and it was declared by them all, that in case any canons were made by the clergy for the good government of the church, and approved and confirmed by the king, (as they ought) that the obstinate disobeying of them was a just cause of deprivation.

Allen v. Nash, p. 13 Car. 1. B. R. Cro. Jac. 37. Non-conformity. Quod nota.

10. If any parson, vicar, &c. have one benefice with cure of souls, and take another incompatible without a faculty and dispensation, it is a just cause of deprivation.

11 H. 4. 37. Taking a second benefice. Quære Stilling. Eccl. Cases, 99, 100.

11. In the time of popery it was cause of deprivation for a priest to marry; but not to have two or three concubines, as they called them: but more of this hereafter.

Dyer, 133. p. 1. Priest to marry was cause of deprivation.

12. Dilapidating the church and buildings, destroying the woods, or alienating the lands belonging to the church by any bishop, abbot, prior, parson, vicar, &c. have been held and adjudged just causes of deprivation; and it were very fit the canons in this case were put in execution (39).

Stilling. Eccl. Cases, 86. 3 Inst. 204. Co. 11. 98. b. 2 H. 4. 3. 9 E. 4. 34. 20 H. 6. 36. 29 E. 3. 16, 17. q. 4. Quicunque. [101]

There may be a question started, what shall be intended by the words, deprived ipso facto; whether by those words the church shall immediately become void by the fact done, or not till conviction or sentence declaratory. The words ipso facto are of late time crept into acts of parliament; as that for striking with a weapon in a churchyard, the party shall ipso facto be excommunicate: and in that case it is made a quære

Deprivation ipso facto. See Taylor's Ductor Dub. 475, &c. 1 Ventris, 146.

Dy. 275. b. p. 48 Quære

Co. 6. 29. b.
Cap. Quia in-
continentia,
verb. ipso facto.

Rolls 2. 282. f. 5.

Rolls 2. 305. § 3.

in Dyer. But in Green's case it is resolved, that the church in this case shall be void without any sentence declaratory, and that avoidances by acts of parliament need no sentence declaratory. But in that case by the canonists, "*requiritur sententia declaratoria.*" And note, that after induction the spiritual court cannot deprive for any error in his institution. So if a clerk commits homicide, and hath his clergy, he shall not afterwards be deprived for this offence. And a man may be deprived by reason of degradation (40).

I must confess, in this chapter I may seem to transgress upon the canonists and civilians, as well as in some other; but I have gone no further upon this subject, than what I have met with in our own books: and I must agree, that the ecclesiastical courts must have the sole jurisdiction in all causes of deprivation, depositions, resignations, &c. And yet the judges of the common law have power to correct their proceedings, if they shall proceed against the rules of the common law, which is the reason we meet with these things in our books, and it may be some advantage to the civilians to know how far the common law approves of their proceedings.

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(40) Although the 21 H. 8. c. 13. declares the first benefice void in law by induction to a second; and the 13 Eliz. and 13 and 14 Car. 2. declare, that persons offending against them shall be ipso facto deprived; and the 31 Eliz. makes inductions contrary to it utterly void: yet if the persons instituted and inducted continue to act as incumbents, contrary to the provisions of those statutes, the ordinary may examine the matter, and declare the church void by sentence in the ecclesiastical court. Wats. c. 5 and 6. Cro. Eliz. 252 and 686. And such declaratory sentence is proper, if not necessary, where the bishop means to take the benefit of the lapse under 13 El. c. 12. though not necessary to the patron or parishioner resisting the plenary. 2 Burn's E. L. 144, et vide 4 Blac. Com. 62.

There are by the canon law divers other causes of deprivation; but it is out of my province, and would be too long for this discourse to reckon them all up. And having said what I have to say upon this subject, I shall proceed next to shew, what leases parsons, vicars, and other ecclesiastics may make at this day of the glebes, tithes, farms, &c. and within the danger of what statutes they may fall.

After induction a man cannot be deprived for any fault in his institution. Rolls 2. 282.
f. 345.

Deprivation for incontinency, Croke Eliz. 789. 41. (41).

Deprivation for adultery, Co. 6. Rep. 13. b. Hob. 243.

(41) Sentence of deprivation must be pronounced by the bishop; but suspension *ab ingressu ecclesiæ* may be pronounced by the ecclesiastical judge. *Owen v. Fleming*, Arches C. 1733-4, cited in *Watson v. Thorp*, 1 Phillimore's Rep. 275. In *Powlett v. Head*, the clergyman was suspended *ab officio et beneficio* by sentence of the bishop in person. *Ibid.* A rector was suspended three years by sentence of the ecclesiastical court for incontinency, and immoral conduct. *Watson v. Thorp*, 1 Phillimore's Rep. 273.

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CHAPTER X.

What Leases Parsons, Vicars, and other Ecclesiastical Persons may make of their Glebe, Tythes, Farms, &c. and within the danger of what Statutes they may fall.

What leases
clergymen may
make.

HAVING undertaken this work chiefly in favour of the parsons and vicars, I designed to have meddled with no other orders of the church but those only; but having in many other things been enforced to intermingle the concerns of other orders with those of the parsons and vicars, I shall beg the reader's pardon, that in this chapter, where I am to treat of the leases which may be made by parsons and vicars, I likewise take in all other orders of the church with the colleges; the learning concerning leases being of use, and necessary for all people to know, and which I shall in this chapter put into as good a method as the subject matter will permit.

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And because the learning of these leases will depend upon several statutes, it will not be amiss, first, to examine what leases or alienations the several persons we have to do with in this chapter, might have made at common law before the statutes, and then to consider where, or in what manner, the several statutes have enlarged, abridged, or restrained their power at common law.

At common law.
1 Inst. 45. a.

And first, at the common law, no bishop, abbot, prior, dean, prebend, or other single corporation, could make any alienation or lease to bind their successors, without the confirmation of their chapter, convent, &c.

The enabling
act of 32 H. 8.
cap. 28.

The first statute that made any alteration in these

cases, was the statute of 32 H. 8. which is commonly called the enabling statute; whereby it is enacted,

That all leases then after to be made of any manors, lands, tenements or hereditaments, by writing under hand and seal, for term of years, or for term of life, by any person or persons of the full age of twenty-one years, having any estate of inheritance either in fee-simple or fee-tail, in their own rights, or in the right of their churches, &c. shall be good and effectual in the laws against the lessors, their wives, heirs and successors.

Provided that that act shall not extend to any lease of any manors, &c. where any old lease should be in being, unless the same expire, be surrendered or ended within one year after the making of such new lease, nor shall extend to any grant to be made of any reversion of any manors, &c. nor to any lease of any manors, &c. 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, nor to any lease to be made without impeachment of waste, or to any lease to be made above the number of three lives, or twenty-one years at the most, from the day of the making thereof; and that upon the making of every such lease there be reserved yearly, during the said lease, due and payable to the said lessors, their heirs and successors, to whom the reversion shall appertain, &c. so much yearly farm or rent, or more, as hath most accustomedly been yielded and paid for the said manors, &c. so to be letten within twenty years next before the lease thereof made, &c.

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Provided this act should not extend to give any liberty or power to any parson, vicar, &c. to make any lease, or grant of any of their messuages, lands, tithes, &c. or in any other manner than they should or might have done before the making of the said act.

So now, where before the making of this act, no

archbishop, bishop, archdeacon, dean or prebend, could have made any lease to have bound his successors without the confirmation and consent of their chapters, &c. as aforesaid: now by this act they are enabled to make leases for three lives, or one and twenty years, without any confirmation at all, with these qualifications:

What qualities such leases may have.

[106]
Must be in writing indented.

1. Such lease must be made by writing indented, and not by parol or deed poll.

Must begin from the making, or day of making.

2. It must be made to begin from the making, or day of the making of such lease.

Old lease must expire within a year.
Co. 5. a. b.
Co. 1 Inst. 44. b.

3. If there be any old lease in being at the time of the making of such lease, it must expire, be surrendered or ended within a year after the making of such new lease; and such surrender must be absolute, and not upon condition.

Must not be a double lease.

4. There must not be a double lease in being at one and the same time, the one for years, and the other for lives.

Of what things such lease may be.
Co. 5. 3. a.
More, 738.
Talentine v. Denton.
H. 2 Jac. B. R.

5. Such lease must be of lands manurable or corporeal, which are necessary to be letten, and out of which a rent may be reserved, and not of things that lie merely in grant; as fairs, markets, tithes, tolls, franchises, advowsons, &c.

Of lands usually letten.

6. Such lease must be of lands, &c. which have most commonly been letten to farm; or occupied by the farmers thereof for the more part of twenty years before the making of such lease: so if they have been so let for eleven years within twenty years next before the making of the new lease, it suffices: and a letting to farm by copy of court-roll, is a sufficient letting to farm within this statute, to enable the making of such new lease.

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Co. 6. 37.

7. There must be reserved upon every such lease, and payable during the continuance thereof to the lessor, his successors, &c. so much farm or rent as hath most accustomedly been yielded and paid for the land so demised within twenty years next before such lease made: so that it sufficeth, if the yearly rent or farm be reserved, though heriots and other casual services be omitted; so if a greater rent than formerly be reserved, it sufficeth. But if the lessor reserve a less rent than the ancient, during his life, and after the full rent, yet it is naught, because it must be reserved during the whole term: so if lands usually letten be demised with any other lands, &c. though a rent be reserved that exceeds the value of those lands and the old rent; yet such lease is not good against the successor within this law. But if the rent were formerly reserved to be paid at four several days, and by the new lease be reserved to be paid all at one, so the whole rent be reserved yearly, it is well enough.

The accustomed rent must be reserved.

Co. 6. 37. b.

Ibid. Co. 5. 6. a.

Co. 1 Inst. 44. b.

Co. 5. 5. b.

Vide Co. 8. 70.

b. &c.

What reservations are good.

Co. 5. 37. b.

If a bishop, &c. have two distinct manors, that have anciently been demised together, and one entire rent reserved for both manors; and these being out of lease, the bishop, &c. may demise them severally, reserving several rents amounting to the whole ratably: and these have been adjudged lately in the Common Pleas to be good, and affirmed in error in the King's Bench; and by same reason, if a termor for life should lease part for years, and then surrender and accept a new lease, rendering the ancient rent, it would be a good lease, tamen quære: for of that part leased by the termor, there would be two leases on foot together; but if the new lease were only of the lands not demised by the termor, then it seems good.

Trin. 26 Car. 2. C. B. Thred-needle v. Linam.

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H. 27 Car. 2. in B. R. This case is put in the Modern Rep. p. 203. but imperfectly reported, ideo quære.

8. Lastly, Such lease must not be without impeachment of waste; and therefore a lease to one for life, remainder to another for life, remainder to a third for life, is not good against the successor, though but for

Such lease must not be without impeachment of waste.

three lives, because the remainders make the present tenants punishable for waste for the time (42).

Parsons and vicars excepted.

But parsons and vicars being excepted in this enabling law, are left as they were at the common law; so that they could make no lease to bind the successor without the confirmation of the bishop and patron, till the statute of 13 Eliz. which we shall speak of hereafter.

Co. 8. 70. b.

And a lease for ninety-nine years, if three lives live so long, is not good within this statute.

But this act, as appears by what hath been said, conferred a new power upon single corporations; but did not in any thing restrain their ancient power in making long leases and alienations of their very sites, demesnes, &c. with confirmations as aforesaid, which was a great prejudice to the church in general, a means of dilapidations, and a great hindrance of hospitality: and therefore,

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1 Eliz. c. 19.
More, 107.
Bishops restrained.

In the first year of Queen Elizabeth it was enacted, That all gifts, grants, feoffments, fines and other conveyances and estates from the first day of that present parliament, to be had, made, done or suffered by any archbishop or bishop of any honours, castles, manors, lands, tenements, or other hereditaments, being part of the possessions of his archbishopric or bishopric, or united, appertaining or belonging to any the same archbishoprics or bishoprics, to any person or persons, bodies politic or incorporate (other than the queen's majesty, her heirs and successors) whereby any estate or estates should or might pass from the said archbishop or bishops, or any of them, other than for the term of twenty-one years, or three lives, from any 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; any law, custom or usage to the contrary thereof in any wise notwithstanding.

Note, the exception, which gives, or rather reserves the power to grant, &c. to the queen, &c. was made void by a statute made 1 Jac.

And note also, that though this statute enacts, that all leases made in any other form shall be void and of none effect to all intent and purposes; yet it has been adjudged, that it is only to be intended as against the successors, and that leases made in other forms shall be good notwithstanding against the party himself that makes them, and may be affirmed by the successor by the receipt of the rent reserved thereupon.

And note, this is a private act of parliament, that must in all cases be pleaded, and cannot be given in evidence.

And note also, that though this statute do not restrain demising of any lands not formerly demised; yet it does it by implication: for the accustomed rent must be reserved, and unless accustomedly let, there cannot be an accustomed rent; and leases within this statute must have all the restrictions in that of 32 H. 8. before-mentioned.

And it must be of things manurable, as hath been said, out of which a rent may be reserved: but some are of opinion, that tithes or things not manurable may be demised for twenty-one years, because an action of debt will lie upon the contract: and so it was adjudged, as a serjeant at law informed me, in the case of the precentor of Paul's about 17 Jac. and that the successor shall have an action of debt upon this contract, and is good within the statute of 32 H. 8. cap. 28. And I have seen a report of a case in the 20 Jac. in the Common Pleas, that it was so adjudged; and see Ley's Rep. 76. That Yelverton, Williams and Tanfield were of the same opinion, that it was good for years (43).

1 Jac. c. 3.

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Leases in other forms not void, but avoidable. Smalwood and Sale v. l'Evesque Lich. & alios. P. 31 El. rot. 21. 65. Co. 3. 59. 1 Inst. 45. a. Cro. Jac. 95.

1 Eliz. a private act. Co. 4. 76. Co. 5. 2. b. Cro. El. 874. More, 253.

Of what things such leases may be made. Co. 5. 3. a.

More, 778. Sir Timothy Tourneur, serjeant le roy.

See the case, Palmer, 104.

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Cro. Jac. 112.

1 Inst. 45. 8.
Concurrent
leases.

More, 66.

1 Inst. 45. a.

1 Inst. 45. a.

More, 253.
Cro. Eliz. 141.

13 Eliz. ca. 10.
The restrictive
law against
leases of deans,
prebends, &c.
[112]

Upon this statute, and the former, it has been held, that archbishops and bishops may with confirmation of the dean and chapter make concurrent leases, that is, notwithstanding there be a lease in being for twenty-one years, they may make a new lease of the same lands to another for twenty-one years from the making thereof; and this being confirmed as aforesaid, shall bind the successor, the other things being observed in it: but Sir Edward Coke excepts the concurrent leases, as to those other things.

And Sir Edward Coke is of opinion, that like concurrent leases may be made by deans, prebends, &c. with confirmation: but some learned men are not satisfied concerning concurrent leases, because by these concurrent leases the successor loses his remedy for his rent by distress during the former term, and the tenant may be insolvent as to an action of debt: but a concurrent lease for lives is not good, because upon such lease the lessor would have no remedy for his rent.

The next restrictive law is that of 13 Eliz. whereby it is enacted, That from thenceforth all leases, gifts, grants, scoffments, conveyances or estates to be made, had, done or suffered by the masters and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other having a spiritual or ecclesiastical living, or any houses, lands, tithes, tenements or other

doubtful whether the lessors thereafter mentioned had power of leasing tithes, because there was no place to distrain for them, the same power of bringing actions of debt, which by a former law, 8 Ann. c. 14. s. 4. had been granted to lessors against tenants for life as to proper rents, was extended to sole and aggregate corporations, heads and fellows of colleges, and others having power of leasing, to recover rent reserved on tithes and incorporeal hereditaments, although leased for life or lives. Vide Toller on Tithes, 30.

hereditaments, being any part of the possessions of any such college, &c. or anywise appertaining or belonging to the same, or any of them, to any person or persons, bodies, &c. (other than for the term of twenty-one 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 during the said term) shall be utterly void, &c.

The penning of this act, and that of 1 Eliz. before-mentioned, being in effect the same in substance, the construction is the same in effect; but in this act there was no saving of grants to the king, and therefore this act being for the public good, had restrained other grants to him not warranted by this statute, though 1 Jac. cap. 3. had never been made.

Co. 5. 14. b.
11 Co. 75. b.

And here note, that as the parsons and vicars had not their power anywise enlarged by the statute of 32 H. 8. so they had no restriction upon them till this act; but from henceforth they are restrained from making any lease or grants, other than for twenty-one years or three lives, with the qualifications above-mentioned in the statutes, and such leases must be confirmed by the patron and ordinary, because excepted in the enabling statute of 32 H. 8. before.

Parsons and vicars restrained by this law.

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And whereas after the making of this statute, heads of colleges, deans, prebends, &c. might have made concurrent leases, as well as bishops might: there is a proviso in the statute of 18 Eliz.

That all leases then after to be made by any the aforesaid ecclesiastical, spiritual or collegiate persons, or others, of any of their ecclesiastical, &c. lands, &c. whereof any former lease for years is in being and not expired, surrendered or ended within three years next after the making of any such new lease, should be utterly void, frustrate, and of none effect, any law, &c.

18 Eliz. c. 11.
No concurrent lease, but within three years before the former ends.

By this proviso, it should seem, the parliament was of opinion, that concurrent leases might be made; but has by this proviso so restrained them that they cannot be made but within three years before the determination of the former.

Bishops not in this act.

But bishops are conceived not to be comprehended within this proviso; for though the words are general enough, yet the particulars mentioned before the general words being of an inferior rank, the general words cannot draw in the more worthy.

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Which bonds and covenants shall be void.

And there is a provision in this act of 18 Eliz. That all bonds and covenants then after made for the making or renewing any lease contrary to the intent of that statute, or of the statute of 13 Eliz. c. 10. should be utterly void.

13 Eliz. c. 20.
Leases of parsons to be void by non-residence.

In the 13th year of Queen Elizabeth, there is an act of parliament made, whereby it is enacted, That no lease made after the 15th day of May following, of any benefice or ecclesiastical promotion with cure of any part thereof, and not being impropriated, should endure any longer, than while the lessor should 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, should come to any possession above forbidden, or] immediately upon such absence shall cease and be void, and the incumbent so offending shall, &c. lose one year's profit of his said benefice, to be distributed by the ordinary to the poor of the parish (44).

These words within the [] are repealed by 14 Eliz. c. 11.

Charging parsonages, void.

And by the same statute it is further enacted, That all charging of such benefices with cure then after with any pension, or with any profit out of the same to be

(44) By 57 Geo. 3. c. 99. all the statutes which vacate leases by reason of non-residence are repealed.

yielded or taken, other than rents reserved upon leases, should be void.

But where any parson should be qualified to have two livings, he may demise the one of them, where he is not ordinarily resident, to his curate only, that shall there serve the cure. And such lease shall endure no longer than during such curate's residence without absence above forty days in any one year.

Where a parson may demise, and be non-resident.

[115]

And by 14 Eliz. it is enacted, That all leases, bonds, promises and covenants, of and concerning benefices and ecclesiastical livings with cure to be made by any curate, shall be of no other or better force, validity or continuance, than if the same had been made by the beneficed person himself, that shall demise the same to such curate.

14 El. c. 11. Leases, bonds and covenants, to be void.

And by the same statute it is enacted, That the restrictive statute of 13 Eliz. c. 10. before, shall not extend to any grant, assurance, or lease of any houses belonging to any the persons, &c. in the said stat. of 13 El. nor to any grounds to any such houses appertaining, &c. 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 they might have been before the making of the said act, so always as such house be not the capital, or dwelling-house used for the habitation of the parsons, &c. nor have above ten acres to the same.

Houses, incorporations, &c. how to be leased.

Provided, that no lease be made by virtue of this act in reversion, nor without reserving the accustomed yearly rent at least, nor for a longer term than forty years at most, charging the lessee with repairs, and no alienation in fee, unless lands of as good yearly value be settled, &c. in lieu thereof.

Not to lease in reversion.

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There is likewise another proviso in this act, that all bonds, contracts, promises and covenants, to be made for the suffering or permitting any person to enjoy any benefice or ecclesiastical promotion with cure, or to

Bonds, contracts, covenants, promises, where to be void.

take the profits or fruits thereof, other than such bonds and covenants as shall be made for assurance of any lease heretofore made, shall be of no other force than leases made by the same person.

18 Eliz. c. 11.

And by another statute made in the 18th year of the same Queen Elizabeth it is enacted, That after complaint made to the ordinary, and sentence given upon any offence committed by the incumbent against the statute of 13 Eliz. c. 20. whereby he shall or ought to lose a year's profit of his benefice, &c. That then the ordinary within two months after such sentence and request made by the churchwardens of the parish, where, &c. or one of them, shall grant the sequestration of such profits to such inhabitant or inhabitants within the same parish, &c. as to him shall seem meet, &c.

Every parishioner may take advantage.

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And that upon default of the ordinary, it shall be lawful for every parishioner, &c. to retain, &c. his tithes, and for the churchwardens to enter upon the glebe-land rents and duties of every such benefice to be employed to the use of the poor, &c. until such time as sequestration shall be committed, by the ordinary; and then the churchwardens and parishioners to account to such to whom the sequestration shall be committed, who is to employ the whole profits according to the act, upon pain to forfeit the double value of the profits withholden, to be recovered in the ecclesiastical court by the poor of the parish.

Having thus for the reader's satisfaction given him an abstract of all the statutes concerning the leases of ecclesiastics of all kinds, I shall briefly sum them all up, and proceed to take a view of such other statutes as the parsons, vicars, &c. are in any manner in danger of (45).

(45) Et vide, 2 Bla. Com. 316. where these statutes are clearly and succinctly explained, or Part 2. Cha. 18. of this book.

Upon the whole matter it appears, that archbishops and bishops may make leases for twenty-one years, or for one, two or three lives, with the qualifications before-mentioned without any confirmations at all: and they may make concurrent leases for twenty-one years, upon leases for twenty-one years from the making, with confirmation of the dean and chapter, with such qualifications as is aforesaid, though there be above three years in being of the old lease at the time of the making the new; and where the bishop has two chapters, there the concurrent lease must be confirmed by both chapters; unless it be as it was in the bishop of Waterford's case, which was thus:

What leases may be made by bishops and archbishops.

The bishop of Waterford had long ago the bishopric of Lismore, and the chapter united to that of Waterford: and in all grants made of the lands belonging to Lismore that chapter only confirmed, and all grants made of the lands anciently belonging to the bishopric of Waterford, the chapter of Waterford only confirmed: and because the union was not extant, all the judges held the confirmation of the one in manner aforesaid was good; for it shall be intended, that it was so provided for upon the consolidation: but otherwise all the judges held, that both chapters ought to have confirmed.

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Co. 12. 71. a.

But if a bishop had two chapters, and one of them surrenders, is suspended or dissolved, the confirmation of the other suffices.

Dy. 282. p. 26.

Ibid.

There is a case in Mr. Justice Harpur's Reports, where the case is put, that a bishop made a lease dated 2 die Maij, confirmed the third day, and sealed the fourth day of May, and held a good lease and well confirmed.

M. 14 & 15 El.

But a confirmation by the dean and chapter after the death of the bishop, comes too late, by Cataline, Southcoate and Windham against Wray.

Harpur's Rep. ibid.

But if a bishop make several concurrent leases, and the latter is first confirmed, and after the first is confirmed; in this case the first lease shall be preferred,

T. 6. El. Mo. 66.

because nothing passes by the confirmation in point of interest, but a mere consent.

[119]
T. 8. Jac. Scac.
Sir Edw. Dimock's case.
Rolls 1. 477.
h. 7.
Cro. El. 141.
More, 253.

If a bishop make a grant to the king, which is confirmed by the dean and chapter before the grant is inrolled; this is well enough.

But note, that a bishop cannot make a concurrent lease for life, though upon a precedent lease for years; nor a concurrent lease for years, where there is a lease for life in being.

Leases by deans,
prebends, colleges,
&c.

Deans, prebendaries, heads of colleges, masters of hospitals, and other ecclesiastical persons mentioned in the stat. of 13 Eliz. c. 10. may make leases for twenty-one years, or any lesser number of years, or for one, two or three lives in possession, according to the qualifications abovementioned; and they may make concurrent leases as bishops may with confirmations; but they must be within three years of the determination of the former term by expiration, surrender, or otherwise: so that in this point the bishop has the advantage.

18 Eliz. c. 10.

And though the enabling statute of 32 H. 8. gives power to make leases, to hold from the making or day of the making; yet the restrictive statute of 13 Eliz. makes them void, if they be not made to hold from the making, and not from the day of the making; quod nota: but the leases of bishops and archbishops are not within that act; but the act of primo of the queen is, That all leases should be void, other than for twenty-one years or three lives from the time of the commencement. Note the different pennings (46).

13 Eliz. c. 10.

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Concurrent
leases, and who
is to confirm
leases.

And forasmuch as all concurrent leases of a bishop, dean, prebend and archdeacon are to be confirmed, it is

(46) Vide 2 Bla. Com. 319. Mr. Christian's note, by which it appears that Lord Mansfield decided that "from the day" might either be inclusive or exclusive of the day. Pugh v. Duke of Leeds, Cowp. 714.

convenient to let the reader know who is to confirm the same; therefore for the reader's satisfaction, he is to know that the leases of bishops and archbishops are to be confirmed by the dean and chapter, or deans and chapters, if there be several chapters.

Grants made by a prebend, are to be confirmed by the bishop, dean and chapter.

The grants made by deans, are to be confirmed by the bishop and chapter.

The grants made by the archdeacon, by the bishop, dean and chapter.

The grants of parsons and vicars, with their patrons and ordinaries.

And grants by the incumbent of a donative, by the patron alone.

But if a parson make a lease, which is confirmed by the bishop only, who is patron, without the dean and chapter, which ought to have joined, it shall bind the successor during the lives of the bishop and incumbent, although the bishop be translated.

But grants by parsons, vicars, prebends, &c. before induction or installations, &c. although confirmed, are not binding to the successor.

But if the king be patron of a prebend, then the king and dean and chapter, and not the bishop, ought to confirm the grant.

A lease made by a prebendary parson, vicar, &c. may be confirmed for part of the term, if it be for years, that is, confirm the land to the lessee for so many years of the term; but if the term be confirmed for part of the term, it were absurd and repugnant, and should be good for the whole term: and as such lease may be confirmed for part of the term, so it may be for part of the land.

If a parson, &c. make a grant, which is confirmed by the patron and ordinary, and after be deprived; yet the grant is good.

3 Rolls, 481.
p. q. r.
Dy. 221. p. 18.
357. p. 42.
Plow. 528.
Dyer, 61. p. 30.
Co. 5. 81. a.
Who are to confirm leases.

[121]
Co. 5. 81. a.
Dyer, 72. a. b.
Cro. El. 472.
Dyer, 52. b.
338. b.
Vid. Lit. § 524.

1 Rolls 476.
f. 1, 2.

- 1 Rolls 479. n. 1. A husband seised in the right of his wife of an advowson, the parson makes a lease warranted by the statutes before-mentioned, and the bishop and husband confirm it; this shall not bind the right of the wife but during the husband's life, but that the successor after his death will avoid it, that comes in by the presentation of the wife.
- Ib. 480. n. 2, 3. So if tenant in tail, being patron, confirm the grant of the parson with the bishop, this shall not bind the incumbent of the issue in tail.
- Ibid. n. 4. If an usurper present, and confirm the lease of his incumbent with the bishop, and after is removed by quare impedit, &c. this shall not bind the clerk of the true patron.
- Cro. Car. 582. If the true patron grant the next avoidance, and then confirm the grant of the parson, who after dies; the incumbent presented by him that had the next avoidance shall avoid the lease, and his very entry upon the lessee avoids the lease for ever.
- 1 Rolls 480. n. 5. [122]
Co. 1 Inst. 46. a. If a parson makes a lease to a patron, which is confirmed by the bishop, this is not good; but if the patron grants it over, it amounts to a confirmation.
- 1 Roll. 481. p. 1. If a prebend, parson or vicar make a lease, and the bishop being patron, confirms it without the dean and chapter; yet this shall bind the bishop and all the prebends, parsons, &c. which he shall collate.
- Cro. El. 18. If a parson had made a lease for above twenty-one years before the statutes of 13 and 14 Eliz. which had been confirmed after; this had been good, and not within the restriction of those laws.
- 1 Leon. 233. Quære. If a parson leases where there are two patrons, both ought to confirm, as should seem.
- Cro. Car. 38. If the patron and a succeeding bishop confirm the lease of the parson, it is good enough.
- Dy. 106. p. 21. Quære. A prebend made a lease, reciting that it was with the consent of the bishop, who signed and sealed the lease to the lessee, but was no party to the deed, quære if good.

And having said thus much of confirmations, let us see what leases a parson or vicar may make at this day, considering all the above-mentioned statutes.

And first, it is to be observed, that at and by the common law a parson or vicar might have granted or charged his glebe in fee-simple, with the confirmation of the patron and bishop; but being excepted out of the enabling statute of 32 H. 8. he could never make any lease or grant to bind their successors, without such confirmation; then by the statute of 13 Eliz. parsons and vicars are restrained: so that they cannot grant but for twenty-one years, or three lives from the making of such lease, and not from the day of the making, as is before observed; and these leases and grants must be with the confirmation of the patron and ordinary, with all the qualifications expressed in the beginning of this chapter.

Leases by parsons and vicars.

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32 H. 8. c. 28.

13 Eliz. c. 10.

And it should seem, they may make concurrent leases, as deans, prebends, &c. may do within three years of the end of the former leases.

It has been a question, whether a parson or vicar at this day can make any lease at all to bind his successor?

For by the statute of 13 Eliz. cap. 20. it is enacted, That leases of parsons, vicars, &c. that have cure of souls, shall endure no longer than they shall be ordinarily resident and serve the cure; and that if such parson, &c. shall be absent from their cure above eighty days in one year, that then such lease shall cease and be void.

13 El. cap. 20.

Now when a parson dies, and eighty days incur, and this being a law for the advancement of religion and hospitality, to avoid dilapidations, it shall have an equitable construction for the preferring these ends: therefore some have held, that the death of the parson, vicar, &c. after eighty days have incurred from their deaths, shall make all their leases and grants void, though never so sufficiently confirmed; and rely very

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Parson leases, which is confirmed, and dies.

much upon the preamble of the statute, which begins, That the livings appointed for ecclesiastical ministers, may not by corrupt and indirect dealings be transferred to other uses; be it enacted, &c. But by these leases it is apparent the profits are converted to other uses, &c.

But others have held the contrary opinion, because such absence is not voluntary, but by the act of God, and regularly these cannot be said absent that are not in esse.

Cro. El. 127.

And though Croke report Mott and Hale's case adjudged in point, that their leases are void by death; yet More reporting the same case, says, As to the matter in law the judges were divided two against two, and that the judgment was given upon a misrecital of the statute.

More, 270.

Bayley v. Munnies, T. 24 Car. 2. B. R. Quære. Dy. 372. p. 11.

And this point, as I am informed, came lately in question in the King's Bench, and was adjudged, that death doth not avoid such leases. Ideo quære inde.

When parsons leases shall be void by non-residence.

There is a quære in Dyer, whether such leases shall be void upon eighty days absence ab initio, or but from the time of absence by eighty days; but it seems to me with some clearness, that it shall only be void from eighty days absence, and not ab initio.

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Dy. 177. p. 31.
Quære.

For first, the words of the statute are, That such lease shall endure no longer than the lessor shall be ordinarily resident, &c. So that till then it is to endure; and the statute closes, That upon such absence the term shall cease, which it could not do, if it had not a being before; for a thing cannot cease to be, that has not been.

Whether void against the parson himself. Co. 3. 59. b. 60. a.

But another quære may be started in this case, upon the reason in Lincoln college case, whether such lease shall be void against the present incumbent that made it, or only against his successors?

And there has been some late opinions, as I have heard,

But it seems to me with some clearness, that the intent of the makers of this act was to make such lease void against the lessor himself upon such absence: for,

as before is said, the statute says, it shall endure no longer, which is a term of limitation, and that immediately upon such absence the lease shall cease and be void; and it cannot cease immediately upon the absence, and yet be good during the life of the incumbent.

against the resolution in Lincoln college case.

But in the case of *Revel v. Hart*, H. 43 Eliz. B. R. the court held the contrary, as my reporter says. *Ideoque*.

Dy. 372. p. 11. Quære.

If any parson, vicar, &c. be suspended, inhibited, or disabled to serve the cure by the space of eighty days in a year; this shall not make such lease void, for the not serving the cure must be voluntary.

Dobbins v. Gerard, p. 39 El. B. R.

And it has been held, that if a parson be resident, and do not serve the cure, or serve the cure and be absent by eighty days, that in both these cases it will make such lease void.

Though this statute upon eighty days absence makes such lease void made by parsons and vicars, and says nothing of confirmation; yet a confirmation of the patron and ordinary in this case seems not to amend the matter; for if the lease be void, the confirmation is of no avail (47).

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At the common law, if a parson, vicar, &c. had made a lease and resigned, the next incumbent might have entered immediately upon the lessee.

St. 28 H. 8. c. 11. Parson leases, and resigns.

But by a statute made in the 28th year of H. 8. The lessee may hold on his term for six years, if the parson that made his lease so long live, and the term were made for so long time; but upon such lease there must be so much rent reserved within forty shillings as such

(47) The reasoning upon this subject will no longer avail; the statute 43 G. 3. and subsequently the 57 Geo. 3. c. 99. having, as before observed, repealed all those statutes which vacate leases by reason of non-residence.

benefice is valued at in the king's book. See the statute at large.

And by the same statute, If a parson make a lease and resign and dies, the tenant shall hold out his lease for the year that was commenced at the time of his death, if the term were to have had so long continuance, if the parson had not died.

But this seems only of such lands as are ploughed; for the succeeding parson is to have the parsonage-house and glebe, which is not sowed within a month after he is inducted, allowing a reasonable deduction for the rent reserved upon such lease.

[127] But in both cases the lessee must pay the reserved rent to the succeeding incumbent, who is enabled to sue or distrain for the same.

And such lease must be in writing under hand and seal, and not by parol.

13 Eliz. c. 20. But it should seem the statute of 13 Eliz. before has made this law of none effect.

And having now done with these statutes as to leases, let us next consider what bonds, covenants, promises, &c. are void within the statute of 18 Eliz. before-mentioned.

18 Eliz. c. 11.

Hob. 269.
Covenants,
bonds, which
good.

Covenants, bonds, &c. made for the enjoying houses within cities, corporations, &c. are not void within this law; for this law makes no bonds, covenants, &c. void, which are not against the intent of this statute and the statute of 13 Eliz. cap. 10. but leases of houses and lands in cities, &c. by the statute of 14 Eliz. cap. 11. are exempted out of 13 Eliz. cap. 10. and are not within the statute of 18 Eliz. before.

More, 641.

A parson made a bond to resign upon request, and afterwards a lease to his patron of part of the glebe for twenty-one years: in an action brought upon this bond, the incumbent pleaded the statute of 18 Eliz. and averred, that this bond was made to secure this

lease, and to compel the incumbent to reside, and adjudged a good plea, and an apt averment (48).

A parson made a lease, and in the lease covenanted, not to be absent by the space of eighty days in any one year, and gave bond for the performance, and after became non-resident for eighty days; and resolved, that the bonds and covenants were both void.

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Cro. El. 489.
Noy, 66.

A parson made a lease, and covenanted neither to do, or suffer to be done, any matter whereby the lease should become void, and after became non-resident by the space of eighty days in a year; and this was held a good covenant; and a covenant, that the parson should be resident, was held not to be against this law, by Popham, Tanfield and Clench, against Williams. Ideo quære.

Oliver's case,
M. 4. Jac. B. R.

Quære.

And having now done with leases to be made by ecclesiastics of every kind, and having therein exceeded my bounds beyond parsons and vicars to all other ecclesiastics, since the leases of colleges and hospitals come in my way, I will give the reader what satisfaction I can concerning them: and as to them,

Leases of colleges, hospitals, &c.

It is to be observed, that they are not comprehended in the enabling statute of 32 H. 8. nor in any other statute that I find, till the restrictive statute of 13 Eliz. whereby (amongst the rest) the masters and fellows of colleges, and the masters and guardians of hospitals, are disabled to make any grants or conveyances of any of their possessions, other than for twenty-one years, or three lives, from the making of such lease, and not from the day of the date, or from the date, as has been said: and this must be of lands usually demised, and the accustomed rent, or more, must be reserved with all

13 Eliz. c. 10.

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(48) General bonds of resignation, as in this case, are now decided to be illegal. *Bishop of London v. Ffytche*, 1 Bro. Cha. Ca. 96.

the other qualifications mentioned in the beginning of this chapter.

Stat. 18 Eliz.
cap. 6.

But there is a restriction upon colleges by the statute of 18 Eliz. that upon all college leases, a third part of the ancient rent shall be reserved in wheat and malt, after the rate of 6s. and 8d. a quarter of wheat, and 5s. a quarter of malt, to be delivered at the colleges; and in default of the delivery to pay for the wheat and barley, after the rate the best wheat and malt shall be sold the next market-day before the rent should have been paid, and for default of such reservation the lease to be void; and the markets that are to set the prices are, Oxford for Oxford, Cambridge for Cambridge, Windsor for Eaton, Winchester for Winchester.

18 Eliz. c. 11.

And by the statute of 18 Eliz. they are restrained to make any concurrent leases till within three years of the end of the former terms that are in being (49).

(49) "The memory of Sir Thomas Smith (says Dr. Kennet) is highly to be honoured for promoting this act, which provideth that a third part of the rent be reserved in corn, payable either in kind or money, after the rate of the best prices in the market. For if a certain rate thereof had been fixed in money instead of corn, it would have been highly prejudicial to the colleges, the value of money abating as the value of land and of the produce thereof advanceth. This worthy knight is said to have been engaged in this service by the advice of Mr. Henry Robinson, soon after provost of Queen's college in Oxford, and from that station advanced to the see of Carlisle." Ken. Par. Antiq. 605.

The statute 39 and 40 Geo. 3. c. 41. recites, that whereas doubts have arisen whether archbishops, bishops, masters and fellows of colleges, deans and chapters of cathedral and collegiate churches, masters and guardians of hospitals, and others having any spiritual or ecclesiastical living or promotion, who are by several acts passed in the reigns of their late majesties King Henry the Eighth and Queen Elizabeth, restrained from granting any leases of their estates whereon the accustomed yearly rent is not reserved, can lawfully

grant separate leases of parts of lands or tenements which have usually been demised by one lease and under one rent, reserving on the several parts so demised less than the rent anciently reserved on the demise of the whole, though the aggregate amount of the rents so reserved on such separate demises should be equal to or exceed the amount of the annual accustomed rent for the whole: and whereas many such separate leases have been granted, and great inconvenience may arise to persons claiming under such leases, if such leases should not be deemed valid and effectual, in case the amount of the rent anciently reserved on demises of the whole shall appear to have been reserved on the separate demises of the different parts; and the power of dividing tenements anciently so demised in one parcel at one rent, may in many cases tend to improve the value of the estates belonging to such ecclesiastical persons and bodies respectively, as well as to the benefit of their lessees and the public: it is therefore enacted, that 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 persons, or body or bodies politic or corporate, having any spiritual or ecclesiastical living or promotion, and having been anciently or accustomedly 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 accustomedly reserved for the whole by such former lease, and the residue thereof is or shall be retained in the possession or occupation of the lessor or lessors, the several and the 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, s. 1.

But 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, s. 3.

Provided that 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, s. 4.

Provided also, that where any specific thing incapable of division or appointment 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, s. 5.

But nothing herein contained shall extend to authorise 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 authorise 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. s. 6, 7.

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 and successors, all or any such leases as shall hereafter be granted of the same lands or tenements in

I shall now shew the reader what things are demisable within these several statutes, and what reservations are good, and in what case the acceptance of rent by the successor will make a lease good, that was voidable within these laws, and the several qualifications mentioned in the beginning of this chapter.

What leases shall be good.

One Small being possessed of the manor of Paddington, by a lease from a bishop for a term of years, the bishop made a lease to another for three lives, and before livery the tenant surrendered his former term; and it was held that the surrender was made in due time, and the second lease good.

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Small's case.
M. 4 Jac. B. R.
Former in being.

A prebend had usually been leased (excepting the crabtrees,) and that the prebendary make a new lease without excepting the crabtrees, reserving the ancient rent, with other due circumstances; and this lease was held void against the successor, by reason of the adding of the crabtrees.

Cro. Jac. 458.
3 Bulster. 290.
More in the new leases, than in the old.

It hath been adjudged, that a bishop, dean, &c. cannot grant the next avoidance of an advowson, nor any rent-charge out of the possessions of the church; but the same is void within the restrictive acts before-mentioned, though these cannot be said any of the possessions of their church.

Co. 5. 15. a.
Next avoidance not demisable.
Co. 10. 60. b.

And it hath been held, that where a bishop demised a rectory for lives, and covenanted to discharge same harmless, and indemnify the lessee, &c. from all pensions, procurations, subsidies, and from all other payments of any sum of money, demands and duties whatsoever,

Davenant v.
Evesq. Sarum.
M. 24 Car. 2.
B. R.
2 Levins, 68.

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 accustomedly 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, s. 8.

ordinary or extraordinary, which shall be due and issuing out of the premises ; that this covenant would not bind the successor, unless it had been in the ancient leases.

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2 Levins, 68.
3 Keeble, 69.

And the Lord Chief Justice Hale was of opinion, that such covenant, though it had been in former leases, should not bind the successor for the royal aid, or any new charge by act of parliament.

Co. 10. 61. b.

But a bishop may grant an ancient office with the ancient fee (if it be a necessary office, for the life of the officer :) but the bishops cannot grant such office to two, or in reversion.

T. 30 Eliz.
Bolton's case,
10 Co. 60.

And a bishop cannot grant an annuity, *pro consilio impenso et impendendo*, to bind his successor, though it be confirmed by the dean and chapter.

Co. ib. b.

And it hath been resolved, that a bishop of late erection may grant an office of necessity to one in possession for life, with a reasonable fee.

But these grants must be all confirmed by the dean and chapter, because they are not good within the statute of 32 H. 8.

Co. 10. 62. a.
Cro. Car. 555.

But where offices have anciently been granted in reversion, they may still be granted in reversion with confirmation.

Evesq. Chich.
v. Freedland,
Ley's Rep. 72.

If a bishop grant an ancient office with the ancient fee and more, and the grant be entire, (as where the ancient fee was five marks, and the new five pounds,) it is void for all. But if it be several, (as five marks, and pasture for two horses,) it is good for the ancient fee, and void for the other, per Hutton and Yelverton v. Crook and Harvey.

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Collyns and
Jones's case,
Ley, 80.

If a copyhold escheator be forfeited, the bishop may grant it in fee by copy of court-roll, notwithstanding the statute of 1 Eliz.

Co. 5. 15. a.
Charges void.

It was also resolved, that where an archdeacon made a lease for three lives, warranted by the statutes before-mentioned, and the lessee granted a rent-charge for an

hundred years, which was confirmed by the bishop, dean and chapter; that notwithstanding the same was void against the successor within the statute of 13 Eliz. cap. 10.

If a writ of annuity should be brought against a parson, &c. pretending the same due by prescription; and although the parson pray in aid of the patron and ordinary, and upon a plea pleaded by them, the plaintiff obtains verdict and judgment, and all this by practice and fraud to charge the glebe, it is void against the successor: for these statutes being made for the benefit of the church, advance of religion and hospitality, and to avoid dilapidations, shall always have a favourable construction. Co. 5. 14. b.
19 Ass. p. 9.

It is regularly true, that where the wife, issue in tail, or successor, accepts the rent after the death of the husband, tenant in tail, or a predecessor, upon a void lease made by the husband, tenant in tail, or predecessor, that such acceptance will not affirm the lease. Acceptance of rent, where it shall bind.

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 prebend, &c. make a lease not warrantable by the statutes for twenty-one years, rendering rent, and dies; here no acceptance of rent by the successor, &c. will affirm this lease, because the same was void without entry or other ceremony. [133]
Hetley, 88.
Co. 3. 65. a.
35 H. 6. 3 & 4.
11 E. 3. Fitz.
Abbot, 9.
8 H. 5. 19.

But if a parson, vicar or prebend, make a lease not warrantable within the before-mentioned statutes for life or lives, reserving rent, and die, 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.

But if a bishop, abbot or prior, which have the inheritance in fee-simple in them, make a lease for lives, or years not warranted by the statutes before-mentioned, not being absolutely void by their deaths; but only voidable by the entry of the successor, if the successor Dy. 239. p. 42.
F. N. B. 50. c.

accept the rent before entry, be it for lives or years, he affirms the lease for his life.

1 *Rolls*, 476. d. If a bishop make a lease not warranted by the statutes, rendering rent, and die, and his successor appoints his bailiff to collect his rents of that manor, who amongst the rest receives the rent reserved upon this demise, and accounts to the bishop's successor for it; this is a good acceptance, and shall bind the bishop for his time.

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11 E. 3. F. Ab-
bot, 9.
Dy. 239. p. 42.
2 H. 4. 2. a.

So if a parson lease for life not warranted nor confirmed, reserving rent, if his successor receive fealty of his tenant upon this lease, he has thereby affirmed the lease for his time: the like it will be, if the successor bring an action of waste.

Cro. Jac. 273. But if a bishop make a lease of tithes or other things not manurable, for life or lives, rendering rent, and dies, and his successor accepts this rent, it will not affirm the lease.

But whether such acceptance upon a lease for years of tithes, &c. will bind the successor; I must leave it a quære, not finding that point any where resolved.

Quære.

I having now held the reader long upon this subject, I shall now leave them, and proceed to examine, what leases or farms they may with safety take, or not take.

St. 21 H. 8. c. 13.
Parsons, &c.
must not take
farms.

By a statute made in the twenty-first year of King Henry the Eighth, it is amongst other things enacted, That no spiritual person shall in his own name, or in the name of any other, take to farm any manors, lands, tenements or hereditaments, upon the penalty of ten pounds for every month that he holds the same; nor by himself nor any other, shall buy cattle, corn, lead, tin, hides, leather, tallow, fish, wool, wood, or any manner of victuals or merchandizes, to sell again for gain, upon pain to forfeit the treble value of things so bought.

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Where he may.

But a spiritual person may buy such things for his own use, and if they do not fit him, he may sell the same again; and so where he hath not sufficient glebe, he may take grounds for the maintenance of his family.

And it is further enacted by the same statute, That no spiritual person beneficed with cure of souls, shall farm the parsonage or vicarage of another to take any rent or profit out of such farm, upon the penalty of forty shillings a week, and ten times the value of the rent, or profit he shall take out of his farm.

Shall not farm another's parsonages, &c.

And it is further enacted by the same statute, That no spiritual person shall have or keep by himself, or any other, any tan-house or brew-house, other than for his own family, upon pain to forfeit ten pounds per mensem.

Must not keep a tan-house or brew-house.

All which penalties are given to the king and informer, to be recovered in any of his majesty's courts of record at Westminster, by action of debt, bill, plaint, or information, wherein no essoin, protection, or wager of law is to be admitted, &c. (50).

Penalties, how to be recovered.

M. 4 Car. 1 Scaccario, it was adjudged, that a spiritual person, not beneficed, was not within this statute.

Cragge v. Lampley, M. 4 Car.

(50) By stat. 57 G. 3. c. 99. (given at length in Part 1. Chap. 7. in notis). So much of the acts of 21 Henry 8. c. 1. and 28 H. 8. c. 13. of the acts of Queen Elizabeth, 13 El. c. 20. 14 El. c. 11. 18 Eliz. c. 11. 43 El. c. 9. and of the act 3 Car. 1. c. 4. as relates to spiritual persons holding farms, and to leases of benefices and livings, and to buying and selling, and to residence of spiritual persons on their benefices, as well as some other acts therein mentioned, are repealed; and by that statute it is enacted, that no spiritual person holding any preferment shall take to farm lands exceeding in amount eighty acres without the consent of the bishop of the diocese, under the penalty of forty shillings per annum for each acre. s. 2.

Nor shall any spiritual person holding any preferment carry on any trade or dealing, on pain of forfeiting the value of the goods bought to sell again, the one half to go to the crown, the other to him who shall sue for the same, s. 3. But he may buy and sell things proper for the occupation of his glebe or other land which may be lawfully held by him. s. 4.

5 Eliz. cap. 5.
Where he may
license the eat-
ing of flesh.

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Penalty, if
needless.

Sheep.
Stat. 25 H. 8.
cap. 13.

Incontinence.

[137]
De Clericis,
cap. 18, 19.

By the statute of 5 Eliz. there is "authority given to the bishop of the diocess, parson, vicar, or curate of the parish, to license any sick person to eat flesh during his sickness; and if his sickness continue above eight days after the granting of such license, then the same is to be registered in the church book, &c. and that license to endure during the sickness, and no longer.

"And if any parson, vicar, or curate, grant any license to any person or persons, other than such as evidently appears to have need thereof by reason of sickness, the parson, vicar, or curate, that granted such license, shall forfeit five marks for every such license, and the license to be void."

In the 25th year of Henry the Eighth there was a statute made against the excessive number of sheep; wherein there is a proviso, "that it might be lawful to all spiritual persons, and every of them, to keep such, and so many sheep upon their own lands, and after such form and manner, and not otherwise, as they might have done before the making of the said act."

There are several acts of parliament for punishing incontinent priests, which though since the blessed reformation (I do not mean the last pretended reformation, but that in the time of Edward the Sixth and Queen Elizabeth) are become obsolete and useless. Yet since I have promised them all the statutes they may fall in the danger of, these are not to be omitted.

But before I come to those particular laws, I will beg the reader's pardon for giving him a short historical account of the restriction of the marriages of priests, which gave the occasion of these laws.

Bellarmin in his disputations endeavours to make the single life of priests to be *jure divino*; but if not so, yet he goes about to prove that it has been enjoined by canons as high as the apostles' time: and to that purpose vouches the canons of the apostles (which though they may be ancient, yet no rational man that peruses them will believe they were made by the apostles, or

very near their time) in which I must confess I find a canon that by implication forbids priests to marry, but not married men to be priests; and 'tis to this effect: *Ex his qui cœlibes in clerum pervenerunt, jubemus, ut lectores tantum et cantores (si velint) nuptias contrahant.* Canon 25.

But if he had looked a little back in those canons, he would have found another manner of prohibition in these words: *Episcopus aut presbyter, aut diaconus, uxorem suam prætextu religionis non abjicit: si abjicit, segregator à communione, si perseverat, deponitur.* Canon 5. Canons against the marriage of priests.

But however it cannot be denied, but there were ancient canons against the marriage of priests; but those only forbid priests to marry, but did not restrain married men from being priests: and so it continued for many hundred years after Christ's time, and for some time they might have married* with the license of the bishop; but never received or put in practice in England, though practised in Italy, France, &c. But the priests here married, till Anselme, archbishop of Canterbury, a Burgundian, a powerful and busy prelate, in a synod or national council held at Westminster, made a severe canon against it; but he meeting with an obstinate clergy, that were unwilling to change their wives for concubines (to speak in the softest word) were not obedient: whereupon (as my author tells me) he called a second council in the ninth year of that king, where he made more severe canons against the married clergy in the presence of the king and nobility, to give them greater authority; which he prosecuted with great zeal, but did not live to effect what he desired. * Concil. An-cyran. Can.

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Hollingshead,
30. b. 10.

Ibid. 34. b. 10.

I do not find that his successor, Rodolphus, troubled himself much in this concern of the eight years that he governed the church of Canterbury; but his successor, William Corbet, followed the steps of Anselme, who for this, and his other good works, was canonized a saint at Rome: and in the year 1126, called a convo-

cation at Westminster against the married priests, wherein one John de Crema, or Cremensis, the Pope's legate, sent to manage this business, being a learned man, made an eloquent oration in commendation of chastity and a single life, and inveighed violently against the married clergy; and as divers authors of good credit affirm, the great orator was the same night taken in bed with a woman, which made him to return with shame enough. Howsoever, as bishop Godwyn tells us, that in that convocation the canons were renewed against the married clergy; but the archbishop finding himself too weak to deal with so stubborn a clergy, commended the case of this business to the king, who taking advantage of the canons, squeezed some money out of the married clergy by way of commutation.

Hovedon in
H. I. 274.
Speed, 461. a.
&c.

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Bp. Godwin's
Catal. of Bish.
83. Mat. Paris.
LXX. agrees
with Hoveden,
and says,
" Quod ipse
cum die illa Corpus Christi consecrasset post vesperam fuit in meretricio interceptus:
Res ipsa notissima negari non potest, dum magnum decus id summum dedecus commutavit.

Goodwin, 84.
Fuller's Eccl.
Hist. 27.

Lindw. si qui
clerici.

I find no more of this matter, till after the death both of this archbishop and Henry I. But I find there was a convocation held at London, December 13, 1138, by the command of Albert, cardinal, bishop of Hostia, where this matter was again violently prosecuted; and I find no more after of it, till in a convocation or council held under Richard Wethershead, archbishop of Canterbury, 1229, in which it is decreed, " qui autem in subdiaconatu vel supra ad matrimonium convolaverint, mulieres renitentes et invitas relinquunt."

But it should seem, notwithstanding all this persecution, that for some years after some married men held their livings: for in a synod or council held by Otho, the Pope's legate, at St. Paul's, in London, in the year 1237, there is a canon to this effect: " Innotuit nobis, pluribus referentibus fide dignis, quod multi propriæ salutis immemores, matrimoniis contractis, clandestine, retinere cum uxoribus ecclesias, et ecclesiastica beneficia adipisci de novo, et promoveri ad

Cap. De uxora-
tis à beneficiis
amovendis.

sacros ordines contra statuta sacrorum canonum, non formidant," &c.

And then proceeds: "quod si repertum fuerit aliquos taliter contraxisse, ab ecclesiis et ecclesiasticis beneficiis (quibus tam eos quam quoslibet alios uxoratos fore discernimus ipso jure privatos) removeantur omnino," &c.

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This nail being thus at length driven to the head, the secular clergy lay about three hundred years under this bondage, and though, if they would be at the cost, they might have dispensations to keep concubines; yet, for the credit of his holiness, there was a great care taken they should not do it publicly or scandalously. To which purpose there is a canon in the same council I last mentioned, to this effect: "statuimus et statuendo præcipimus, et ubi clerici, et maxime in sacris ordinibus constituti, qui in domibus suis et alienis detinent publice concubinas, eas illas vel alias de cætero nullatenus denturi," &c.

Cap. de concubinis clericorum removendis.
* Nota.
Canons against concubines.

There was another canon much like this, made in another council held under Stephen Langton, archbishop of Canterbury, at Oxford, not long before, in the year 1222, to this effect: "quod clerici beneficiati aut in sacris ordinibus constituti in hospitibus suis publice tenere concubinas non audeant, nec etiam alibi cum scandalo accessum publicum non habeant ad eas."

Cap. clericalis.
* Nota.

So that it appears clearly by these canons, that clerks were not in those days positively and absolutely forbidden to keep concubines: but it must not be done, publice nec cum scandalo, nor must they have publicum accessum.

And it appears by the centum gravamina that were presented to the Pope about the year 1521, by the German princes, that it was one of the grievances of that nation, that the Pope permitted clerks, religious, and secular persons to live publicly with their harlots and get children; and that in most places the bishops and their officials not only tolerated concubinage upon

[141]
Dispensations for concubinage, hist. H. by my Lord Cherbury, p. 131.
Art. 74.
Art. 91.

paying money in the more dissolute sort of monks; but also exacted it of the most continent, saying, "it was then at their choice, whether they would have them or no."

Calvin's Inst.
1. 4. c. 12. § 23.

So upon the whole matter, it seems, it was no offence in a clergyman, that had a dispensation to keep a concubine privately in a nook without scandal, and go to her in the dark; but to keep a wife of his own was a sin against the Holy Ghost, he must be deprived, he must be deposed.

Dyer, 133. p. 1.
2 H. 4. 26. a.
Cap. de uxora-
tis à beneficiis
amovendis, ubi
supra.

And therefore he cannot blame the German and French laity, that they were so solicitous in the council of Trent to have their priests married, being loath (as should seem) to trust their wives and daughters at confession with priests that had not wives of their own.

And it was no less a religious than prudent expression of Pope Pius II. 'that though there were many weighty reasons why priests should be restrained from marriage, yet the reasons for restoring them their wives were the more weighty.'

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I would not have the reader to think, that I speak this to reproach the church of Rome with this matter, as any of the allowed doctrines of that church; for I know there are many very severe canons against the incontinence of priests; and not so only, but that forbids them to keep any women in their houses, but mothers, sisters, and other near relations, to avoid scandal and temptations. But I write this, to shew the corruption of the court of Rome; for whilst the Pope has the power to dispense with the canons of the church, money will make the best ineffectual there.

1 H. 7. cap. 4.
Statute, that
the bishops
should imprison
priests for in-
continence.

Having given the reader this historical account concerning the restraint of the marriage of priests, and the success of it, I will in the next place shew what acts of parliament have been made relating to this matter, and which are in force at this day.

In the first year of H. 7. there was an act made, "That it shall be lawful to all archbishops and bishops, and other ordinaries, having episcopal jurisdiction, to punish and chastise such priests and clerks, and religious men, being within the bounds of their jurisdiction, that should be convicted before them, by examination and other lawful proofs requisite by the law of the church, of avowtry, fornication, and incest, or any other fleshly 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. And that none of the said archbishops, &c. be thereof chargeable, of, to, or upon any action, or false or wrongful imprisonments, but that they be utterly thereof discharged in any of the cases aforesaid, by virtue of this act."

Vid. Bro. Abr.
Tit. Cust. 10.
Lond. Tr. 74.
as to the custom
of London.

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It seems a canon
would not justify
an imprisonment.

This law, for ought I know, stands still in force: but there was a severe law made in the 31st of H. 8. whereby it was made "felony for a priest carnally to use a woman, to whom he had been married or contracted; or if he kept company or familiarity with her, or if any priest kept a concubine, as by paying for her board, maintaining her with money, or other gifts or means, to the evil example of others, he should forfeit all his goods, chattels, and spiritual promotions, and be put in prison for the first offence, and the second offence to be felony."

31 H. 8. c. 14.
Made felony to
use their own
wives.

But this seeming too severe, was the next year repealed; and it was enacted, "that such offender should for the first offence lose all his goods, chattels, and debts, and lose the profits of all his ecclesiastical promotions, but only for his life: for the second offence to forfeit his goods, chattels, and debts, and the profits of all his lands, and of his spiritual benefices, promotions and dignities, for his life: and for the third offence

32 H. 8. c. 14.
mitigated.

should make the like forfeiture, and be imprisoned during life."

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31 H. 8. c. 14.
The six articles
make the marriage
of priests
heresy.

By an act of parliament made in the 13th of H. 8. which is commonly called the act of the six bloody articles, by the third article it was decreed, "that priests, after they have received orders, might not marry, and to affirm the contrary thereof, was made heresy and treason by that act." But this bloody act was repealed by 1 E. 6. cap. 12.

All laws against
marriage of
priests made
null and void.

By the statute of 2 and 3 Ed. 6. cap. 21. "All laws, statutes, canons, ordinances, and constitutions made against the marriage of priests, are made null and void."

Children legiti-
mate.

And by another statute made 5 and 6 E. 6. cap. 12. it is adjudged and declared, "that the marriage of priests is lawful, and legitimates their children, and makes them capable to endow their wives, and to be tenants by the curtesy." But these laws were repealed by the statute of 1 Mar. cap. 1.

1 Jac. cap. 25.

However it came to pass I know not, but for ought I can find these acts lay repealed all Queen Elizabeth's time, till 1 Jac. then the latter act was made perpetual, and their children made legitimate.

See 2 Inst. 686.

See 2 Inst. 683.

So that upon the whole matter, all acts of parliament, canons, constitutions, &c. that restrain the marriage of priests, or that illegitimate their children, are made null and void; but the canons and acts of parliament that punish their incontinency stand in force.

Next let us see what privilege the clergy have right to at this day (51).

(51) Vide in Part I. chap. ix. note 41. some modern cases of clergymen suspended for incontinence and immoral conduct.

CHAPTER XI.

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What Privileges belong to the Clergy at this day, by the Common and Statute Laws of this Realm, and likewise by the Laws Ecclesiastical.

THE laws of this realm have allowed the clergy in holy orders many great privileges :

First, in their persons, they are not compellable to serve in any temporal office, as sheriff, constable, overseer of the poor, &c. “ Neither can they be prest to serve in the wars; neither may they be arrested in the church or church-yard, when they are attendant on divine service, upon pain of imprisonment, and ransom at the king’s pleasure, and likewise to make agreement with the party.”

The privilege of the clergy.
2 Inst. 3. 625.
4. 1 Lev. 303.
May not be officers temporal.
5 E. 3. c. 5.
1 R. 2. c. 15.
Co. 2 Inst. 3.
Must not be arrested in church or churchyard.
Grot. de Jure Belli, l. 1. c. 2.
§ 10. 9.
Co. 2 Inst. 58.

And by a statute made 1 Mariæ, it is enacted,

“ That if any person, &c. of their own power and authority at any time, &c. shall or do willingly or of purpose, by open and overt word, fact, act, or deed, maliciously or contemptuously molest, let, disturb, vex, or trouble, or by any other unlawful way or means, disquiet or misuse any preacher or preachers, &c. licensed, allowed or authorised to preach by the queen, or by any archbishop or bishop of this realm, or by any other lawful ordinary, or by either of the two universities, &c. or otherwise lawfully authorised or charged by reason of his or their cure, benefice, or other spiritual promotion or charge, in any of his or their sermon or collation in any church, chapel, or church-yard, or in any other place appointed to be preached in.

1 M. Sess. 2. c. 3.
Must not be disturbed praying or preaching.

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“ Or if any person, &c. shall maliciously, willingly, or of purpose, molest, let, disturb, vex, disquiet, or

otherwise trouble, any parson, vicar, parish-priest, or curate, &c. saying, doing, singing, ministering or celebrating mass, or other divine service, sacraments, &c. that at any time then after shall be allowed, set forth, or authorised by the queen's majesty.

“That the offender, upon conviction before two justices of the peace, shall by them be committed to the gaol without bail or mainprize for three months, and after to the next quarter sessions; where, if he repent and be reconciled, then to be discharged of his imprisonment, finding sureties for his good behaviour; and if he fail therein, to be continued till the next quarter sessions.”

This act, though made in the time of popery, is still in force, and may be executed upon such as disturb the present ministers, parsons, vicars, and curates, &c.

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And though it refer to such church-service as then after should be settled by the queen, yet I conceive it extends to her successors; and a settlement by act of parliament, is a settlement by the king in the most superlative manner.

And the late act for uniformity declares and enacts, “that all former acts for uniformity of common-prayer shall be of force, and extend to the Book of Common Prayer.”

Must not be arrested.

The bodies of clergymen cannot be arrested upon any *capias* sued forth upon any statute-staple or statute-merchant; for the processes are made out conditionally, *si laicus fuerit*: and if the sheriff or any other officer arrest a clergyman upon any such conditional process, I conceive an action of false imprisonment lies against him that does it, or he may have a special *supersedeas* out of the chancery, (that is, the *cursor's* office.)

2 Inst. 4.
Co. 2 Inst. 3.
Regist. 260. a.

Privilege in their goods.
Co. 2 Inst. 3.
Regist. 260. a.
Free from tolls.

And every parson, vicar, &c. is by the common laws of England free from the payment of tolls in all fairs and markets, not only for all the goods and merchan-

dizes gotten upon their church livings; but also for all goods and merchandizes by them bought to be spent upon their rectories and church livings.

Vid. Diversity. Davis of impositions, 13.

And they are quit of pontage, murage, and other like charges; and if they be distrained for any of these, they may have a writ out of the chancery, as aforesaid, made of course without petition or motion, under the great seal of England, directed to the party that distrains or disturbs them for any of these things, commanding them to desist: and if such writ be not obeyed, the cursitor of course will make out an alias and pluries; and if none of those will be obeyed, an attachment to arrest the party, and detain him till he obey: and this writ is called, a writ de essendi quietum de toloneo, which you may see in the register, or in the *natura brevium*.

Pontage, murage, Co. 2 Inst. 4. See the ancient law, Selden in Drayton's Polyolbion, 188. [148] Vide, Ezra. c. 7. v. 24. ad idem.

Regist. 260. a. F. N. B. 227.

But clergymen are liable to all public charges imposed by act of parliament, and in particular for reparation of highways. 1 Ventris, 273. (52).

They are not bound to appear or do suit at the sheriff's turn, or any leet or law day; and if they shall be distrained so to do, they may have a writ of course in the chancery directed to the lord of the leet, commanding him to forbear distraining them for any such cause, with like process as in the last for his contempt.

Not bound to appear at leets and sheriff's turn. Regist. Orig. 175. a. F. N. B. 160. c.

And by the statute of *circumspecte agatis*, it is enacted, "de violenta etiam manuum injectione in clericum, et in causa defamationis placitum tenebitur in curia christianitatis, dummodo ad correctionem peccati agatur; et non petatur pecunia."

Stat. 13 E. 1. 2 Inst. 491, 492, 493.

(52) And clergymen are now held liable to all charges by act of parliament, unless they are specially exempted. 3 Burn's Eccl. Law. 204.

There is no special exemption in the yearly mutiny acts for clergymen, in respect of soldiers' carriages.

Co. Inst. 96. a.
 Regist. Orig.
 187. b.
 F. N. B. 175. b.
 Not to be bailiffs, reeves, &c.

And if a clergyman have lands by the tenure of which he is subject to be bailiff, reeve, or beadle, and be chosen into any such office by reason thereof, he has a cursory writ out of the chancery to discharge himself.

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A writ of privilege was granted to excuse the archdeacon of Rochester from being an expeditor in the level in Romney Marsh, in Kent. 1 Mod. Rep. 282. 1 Vent. 105. 1 Lev. 303.

Regist. Orig.
 189. a.
 F. N. B. 176. a.
 Must not be disturbed by collector of tenths.
 Harwood v. Palyn. 24 Car. 1. B. R. per B.

So if the sheriff or collector of the tenths or fifteenths will disturb them in the lands belonging to their churches, &c. they may have the like writ for their discharge, and like process for disobeying it, ut supra.

But it hath been held, that tythes may be extended upon an elegit for the debt of the parson, quod mirum: but the elegit being given by a statute in which tythes are not excepted, it will draw in tythes.

2 Inst. 633,
 634, 635.
 The privilege of clergy in criminal cases.

Anciently if a clergyman had been convicted of any murder, robbery, burglary, &c. he was upon the demand of his ordinary to be delivered over to him, where he was to make his purgation according to the rules of the ecclesiastical laws; and if he cleared himself, he was acquit * without any regard to his conviction at common law; but if they adjudged him guilty, then he was to be degraded and kept in prison: and this was confirmed to them by several acts of parliament.

* Lindwood, cap. clerici pro suis criminibus detent. gloss. verb. pro convictis.
 West. 1. cap. 2.
 Marlbr. c. 27.
 25 E. 3. cap. 4. and 5.
 4 H. 4. c. 3.
 4 H. 7. c. 13.

But this privilege was never allowed to them in this kingdom in treason, petit treason, or sacrilege.

And a delinquent might have had his clergy ad infinitum, till the statute of 4 H. 7.

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And though this privilege of the clergy be taken totally away in many cases by several statutes, and in other cases laymen have it in common with the clergy, if they can read as a clergyman; and though the delivery of them over to the ordinary be totally abolished; yet the clergy that are in holy orders at this day retain some of their ancient privileges, which the laymen are not capable of.

For if a clerk in holy orders be convicted (that is, found guilty by the petit jury) of a crime for which the benefit of the clergy is allowable, at this day he shall not upon the allowance thereof be burned in the hand (as a layman shall) upon the producing of his orders; and if he have not them with him, the court may, *ex gratia*, give him time to produce them till any other assize or sessions.

Co. 5. 50.
Bro. Cor. 211.
2 Inst. 637.
Hob. 294.

And a clerk in holy orders at this day shall have his clergy *ad infinitum*, from time to time, which no layman can have above once (53).

Co. 2 Inst. 637.
St. 4 H. 7. 13.
28 H. 8, cap. 1.
1 E. 6. cap. 12.

The goods of clergymen were by several statutes exempted and freed from the king's purveyance; but his majesty having by act of parliament graciously released this duty, the laity hath the same privilege.

See Co. Inst. 3.
St. 3 E. 1. c. 1.
14 E. 3. c. 1.
13 E. 3. c. 4.
1 R. 2. c. 3.
Purveyance.

A clergyman shall not be amerced the higher in respect of his church living or benefice. *Mag. Chart.* c. 14. *Co.* 2 Inst. 29.

2 Inst. 267.
Not amerced for the church land.
Regist. Orig. 289.
F. N. B. 29.
No execution upon the goods of the churches.

Nor shall any execution be executed upon the goods of his church, nor any distress taken in the ancient fee thereof; but otherwise it is of lands of late purchase: and if he fear any such thing, he may have a protection in chancery *cum clausula*, (*quia nolumus*.)

If an action of trespass, debt, account, or other action, wherein process of *capias* lies, be brought against a clerk in holy orders, and the sheriff upon the original return, that the defendant is clericus beneficiatus *nulum habens laicum feodum ubi summoneri potest*; in this case the plaintiff cannot have a *capias* to arrest his body, but a writ to the bishop to compel him to appear (54).

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2 Inst. 4.
No *capias* against a clerk.
9 E. 3. 30.
24 E. 3. 44.

(53) Vide 1 Bla. Com. 377. note 2.

(54) If a person be bound in a recognizance in Chancery, or another court, 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*

50 E. 3. c. 5.

And by a statute made in the fiftieth year of Edward the Third, it is recited, "that as well divers priests bearing the sweet body of our Lord Jesus Christ to sick people, and their clerks with them, as otherwise divers other persons of holy church, whilst they attend to divine services in churches, churchyards, and other places dedicated to God, be sundry times taken and arrested by authority royal, and commandment of other temporal lords, in offence of God and holy church, and also in disturbance of such divine services: the king wills, and grants, and defends upon grievous forfeiture, that none do the same from henceforth; so as collusion or feigned cause be not found in any of the said persons of holy church in this behalf."

1 R. 2. cap. 15.

In the first year of R. 2. there was another statute made to the like effect, with this added, "that the party convicted should be imprisoned, ransomed, and made agree with the party so arrested."

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Co. 12 Rep. 99.

So that if any parson, vicar, or priest be arrested in going, staying, or returning to do divine service, according to his duty, he may have an action upon this statute, and recover damages, and have the party fined and imprisoned that made the arrest, and the clerk that is assistant may have the benefit of these laws.

Cro. Jac. 321.

Privilege of the
clergy confirmed
by several par-
liaments.

And note, that all the privileges of the church of England are confirmed by the statute of Magna Charta: and so they were for the most part at the opening of

to the sheriff to levy the same of these goods, but the writ ought to be directed to the bishop of the diocese to levy the same on his ecclesiastical goods. 2 Inst. 4. And an attachment will go against the chancellor for not returning it. 1 Wils. 332. It has been likewise decided, that the assignees under an insolvent act are not entitled to demand and receive the profits of an ecclesiastical benefice, which have accrued subsequent to the assignment, nor can they maintain an action for the same, though included in the schedule of the insolvent. 3 Bos. and Pull. 321.

every other parliament after, till the beginning of the reign of Henry the Fifth. How it came then to be discontinued by the negligence of the clergy, or for what other cause, I know not.

And so having thus briefly mentioned many of the privileges of the clergy, whereof the common law takes notice, and to which they have right at this day, by the laws and statutes of this realm; next I will shew the reader what privileges they pretend unto, at, and by the canon and civil law, which Mr. Lindwood reckons up in fourteen particulars:

Primo, in hoc quod non convenientur coram iudice seculari. Vide Concil. Agathi, canon 23.

Cap. Item statutus verb. Clericali privilegio. Concil. Agatha. c. 23. [153] Vid. Stillingsf. of the Eccl. Commission, 24. Irenicum, 43. Kelway, 182. &c.

But this privilege has not been allowed to them here in-England; and this was resolved in the 7th year of Henry the Eighth, in the case of one Dr. Horsey, chancellor of the Bishop of London, of which case, for the rarity, I will give the reader a brief account, and it was thus:

“ One John Hunn, a merchant of London, had prosecuted Horsey in a præmunire; whereupon Horsey caused Hunn to be arrested for suspicion of heresy, and committed him to Lollards’ Tower, being the bishop of London’s prison, and in a morning soon after, the prisoner Hunn was found dead and hanged in prison: and it was given forth, that he had hanged himself in his girdle; but notwithstanding it was believed that Horsey and the gaoler had murdered him.

“ This coming to the gaoler’s ear, he took sanctuary at Westminster; upon which and other great circumstances, Horsey and the gaoler were, by a coroner’s inquest in London upon view of the body, found guilty of the murder; and Horsey, as should seem, being in

orders, (I dare not say holy) stood upon this privilege, not to be tried before temporal judges.

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4 H. 8. c. 2.

“ And this being a dispute between the king’s prerogative and the privilege of the church; the king, at the request of the temporal lords and many of the commons in parliament, called before him at the Blackfriars, divers of his spiritual council, divines and canonists; where the clergy had one of their counsel argued for their privilege, and Dr. Standish, a learned divine, argued for the king: but the great offence taken was against the abbot of Winchcomb, who in his sermon preached at Paul’s Cross, in the time of the parliament, had affirmed, that the act made 4 H. 8. (which took away clergy from laicks in many capital offences, but not from clerks in holy orders) was against the law of God, and privilege of the clergy, and that the makers of the said act had incurred the censures of the church.

“ Soon after Dr. Standish, who had argued for the king, was cited before the convocation, and there charged with matters of heresy, arising from matters which had passed in his argument; whereupon he made his application to the king, who being satisfied of the justness of his cause by Dr. Veisey, dean of his chapel, assembled all his judges and counsel spiritual and temporal, and divers of the parliament men: and after hearing of divines, &c. the judges declared, that those of the convocation-house, that were at the awarding of the citation against Dr. Standish, were in a præmunire.

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“ And Fineaux, chief justice, did declare, in the name of all the judges, that the convention of clerks before temporal judges had been maintained by many good and religious kings of this realm, and many good and holy fathers of the church had been obedient to it, and content with the law of the land in this point, &c.

“And Dr. Veisey gave the reason, “because the canon in that point was never received or allowed in England.”

Selden de Dec. in Pref. 5, Review, 478.

“But the clergy not being satisfied, the two archbishops (who affirmed, that they were bound by oath to maintain the privileges of the church) moved the king, that to avoid the censures of the church, he would refer the matter to the pope.”

Nota.

Nota.

“But Henry the Eighth stoutly answered, that he, by the decree and sufferance of God, was king of England, and the kings of England in time past had no superior but God only; and therefore know, that he would maintain the right of his crown and his temporal jurisdiction, as well in this point as in all other.”

Selden's Titles of Honour, 19.

“And after Horsey (that all this while had been protected in the archbishop's house at Lambeth, the bishops having made his peace with the king) appeared privately in the King's Bench, and pleaded not guilty to the inquisition; and Erneley the king's attorney confessed the plea, whereby Horsey was discharged (the more pity,) and the bishops promised to dismiss Standish: and so this point was settled against the church, as it was very good reason.”

I shall make no comment upon the case, though there are many things in it worth observation; and those that are not satisfied with this short account of this case, may read it at large in Kelway's Reports, with all the circumstances, and the reader will not think his time ill spent, but with me praise God, that the king and nation are freed of the popish bondage and clergy.

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2. The second privilege mentioned by Lindwood, is, “Quod verberans clericum incidit in canonem.”

This privilege is confirmed to the clergy by the

Co. 2 Inst. 492. statute of *Circumspecte Agatis*, that the spiritual court should have jurisdiction, *de violenta manuum injectione in clericum*; but the end of such suit in the spiritual court is only, *pro salute animæ*, by excommunication or penance.

And if a clerk should sue in the spiritual court in point of damage, he runs himself in danger of a *præmunire*; for the ecclesiastical judge may proceed only *ex officio* to correct the sin (55).

But if the clerk will in this recover damages, he must bring his action at common law.

And note, that such suit in the spiritual court can only be sued by one in holy orders.

[157] 3. The third privilege, Lindwood mentions, is, "*Quod non vocantur ad onera secularia.*"

This privilege the common law allows; but it must be intended of such charges as were at common law, but not of new charges by statute law; in which the clergy are not exempted, as hath been said before in the beginning of this chapter.

And yet note, that the clergy, till the late rebellion, granted all their subsidies in their convocations; but in the late acts of parliament are taxed promiscuously.

(55) A prohibition having been granted, where a clerk libelled against another in the spiritual court, for that he beat him, or at leastwise assaulted him with a bill, and would have stricken him, and called him opprobrious names; the court held, that the prohibition did well lie: for although for the laying violent hands on a clerk, the suit ought to be in the spiritual court, yet for an assault only, the suit ought to be at the common law. *Cro. El. 753*. So also where a prohibition was granted to stay process in the spiritual court, against one who seeing an assault made upon his servant by a clerk, came in aid of his servant, and laid his hands peaceably upon the clerk, *Gawdy, C. J.* held, that the case was out of these statutes, because the party had good cause to beat the clerk, and the prohibition stood. *Cro. El. 655*.

4. The fourth privilege Lindwood mentions, is, "Quod possunt facere collegium ubi hoc laicis non licet."

It is true, that before the reformation the clergy have erected colleges, abbies, priories, and other spiritual and religious corporations by the licence of the pope, or the bishop; but generally confirmed by the king's.

Vid. Dyer, 267. a. b. & 81. a. 9 H. 6. 16. b. Co. 4. 107. b.

But without licence of the bishop of the diocess, it was forbid to erect any such by several canons; and by such licence, I take it, a lay-person as well as a clergyman, might have erected a college, &c. But here in England, the clergy never had greater privilege than the laity in this matter; for no such corporation could ever be erected here but by the royal authority.

Conc. Agatha. Can. 18. Conc. Aurelian. Can. 18. q. 2. Grat. 9 H. 6. 16. b. Dyer, 81. p. 64. & 267. p. 12. Co. 4. 107. b.

5. The fifth privilege reckoned by Lindwood, is, [158]
"Quod possunt vindicare rem concessam ecclesiæ ante deliberationem."

This privilege is of no use here in England, because the spiritual courts have not power to determine the right or property of lands or goods.

2 Inst. 492.

6. The sixth privilege is, "Quod eodem privilegio gaudent persona et familia."

This privilege holds no further here in England, than in such particulars as are mentioned in the former part of this chapter.

7. The seventh privilege by Lindwood mentioned, is, "Quod facientes statuta contra clericos sunt ipso facto excommunicati."

He that would attempt to put this privilege in execution, would endanger to run himself in a great præmunire; and many statutes have been made against the clergy in the height of popery, as the reader may find in many parts of this book.

8. The eighth privilege is, "Quod soli clerici possunt beneficium ecclesiasticum obtinere."

This is allowed without dispute.

9. The ninth is, "Quod per literas impetratas contra laicum, cum clausula generali non potest clericum conveniri."

I must leave this to the civilians to determine; for I must ingenuously acknowledge, I do not understand the meaning of this, nor the next; which is,

10. "Quod in civili nomina sportularum non tenentur dare nisi quatuor siliquas."

"Hæc tamen de jure canonum non debentur," says the author; and then proceeds,

[159] 11. "Quod de acquisitis licet sint in potestate patris possunt testari."

This, and the next privileges, are in the spiritual law and courts, and not opposed by the common law.

12. "Quod sine consensu patris agere possunt pro rebus suis recuperandis."

13. The thirteenth I must leave it as I find it; and it is, "Quod non pignorari."

14. The last is, "Quod si sciente domino servus efficiatur clericus liberatur à domini potestate."

I do not find any such privilege allowed in England, but it may be reasonable enough; these four last are only known to the civilians, to whom I leave them.

And so much for the privilege of the clergy by the canon and civil laws: but I conceive they receive more benefit by those the common law allows to them (56).

(56) The dress of the clergy has frequently been a subject of canonical animadversion. The following part of a canon of Archbishop Stratford, 1343, may be considered a curious specimen. "Though the behaviour of the clergy ought to

be the instruction of the laity, yet the prevailing excesses of the clergy, as to tonsure, garments and trappings, give abominable scandal to the people; because such as have dignities, parsonages, honourable prebends, and benefices with cure, and even men in holy orders, scorn the tonsure, (which is the mark of perfection and of the heavenly kingdom,) and distinguish themselves with hair hanging down to their shoulders in an effeminate manner; and apparel themselves like soldiers rather than clerks, with an upper jump remarkably short, with excessive wide or long sleeves, not covering the elbows, but hanging down: their hair curled and powdered, and caps with tippets of a wonderful length, with long beards, and rings on their fingers, girt with girdles exceedingly large and costly, having purses enamelled with figures and various sculptures gilt, hanging with knives (like swords) in open view; their shoes chequered with red and green, exceeding long, and variously indented; with croppers to their saddles, and horns hanging at the necks of their horses, and cloaks furred at the edges, contrary to the canonical sanctions." The canon then goes on to ordain, that the clergy shall not wear a short and close upper garment, with long sleeves, not covering the elbow, but hanging down; hair unclipped and long beards, with rings on their fingers (except those of honour and dignity) upon pain of suspension from their office. Lind. 122. Johns. Stratf. As dress is fluctuating in its nature, it is impossible to lay down rules for apparel in one age, which will not appear ridiculous in the next. In such case the general rule can only be, that clergymen shall appear in habit and dress such as shall comport with gravity and decency, without effeminacy or affectation. 3 Burn's Eccl. Law, 204.

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CHAPTER XII.

How the Law stands concerning Churches, Chapels, and Churchyards, in whom the Freehold is, and how to be repaired, and concerning Seats, Burials, Tombs, Coats of Arms, and other Ensigs of Honour in memory of the Dead, and of Church Ornaments, and at whose Charge to be provided, and what Remedy against those that shall commit any Trespass in the Church, Churchyard, or in breaking up Tombs, taking, carrying away, or embezzling any of the Goods or Ornaments of the Church, &c.

THE word CHURCH is taken from the Saxon word *cyrc*, or *cyric*, which name is still retained in the north parts of England, and in Scotland, by changing the C into K, as was usual with the English Saxons; in Latin *ecclesia*, or *basilica* from the Greeks; and it hath in the Holy Scriptures several acceptations; for sometimes it is taken for one family of the faithful people of God, as 1 Cor. 16. 19. Rom. 16. 4, 5. Sometimes for the Christian people of one country or province, Rom. 6. 23. Sometimes a council or synod is taken for the church, Mat. 18. 17. and sometimes, “*pro universa fidelium per totum terrarum orbem diffusorum multitudine:*” and sometimes for the material church, as 1 Cor. 11. 18. and 14. 34.

Church unde dicitur.

The several acceptations.

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The material church, quid.

Distinctio 1.
Nemo ecclesiam.

And that is the church of which I am now to discourse, that is, a building made of stone, brick, timber, and other materials, for the meeting of Christians to hear the word of God read and preached, and to join in prayer and other religious duties; built by the licence of that bishop in whose diocess the same is erected, and by him consecrated to that service, an office

peculiarly belonging to the office and dignity of the bishop.

See the several acceptations of the word church, in King's Enquiry of the Constitution, &c. of the Primitive Church, L. i. c. 1. § 1, 2, 3, &c.

The ancient manner of founding churches, was, after the founders had made their applications to the bishop of the diocess, and had his licence, the bishop, or his commissioners, set up a cross, and set forth the* church-yard 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. See Stillingsf. Eccl. Cases, 238.

The manner of founding of churches. Ridley's View, 76. Causa 16. q. 1. quicunque q. 3. Lat. Concil. Chalcedon 1. Can. 4. * Ut major ecclesie per circuitum 40 passus habeat. Capella vero vel minoris Ecclesiam. See Sir Tho. Ridley's View of the Civil and Ecclesiastical Laws, 191. more of this matter.

But by the common law and custom of England, any good christian may build a church without the licence of the bishop, which was confirmed by the pope at the request of King John, with this qualification, so that it were with the bishop's consent, and not prejudicial to any ancient churches: but however the law takes no notice of them as churches, nor have they any privilege, till they be consecrated by the bishop.

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3 Inst. 201.
Who may build a church.

And in some cases, though a church have been consecrated, it must be re-consecrated; as in case any homicide, adultery, or fornication shall be committed in it, or the church burned: but the re-building of the walls, if the altar (that is, the communion table) were not removed, requires no new consecration, nor churches consecrated by heretics, "In fide Sanctæ Trinitatis in forma ecclesiæ," are not again to be consecrated.

3 Inst. 203. a.
Where a church shall be re-consecrated. Conc. Nicie pars 3. dist. 1. Ecclesiis semel. Ibid. Si motum.

Ibid.

The church consists of three principal parts, that is, the belfry or steeple, the body of the church with the aisles, and public chapels, and the chancel.

Division.

In whom the freehold is.

11 H. 4. 12. a.
21 H. 7. 21. b.
Cro. Jac. 667.
8 H. 6. 9.
8 H. 7. 12.
38 H. 6. 19.
15 H. 7. 8.
36 H. 6. 19.
15 H. 7. 8.
Noy, 104.

The freehold of the whole church, and churchyard, are in the parson or rector, and therefore the parson may have an action of trespass against any body that shall do any trespassable act in the church, or churchyard; as in breaking seats annexed to the church, in breaking the windows, cutting the trees, or taking away the leads, or any of the materials of the church, or for breaking windows, the party may be indicted and fined, and bound to his good behaviour.

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Who is to repair churches.
2 Inst. 653.
Coke, 5. 67. b.
Stath. tit. Ac-compt.

The body of the church, the belfry, and all public and common chapels, within or adjoining to the church, are by the laws and custom of England, to be re-edified, maintained and repaired, at the charge of the parishioners and land-holders within the parish; and herein the common law and custom of England is kinder to the clergy, than in other countries where the whole charge lies upon the rector.

How churches were anciently repaired.

C. 10. q. 5.
Quia vero et placuit ut nullus Conc. Braga. cap. 2.
Cathedraicum, how it came due.

Anciently the bishops had a third part of the tithes and offerings, in some places a moiety, and in some places a fourth part, and in consideration thereof were bound to the repair of the whole church; but upon a release of this interest to the rectors, they were acquitted of the repairs of the churches, and had only two shillings for the honour of the bishop's chair, in lieu thereof, called cathedraicum, which duty (as I take it) was never paid in England; and the reason might be, because the bishops here were never charged with the repair of the churches, and had therefore no share in the offerings; tamen inde quære.

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Who is to raise money for the repair of the church.

The churchwardens are to raise the money for the repair of the church, and are to make the repairs; and for the raising monies to that purpose, they are to make their levies in this manner:

The manner to make a levy for the church.

The Sunday before the churchwardens design to

make a levy, they are to give public notice in the parish church, immediately after common prayer, of the time and place designed for making the intended levy; and then at the place and time appointed, the churchwardens and the parishioners, there met, are to consider what sum of money will be necessary to be raised for such repairs as shall be then needful; and after they, or the major part of the parishioners, there met, have agreed what sum is fit to be raised, then they, or the major part there present, are to proceed, and make an equal levy upon all the parishioners and landholders within the parish; and if any of the parishioners refuse to pay their rates, being demanded by the churchwardens, they are to be sued for, and to be recovered in the ecclesiastical court, and not elsewhere.

Co. 5. 67. b.

How it is to be recovered.

Stat. Circumspete Agatis, 13 E. 1.

Reg. Orig. 44. b. Briton, l. 1. c. 4.

But in case the bounds of the parish come in dispute in the ecclesiastical court, that is, if the party assessed aver that the land for which he is assessed lies in another parish, and not in the parish where it is assessed, if the party be contentious he may have a prohibition, and try it at common law (57).

Prohibition lies where the bounds of the parish are controverted. 2 Rolls, 291. l. 1. 5. 4.

(57) By the 17 Geo. 2. c. 37. where there shall be any dispute in what parish or place, improved wastes, and drained and improved marsh lands lie, and ought to be rated, the occupiers of such lands or houses built thereon, tithes arising therefrom, mines therein, and saleable underwoods, shall be rated to this and all other parish rates within such parish and place as lies nearest to such lands; and if on application to the officers of such parish or place to have them rated as aforesaid, any dispute shall arise, the justices of the peace at the next sessions after such application made, and after notice given to the officers of the several parishes and places adjoining to such lands, and to all other interested therein, may hear and determine the same on the appeal of any persons interested, and may cause the same to be equally assessed, whose determination therein shall be final. But this shall not determine the boundaries of any parish or

Relley vs Burden / Curteis 383.

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What to be
done, if the
parishioners will
not make a levy.
Cap. Archidiacon.
verb. Subpœna.

And if the parishioners, when they come together at such meeting, refuse or neglect to join in making such assessment, or refuse to meet, I conceive the churchwardens, having just cause for such assessment, may proceed alone.

For if the churchwardens shall neglect to make the repairs when duly admonished by those that have the power to visit, within a certain time the ordinary or other visitors shall limit, they may proceed against the churchwardens by ecclesiastical censures, to compel them to do it: and the law never compels any body to do a thing, they have not means to effect.

And it should seem in this case, that the parishioners are likewise punishable by the ecclesiastical judge, for their neglect in this kind.

Hetley, 61.

But some are of opinion, that the churchwardens cannot proceed alone, but must compel the parishioners to do it by ecclesiastical censures: Ideo quære. 1 Mod. Rep. 97. 194. 236. 1 Ventris 367.

2 Rolls, 308.
v. 20.

And it should seem, that by custom lands in a foreign parish may be charged to the repair of the church.

How to be re-
lieved against
unequal assess-
ments.
2 Roll. 289.
H. 6. 5. 67. a.

And if any person find himself aggrieved at the in-

place, other than for the purpose of rating such lands to the parochial rates as aforesaid.

And the church rate charged upon quakers is recoverable before the justices of the peace in like manner as are their tithes.

If the churchwardens defer to make or collect their rate until they are out of their office, they are deprived of all legal authority of doing either; but they may present the persons in arrear at the Easter visitation when they go out of their office, and the judge will cause justice to be done therein, or their successors may prosecute for the same. 1 Bac. Abr. 376.

equality of any such assessment, his appeal is to the ecclesiastical judge, who is to see right done.

Every one that holds any lands within the parish, is in judgment of law a parishioner, chargeable to this tax; but the landlord, in respect of the rent he receives, is not chargeable to the repair of the church; nor in that respect can be said a parishioner.

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Landlords not taxable for their rents.

And these levies are not chargeable upon the land; but upon the person in respect of the land, for the more equality and indifferency.

These taxes are upon the person in respect of the land.

But there has been some question made, where one that holds lands in one parish, and resides in another, may be charged to the ornaments of the parish church where he doth not reside? And some opinions have been, that foreigners are only chargeable to the shell of the church; but not to bells, seats, or ornaments.

Who is chargeable to the ornaments.

Rolls, 291. k.
1. 2.
2 Brownl. 10.

But I conceive the law to be clear otherwise, and that the foreigner that holds lands in the parish, is as much obliged to pay towards the bells, seats and ornaments, as to the repair of the church; otherwise there would be great confusion in making several levies, the one for the repair of the church, the other for the ornaments, which I have never observed to be practised within my knowledge.

Landlords chargeable.

Landholders are, and the reasons.

Secondly, It is possible that all, or the greatest part of the land in a parish, may be held by foreigners, and it were unreasonable in such case to lay the whole charge upon the inhabitants, which may be but a poor shepherd.

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Thirdly, The reason alleged against this charge upon the foreigners, is chiefly because the foreigner has no benefit by the bells, seats and ornaments.

Which receives an answer in Jefferie's case; for Co. 5. 67. b.

there it is resolved, that landholders, that live in a foreign parish, are in judgment of law inhabitants and parishioners, as well in the parish where they hold lands, as where they reside; and may come to the parish meetings, and have votes there as well as others.

Lindw. Cap.
Licet parochiani.

For authorities in the case, it is clear by the canon, that all landholders "in ipsis degentes, vel alibi, ad quævis onera parochianos ipsos ipsam ecclesiam et ornamenta ejusdem concernentia, et eis in his de jure vel consuetudine incumbentia, consideratis possessionum et reddituum hujusmodi quantitibus, cum cæteris parochianis ecclesiarum prædictarum, quoties opus fuerit, contribuere teneantur."

Authorities.

And I have seen a report under the hand of Mr. Latch, that it was resolved in Willmot's case, H. 6. Jac. B. R. and in Chester's case, 10 Jac. that a foreigner that held lands in another parish wherein he did not reside, was as much chargeable to the ancient ornaments of the church, as bells, seats, &c. as those that lived in the parish; but that such landholders could not be charged to new bells, organs, &c.

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1 Bulstr. 20.

And Mr. Bulstrode reports a case about the same time, that the Chief Justice Fleming, and Mr. Justice Williams, were of the same opinion, and gave this reason, that the foreigner might come to church if he pleased.

Quære.

And having said thus much to this matter, I must leave it a quære amongst these diversities of opinions (58).

(58) T. 1. W. Woodward and Makepeace. Woodward, who lived in the diocese of Lichfield and Coventry, but occupied lands in the parish of D. in the diocese of Peterborough, was in the said parish of D. taxed in respect of his land as an inhabitant, towards a rate for new casting the bells; and because he refused to pay, was cited into the court of the bishop of Peterborough, and libelled against for

It hath been resolved, that the major part of the parishioners may make a levy for new bells or organs.

2 Rolls, 291. k. 4. Addit. Poph. 197.

But if in the making a levy for the repair of the church, some of the parishioners or landholders are omitted, if the churchwardens shall sue upon such a levy, a prohibition lies in the case; tamen quære.

If some should be omitted in a levy. 2 Rolls, 291. k. 3. contra. Ibid. 290. H. 10.

Though generally all the parishioners and landholders within a parish ought to be taxed towards the repairs of the church, as has been said; yet that rule admits some exceptions.

*Smith v. Leats
by Hagg Eccles. 279.*

For, first, the rectory or vicarage which is derived out of it are not chargeable to the repair of the body of the church, steeple, public chapels or ornaments, being at the whole charge of repairing the chancel.

Who may be freed from these levies. Cap. Licet parochiani. The rector and vicar.

Secondly, The founder of the church may prescribe,

The founder. H. 3. Car. 1. B. R. per Henden.

this matter. And by the court, This is not a citing out of the diocese within the statute 32 H. 8. c. 9. for he is an inhabitant where he occupies the land, as well as where he personally resides. Secondly, although he doth not personally live in the parish, yet by having lands in his hands he is taxable; and whereas it was pretended that the bells were but ornaments, it was held, that they were more than mere ornaments; that they were as necessary as the steeple, which is of no use without the bells; and Holt, C. J. said, If he be an inhabitant as to the church, which is confessed, how can he not be an inhabitant as to the ornament of the church? 1 Salk. 164. An impropiator of a rectory or parsonage, though bound to repair the chancel, is also bound to contribute to the reparations of the church, in case he hath lands in the parish which are not parcel of the rectory. This was adjudged by the whole court in Serjeant Davie's case, without any question made of it. Gibs. 197.

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. Gibs. 197.

that in respect of the foundation, he and his tenants have been freed from the charge of repairing the church.

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Chapelry.
Hob. 67.
2 Rolls, 290. l.
1, & 2.

Thirdly, It hath been resolved, that the inhabitants of a chapelry may prescribe, that in consideration that they have time out of mind paid three shillings and fourpence, to the repair of the mother church, or at their own charge repaired a certain part of the mother church, they have been freed from all other charges about the repair thereof.

Noy, 41. contra.
2 Rolls, 290. l. 1.
Ibid. 311. a. 1.
Marsh. 91.
Hob. 67.

But a prescription by the inhabitants of a chapelry, that because they have time out of mind repaired some part of the fence of the churchyard, they have been freed from the repair of the mother church, has been disallowed.

2 Rolls, 290.
H. 7, & 8. cont.
Bulst. 1. 16, 17. ✕
accord. and so it was resolved.
P. 42 El. B. R. between the chapelry of Coxwell and church of Faringdon in Berkshire.

And yet there hath been some resolutions, that the inhabitants of a chapelry may prescribe, that in consideration they have repaired their own chapel time out of mind at their own charge, that they have been freed from the charge of repairing the mother-church; but there being opinions to the contrary, I must leave it as a quære: but the better opinion seems against such prescription.

Quære.
2 Rolls, 289.
H. 5. Andrews v. Hutton.
H. 4. Car. 1.
Hetley, 133. ✕

If a petit chapman take a standing weekly in the market to sell his wares, he shall not for this be charged to the repair of the church.

*See the note to
Hob. 67. p. 279.*

A prescription, that the arable lands within a parish had time out of mind been only charged to the repair of the church, has been disallowed; for the houses are as well chargeable as the land.

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Hob. 67.
Churches united, how to be repaired.

If two churches be united, at the common law, the repairs of the several churches shall be made as before the union.

But by the stat. 4 and 5 W. & M. c. 12. the parishioners of the church united are made contributory to the repairs and ornaments of the church to whom the union is made. Vide stat.

And so much concerning the repair of parish churches

and public chapels annexed to them; and as for the repair of other chapels, I shall defer till I come to speak of chapels.

I did purposely omit, in the former edition of this book, to speak of the repair of chancels, lest I should have raised a question I could not determine; but the point has lately come in question judicially, and I shall tell the reader now what I have learned on this subject.

Regularly, the repair of the chancel, both by the canon law and custom of England, is to be made by the rector or parson of the parish, which he is compellable to do by ecclesiastical censure, suspension and sequestration.

But the great question in this case is, where there is an impropriator, how to compel him to do it, the rectories and tithes in that case being become lay-fee: but this point coming lately in question in the Common Pleas, between Walwin and Awbry, it was agreed to both by the counsel that argued on both sides, and the whole court.

P. 29 Car. 2.
rot. 372. C. B.

First, That the impropriators are chargeable with the repairs of the chancels.

Secondly, That they may in the ecclesiastical courts be compelled by ecclesiastical censures to repair them.

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But the great question was, whether the bishop might sequester the tithes, they being now become lay-fee? Which point, by reason of some miscarriage in the pleadings, did not receive a determination.

Many precedents were shewed in point, that impropriate tithes had been sequestered by the ecclesiastical judge in this case, both before and since the war; and the better opinion seemed to be for the sequestration, it being agreed that the ecclesiastical court has jurisdiction of the cause, and that being one of the ordinary processes of court (59).

(59) Vide 1 Burn's Eccl. Law, 352. Lay impropriators are generally under the same obligation of repairing the

Seats in churches.

The next thing to be spoken of is the seats in churches, built for the ease of the parishioners to sit, kneel, and stand in, for the hearing the word of God read and preached, and joining in prayers, and other religious duties, with the other parishioners.

By whom to be repaired.

These 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.

In what manner to be built.

The seats ought to be regular, and of a moderate height, that the behaviour of the parishioners may the better be observed; and if any body of their own heads shall presume to build any seat in the church without the 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 one presume to cut or pull down

Who may build seats.

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Dantrie's case, T. 2 Jac. C. B. 11 H. 412. a. Cro. Jac. 667. 21 H. 7. 21. b. Seats cut or pulled down, who shall have the materials.

chancel, as spiritual rector; but impropriate tithes cannot be on this account sequestered. 1 Mod. 258. 2 Mod. 254. But for such neglect lay impropriators are amenable to the ecclesiastical tribunal. A distinction, however, must be observed between impropriations and appropriations; the former are such parsonages as, having belonged to the religious houses, by the statutes for dissolving those bodies came to the king, and from him to his patentees, and are now vested in lay hands; but an appropriation is, where such a parsonage or other church preferment belongs to and is in the possession of some ecclesiastical corporation, sole or aggregate, and their successors. And as to such of them as never were the property of religious houses, and were never made temporal fees, there appears no ground to exempt them from sequestration for neglecting the repairs of the chancel, more especially as corporations aggregate (the more frequent owners of them), are not capable of being excommunicated. 2 Mod. 254. Toller on Tithes, 38.

any seat annexed to the church, he may have an action of trespass against the misdoer (though he formerly set it up) if he do it without his consent or order from the ordinary; but if the seat be set loose, he that built it may remove it at his pleasure, as I conceive (60). 8 H. 7. 12.

(60) In *Tattersall v. Knight*, Arches' Court, 1 Phillimore's Rep. 233. a faculty for the erection of a gallery in a church was granted, notwithstanding the opposition of the vicar; and Sir John Nicholl, in giving judgment, made these observations: "Now it is to be observed, that the incumbent has no authority in the seating and arranging the parishioners beyond that of an individual member of the vestry, and that which his station and influence in the parish naturally gives him. He may properly object to a plan which is generally inconvenient, which diminishes the accommodation in the church, which disfigures the building, which renders it dark and incommodious. In any case of this description, it is very proper that he should make a representation to the ordinary; but as to the mere arrangement of seats, if the parishioners can settle that among themselves, and to their own satisfaction, and can agree about the expense, there seems but little necessity for the interference of the incumbent: the expense is that of the parishioners. The churchwardens are bound to repair with the consent of the vestry. It is not the vicar but the vestry which appropriates seats; the general superintendance and authority in allotting them rests with the ordinary.

"Great inconvenience has been found to arise from annexing pews to houses; the houses become dilapidated, the inhabitants of them fail in their circumstances, new houses are erected, and the occupiers of them want pews. It is very desirable that after due time has been given as encouragement to those who build them, that seats should return to the disposition of the ordinary; the form of the grant should be 'as long as they continue inhabitants of the parish;' or 'as long as they continue inhabitants of the parish, and occupiers of the messuages stated.' The former of these is more usual, as it gives no notion of annexing houses." Et vide *Bulwer v. Hase*, 3 East's Rep. 217.

In *Butterworth and Barker v. Walker and Waterhouse*, the Court of K. B. seems to have been of opinion, that the consent of the parish is not necessary to the ordinary's ordering an organ to be erected in a church; but the parish cannot, without their consent, be charged with the expense of erecting or repairing it, or adding new ornaments: nor can the consent of the vestry bind the parish without immemorial usages. In this case, the organ being provided for by voluntary contribution, a prohibition was denied. 3 Burr. 1689.

2 Roll's Abr.
288.

Ken. Par. Ant.
649.

Where a person set up a possessory right in a pew, that his grandfather had the estate and pew for twenty years, and that he succeeded to it: that right was held good against a mere disturber. And, observed Sir John Nicholl, "by the general law and of common right, all pews belong to the parishioners at large for their use and accommodation; but the distribution of seats among them rests with the ordinary: the churchwardens are the officers of the ordinary. They are to place the parishioners according to their rank and station; but they are subject to the control of the ordinary, if any complaint should be made against them. The vestry, as such, has no authority whatever on the subject; the churchwardens are not bound to follow their directions: at the same time the sense and opinion of the vestry ought to have weight with them." 1 Phillimore's Rep. 323. *Pettman v. Bridger*.

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. 1 Term Rep. 431. *Rogers v. Brooke*. But 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 families, this proof was holden to rebut the presumption which would otherwise arise from so long a possession. *Griffith v. Matthews*, 5 T. R. 296.

It was said by Lord Kenyon, that a pew might be annexed to a house by a faculty, as well as by prescription which supposes a faculty, and in that case might 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. 1 Term Rep. 431.

But though the freehold of the church be in the parson, yet he cannot pull down any of the seats anciently erected, or of late erected, but by licence from the bishop, or by the consent of the churchwardens.

What the parson may do in the church.

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, I take it, the property of the materials upon removal is in the parishioners. Noy, 108.

The churchwardens, with the approbation of the parson, may by custom dispose of the common seats, built at the charge of the parish, and place the parishioners therein, according to their degrees and qualities, but no such custom can exclude the bishop from a temporary disposition of such seats: but the bishop cannot grant seats to a man and his heirs, because they must be attendant to the houses.

Who may dispose of the seats.
2 Rolls, 288.
g. 1, 2.

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3 Poph. 140.
Hob. 69.
Gratrix & alii
v. Beadesley,
H. 30 & 31 Car.
2. B. R. 2 Rolls,
288. g. 5.
Parson's Law,
113. Hob. 69.

But the bishop has no power to dispose of the seats in any private chapel next to the church, that is not maintained and repaired at the parish charge.

The seats in the chancel are properly in the disposal of the rector or parson; but it should seem that a parishioner may prescribe for a seat there.

Holt v. Ellys,
Noy, 133.

As a seat in a church, so priority in a seat may be prescribed for. E. 2 Cha. Noy, 78.

In some places where the parson repairs the chancel, the vicar, by prescription, claims a right of a seat for his family, and of giving leave to bury there, and a fee upon the burial of any corpse. As to the right of a seat in the chancel, it was originally inherent in every vicar; for before the reformation, part of the service was to be there performed by him. 1 Burn's Eccl. Law, 363.

And note, that all that has been said before of seats, must be intended of such seats as no particular parishioner has a right to by prescription; for wheresoever any parishioner is owner of an ancient messuage, to which any seat has been used by prescription time out of mind; there the ordinary, parson or churchwardens, have nothing to do in the disposing of such seats.

3 Cro. Jac. 667.
Co. 12. 106.

About prescriptions for seats in churches, the law has been controverted; for sometimes it has been held, that the owner of an ancient messuage might prescribe to have a seat in the aisle of a church, which himself repaired: after it went further for a seat in the body of the church, which was repaired by him that prescribed to have it.

3 Inst. 202.
Noy, 129.

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But the law is now settled in this case, that a man that is owner of an ancient messuage might prescribe for a seat in any part of the parish church, within which parish such messuage stands, although he have not used to repair it.

Buxton v. Bateman. T. 4 Car. 2.
B. R. rot. 463.

And this was resolved in an action of the case brought by Buxton against one Bateman, for disturbing him in a quire, in the body of Yelgreave church in Derbyshire, which Buxton claimed by prescription to his house, by all the judges of the King's Bench, and after affirmed in a writ of error in the Exchequer Chamber, so that this point is now settled by all the judges in England.

Vide Syderfin,
88, 89, 209.
Malement Report.

See 3 Keble, 754. how prescription to a seat ought to be pleaded (61).

(61) But if a person prescribe to have a seat in the nave of the church generally, without the consideration of repairing the seat, the ordinary may displace him. 2 Roll's Abr. 288. Reparation of a pew is strong evidence to support a prescription. In Pittman v. Bridger, 1 Phillimore's Rep. 325. Sir John Nicholl observed, " A presumptive 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 it is necessary to shew, that use and oc-

And as a man may prescribe for a whole seat in a church, aisle or quire; so he may prescribe for the first, second, or other sitting or place in a seat.

Carleton v. Hutton, Noy, 78.

And in all these cases of prescriptions, the ordinary has nothing to do; but the matter is solely determinable at common law.

And as a man may prescribe to have a quire, aisle or seat in a church; so he may prescribe to an ancient messuage, to have the sole burial of the dead, in such aisle, quire, or place in the church.

Co. Ent. 8. b. Prescription for burying.

Anciently none were admitted to be buried in the church but priests, and those that were of clear life and conversation.

Who may be buried in the church. Spelm. Conc. 590. n. 9. 451. n. 29. 545.

cupation of the seat has been from time immemorial appurtenant to a certain messuage, not to lands; the ordinary himself cannot grant a seat appurtenant to lands.

“Secondly, It must be shewn that if any acts have been done by the inhabitants of such 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 that right. What might be the effect of long occupancy where no repairs have been necessary, I am not called upon to say. It is a common error to suppose that by mere occupancy pews become annexed to particular houses; in country parishes the same families occupy the same pews for a long time, but I apprehend they still belong to the parish at large. If, however, it is shewn that the inhabitants of a particular parish have repaired, that fact establishes that the burthen and benefit have gone together, and is inconsistent with the right of the parish still to claim the benefit, and is evidence of the annexation of the pew. Thus the uniform and exclusive possession of the inhabitants of a particular messuage, connected with the burthen of maintaining and repairing the seat, is evidence sufficient to establish a prescriptive right.”

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Ibid. 517.
Payment for
burials.

There was likewise anciently a payment due for those that were buried, called *symbolum animæ*, or *pecunia sepulchralis*; and this was paid though the body was buried in another parish.

Nothing to be
paid for burials.
Conc. Tribu-
riensis. Can. 16.
Can. 17.

But by the canon law, "*Interdictum est omnibus Christianis terram mortuis vendere et debitam sepulchram denegare.*" But this must be intended in the churchyard; for by another canon in the same council it is expressly decreed, "*Quod nullus laicus in ecclesia sepeliatur nisi in cæmeterio.*"

Where one shall
be buried.
Can. 15.

And by the same council it is decreed, that "*ubi decimas persolvebat vivus, sepeliatur mortuus.*"

No churchyards
in cities, Spelm.
Concil. 290.

Anciently there were no churchyards in cities, nor burying of the dead; so that the archbishop of Canterbury could not be buried in his own cathedral, till Cuthbert archbishop of Canterbury obtained licence from the king, that the archbishops might be buried in the cathedral at Canterbury.

2 Inst. 489.
Co. 6. 67.

The churchyards are of common right to be fenced by the parishioners.

Who may be
buried in the
churchyard.
13. q. 2. quæsta
& tribus, &
sepeliendum.

By the custom of England, every person (except such as are afterwards excepted) may at this day be buried in the churchyard of the parish where he dies, without paying any thing for breaking the soil.

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Who in the
church.

Spelm. Concil.
564. leges Ca-
nuti, cap. 20.

And by the custom of England, every parishioner (except as hereafter is excepted) may be buried in any common part of the church or chancel, paying the accustomed fee to the parson for breaking the soil, which for the most part is three shillings and fourpence in the church, and six shillings and eightpence in the chancel; and this is only for breaking of the floor, and that is the reason that in some places the churchwardens have the fee for breaking up the church, though of common right it belongs to the parson; and in this the custom must be observed.

Sir Edward Coke is of opinion, that any person may erect a tomb or monument for the dead in the church, chancel, public chapels, or churchyards, in a convenient place; (but, I conceive, it must be intended by licence of the bishop, or consent of the parson and churchwardens :) and that if any body break it, the party that set it there may have an action against those that break or pull it up, or deface it: and after the death of those that set it, the heir shall have the action.

Who may set up tombs.
3 Inst. 202.

What remedy if broken.

More, 878.
3 Inst. 202.

Some persons are denied Christian burial, and therefore such persons are excepted in what is said before, and may not be buried in the church or churchyard, without special licence from the bishop.

Who may not be buried in the church, or churchyard,
13. q. 2. placuit & ibid. fatendum, & ibid. quibus.

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That is, such persons as murder themselves, die excommunicated; those that die in any mortal sin, sacrilegious persons and usurers; but of usurers the canon holds not in England.

For gravestones, winding-sheets, coats of arms, penons, or other ensigns of honour, hanged up, laid or placed in memory of the dead, the property remains in the executors, and they may have actions against such as break, deface, or carry them away, or an appeal of felony. See Co. 1 Inst. 18. b. The heir shall have the action, and by some the wife, or executors, that erected them against those that deface them in their time.

Gravestones, &c. See Gravvii. Rom. Ant. Vol. 12. p. 1316. More, 878. 9 E. 4. 14. a. Co. 12. 113. 3 Inst. 110, & 202.

The property of the bells, books, and other ornaments of the church, is in the parishioners, and in the custody of the churchwardens, who may maintain an action of trespass against such as shall wrongfully take them away, and the successors may sue this action for the taking away in the time of their predecessors, and the damages recovered shall be to the use of the parishioners; but they may declare ad damnum ipsorum, or damnum parochianorum, and either way good, and the release of one churchwarden shall not bar his com-

Whose the bells, &c. are.
12 H. 7. 27. b. 37 H. 6. 32. 8 H. 5. 4. 10 H. 4. 9. Who may have an action for taking them.

Cro. El. 179.
8 E. 4. 6. b.

Cro. Jac. 23.

panion; or they may have an appeal of robbery, for stealing the goods of the church (61*).

Property
changed by
offerings.
34 H. 6. 10.
Co. 10. 91. a.

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By the laws of England, in the time of popery, if a stranger had taken my goods, and offered them to an image in a consecrated church; this had made as good a change of the property of my goods, as though I had sold them in a market overt; but if I found the goods after in the wrong doer's possession, I might take them again.

(61*) Since this work went to the press, a decision has been made at nisi prius, which it may be useful to introduce here. Kent Lent assizes, March 17, 1819. Cramp and another v. Bayley, clerk. This was an action of trover by the plaintiffs, churchwardens of the parish of St. John the Baptist, Margate, against the defendant as rector of that parish, to recover the value of certain black cloth which had been put up in the church in respect to the memory of the late Princess Charlotte, but which the defendant, the rector, had converted to his own use, by having it made up into coats, waistcoats, and other articles of apparel.

After hearing the evidence, which only went to the alleged fact, Bayley, J. in his address to the jury, laid it down as the rule of law, that no person had a right to hang up what are called ornaments in the church without leave of the rector, because the freehold of the church was in him, and he might make his own terms for that leave. In general, where private individuals hung black cloth in the parish church, with the concurrence of the rector, there was a kind of understanding between them, that the cloth became the property of the rector. In the present case, however, there was no bargain between the plaintiffs and the defendant with respect to the terms upon which the cloth was to be hung in the church, and consequently the latter had no right to take any portion of the cloth, because by law he was not entitled to take such a property unless by matter of agreement between the parties to whom it belonged. Under these circumstances, that the plaintiffs were entitled to a verdict for the value of the cloth. Verdict for the plaintiffs, damages 15l.

A man at this day 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, and the churchwardens may have an action for the taking them away.

Goods may be given to the church.
11 H. 4. 12.
Cro. Car. 343.

There has always been great reverence given to churches and churchyards, and other places consecrated to God's service; and anciently churches and churchyards were sanctuaries for traitors, murderers, robbers, thieves, and other malefactors; and many laws were made for the regulation of them, and restraining that privilege, till at last sanctuaries, with great reason, were totally taken away; for they were not used like the cities of refuge under the law, for those that unawares killed others, but for all people, be the crime never so horrid.

Reverence to the church and churchyards.

Numb. 35. v. 11.

In the 26th of H. 8. sanctuaries were taken away in high treason; in the 27th of H. 8. they were taken away in wilful murder, rape, burglary, robbery in the highway, or in any house, or in any * church or chapel, and in wilful burning any house or barn with corn.

Where sanctuaries were taken away.

Stat. 26 H. 8. cap. 13.
Stat. 27 H. 8. c. 12.

* Frustra implorat ecclesie

auxilium qui in ipsam deliquit, c. 17. q. 4. Ad episcopos.

But by a statute made in the 21st year of King James they were finally taken away and abolished, they having too long continued for the protection of the greatest malefactors, a thing unfit for hallowed places.

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St. 21 Jac. c. 28.
Sanctuaries finally taken away.

But that churches and churchyards should not be profanely used, is evident from the example of our Saviour, who cast out those that bought and sold in the temple, and overthrew the tables of the money-changers, and the seats of them that sold doves: telling them, "my house shall be called of all nations the house of prayer, but you have made it a den of thieves."

Mark 11. v. 15.

Courts not to be kept in churches or churchyards.

Can. 40.

See Chamberlen's Justice,

475.

* Churchyards.

Fairs and markets not to be in churches or churchyards.

Can. 76.

Can. 89.

Stat. Winton.

Conc. Cabilonensis, Can. 17.

No fighting, &c. in churches and churchyards.

And in the council of Mentz it is forbid, "ut in ecclesiis aut in domibus ecclesiarum vel * atriis placita secularia minime fiant."

And by a canon made in the sixth general synod at Constantinople, buying and selling is forbidden in churches and churchyards, wherewith a canon of our own, made in the time of King James, agrees.

And by a statute made in the 13th year of Edward the First it is enacted, "that fairs or markets should not be kept in churches or churchyards, for the honour of the church."

There is a canon to this effect, "quod nullus secularium, nec in ecclesia, nec infra atrium ipsius ecclesiæ, qualecunque scandalum, aut simultates excitare præsumat, nec arma trahere, aut quemcunque ad vulnerandum, aut interficiendum appetere, quod si fecerit à communione privetur."

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5 Ed. 6. cap. 4.

And to the same effect there was a statute made in the fifth year of Edward the Sixth, "that if any parson, &c. should by words openly quarrel, chide, or brawl, in any church or churchyard; that then it should be lawful for the ordinary of the place, the matter of fact being proved by two witnesses, to suspend a lay-person, ab ingressu ecclesiæ, and a clerk from the exercise of his office as long as he shall think fit, according to the quality of the offence.

"And that if any person shall smite or lay violent hands upon any other in the church or churchyard, then, ipso facto, every such person shall be deemed excommunicate.

Chamberlen's Justice, 475.
No striking or drawing weapons in the church or churchyard.

"And if any person, &c. maliciously strike another in any church or churchyard, with any weapon, or shall draw any weapon in any church or churchyard, to the intent to strike any other therewith; the party thereof convicted by verdict, or two lawful

witnesses, before the justices of assize, oyer and terminer, or justices of the peace in their sessions, shall have one of his ears cut off; and if he have no ears, then to be marked in the cheek with an hot iron, with the letter F. and ipso facto excommunicate" (62).

It may be a question, what the meaning of these words, ipso facto excommunicate, in this act shall be understood; whether it shall be without sentence declaratory, or no? which is made a quære in Dyer; but by the canonists there must be a sentence declaratory, or conviction. Cro. El. 919. See the same book, page 680. See also 3 Inst. 177. and 6 Rep. 29. b. contra (63).

And the law so abhors violence and force to be used in churches and churchyards, that it will not admit a man to strike again in his own defence in a church or churchyard; and therefore the plea of de son assault demesne, is not allowed for a good plea in that case.

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Vi. Dy. 96.
p. 48.
Ipso facto.
Dy. 275. p. 48.
Lindwood, cap.
Quia incontinentiæ, verb.
Ipso facto.

De son assault demesne, no plea in a church, &c.
Cro. Jac. 367.

(62) By statute 27 G. 3. c. 44. no suit shall be brought in any ecclesiastical court for striking or brawling in any church or churchyard after the expiration of eight calendar months from the time when such offence shall have been committed.

And it has been holden under the words of the act, "lay any violent hands," that churchwardens, or perhaps private persons, who whip boys for playing in a church, or pull off the hats of those who obstinately refuse to take them off themselves, or gently lay their hands on those disturbing divine service, and turn them out of the church, are not within the meaning of this statute. 1 Hawk. 139. If a person steal a dead body from a church or churchyard with the shroud, it is felony. 2 Bla. Com. 429. And to steal a body merely, is indictable as a misdemeanour. 2 T. R. 733.

(63) There ought to be a precedent conviction at law, or else the excommunication must be declared in the spiritual court upon a proper proof of the offence there. 1 Haw. 139. *Bilson v. Chapman*, Cas. Hardwicke, 190.

Arrest in churches, &c. punishable. Cro. Car. 602.

Ways through churches, &c. 18 E. 4. 8. a. 2 E. 6. cap. 4. Clergy taken away in sacrilege.

And to make an arrest in a church or churchyard, immediately after divine service, when it may be done elsewhere, is indictable and finable.

And yet it hath been held, that there may be a way through a church or churchyard.

By the statute of 1 E. 6. the benefit of the clergy is taken away from such as steal any goods out of any church or chapel.

For the punishment of such as disturb the minister in the church, whilst he is reading divine service, or arresting the minister whilst he is attending divine service, see in the 11th chapter before, and stat. 50 E. 3. cap. 5. and 1 R. 2. cap. 15.

And so much for the privileges of churches and churchyards.

[182]
Officers of the church. Kitchin, 194.

The last thing I have to speak relating to churches, is the officers belonging to the same, which in time of popery were many: as ostiarii, lectores, exorcistæ, acolythi, psalmistæ, cantores, &c.

De clericis, lib. 1. cap. 13. Distinct. 23. c. Quorundam Clericorum et dist. 25. perlectus.

He that minds to know the several duties of all these officers, or orders, may satisfy himself in Bellarmin's disputations, or in Gratian, with the manner of their ordinations (64).

Ostiarius may be taken for a clerk or sexton.

Amongst these the churchwardens and parish clerk or sexton, who perform several of these offices, are not reckoned, and those are now the only officers of the church of England, and of whom I am now to speak.

Churchwardens' office. Doct. and Stud. 118.

The office of the churchwardens is to take care of the repair of the church, and has the ordering of the bells and seats, and is to provide all books and ornament belonging to the church, and in his custody, and in their charge are all the goods of the church, and they are to provide bread and wine for the communion,

8 H. 5. 4.

and to see there be a decent communion table, with a table-cloth and carpet, and flagon, plate, and bowl of silver, gold, or pewter, for the service of the church, when the communion is administered; they are to make levies, and raise money for the doing of all this in such manner as is before directed; and at the end of their office they are to give an account of their receipts and disbursements to the parishioners, and what remains in their hands upon such account, with all the goods of the church in their custodies, they are to deliver over to their successors.

There are many things more belong to their office, but so well known, I need not mention them.

These officers, by a canon made in the time of king James the First, are to be chosen by the minister and parishioners; but if they cannot agree of the persons, then the parson, vicar, or curate, is to choose one, and the parishioners the other; but where the custom has been to choose them all by the parishioners, without the minister, the custom must be observed, notwithstanding the canon.

By Hale Ch. Bar. (Hardres, 379.) every parish of common right ought to choose their own churchwardens, but because the manner of election varies, a custom may be alleged (65).

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8 E. 4. 6.

By whom to be
chosen.
Can. 89.

26 H. 8. 6.
2 Rolls, 287.
f. 50.

(65) But such customs are to be construed strictly; for if through disagreement of the electors, or other circumstances, the customary method of election cannot be followed, the custom is thereby laid out of the case, and the parish must elect according to the canon. 1 Nolan's Poor Laws, 41.

Where the right of appointing exists in the parishioners, they are all upon an equal footing, and all power therefore resides in the majority. *Staughton v. Reynolds*, 2 Str. 1045. and the bishop's court cannot try the legality of the votes. *R. v. Harris*. 3 Burr. 1422.

No person who lives out of the parish is eligible as church-

warden, although he occupies land within it, and many residents are exempted from serving the office by the common law; such as peers, members of parliament, and clergymen, attorneys, and clerks of the King's Bench. Others are privileged by statute, as apothecaries, freemen of the surgeons' corporation in London, dissenters, those who prosecute a felon to conviction, Roman catholic ministers taking the oath and conforming to the regulations specified 3 Geo. 3 c. 32. Sergeants, corporals, drummers, and privates in the militia from their enrolment until their discharge.

Churchwardens must be sworn into the office before they can take its duties upon them. The archdeacon is to administer the oath, and his function is altogether ministerial, so that whatever reasons there may be to doubt of the party's qualification for the office, or the validity of his election, he cannot inquire into these matters, nor refuse to swear him on these accounts. By the can. 1 Jac. 89. churchwardens shall continue in office but one year, except chosen again in like manner. But this refers only to the period at which others should be appointed in their stead, for when once sworn in they continue in office, until those who are chosen to succeed them are in the same manner sworn in.

If those persons who ought to choose churchwardens neglect to do so at the proper season, they may be compelled by writ of mandamus. In the same manner may the archdeacon be compelled to administer the oath. 1 Nolan's P. L. 41, 42.

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.

Every churchwarden is an overseer of the poor by stat. 43 El. c. 2. As churchwardens may present in the temporal, so they may libel in the spiritual courts. 2 W. and M. 1 Burn's Eccl. Law, 409.

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 to purchase lands or to take by grant, except in London, where they are a corporation for those purposes only. Gibs. 215.

And therefore if any one give land to the parish, for the

There were other officers called side-men, but they are almost laid aside; their office is to assist the churchwardens in doing duties, and they were to take care that nobody should loiter or talk in the churchyard or church-porch, and to see that the parishioners frequented the church, &c.

Side-men their
office.
Can. Jac. 90.

The clerk or sexton is to be chosen by the parson or vicar, or in their absence by the minister, who the Sunday after such election, is by him that makes the election to be declared, who is elected.

The clerk's
office.
Can. Jac. 91.

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 be renewed from time to time, as the trustees die away. Gibs. 215. And churchwardens cannot bring actions in right of their office, after their office is expired, but their successors must do it. 1 Burn's Eccl. Law, 413.

By 17 G. 2. c. 38. the churchwardens and overseers of the poor shall, every year, within fourteen days after the appointment of new overseers, deliver in to such overseers an account in writing of all sums of money received, and assessed, and not received; and of all goods to be wrought by the poor, and of all monies paid; and shall pay over all sums of money, &c. in their hands to the succeeding overseers. Such account to be verified upon oath, or in case of quakers, upon affirmation before a magistrate, which oath, &c. such justice is authorised to administer, and to sign the caption at the foot of the account. And the said book is to be preserved by the churchwardens, &c. and any person assessed is to be permitted to inspect the same upon paying sixpence. And in default of yielding up such an account, &c. they may be committed to gaol until they have given up such accounts, &c.

The spiritual court may compel churchwardens to deliver in their account, but cannot decide on the propriety of the charges. 3 T. R. 3.

For a general view of the appointment, office, and duties of churchwardens and overseers, vide Nolan's Poor Laws, chap. 2.

How to be
elected.

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Cro. Car. 510.
2 Rolls, 286.
f. 42.

Parson's Law,
116.
Cro. Jac. 670.

— The party so elected ought at least to be twenty years of age, of honest life and conversation, and one that can write, read, and sing. His office is to assist the minister at prayers, and to attend him, and to keep the church and seats clean, and has the keeping of the keys of the church to that purpose, and is to ring to prayer, and to do many other things, which by custom belong to his office to do.

But if such parish-clerk have time out of mind been chosen by the parishioners, he must be so still, notwithstanding the canon (66).

And so much for churches, I shall next proceed to the chapels.

Chapel, unde
dicitur.
Cowel, Min-
shay, Spelman,
hoc verbo.

Chapels, in Latin *capellæ*; about which denomination I find great diversity of opinions amongst the learned: some conceiving it takes its name à *capiendo* laicos; others are of opinion they took that name à *capra*, because anciently they were covered with goat-skins.

Others think they take their name à *cappa Sancti Martini*, because anciently the kings of France, when they went to wars, carried that cap along with them, which was kept under a tent, and thence called *capella* (67).

Others have thought it is taken for a chest or repository, wherein the relics of saints were preserved.

Ella, in the end
of a word signi-
fying little, and
cap of capio, to
receive.

Amongst this variety of opinions, I shall beg the reader's pardon to put in my own amongst the rest, being not well satisfied with any of these.

(66) Serving the office of parish-clerk for a year gains a settlement, even although he be a certificate man. 1 Salk: 536. The same may be observed of a sexton. 1 Nolan's Poor Laws, 557.

(67) Du Cange is of the same opinion. Vide Glossar. title *Capella*.

A chapel is a church in smaller character, and therefore I imagine it might be called capella from the littleness of its content or capacity to receive persons, it differing nothing from a church, but in the dimension or content, and that the church is the elder sister.

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So a chapel is of little receipt in respect of the mother church.

Of chapels there are three sorts; free chapels, chapels of ease, and private chapels.

Division of chapels.

What those chapels were that were called free chapels, I find likewise some difference of opinions; for some have been of opinion, that they were chapels founded in parish-churches, and endowed by the founder, and made free to all people to come, and therefore called free chapels.

Minshey, Cowel in free chapels.

See Tichmies Alexander 32 & 8 (C.H.) 790.

Others were of opinion, that they were chapels built by the kings of this realm, or by their licence, and exempted from the visitation of the ordinary.

Others take them for donatives, and therefore called free chapels, because they were freely given.

These free chapels, whatsoever they were, were all given to the king in the first year of 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: for it is agreed on all hands, that the king may erect a free chapel, and free it from the jurisdiction of the ordinary, or may license a subject so to do.

St. 1 E. 6. c. 14:

Chapels of ease; some of them have parochial rights to christen and bury, and are therefore called parochial chapels by way of distinction, from others that have no such privilege; and these differ in nothing from churches, but in the want of rectories and indowments, the mother being to be served before the daughter.

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Chapels of ease; parochial and not parochial, the difference; 2 Inst. 362.

R. & Wilson 10 R. 2.

Those chapels of ease which are not parochial, cannot bury or christen; but are only used for the ease of the parishioners, to hear the word of God read and preached, and to join in prayers.

Chapels have like officers for the most part as churches

Chapels how to be repaired, &c.

have, distinguished only in name; and these chapels must be consecrated by the bishop as churches are; and the repairs must be made by assessments on the inhabitants and landholders within the chapelry in the same manner as for the repair of churches, and are visitable by the ordinary, and the like appeals to the ordinary for unequal assessments; but all this must be intended of ancient chapels, and where this course hath 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.

But of new chapels of ease there may be some question, whether the ordinary can compel the inhabitants to repair the same.

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44 E. 3. 18, 19.

But when a number of people have for their ease joined together, and erected a chapel, and procured the bishop to consecrate it (which was the original manner of erecting churches), it should seem in reason, that the bishop should have the same power to compel the repair, as he has to visit it.

Co. 5. 63, 64. a.
Co. 8. 127.
It is a maxim at the civil law, *refertur ad universos quod publice fit per majorem partem.*

But I conceive there is no doubt, but those of the chapelry, or the major part of them, may agree to make an assessment for the repair of such chapel, and agree that the collector for default of payment should distrain for it; and I conceive such by-law for a public good, made by the greater number, shall bind the rest.

Who has the cure of chapels.

The cure of chapels of ease in many places, is to be performed by those that have the cure of souls in the parish; and in some places they are indowed with lands or tithes, and in some places by voluntary contributions.

* Rast. Entr. trespass in dismes 4. and in præmunire in Rome 4.
† Rolls, 110. a.
Co. 5. 72. b.
22 H. 6. 46. b.
Rast. Entr. 2. b.

* And land or tithes may be appendant to a chapel.

Whosoever by law or custom is bound to provide chaplains for any such chapel, may be compelled to do it in the ecclesiastical courts, or an action upon the case lies against him at common law, to recover damages for not performing; but this must not be intended of a public chapel.

The offerings made at any chapel are to be rendered to the mother church; but this must not be intended where by custom, time out of mind, the chaplain has had them, for there the canon will not bind; nor does the canon extend to chapels of late erection, unless they be with a salvo jure matris ecclesiæ tunc concessæ.

Offerings at chapels.
Orthobon cap.
Gratia quæ.
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If the patron of a chapel presentative present to it by the name of a church, and the clerk by that presentment be instituted and inducted, it hath lost the name of a chapel, and gained the name of a church. Quære, what other alteration is made thereby?

How a chapel may become a church.
47 E. 3. 4. b.
5. a.
2 Inst. 364.

Public chapels annexed to parish-churches are (as hath been said) to be repaired by the parishioners as the church is; but not if any other person be bound by custom to repair them.

Chapels annexed to churches how to be repaired.
2 Inst. 489.

And note, that a quare impedit will lie of a chapel.

Quare Imp. will lie of a chapel.
2 Inst. 363.
F. N. B. 33. E.

In what cases the inhabitants of a chapelry shall be freed from the repair of the mother church, see before in this chapter (68).

(68) When the question was, whether it were a church or a chapel belonging to the mother church? the issue was, whether it had a font and burying place? for if it had the administration of sacraments and sepulture, it was judged in law a church. 2 Inst. 363.

Whenever a chapel of ease is erected, the incumbent of the mother church is entitled to nominate the minister, unless there is a special agreement to the contrary, which gives a compensation to the incumbent of the mother church, or a prescription, in which every thing is presumed to have been proper; and in that case, though the chapel was erected and endowed by a grant of lands from the lord and freeholders of a manor, and though the right of nomination was given by the archbishop in his deed of consecration to the inhabitants, and the vicar of the mother church at the time declared he had no right to nominate, and though the inhabitants had repaired and nominated for ninety years, his lordship decreed the right of nomination to belong to the vicar, there being neither an agreement by deed between

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 noble and worthy 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 still to be so; but I doubt many have been neglected of late time.

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Churchyards,
&c.

The last thing I have to speak of, relating to churches, is the churchyard, in Latin *cœmeterium*, from the Greek, "quasi dormitorium, quia mortui dicuntur dormire usque ad resurrectionem."

Inst. 489.

It is the ground wherein the church is erected; the

the bishop, patron, and incumbent, or evidence of a prescriptive title in the inhabitants. *Dixon v. Kershaw and others*, Amb. 528.

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. *Attorney-General v. Brereton*. 2 Ves. 425. 427.

Building and endowing a church originally entitled the patron to the patronage, but an impropiator of a parish has no right to nominate a preacher to every chapel within the parish; it would be a hardship should he be so bound 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. *Herbert v. Dean and Chapter of Westminster*. 1 P. W. 774.

freehold thereof is in the parson; so that the trees, grass, &c. growing in it are his; but he may not cut down the trees but in especial cases, as hath been shewed elsewhere.

The fences are to be repaired at the charge of the parishioners, or in such manner as by custom has been used: and the visitors in their visitations are to inspect the repairs, and to compel the reparations, if need require.

It is consecrated ground, and participates of all the privileges belonging to the church before-mentioned, and the parishioners may here freely bury their dead without contradiction, or paying any thing for breaking the soil.

It is not to be put to any profane use, to have swine kept in it, or muck-heaps laid in it; but kept decently, as a place dedicated to God's service (69).

Doct. and Stud.
118.
Cap. *quamvis*
lex naturæ.
2 Inst. 489.

(69) Great inconvenience having arisen from a want of proper accommodation for the population of this country, who might be desirous of attending divine service, an inconvenience more particularly felt by the inhabitants of the metropolis and its vicinity, the statute 58 Geo. 3. c. 45. was passed, for building and promoting the building of additional churches in populous parishes. The provisions of this act are long, but as they seem applicable to the subject of the present chapter, an abstract of them is here introduced.

His majesty may authorise the commissioners of the treasury to issue exchequer bills not exceeding one million, according to the same rules and directions as enacted by the stat. 48 G. 3. c. 1. S. 1.

That all the provisions of stat. 48 G. 3. c. 1. shall be extended to the exchequer bills to be made out in pursuance of this act, as fully as if the same had been re-enacted in the body of it. S. 2.

The said exchequer bills shall bear interest not exceeding twopence per cent. per diem, and the principal and interest shall be made payable at such periods as shall be fixed by the said commissioners; but so as that all such bills as shall

be advanced, shall be payable within three years from the issuing thereof. S. 3.

And such bills shall not be exchanged for money by any receivers or collectors of the revenues before the day appointed for their payment, &c. nor shall any action be maintained for refusing to exchange any such exchequer bills before the day of payment thereof. S. 4.

That from time to time, as the commissioners for the execution of this act find it necessary, upon application by them made, the commissioners of the treasury, if satisfied of the necessity, shall direct exchequer bills to the amount applied for to be issued out, provided the total amount does not exceed the amount directed by the act, and every such bill shall bear date on the day of such direction, and be signed by the auditor of the exchequer, or by some person duly authorised by him. S. 5.

And the officers of the exchequer shall deliver lists of the bills delivered to the commissioners, specifying therein the days and sums, the periods for payment of the same, and the persons to whom, and the numbers of the certificates by virtue whereof, the same were delivered. S. 6.

The bank may advance money upon the credit of such exchequer bills, not exceeding one million. S. 7.

His majesty, by letters patent, may appoint commissioners to execute this act, any five of which may act in the execution of the powers of it, and their commission shall continue in force for ten years from the date of the letters patent. S. 8.

The commissioners shall examine into the state of all the parishes and extra-parochial places of England and Wales, for the purpose of ascertaining where churches, according to the established religion, are required. S. 9.

The commissioners may appoint a secretary and clerk, and make surveys, reports, &c. and may assign reasonable salaries. S. 10.

The commissioners of the treasury may issue such sums as may be necessary to defray the expenses incurred in the execution of this act, an account of which shall be laid before both houses of parliament. S. 11.

The commissioners shall, as soon after their appointment as the obtaining the necessary information will allow, draw

up certain regulations for their proceedings, and fix the sums to be allowed for building churches, and shall have power to alter their regulations; and these shall be laid before the king in council, who may disallow or approve of the same. S. 12.

The commissioners may grant money for the building of churches or chapels in parishes wherein there is not accommodation for more than a fourth of the parishioners, or in which there shall be a thousand persons resident more than four miles from any church or chapel, where the commissioners are satisfied that such parish is unable to bear any part of the expense: and they may give loans to assist in building churches and chapels in places which may contain a like population, but in which the commissioners may deem the inhabitants capable of bearing part of the expense. S. 13.

The commissioners may make grants and advance money to build churches in parishes, &c. where a certain proportion (to be fixed by the commissioners in the regulations they are empowered to make) is raised by rate or subscription. S. 14.

The commissioners, in the selection of places for distributing these sums, shall have regard to the amount of the population, the disproportion between it and the accommodation for attendance on divine service according to the established church; to the proportion of expense offered to be contributed, and to the pecuniary ability of such parishes or places; and in giving preference as between places not offering to contribute, the commissioners shall have regard to the order of priority in which places, under similar circumstances, as to population and the means of accommodating them, shall have given notice to the commissioners of having provided sites to build upon. S. 15.

Where the commissioners think that it will be expedient to divide any parish into two or more parishes, the commissioners may apply to the patron of the church of such parish for his consent, and upon obtaining it, may lay their plan before the king in council, and the king, if he approve of it, may order a division to be made of it into separate parishes: but no such division shall take effect till after the death, &c. of the existing incumbent. S. 16.

And all tithes, &c. shall belong to the incumbents of each division of the parishes respectively. S. 17.

During the existing incumbency, every new church shall be considered as a chapel of ease, and the curate shall be nominated by the incumbent, and licensed by the bishop of the diocese. S. 18.

And every such separate parish, when the division shall have been completed by the death, &c. of the incumbent of the original parish, shall be deemed a rectory, vicarage, donative, or perpetual curacy, according to the nature of the original parish, and shall be subject to the same laws and regulations. S. 19.

All donatives and perpetual curacies shall be subject to lapse, if no appointment thereto shall be made within six months after any death, &c. of the incumbents thereof: no spiritual person appointed to such donative or perpetual curacy shall be removable at the pleasure of the person appointing. S. 20.

Where the commissioners shall be of opinion that it is not expedient to divide a parish, the king in council may order such parish to be divided into ecclesiastical districts, in order to afford accommodation in churches and chapels already built; or otherwise, they may build or aid the building of chapels to be served by curates, to be appointed by the incumbent of the parish. S. 21.

The new parishes to be created, and districts that shall be made, shall be marked out by bounds, and the description thereof shall be enrolled in Chancery. S. 22.

The king in council may alter such boundaries. S. 23.

Such districts shall be called district parishes, by such names as shall be given to them in the instrument so enrolled, and shall be parishes for all ecclesiastical purposes, except as in this act is excepted. S. 24.

Every church and chapel thus built shall be deemed a perpetual curacy, and shall be considered in law as a benefice, presentative so far only as that the licence thereto shall operate in the same manner as institution to any such benefice, and shall render voidable other livings; and such incumbent shall be subject to all laws ecclesiastical and common, and to all provisions contained in any statutes relating thereto; and such benefice shall be subject to lapse. S. 25.

No such church or chapel of such district shall be tenable with the original church, or with the church or chapel of any other such district parish. S. 26.

All acts of parliament relating to publishing banns of marriage and other ecclesiastical duties shall apply to such district parishes, churches, and chapels. S. 27.

Banns are not to be published, or marriages, &c. had in any such district church or chapel, until after a death, resignation, or avoidance of the incumbent at the time of consecration of the church or chapel. S. 28.

The death, &c. of the incumbent of the church, is to be notified by the bishop, and entered in the register book of the parish church, &c.; such entries shall be evidence of the commencement of publication of banns, &c. in the chapel. S. 29.

The division of a parish into district parishes only, and not into separate parishes, shall not affect any glebe, tithe, moduses, &c. but the original parish shall remain as to all such tithes. S. 30.

The original parish shall remain and continue a parish to all intents and purposes, as far as regards all poor and parochial rates, except church rates. S. 31.

The commissioners may make compensation for losses from oblations, offerings, &c. to the incumbent of a parish during his incumbency, by reason of the diminution of his fees in consequence of its division into district parishes. S. 32.

The commissioners may accept buildings and sites for churches and chapels; the sites not to exceed more than is sufficient for the erection of a church or chapel, and a churchyard, &c. and they may accept houses and lands, not exceeding ten acres, for the residence of a spiritual person. S. 33.

The commissioners of woods and forests may, with the consent of the commissioners of the treasury, duchy of Lancaster and Cornwall, and bodies politic, grant sites for building such churches and chapels. S. 34.

Such parishes and places as shall be required by the commissioners shall furnish sites for such additional churches and chapels. As soon as the commissioners have fixed upon any place where such church or chapel is necessary, they

shall leave notice with the churchwardens of the parish of their intention, and of the quantity of ground which will be required, and where they propose to build it; and the churchwardens shall, within fourteen days, call a meeting of the vestry to take such measures as may be necessary for providing such site: but they are not to conclude any bargain for the same without the consent of the commissioners. S. 35.

Bodies politic are enabled to sell and convey sites. S. 36.

A form of conveyance is drawn out, which shall be a complete bar to all estates and interests whatsoever. S. 37.

A conveyance by lords of manors, of lands taken from the common, shall be sufficient, and the proceeds shall be paid to the churchwardens, who shall apply the money in such manner as a vestry may direct. S. 38.

All bodies politic, hereby capacitated to sell, may receive satisfaction for their lands, &c. and after executing the conveyance, the commissioners may enter; and in case the parties cannot agree as to the satisfaction, the price shall be settled by a jury. S. 39.

If the parties are dissatisfied or refuse, or are incapacitated to treat, a jury shall be impanelled to decide, and such jury shall assess the sums which shall be given for such lands, &c. their verdict and judgment to be conclusive, provided fourteen days' notice be given to the body politic, &c. and if the verdict be given for more than the sum offered by the commissioners, the expenses shall be paid by them; if less, by the body politic, &c. unless any person may have been prevented by absence or otherwise from agreeing, in which case the expenses shall be paid by the commissioners. S. 40.

If the sheriff or other person directed to summon a jury refuse to do so, he shall forfeit not exceeding twenty pounds; if a juryman refuse to attend, or to give his verdict after attending, he shall forfeit not exceeding ten pounds. S. 41.

Such verdicts are to be recorded at the quarter sessions, and true copies of such records shall be deemed evidence. S. 42.

The commissioners are empowered to enter upon and take possession of lands, &c. upon the payment or tender of the purchase money, and this shall bar all rights and interests, dower, &c. but the commissioners are not to dig for

foundation of such church or chapel before payment, without leave of the owners or occupiers. S. 43.

Where money to be awarded for any land, &c. shall belong to any corporation, or person under a disability to receive it, such money, if it amount to 200l., shall be paid into the court of Chancery, in order that it may be applied by direction of the court for the benefit of the corporation, &c. to whom it belongs; the order to be made upon petition in a summary way. S. 44.

Where the sum is less than 200l. and exceeds 20l. it may be paid into the court of Chancery, or to three trustees, at the option of the person who may have a temporary right to receive the rents, &c. S. 45.

Where such sum is less than 20l. it shall be applied to the use of the person who for the time would have been entitled to the profits, in such manner as the commissioners may think fit. S. 46.

If the person, &c. to whom such sum shall be ordered to be paid, cannot make out a good title, or if persons entitled cannot be found, the purchase money shall be paid into the bank, subject to the order of the court of Chancery, on motion or petition. S. 47.

Where there is any question relative to the title to money, the person who shall be in possession of the lands, &c. at the time of such purchase shall be deemed entitled according to possession. S. 48.

The court of Chancery may order reasonable expenses of purchases to be paid by the commissioners. S. 49.

Mortgagees in possession are to convey on tender of principal and interest; and three months further interest by commissioners, or on notice at two months. S. 50.

The commissioners are empowered to resell lands not wanted, and the first offer of resale is to be made to the persons of whom the lands were bought. S. 51.

The commissioners are allowed to procure sites for churches of parishes already empowered, or who are desirous to build, &c. without aid from the commissioners. S. 52.

The commissioners are not allowed to take any private dwelling-house, &c. without consent of the owner. S. 53.

They may advance money to parishes to purchase sites, where they think it necessary; to be repaid by instalments within ten years. S. 54.

If a parish does not procure a site after due notice given, the commissioners may do so, and charge the expense upon the parish. S. 54.

Sums expended in purchasing sites or advanced to parishes by the commissioners, to be charged upon and paid out of the church rates. S. 55.

In extra-parochial places, where no church rates are collected, justices of the peace may raise and levy rates in like manner as churchwardens, and such rates shall be deemed church rates. S. 56.

Churchwardens are empowered to borrow money on the credit of the rates. S. 57.

And to borrow money for the enlargement of an existing church or chapel, and to make rates for payment of the interest, and forming a fund, not less than the amount of the interest for paying off the principal; one-half of the additional accommodation to be free seats. S. 58.

No application is to be made for building, &c. by means of rates, unless with consent of the majority of the inhabitants paying poor rates; or where there is a select vestry, then, with the consent of not less than four-fifths of such vestry, and also with consent of two-thirds in value of the proprietors of lands, &c. S. 60.

Churchwardens of a parish where any such church, &c. is built, may raise rates for the purpose. S. 61.

The commissioners may build churches, &c. on such plans as they think convenient, and by consent of the bishop may arrange and let the pews: the part not arranged shall be assigned for free seats. S. 62.

The commissioners may reserve the rent to be paid for each pew; and of the produce form a fund for the maintenance of a spiritual person and a clerk. S. 63.

The commissioners are to assign stipends to clergymen out of pew rents: differences between commissioners and bishops as to stipends are to be decided by the archbishop. S. 64.

Bishops may direct the performance of a third service, with a sermon, where they think it expedient for the accommodation of the parishioners; the churchwardens are allowed to let so many pews, for the purpose of affording a salary to the curate for such service, as the bishop shall think fit; the free sittings nevertheless not to be less than

one-fourth: where parishioners offer to provide for such curate by subscription, the bishop may require the incumbent to nominate one, except so far as relates to his salary; such curate is subject to all the provisions, &c. relating to stipendiary curates. S. 65.

Persons who may make such subscription are entitled to pews for such third service. S. 66.

The patronage of district churches is to be in the patron of the parish church. S. 67.

Where a chapel is built by rates made in the parish, the nomination to such chapel is to be in the incumbent of the parish-church. S. 68.

The rights of Brazen-nose College as to the presentation to Stepney are preserved. S. 69.

Repairs of district churches are to be made by rates upon the district. S. 70.

But the district is to remain liable for repairs of the parish church for twenty years, to be reckoned from the consecration of the district church, &c. S. 71.

Churchwardens are to be appointed for every such church, &c.; one to be chosen by the incumbent, the other by the parishioners entitled to vote at the usual time of choosing, &c.; when elected, they shall be sworn, and shall receive the rents of the pews, and pay the stipend to the minister and clerk; and in case of non-payment of rents may sell the same or sue for them. S. 73.

The parish churchwardens are to act in parishes where additional chapels shall be built. S. 74.

Pews are to be provided rent-free for the minister and his family, &c. and free seats, not less than a fifth, shall be set apart for the poor. S. 75.

Subscribers are to have a choice of pews. S. 76.

Pews let to raise the minister's salary shall be charged according to their number in the schedule to be made respectively; the rents to be paid to the churchwardens half-yearly. S. 77.

Churchwardens may, with consent of incumbent, patron, and bishop, alter pew rents. S. 78.

Where the pew rents are in arrear for three months, and notice in writing for payment has been given, the churchwardens may sell the same for payment, or may sue the occupiers in an action of debt. S. 79.

No openings are to be made in any church or chapel for purposes of burial, or graves made in any churchyard at a less distance than twenty feet from the external walls of the church, penalty 50l. : Provision is made for burial in vaults. S. 80.

Accounts are to be annually laid before parliament. S. 81.

Commissioners may receive and send letters, duly directed, free of postage. S. 82.

Actions upon this statute are limited to six months after the fact committed; general issue may be pleaded: treble costs are given to defendants where plaintiffs are nonsuited. S. 83.

Rights of the bishop, &c. are preserved. S. 84.

He, the archdeacon, &c. shall exercise ecclesiastical jurisdiction within his diocese. S. 85.

CHAPTER XIII.

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Of Parsonages, Vicarages, Sine Curas, and Donatives, and of the Indowments of Vicarages, and how a Parsonage and Vicarage may be re-united; and many other things relating to Parsonages, Vicarages, and Sine Curas.

A PARSONAGE, or rectory, is a certain portion of land, tithes, and offerings, established by the laws of this kingdom, for the maintenance of the minister that hath the cure of souls within the parish where he is rector, or patron, and properly comprehends, integra ecclesia parochialis, cum omnibus suis juribus prædiis, decimis, aliisque proventuum speciebus: alias vulgo dictum beneficium. And sometimes it is taken pro mansione, seu domicilio rectoris.

A parsonage or rectory, quid.

Spelman's Gloss. verbo rector, 12.

And though properly a rectory or parsonage doth consist of glebe land and tithes with the offerings; yet it may be a rectory, though it have no glebe but the church and churchyard; and in some places, as in London, and other great towns and cities, there may neither be glebe nor tithes; but annual payments and offerings in lieu thereof, and by the grant of a rectory all the glebe, tithes, and offerings will pass.

15 H. 7. 8. a.
21 H. 7. 21. b.
Edgar v. Sorrel,
M. 5 Car. B. R.

Ibid.

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A vicarage is a cantel or portion of the rectory set out by the patron, parson, and ordinary, for the maintenance of a perpetual vicar, who, as vicegerent of the parson, hath the cure of the souls within the parish where he is vicar. But a vicarage may consist of land or tithes alone, or of glebe, tithe, and offerings, or in an annual pension without glebe or tithes; and such pen-

Cap. quoniam autem verbo 5. q. marcarum.

sions have been limited by several canons, first to five marks, after it was extended to six marks, and lastly to eight.

A vicar can have tithes but by gift, composition, or prescription; for all tithes de jure do appertain to the parson. March. Rep. 11.

Generally vicarages are indowed with glebe and tithes.

Indowments before and within memory.

Of indowments, some are beyond all time of memory, that is, so long ago, that it is not known in what time or age the same was made, and in such case it shall be presumed, that the vicar was indowed with such share of the rectory, tithes, and offerings, as the vicar and his predecessors have enjoyed by all the time of the memory of any man.

See infra, 193.

But if the indowment itself be extant, then the vicar must be content with such part of the rectory as he is thereby indowed with.

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How to be expounded.

But if these indowments be ancient they shall be expounded according to the usage since.

2 Rolls, 335. 7.

And therefore if a vicar were anciently in the time of Henry the Third, or before, indowed de decimis garbarum, arising in such a village, hamlet, or place, and have by colour of this indowment, as long as any body can remember, had the tithe hay as well as tithe corn of the same villages, hamlets and places, it shall be presumed that in those days hay past by that name.

Ibid. 335. 8.
Reynells v. Green, M. 10
Jac. B. R.

So if a vicar were anciently indowed de minutis decimis, and have by colour of this indowment, by all the time of memory, had the tithe of some small parcel of wood; although tithe of wood in its own nature be accounted a great tithe, yet the vicar shall enjoy the tithe of this wood by reason of the usage.

Hetley, 70. 135.

If a vicarage were anciently indowed de altaragio, which properly signifies the offerings at the altar; yet if the vicar, by colour of this indowment, by all the time of memory have enjoyed the small tithes, he shall have them still.

If a vicar be indowed of all the tithes arising in the parish (except corn), and certain fields or grounds in the parish, have time out of mind been sown with corn, till of late they have been planted with hops, or sown with saffron, wood, rape, &c. the vicar shall have the tithe and not the parson.

2 Rolls, 234. 7.
335. 4.
Owen, 74.

And if the vicar be indowed of all the white tithes, or small tithes arising, renewing, &c. within the parish, he shall not by this indowment have the small tithes arising upon the glebe lands of the rectory, though they should afterwards be severed from the rectory.

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2 Rolls, 335.
2 and 3 Cro.
Eliz. 578.
More, 457.
Hetley, 335.
Winch. 70.

And it hath been resolved, that upon a general indowment of a vicarage, the vicar shall not pay the tithes of his glebe land to the parson.

Vicars shall not pay tithes of the glebe.
Crompton's case.
P. 7 Car. 1. B. R.
Matter upon indowments.
2 Rolls, 335. 5.

If the vicar be indowed of all the small tithes, and after lands that have been sown with corn, or mowed for hay, time out of mind, whereof the parson hath had the tithe, and these lands are since converted to hop yards, or sown with saffron, wood, rape, &c. the vicar shall have the tithes, and not the parson: for the indowment goes not to the lands, but the tithes.

A vicar enjoyed a tithe time out of mind, which was not in his indowment; and adjudged good, and shall be intended an augmentation made by the parson.

Hardress, 323,
329.
See supra, 191.

If a vicar be indowed of all the tithes arising upon a manor, he shall by such indowment have not only the tithes of the demesne and tenements, but also of the freeholders' lands within the manor.

2 Rolls, 235. 6.

The parsonage of Luffenham, in Leicestershire, the 22d of Edward the Fourth, was appropriated to the abbey of Sully, upon condition that a vicarage should be indowed. A vicar from time to time ever since was

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presented and paid first-fruits, but no indowment now extant, it shall now be intended that it was indowed.

The indowments of vicarages have been always favoured at law, the vicars for the most part having the cure of souls.

Upon what occasion vicarages were indowed. Selden de Decimis, 371, 372.

Indowments of vicarages were for the most part made upon the appropriating of churches to religious houses, &c. and upon the appropriation they did usually assign some small portion of the rectory to maintain a perpetual vicar to serve the cure, and took the rest of the rectory to the use of abbeys, &c.

But in process of time the abbots, &c. grew better husbands, and took the whole rectories to themselves, without indowing of any vicar, and served the cures by their own monks and friars; by which means hospitality was neglected, the churches and rectory houses dilapidated, the minister often wanting; whereupon the statute of 15 R. 2. and 4 H. 4. were made, for the making void such appropriations as were made without competent indowment of vicarages, and likewise against the appropriating of vicarages; but vicarages indowed before those statutes, might notwithstanding those statutes have been appropriated.

15 R. 2. cap. 6.
4 H. 4. cap. 18.

Bretton v. Ward.
M. 17 Jac. B. R.

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Sine curas how introduced.

But though for the most part vicarages were indowed upon appropriations; yet sometimes the parsons, patrons, and ordinaries did indow vicarages without any appropriation of the parsonage. And if the vicar were charged upon such indowment with the cure, as for the most part they were, then the parsonage became a sine cura; of which more hereafter.

How an impropriation may be restored.
17 E. 3. 51. b.
11 H. 6. 18. b.
39 E. 3. 33. a.
19 E. 2. quare impedit. 178.

The parson, or appropriator, is patron of the vicarage by common right; yet nevertheless a layman might have been patron of a vicarage as well as the parson, and so might the king; and the advowson of a vicarage may be appendant to a manor by prescription,

and it shall be intended it was granted by the parson before the time of memory. 2 Rolls, 336. E. 5. 14 E. 3. 8. 15.

It should seem that at the common law, before the statute of 14 E. 3. the freehold of the vicarage remained in the parson, and that the præcipe was to be brought against the parson; and before that statute the vicar could not have had a *juris utrum*, and he shall still have aid of the patron, parson, and ordinary. Freehold of the vicarage, in whom. 6 E. 3. 50. a. 3 E. 3. 17. b. 9 E. 3. 8. b.

And as the vicarage was part, and taken out of the parsonage, so it may be again re-united.

For if the profits of the parsonage or vicarage fall into such decay, that either of them by itself is not sufficient to maintain a parson and vicar, they ought again to be re-united. How a vicarage may be re-united. 31 H. 6. 14. a. 40 E. 3. 28. b.

And the parson and ordinary, in the time of the vacation of the vicarage, may re-unite the vicarage to the parsonage. [196] 2 Rolls, 337. h. 1.

And if a vicarage so fall into decay, that the same is not sufficient, competently to maintain a vicar, the bishop may judicially compel the parson to enlarge the vicarage or appropriator; but by Catisby, 22 E. 4. 24. b. such augmentation must be made by the bishop, patron, and ordinary (70). Where a vicarage may be enlarged, and how. Ibid. h. 2. 22 E. 4. 24. b. per Catisby.

It hath been resolved, that where there is a parsonage and vicarage indowed, that the bishop in the vacation may dissolve the vicarage. But if the parsonage be impropriated, the bishop cannot dissolve the vicarage; for upon a dissolution the cure must revert, which it cannot into lay hands: for where there is a parsonage How a vicarage may be dissolved. Barry v Bancks. 12 Jac. Scac. Palmer, 219.

(70) It may seem doubtful how far such an invasion of private property would now be considered to be law; in all events, the institution of Queen Anne's bounty, and the parliamentary grants for the augmentation of small livings, have removed a pretext for making an attempt to put such a law into execution.

and vicarage, they both have the cure; the parson habitualiter, the vicar actualiter; per Noy.

How the rectory and vicarage may be re-united.

44 Ass. p. 37.

2 H. 6. 33.

11 H. 6. 18. b.

If an impropiator or appropriator, patron of a vicarage, by agreement between him and the ordinary, presents to the parsonage, by this they are re-united; and it seems that a bare presentation, without any agreement at all, disappropriates the parsonage, and re-unites the vicarage.

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Charge falls on the vicar, parson is to free it.

31 H. 6. 14. a.

If any charge fall upon the vicarage, it ought to be repaired by the parson.

And so much of parsonages and vicarages.

A donative, quid.

More, 765.

Cro. Jac. 63.

Yelv. 60.

A donative is a spiritual preferment in the church, chapel or vicarage, which is in the free gift or collation of the patron, without making any presentation to the bishop.

Neither needeth such clergyman have any admission, institution or induction, by any mandate from the bishop, or others; but may by the patron, or by any other authorised by the patron, be put into possession.

1 Inst. 334. a.

And such incumbent is free from the visitation of the bishop, or any other than his patron or his commissioners, and by consequence freed from procurations.

Ass. p. 29.

A parish church may be a donative.

And if the bishop should take upon him to visit a donative, and deprive the incumbent, he runs himself into the danger of a præmunire. Co. 3 Inst. 122. and Davis Rep. 44. a. Ex Bro. Præm. 21.

2 Rolls, R. 1.

1 Inst. 344. a.

6 H. 7. 14. a.

contra Keble.

And note, that a parish church may be a donative, and have cure of souls: and such donatives cannot lapse, unless by special agreement at the foundation; but the ordinary may compel the patron to collate.

Yelv. 61.

F. N. B. 35. e. f.

1 Inst. 344. a.

But the patron cannot collate a layman, as some have thought, but a spiritual person in holy orders.

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Cro Jac. 63.

But if the patron once present to a donative, and the clerk upon such presentation be admitted, instituted

Reg. v. Foley 2 CB 696 contra

and inducted, it is thereby for ever after become presentative, and shall be no longer esteemed, or used, as a donative.

How a donative may be made presentative.
1 Inst. 344. a.
F. N. B. 35. e.
1 Inst. 344. a.

But if a stranger that has no right, presents to a donative, though his clerk be admitted, instituted and inducted; yet that shall not alter the nature of the living.

If the king found a church, and exempt it from the visitation of the ordinary, it is a donative, and the king shall visit by his chancellor.

The king may found a donative or licence a subject to do it.

So it is, if the king found a church or chapel, without any special words.

1 Inst. 344. a.

And the king may give licence to a subject, to erect or found a church or chapel donative, and exempt it from the ordinaries visitation; and the patron may in such case visit by his own commissioners.

Ibid.

And a quare impedit may be brought of a donative, "quod permittat ipsum præsentare ad ecclesiam;" but the declaration in such case must be special.

A quare imp lies of a donative.
1 Inst. 344. a.
Yelverton, 61.
F. N. B. 23. e. f.

And donatives are within the statute against simony, and where they have cure of souls, they are likewise within the statute against pluralities.

Donatives within the statute of simony and pluralities.

There is another sort of church livings that are commonly called sine curas; these are such parsonages as have vicars indowed with cure of souls, as has been said: but these are not within the statute of pluralities, nor are these livings said to be incompatible: for those livings are only said to be incompatible that have cure of souls; and therefore I conceive there needs no dispensation, or faculty, for taking one of these sine curas, though the party had another living before with cure of souls: but herein the party is best to be advised by some learned canonists; but by the statute there needs no dispensations.

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Sine curas, quid.

Livings incompatible. Quære.

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CHAPTER XIV.

What Resignations and Permutations are, and in what manner they may be made, and other matters relating to them; and of Union and Consolidations.

Resignation,
quid.

A RESIGNATION is, where a parson, vicar, or other beneficed clergyman, voluntarily gives up, and surrenders his charge and preferment to those from whom he received the same, which may be absolutely, or upon condition.

To whom.
Dyer, 294. b.

A resignation must regularly be made to the next immediate ordinary, and not to the superior.

To or by a proctor.
Noy, 147.

A resignation may be made by or to a proctor; but a church is not void by any such resignation in absence, till the same be presented, and accepted by the ordinary: or a resignation may be made in the presence of a public notary in the absence of the bishop; and after it is presented and accepted, it is as good as though the bishop had been present.

Gayton's case,
P. 34. El. C. B.

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Resignation
may be to the
king.
Dy. 294. p. 56.
Kelway, 49.
Plo. 498. a.

And though regularly resignations ought to be made to the bishop, from whom the clerk, upon his admission, receives his charge and cure; yet a resignation to the king, as supreme ordinary, hath been held good (71).

(71) The qualification in the grant of a living, that the person to be presented should not at such time as the church should be void, "be presented, instituted, or inducted into any other living," is sufficiently complied with by the previous resignation of another living, where the defendant sent an instrument drawn up in the usual form, indorsed by a

The usual words of a resignation are, *renuntiare, cedere, remittere, et resignare.*

Words of resignation.

Dyer, *ibid.*

Donatives must be resigned to the patron, and not to the ordinary; for the clerk in that case received his living immediately from the patron.

To whom a donative is to be resigned.

Cro. Jac. 63.

Yelv. 60.

1 Inst. 344. a.

And if there be two patrons of a donative, and the incumbent resign to one of them, it is good for the whole.

In the case of one Gayton, P. 34 Eliz. in the Common Pleas, in a *quare impedit* for the church of Little Cressingham in Norfolk, a parson resigned his benefice in the presence of a public notary, *sponte, pure, et simpliciter*, to the use of two upon condition, "*quod si aliqui eorum non admissi fuer' et realem possessionem ecclesiæ prædictæ adipisci non valeant infra sex menses, quod tunc,*" &c.

Cro. Jac. 63.

Yelv. 60.

Resignation in

presence of a

public notary.

Semble resolution.

P. 3. Eliz. rot.

343. C. B.

And in this case it was very much disputed, whether a resignation could be upon condition; but at last, with advisement with the civilians, it was resolved, that a resignation might be upon condition.

Permutations, or exchanges, are where two clergymen agree to exchange their livings, and after they made such agreement and put in writiug, they make mutual resignations upon condition, in the form following.

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Permutations,
quid.

Regist. 306. b.

notary public, to the bishop by the post. And this resignation was held enough if the bishop signed a memorandum of his acceptance of it; for that acceptance is not a judicial but domestic act, requiring no registration. *Hayes v. Exeter College*, 12 Vcs. 336.

It is still doubtful whether the ordinary may refuse to accept a resignation without assigning any cause, or whether he may be compelled to assign a sufficient cause if he should refuse. Vide 1 Bla. Com. 393. Mr. Christian's note.

A resignation
upon permuta-
tion. Regist.
Indit. 306.

“ *In Dei nomine, amen. Ego H. de W. rector ecclesiæ de N. Lincoln’ dioces. volens ipsam ecclesiam meam cum ecclesia de P. dictæ dioces. cujus rector existit Dominus de W. certis justis, et legitimis de causis sine dolo et fraude canonicè permutare, ipsam ecclesiam meam ex causa permutationis hujusmodi et non alio modo, in sacras manus venerabilis in Christo patris Domini T. Dei gratia Lincoln’ episcopi resigno, supplicans humiliter et devote, ut H. de hujusmodi causa permutationis ipsam resignationem sic factam et non aliter velitis admittere, et negotium permutationis hujusmodi quatenus ad vos attinet fideliter expedire. Et protestor expresse in his scriptis, quod si dicta permutatio debitum non sortiatur, effectum, quod hujusmodi mea resignatio prædicta pro nullo penitus habeatur.*”

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To which is added an instrument containing a protestation, in the form following :

The protesta-
tion.

“ *In Dei nomine, amen. Ego H. de W. nunc rector ecclesiæ de P. Lincoln’ dioces. et prius rector ecclesiæ de N. dictæ dioces. protestor, dico et allego in his scriptis, quod si contingat quod hujusmodi ecclesia mea de P. absque dolo et culpa meis in hac parte à me aliquàlter evincatur, volo et intendo ad dictam ecclesiam de N. absque aliqua difficultate libere et licite redire, et eam re-habere juxta canonicas sanctiones, et protestor insuper quod non intendo nec volo ab hujusmodi protestatione seu effectu ejusdem recedere aliquàlter in futuro ; sed eidem protestationi et contentis in eadem, volo et intendo in futuris temporibus firmiter adhærere, juris beneficio in omnibus semper salvo,*” &c.

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What the effect of this protestation is, I must leave to the civilians to determine. However the intent of the thing agrees well enough with the reason of the common law ; for, at the common law, if a man ex-

change lands, and the land he receives in exchange be evicted, he may repair to his own lands, and re-enter upon them.

And it has been resolved, that where two parsons of two several churches, by an instrument in writing, agreed to permute their churches by way of exchange, and severally resigned them into the hands of the ordinary to that intent; and the several patrons presented, according to the intent of the exchange, and the one parson was admitted, instituted and inducted; and the other was admitted and instituted, but died before induction; that though the induction of the other was absolute, yet this was so directed by the precedent agreement, which was by way of exchange, which ought to be executed on both parts in the life of the parties; and the induction could not be made upon condition; therefore for this reason it was all resolved to be void (72).

Permutation void, quia one died before induction. 45 E. 3. F. Exchange 10. Co. 2. 74. b. Perkins tit. Exchange.

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A union or consolidation is where two or more churches are united and consolidated into one, and may be for a certain time; as for the life of the incumbent;

Inst. Juris Canonici, 74.

(72) By statute 55 Geo. 3. c. 147. spiritual persons are enabled to exchange the parsonage or glebe houses or lands belonging to their benefices, for others of greater value or more conveniently situated for their residence and occupation; and to annex such houses and lands so taken in exchange, to such benefices, as parsonage or glebe houses and glebe lands, and to purchase and annex lands, where the glebe does not exceed five acres; and the purchase money may be raised by mortgage of the tithes, not exceeding two years net income. The governors of Queen Anne's bounty are empowered to lend money for this purpose without interest; colleges may lend money with or without interest. And by statute 56 Geo. 3. c. 52. the incumbent may apply money arising from the sale of timber, cut and sold from the glebe lands of his benefice, &c. towards the exchange or purchase of a parsonage house or glebe lands.

and then it is but in the nature of a plurality, or it may be perpetual.

Cro. El. 500,
501.
Finch, 90, 91.
More, 661.
50 E. 3. 28. a. 27.
2 Rolls, 778.
40 E. 3. 28. a.
Causa 2. 16. q.
Et Tempori 1.
See Dyer, 259.
p. 19. bone forme du Union.
Stat. 37 H. 8.
cap. 21.

Unions are made by the ordinary by the consent of the patrons in the vacancy, with the licence or confirmation of the king: but if the churches, or either of them, be full, the consent of the incumbent is likewise necessary.

By a statute made in the 37th year of Henry the Eighth, the bishop is enabled to unite churches which are within a mile one of the other, without the king's licence or confirmation, so as one of the churches be not above six pounds in the king's book.

12 Car. 2. c. 3.

By another statute in the 17th year of King Charles the Second, the ordinary is enabled in cities and corporations to unite churches, with the consent of the chief magistrates, without the king's licence or confirmation, so the churches united exceed not 100l. per annum.

Cro. El. 501.

The uniting of churches ought to be *causa utilitatis sive necessitatis*, as vicinity, paucity of inhabitants, smallness of the livings, &c.

Cro. El. 501.
2 Rolls, 778.

And if two or more churches shall be united upon a false suggestion, it seems the union is void, both by the common and canon law.

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At the common law, it should seem, churches might be united of any value by the ordinary, with the consent of the patron's and the king's licence or confirmation.

Cro. Eliz. 501.
per Gaudy and
Fenner.
Finch, 91.

But I find two judges affirm, that the ordinary might unite poor livings without the king's licence or consent; but not great ones.

50 E. 3. 27. a.
11 H. 7. 82. b.
92. a.
F. Grant, 104.

Whence the judges took this difference I am to seek: for in the height of popery I find the king's licence or confirmation always concurrent.

And so much for unions and consolidations.

Attorney General v. Episc. Oxon. about 12 Car. 1. Bill to unite a parsonage to the bishop's see. Tothil's Transactions in Chancery, 133.

An abstract of statute 4th of Anne, chap. 14. relative to briefs, the statute 26th of Geo. 2. chap. 33. commonly called the marriage act, and the statute 52 Geo. 3. chap. 146. relative to parish registers, are here annexed, as being likely to form a useful addition to the work.

By statute 4 Anne, c. 14. entitled, "An act for the better collecting charity money on briefs by letters patent, and preventing abuses in relation to such charities," it is enacted, "That when letters patents, commonly called briefs, shall be issued out of chancery, copies thereof to the number required by the petitioners, and no more, shall be printed by the printer of the queen, her heirs or successors, at the usual rates for printing.

II. "The printer shall deliver the same to such persons only as shall, by the consent of a majority of petitioners, undertake the laying or disposing of them.

III. "The undertaker shall give to the printer a receipt for the same, expressing therein the number of copies; which printer shall forthwith deliver the receipt, or an attested copy thereof, to the register of the court of chancery, to be filed there.

IV. "The undertaker shall next cause all the printed copies to be indorsed, or marked in some convenient part, with the name of one trustee (or more), written with his own hand, and the time of signing.

V. "And he shall also cause them to be stamped with a proper stamp to be made for that purpose, and kept by the register of the court of chancery; and if any person shall counterfeit the stamp, he shall be set in the pillory for an hour.

VI. "This done, he shall, with all convenient speed, send or deliver them to the churchwardens or chapelwardens, and to the teachers and preachers of every separate congregation, and to any person who hath taught or preached among Quakers.

VII. "Which persons, immediately after receipt, shall indorse the time of receiving, and set their names.

VIII. "Then the churchwardens or chapelwardens shall forthwith deliver them to the minister.

IX. "And the ministers on receipt shall indorse the time, and set their names.

X. "Then the ministers (and teachers respectively), in

two months after receipt, shall on some Sunday, immediately before sermon, openly read or cause them to be read to the congregation.

XI. "When the churchwardens and chapelwardens (and teachers and others to whom they were delivered) shall collect the money that shall be freely given, either in the assembly, or by going from house to house, as the briefs require.

XII. "Next, the sum collected, the place where and time when, shall be indorsed, fairly written in words at length, according to the form to be printed on the back of each brief, and signed by the minister and churchwardens, or by the teacher and two elders, or two other substantial persons of such separate congregation.

XIII. "Afterwards, on request of the undertaker (or other person by him lawfully authorised), which he is required to make within six months after the briefs were first delivered into the respective parishes, on pain of twenty pounds, to be recovered by action at law; the churchwardens and teachers shall deliver to him the briefs so indorsed, and the money thereon collected by virtue, taking his receipt for the same in some book to be kept for that purpose.

XIV. "Every minister, curate, teacher, preacher, churchwarden, chapelwarden, and Quaker, refusing or neglecting to do any thing above required, shall forfeit twenty pounds, to be recovered by action of debt, bill, plaint, or information.

XV. "And in every parish or chapelry and separate congregation, a register shall be kept by the minister or teacher of all monies collected by virtue of such briefs, therein also inserting the occasion of the brief, and the time when collected, to which all persons at all times may resort without fee.

XVI. "And the undertaker shall enter in a book the number of briefs, when signed and sent, and whether and when received back.

XVII. "And the briefs so received back shall be deposited by him with the register of the court of chancery, and if the whole number shall not be returned, the undertaker for every one not returned (through default of him or his agents) shall forfeit fifty pounds, unless he shall prove that it was lost or destroyed by inevitable accident, and shall pay the money collected thereon.

XVIII. "And the undertaker in two months after he has

received the money, and after notice thereof to the sufferers, shall account before a master in chancery, and shall be allowed all just charges.

XIX. "And if any shall purchase or farm charity money on briefs, such contract shall be void, and the purchaser shall forfeit five hundred pounds, to be recovered by action at law, the same to be applied (as also the other penalties) to the use of the sufferers."

An act for the better preventing of clandestine marriages

"Whereas great mischiefs and inconveniencies have arisen from clandestine marriages; for preventing thereof for the future, be it enacted by the king'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, that from and after the twenty-fifth day of March, in the year of our Lord one thousand seven hundred and fifty four, all banns of matrimony shall be published in an audible manner in the parish church, or in some public chapel, in which public chapel banns of matrimony have been usually published, of or belonging to such parish or chapelry wherein the persons to be married shall dwell, according to the form of words prescribed by the rubrick prefixed to the office of matrimony in the book of common prayer, upon three Sundays preceding the solemnization of marriage, during the time of morning service, or of evening service (if there be no morning service in such church or chapel upon any of those Sundays) immediately after the second lesson: and whensoever it shall happen that the persons to be married shall dwell in divers parishes or chapelries, the banns shall in like manner be published in the church or chapel belonging to such parish or chapelry wherein each of the said persons shall dwell; and where both or either of the persons to be married shall dwell in any extraparochial place, (having no church or chapel wherein banns have been usually published) then the banns shall in like manner be published in the parish church or chapel belonging to some parish or chapelry adjoining to such extraparochial place: and where banns shall be published in any church or chapel belonging to any parish

Publication of
banns.

Minister to sign the publication;

and the marriage to be solemnized in one of the churches where the banns have been published.

Notice of the names, places of abode and time of residence of the parties to be given to the minister seven days before publication of banns.

Minister not punishable for solemnizing marriage after banns published, where the parents or guardians give no notice of dissent;

but where such dissent shall be declared, publication of banns to be void.

Licences to be granted to solemnize matrimony in the

adjoining to such extraparochial place, the parson, vicar, minister, or curate, publishing such banns, shall, in writing under his hand, certify the publication thereof in such manner as if either of the persons to be married dwelt in such adjoining parish; and that all other the rules prescribed by the said rubrick concerning the publication of banns, and the solemnization of matrimony, and not hereby altered, shall be duly observed; and that in all cases where banns shall have been published, the marriage shall be solemnized in one of the parish churches or chapels where such banns have been published, and in no other place whatsoever.

“ II. Provided always, and it is hereby further enacted, that no parson, vicar, minister, or curate shall be obliged to publish the banns of matrimony between any persons whatsoever, unless the persons to be married shall, seven days at the least before the time required for the first publication of such banns respectively, deliver or cause to be delivered to such parson, vicar, minister, or curate, a notice in writing of their true christian and surnames, and of the house or houses of their respective abodes within such parish, chapelry, or extraparochial place as aforesaid, and of the time during which they have dwelt, inhabited, or lodged in such house or houses respectively.

“ III. Provided always, and be it enacted by the authority aforesaid, that no parson, minister, vicar, or curate solemnizing marriages after the twenty-fifth day of March, one thousand seven hundred and fifty-four, between persons, both or one of whom shall be under the age of twenty-one years, after banns published, shall be punishable by ecclesiastical censures for solemnizing such marriages without consent of parents or guardians, whose consent is required by law, unless such parson, minister, vicar, or curate shall have notice of the dissent of such parents or guardians; and in case such parents or guardians, or one of them, shall openly and publicly declare, or cause to be declared in the church or chapel where the banns shall be so published, at the time of such publication, his, her, or their dissent to such marriage, such publication of banns shall be absolutely void.

“ IV. And it is hereby further enacted, that no licence of marriage shall, from and after the said twenty-fifth day of March, in the year one thousand seven hundred and fifty-

four, be granted by any archbishop, bishop, or other ordinary or person having authority to grant such licences, to solemnize any marriage in any other church or chapel, than in the parish church or public chapel of or belonging to the parish or chapelry, within which the usual place of abode of one of the persons to be married shall have been for the space of four weeks immediately before the granting of such licence, or where both, or either of the parties to be married shall dwell in any extraparochial place, having no church or chapel wherein banns have been usually published, then in the parish church or chapel belonging to some parish or chapelry adjoining to such extraparochial place, and in no other place whatsoever.

church or chapel of such parish only, where one of the parties shall have resided for four weeks before, &c.

“ V. Provided always, and be it enacted by the authority aforesaid, that all parishes, where there shall be no parish church or chapel belonging thereto, or none wherein divine service shall be usually celebrated every Sunday, may be deemed extraparochial places for the purposes of this act, but not for any other purpose.

Places which may be deemed extraparochial by this act.

“ VI. Provided always, that nothing herein before contained shall be construed to extend to deprive the archbishop of Canterbury and his successors, and his and their proper officers, of the right which hath hitherto been used, in virtue of a certain statute made in the twenty-fifth year of the reign of the late King Henry the eighth, intituled, ‘ An act concerning Peter Pence and dispensations;’ of granting special licences to marry at any convenient time or place.

Archbishop of Canterbury's right to grant special licences reserved.

“ VII. Provided always, and be it enacted, that from and after the twenty-fifth day of March, in the year one thousand seven hundred and fifty-four, no surrogate deputed by any ecclesiastical judge, who hath power to grant licences of marriage, shall grant any such licence before he hath taken an oath before the said judge faithfully to execute his office, according to law, to the best of his knowledge, and hath given security by his bond in the sum of one hundred pounds to the bishop of the diocese, for the due and faithful execution of his said office.

Surrogate deputed to grant licences, to take an oath of office, and give security.

“ VIII. And whereas many persons do solemnize matrimony in prisons and other places without publication of banns, or licence of marriage first had and obtained; therefore, for the prevention thereof, be it enacted, that if any

Persons convicted of solemnizing matrimony without banns or licence, or in

any other place,
&c. except by
special licence,

to be trans-
ported,

and the mar-
riages to be null.

Prosecution for
the same to be
commenced
within three
years.

Proof of the
parties dwelling
in the parishes,
&c. where mar-
riages shall have
been solemnized,
not necessary
to the validity
of such
marriage.

Marriages solem-
nized by
licence without
consent of the
parents or
guardians,
where either of

person shall, from and after the said twenty-fifth day of March, in the year one thousand seven hundred and fifty-four, solemnize matrimony in any other place than a church or public chapel, where banns have been usually published, unless by special licence from the archbishop of Canterbury; or shall solemnize matrimony without publication of banns, unless licence of marriage be first had and obtained from some person or persons having authority to grant the same, every person knowingly and wilfully so offending, and being lawfully convicted thereof, shall be deemed and adjudged to be guilty of felony, and shall be transported to some of his majesty's plantations in America for the space of fourteen years, according to the laws in force for transportation of felons; and all marriages solemnized from and after the twenty-fifth day of March, in the year one thousand seven hundred and fifty-four, in any other place than a church or such public chapel, unless by special licence as aforesaid, or that shall be solemnized without publication of banns, or licence of marriage from a person or persons having authority to grant the same, first had and obtained, shall be null and void to all intents and purposes whatsoever.

“IX. Provided, that all prosecutions for such felony shall be commenced within the space of three years after the offence committed.

“X. Provided always, that after the solemnization of any marriage, under a publication of banns, it shall not be necessary in support of such marriage, to give any proof of the actual dwelling of the parties in the respective parishes or chapelries, wherein the banns of matrimony were published; or where the marriage is by licence, it shall not be necessary to give any proof that the usual place of abode of one of the parties, for the space of four weeks as aforesaid, was in the parish or chapelry where the marriage was solemnized; nor shall any evidence in either of the said cases be received to prove the contrary in any suit touching the validity of such marriage.

“XI. And it is hereby further enacted, that all marriages solemnized by licence, after the said twenty-fifth day of March, one thousand seven hundred and fifty-four, where either of the parties, not being a widower or widow, shall be under the age of twenty-one years, which shall be had with-

out the consent of the father of such of the parties, so under age (if then living) first had and obtained, or if dead, of the guardian or guardians of the person of the party so under age, lawfully appointed, or one of them; and in case there shall be no such guardian or guardians, then of the mother (if living and unmarried) or if there shall be no mother living and unmarried, then of a guardian or guardians of the person appointed by the court of Chancery; shall be absolutely null and void to all intents and purposes whatsoever.

“ XII. And whereas it may happen, that the guardian or guardians, mother or mothers, of the parties to be married, or one of them, so under age as aforesaid, may be non compos mentis, or may be in parts beyond the seas, or may be induced unreasonably, and by undue motives to abuse the trust reposed in him, her, or them, by refusing or withholding his, her, or their consent to a proper marriage; be it therefore enacted, that in case any such guardian or guardians, mother or mothers, or any of them, whose consent is made necessary as aforesaid, shall be non compos mentis, or in parts beyond the seas, or shall refuse or withhold his, her, or their consent to the marriage of any person, it shall and may be lawful for any person desirous of marrying, in any of the beforementioned cases, to apply by petition to the lord chancellor, lord keeper, or the lords commissioners of the great seal of Great Britain for the time being, who is and are hereby empowered to proceed upon such petition, in a summary way; and in case the marriage proposed shall, upon examination, appear to be proper, the said lord chancellor, lord keeper, or lords commissioners of the great seal for the time being, shall judicially declare the same to be so by an order of court, and such order shall be deemed and taken to be as good and effectual to all intents and purposes, as if the guardian or guardians, or mother of the person so petitioning, had consented to such marriage.

“ XIII. And it is hereby further enacted, that in no case whatsoever, shall any suit or proceeding be had in any ecclesiastical court, in order to compel a celebration of any marriage in facie ecclesiæ, by reason of any contract of matrimony whatsoever, whether per verba de præsentī, or per verba de futuro, which shall be entered into after the twenty-fifth day of March, in the year one thousand seven hundred

the parties (not being a widower or widow) shall be under age, void.

Where the guardians or mother shall be non compos mentis, or in parts beyond the seas, or shall unreasonably withhold their consent, the parties may apply to the lord chancellor, &c. and being approved by order of the court, shall be effectual.

No suit to be in the ecclesiastical court to compel a marriage in facie ecclesiæ by reason of any contract.

and fifty-four; any law or usage to the contrary notwithstanding.

Churchwardens to provide books in which are to be registered all marriages and banns;

“XIV. And for preventing undue entries and abuses in registers of marriages; be it enacted by the authority aforesaid, that on or before the twenty-fifth day of March, in the year one thousand seven hundred and fifty-four, and from time to time afterwards as there shall be occasion, the churchwardens and chapelwardens of every parish or chapelry shall provide proper books of vellum, or good and durable paper, in which all marriages and banns of marriage respectively, there published or solemnized, shall be registered, and every page thereof shall be marked at the top, with the figure of the number of every such page, beginning at the second leaf with number one; and every leaf or page so numbered, shall be ruled with lines at proper and equal distances from each other, or as near as may be; and all banns and marriages published or celebrated in any church or chapel, or within any such parish or chapelry, shall be respectively entered, registered, printed, or written upon or as near as conveniently may be to such ruled lines, and shall be signed by the parson, vicar, minister, or curate, or by some other person in his presence, and by his direction; and such entries shall be made as aforesaid, on or near such lines in successive order, where the paper is not damaged or decayed, by accident or length of time, until a new book shall be thought proper or necessary to be provided for the same purposes, and then the directions aforesaid shall be observed in every such new book; and all books provided as aforesaid, shall be deemed to belong to every such parish or chapelry respectively, and shall be carefully kept and preserved for public use.

the same to be signed by the minister;

and the books to belong to the parish, and to be kept for public use.

Marriages to be solemnized in the presence of two witnesses, besides the minister, and to be registered,

“XV. And in order to preserve the evidence of marriages, and to make the proof thereof more certain and easy, and for the direction of ministers in the celebration of marriages and registering thereof, be it enacted, that from and after the twenty-fifth day of March, in the year one thousand seven hundred and fifty-four, all marriages shall be solemnized in the presence of two or more credible witnesses, besides the minister who shall celebrate the same; and that immediately after the celebration of every marriage, an entry thereof shall be made in such register to be kept as afore-

said; in which entry or register it shall be expressed, that the said marriage was celebrated by banns, or licence; and if both or either of the parties married by licence, be under age, with consent of the parents or guardians, as the case may be; and shall be signed by the minister with his proper addition, and also by the parties married, and attested by such two witnesses; which entry shall be made in the form or to the effect following; that is to say,

and signed by the minister, parties and witnesses.

Form.

A. B. of { the } Parish

and C. D. of { the } Parish

were married in this { Church } by { Banns } with con-

sent of { Parents } this day of in

the year

by me J. J. { Rector }
 { Vicar }
 { Curate }

This marriage was solemnized between us A. B. in the pre-

sence of E. F.
 G. H.

“ XVI. And be it further enacted by the authority aforesaid, that if any person shall, from and after the twenty-fifth day of March, in the year one thousand seven hundred and fifty-four, with intent to elude the force of this act, knowingly and wilfully insert, or cause to be inserted in the register book of such parish or chapelry as aforesaid, any false entry of any matter or thing relating to any marriage; or falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or act or assist in falsely making, altering, forging, or counterfeiting any such entry in such register; or falsely make, alter, forge, or counterfeit, or cause or procure to be falsely made, altered, forged, or counterfeited, or assist in falsely making, altering, forging, or counterfeiting any such licence of marriage as aforesaid; or utter or publish as true any such false,

Persons convicted of making a false entry in the said register,

or of forging, &c. any such entry,

or of forging, &c. any licence,

or of destroying
with an ill in-
tent such re-
gister,

to suffer death.

Marriages of the
royal family,

and of Quakers
and Jews, and
of persons in
Scotland, or be-
yond the seas,
excepted.

This act to be
read in all parish
churches and
public chapels.

altered, forged, or counterfeited register as aforesaid, or a copy thereof, or any such false, altered, forged, or counterfeited licence of marriage, knowing such register or licence of marriage respectively to be false, altered, forged, or counterfeited; or if any person shall, from and after the said twenty-fifth day of March, wilfully destroy, or cause or procure to be destroyed, any register book of marriages, or any part of such register book, with intent to avoid any marriage, or to subject any person to any of the penalties of this act; every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged to be guilty of felony, and shall suffer death as a felon, without benefit of clergy.

“ XVII. Provided always, That this act, or any thing therein contained, shall not extend to the marriages of any of the royal family.

“ XVIII. Provided likewise, That nothing in this act contained shall extend to that part of Great Britain called Scotland, nor to any marriages amongst the people called Quakers, or amongst the persons professing the Jewish religion, where both the parties to any such marriage shall be of the people called Quakers, or persons professing the Jewish religion respectively, nor to any marriages solemnized beyond the seas.

“ XIX. And be it further enacted by the authority aforesaid, That this act shall be publicly read in all parish churches and public chapels, by the parson, vicar, minister or curate of the respective parishes or chapelries, on some Sunday immediately after morning prayer, or immediately after evening prayer, if there shall be no morning service on that day, in each of the months of September, October, November and December, in the year of our Lord one thousand seven hundred and fifty-three, and afterwards at the same times, on four several Sundays in each year, (that is to say,) the Sundays next before the twenty-fifth day of March, twenty-fourth day of June, twenty-ninth day of September, and twenty-fifth day of December respectively, for two years, to be computed from and immediately after the first day of January in the said year one thousand seven hundred and fifty-four.”

An act for the better regulating and preserving parish and other registers of births, baptisms, marriages, and burials, in England. [28th July, 1812.]

“ Whereas the amending the manner and form of keeping and of preserving registers of baptisms, marriages, and burials, of his majesty's subjects in the several parishes and places in England, will greatly facilitate the proof of pedigrees of persons claiming to be entitled to real or personal estates, and be otherwise of great public benefit and advantage; Be it therefore enacted by the king'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, that, from and after the thirty-first day of December one thousand eight hundred and twelve, registers of public and private baptisms, marriages, and burials, solemnized according to the rites of the united church of England and Ireland, within all parishes or chapelries in England, whether subject to the ordinary or peculiar, or other jurisdiction, shall be made and kept by the rector, vicar, curate or officiating minister of every parish, (or of any chapelry where the ceremonies of baptism, marriage and burial have been usually and may according to law be performed) for the time being, in books of parchment, or of good and durable paper, to be provided by his majesty's printer as occasion may require, at the expense of the respective parishes or chapelries; whereon shall be printed, upon each side of every leaf, the heads of information herein required to be entered in the registers of baptisms, marriages, and burials respectively, and every such entry shall be numbered progressively from the beginning to the end of each book, the first entry to be distinguished by number one; and every such entry shall be divided from the entry next following by a printed line, according to the forms contained in the schedules (A.) (B.) (C.) hereto annexed; and every page of every such book shall be numbered with progressive numbers, the first page being marked with the number 1. in the middle of the upper part of such page, and every subsequent page being marked in like manner with progressive numbers, from number 1. to the end of the book.

Officiating ministers to keep registers of public and private baptisms of marriages and of burials.

Parishes to provide suitable books for that purpose.

King's printer to transmit to each parish a printed copy of act, and register books adapted to forms prescribed.

“ II. And, for better ensuring the regularity and uniformity of such register books, be it further enacted, That a printed copy of this act, together with one book so prepared as aforesaid, and adapted to the form of the register of baptisms prescribed in the schedule (A.) to this act annexed; and also one other book so prepared as aforesaid, and adapted to the form prescribed for the register of marriages in the schedule (B.) to this act annexed; and also one other book so prepared as aforesaid, and adapted to the form prescribed for the register of burials in the schedule (C) to this act annexed, shall, as soon as conveniently may be after the passing of this act, be provided and transmitted by his majesty's printer to the officiating ministers of the several parishes and chapelries in England respectively, who are hereby required to use and apply the same in and to the purposes of this act; and such books respectively shall be proportioned to the population of the several parishes and chapelries, according to the last returns of such population made under the authority of parliament; and other books of like form and quality shall for the like purposes be furnished from time to time by the churchwardens or chapelwardens of every parish or chapelry, at the expense of the said parish or chapelry, whenever they shall be required by the rector, vicar, curate, or officiating minister to provide the same; and all such books shall be of paper, unless required to be of parchment by such churchwardens or chapelwardens respectively.

Registers in separate register books.

“ III. And be it further enacted, That such registers shall be kept in such separate books aforesaid, and that every such rector, vicar, curate, or officiating minister shall as soon as possible after the solemnization of every baptism, whether private or public, or burial respectively, record and enter in a fair and legible handwriting, in the proper register book to be provided, made, and kept as aforesaid, the several particulars described in the several schedules hereinbefore mentioned, and sign the same; and in no case, unless prevented by sickness, or other unavoidable impediment, later than within seven days after the ceremony of any such baptism or burial shall have taken place.

Certificate of baptism, &c.

“ IV. And be it further enacted, That whenever the

ceremony of baptism or burial shall be performed in any other place than the parish church or churchyard of any parish (or the chapel or chapelry of any chapelry, providing its own distinct registers) and such ceremony shall be performed by any minister not being the rector, vicar, minister or curate of such parish or chapelry, the minister who shall perform such ceremony of baptism or burial shall, on the same or on the next day, transmit to the rector, vicar, or other minister of such parish or chapelry, or his curate, a certificate of such baptism or burial in the form contained in the schedule (D.) to this act annexed; and the rector, vicar, minister, or curate of such parish or chapelry, shall thereupon enter such baptism or burial according to such certificate in the book kept pursuant to this act for such purpose; and shall add to such entry the following words, ‘ According to the certificate of the reverend

transmitted to me on the day of .’

“ V. And be it further enacted, That the several books wherein such entries shall respectively be made, and all register books heretofore in use, shall be deemed to belong to every such parish or chapelry respectively, and shall be kept by and remain in the power and custody of the rector, vicar, curate, or other officiating minister of each respective parish or chapelry as aforesaid, and shall be by him safely and securely kept in a dry well-painted iron chest, to be provided and repaired as occasion may require, at the expense of the parish or chapelry, and which said chest containing the said books shall be constantly kept locked in some dry, safe, and secure place within the usual place of residence of such rector, vicar, curate, or other officiating minister, if resident within the parish or chapelry, or in the parish church or chapel; and the said books shall not, nor shall any of them, be taken or removed from or out of the said chest, at any time or for any cause whatever, except for the purpose of making such entries therein as aforesaid, or for the inspection of persons desirous to make search therein, or to obtain copies from or out of the same, or to be produced as evidence in some court of law or equity, or to be inspected as to the state and condition thereof, or for some of the purposes of this act; and that immediately after making such respective entries, or producing the said books re-

when performed in other place than parish church, &c. according to schedule (D.) Entry of baptism, &c. distinguished accordingly.

Register books kept in custody of officiating minister in iron chest, provided at expense of parish.

spectively for the purposes aforesaid, the said books shall forthwith again be safely and securely deposited in the said chest.

Annual copies of registers made; and verified by officiating minister.

“ VI. And be it further enacted, That at the expiration of two months after the thirty-first day of December one thousand eight hundred and thirteen, and at the expiration of two months after the end of every subsequent year, fair copies of all the entries of the several baptisms, marriages, and burials, which shall have been solemnized or shall have taken place within the year preceding, shall be made by the rector, vicar, curate, or other resident or officiating minister, (or by the churchwardens, chapelwardens, clerk, or other person duly appointed for the purpose, under and by the direction of such rector, vicar, curate, or other resident or officiating minister) on parchment, in the same form as prescribed in the schedules hereunto annexed (to be provided by the respective parishes); and the contents of such copies shall be verified and signed in the form following, by the rector, vicar, curate, or officiating minister of the parish or chapelry to which such respective register book shall appertain.

“ ‘ I A. B. rector [or, as the case may be] of the parish of C. [or, of the chapelry of D.] in the county of E. do hereby solemnly declare, that the several writings hereto annexed, purporting to be copies of the several entries contained in the several register books of baptisms, marriages and burials, of the parish or chapelry aforesaid, from the day of to the day of are true copies of all the several entries in the said several register books respectively from the said day of to the said day of ; and that no other entry during such period is contained in any of such books respectively, are truly made according to the best of my knowledge and belief. Signed A. B.’

Which declaration shall be fairly written, without any stamp, on the said copy immediately after the last entry therein; and the signature to such declaration shall be attested by the churchwardens or chapelwardens, or one of them, of the parish or chapelry to which such register books shall belong.

Annual copies of register books transmitted to

“ VII. And be it further enacted, That copies of the said register books, verified and attested as aforesaid, shall,

whether such parish or chapelry shall be subject to the ordinary, peculiar or other jurisdiction, be transmitted by such churchwardens or chapelwardens, after they, or one of them, shall have signed the same, by the post, to the registrars of each diocese in England within which the church or chapel shall be situated, on or before the first day of June one thousand eight hundred and fourteen, and on or before the first day of June in every subsequent year.

registrar of diocese.

“ VIII. And be it further enacted, That the registrar of every diocese in England shall, on or before the first day of July one thousand eight hundred and fourteen, and on or before the first day of July in every subsequent year, make a report to the bishop of such diocese, whether the copies of the registers of the baptisms, marriages, and burials, in the several parishes and places within such diocese, have been sent to such registrar, in the manner and within the time herein required; and in the event of any failure of the transmission of the copies of the registers as herein required, by the churchwardens and chapelwardens of any parish or chapelry in England, the registrar shall state the default of the parish or chapelry, specially in his report to the bishop.

Registrars to make reports to bishops, whether copies have been sent in.

“ IX. And be it further enacted, That in case the rector, vicar, or other officiating minister or curate of any parish or chapelry shall neglect or refuse to verify and sign such copies of such several register books, and such declaration as aforesaid, so that the churchwardens or chapelwardens shall not be able to transmit the same, as required by this act, such churchwardens or chapelwardens shall, within the time required by this act for the transmission thereof, certify such default to the registrar of the diocese within which such parish or chapelry shall be, who shall specially state the same in his report to the bishop of such diocese.

Officiating minister neglecting to verify copies of register books, churchwardens to certify default.

“ X. And, for the obtaining of returns and registers of baptisms and burials in extra-parochial places in England, where there is no church or chapel, be it further enacted, That in all cases of the baptism of any child, or the burial of any person in any extra-parochial place in England, according to the rites of the established church, where there is no church or chapel, it shall be lawful for the officiating minister, within one month after such baptism or burial, to deliver to

Places where no church, &c. memorandum of baptisms, &c. delivered to officiating minister of adjoining parish.

the rector, vicar, or curate of such parish immediately adjoining to the place in which such baptism or burial shall take place, as the ordinary shall direct, a memorandum of such baptism or burial, signed by such parent of the child baptized, or a memorandum of such burial, signed by the person employed about the same, together with two of the persons attending the same, according as the nature of the case may respectively require; and every such memorandum respectively shall contain all such particulars as are hereinbefore required; and every such memorandum delivered to the rector, vicar, or curate of any such adjoining parish or chapelry, shall be entered in the register of his parish, and form a part thereof.

Letters, &c.
containing annual
copies of
register books
free of postage.

“ XI. And be it further enacted, That the superscriptions upon all letters and packets containing the copies of such parish or other registers, to be transmitted by the post to the several offices of the said registrars as aforesaid, shall be indorsed and signed by the churchwardens or chapelwardens of every respective parish and chapelry in England, in the form contained in schedule (E); and that all such letters and packets shall be carried and conveyed by means of his majesty's post office to, and be delivered at, the offices of the said registrars, without postage or other charge being paid or payable for the same.

Annual copies of
register books
when transmit-
ted to registrars,
kept from da-
mage.

“ XII. And be it further enacted, That when and so often as the copies of the said register books of baptisms, marriages, and burials as aforesaid, and also the said lists of births, baptisms, marriages or burials as aforesaid, shall be transmitted to the office of the said registrars respectively, as aforesaid, pursuant to the directions hereinbefore contained for that purpose, the said registrars shall respectively cause all the said books and lists to be safely and securely deposited, kept, and preserved from damage or destruction by fire or otherwise, and to be carefully arranged for the purpose of being resorted to as occasion may require; and the said registrars respectively shall also cause correct alphabetical lists to be made and kept in books suitable to the purpose, of the names of all persons and places mentioned in such books and lists as shall have been transmitted to the said registrars respectively, which alphabetical lists and books, and also the

Alphabetical
lists.

copies of registers and lists so transmitted to the said registrars as aforesaid, shall be open to public search at all reasonable times on payment of the usual fees.

XIII. “ ‘ And whereas in many dioceses the places wherein the copies of the parochial registers of baptisms, marriages, and burials, as well as the original wills proved within the same respectively are kept, are insufficient for their being preserved with due care ; for which a remedy should be applied in those dioceses where it shall be found necessary ;’ Be it further enacted, That, in order to a due examination thereof, the bishop, together with the custodes rotulorum of the several counties within each diocese, and the chancellor thereof, shall, before the first day of February one thousand eight hundred and thirteen, cause a careful survey to be made of the several places in which the parochial registers, and the wills proved within the diocese, are kept ; and shall make a report to his majesty’s most honourable privy council, of the state of the same, on or before the first day of March following, setting forth in each case whether the buildings are in all respects fit and proper for the preservation of papers of the above description, as well with respect to space as to security from fire, and to protection from damp, and if not, at what probable expense they can be made so ; and where the instruments and papers before mentioned are kept in dwelling-houses or other places, which cannot be made fit and secure for the due preservation thereof, then and in such case the persons before named shall enquire and report in like manner at what expense proper buildings may be provided, and in what places, so as to have one place within each diocese for the due preservation of all such registers and wills ; together with their opinion upon the most suitable mode of remunerating the officers employed in each registry, for their additional trouble and expense in carrying the provisions of this act into execution.

“ XIV. And be it further enacted, That if any person shall knowingly and wilfully insert, or cause or permit to be inserted in any such register book of such baptisms, burials, or marriages as aforesaid, or in any such copy of any such register so directed to be transmitted to the registrars as aforesaid, or in any such lists or declarations also directed to be transmitted to such registrars as aforesaid, any false entry

Report to privy council on or before 1st March, 1813, respecting proper places for preservation of copies of register books, as well as original wills in each diocese ; and for remuneration of registrars’ officers.

False entries, or false copies of entries, or altering, &c. register book,

of any matter or thing relating to any baptism, burial, or marriage, or shall falsely make, alter, forge or counterfeit, or cause or procure, or wilfully permit to be falsely made, altered, forged or counterfeited, any part of any such register, list, or declaration, or of any such copy of any such register; or shall wilfully destroy, deface, or injure, or cause or procure or permit to be destroyed, defaced, or injured, any such register book, or any part thereof; or shall knowingly and wilfully sign, or certify any copy of any such register hereby required to be transmitted as aforesaid, which shall be false in any part thereof, knowing the same to be false; every person so offending, and being thereof lawfully convicted, shall be deemed and adjudged to be guilty of felony, and shall be transported for the term of fourteen years.

Transportation.

Persons committing accidental errors not affected, if duly corrected according to truth of case.

“ XV. Provided always, and be it enacted, That no rector, vicar, curate, or officiating minister of any parish or chapel, who shall discover any error to have been committed in the form or substance of the entry in the register book of any such baptism, burial, or marriage, respectively by him solemnized, shall be liable to all or any of the penalties herein mentioned, if he shall within one calendar month after the discovery of such error, in the presence of the parent or parents of the child whose baptism may have been entered in such register, or of the parties married, or in the presence of two persons who shall have attended at any burial, or in case of the death or absence of the respective parties aforesaid, then in the presence of the churchwardens or chapelwardens, (who shall respectively attest the same) alter and correct the entry which shall have been found erroneous, according to the truth of the case, by entry in the margin of the book wherein such erroneous entry shall have been made, without any alteration or obliteration of the original entry, and shall sign such entry in the margin, and add to such signature the day of the month and year when such correction shall be made: Provided also, that in the fair copy of the registers respectively which shall be transmitted to the registrars of the dioceses, the said rector, vicar, curate, or officiating minister shall certify the alterations so made by him as aforesaid.

Fees heretofore payable;

“ XVI. Provided always, That nothing in this act contained shall in any manner diminish or increase the fees

heretofore payable or of right due to any minister for the performance of any of the before mentioned duties, or to any minister or registrar, for giving copies of such registrations, but that all due legal and accustomed fees on such occasions, and all powers and remedies for recovery thereof, shall be and remain as though this act had not been made.

Proviso for.

“ XVII. Provided also, and be it enacted, That no duplicate or copy of any register of baptism, marriage, or burial, made under the directions and for the purposes of this act, shall be chargeable with any stamp duty thereon; any act now in force to the contrary thereof in any wise notwithstanding.

Copy of register books not subject to stamp duty.

“ XVIII. And be it further enacted, That one half of the amount of all fines or penalties to be levied in pursuance of this act shall go to the person who shall inform or sue for the same; and the remainder of such fines as shall be imposed on any churchwarden or chapelwarden shall go to the poor of the parish or place for which such churchwarden or chapelwarden shall serve; and the remainder of such fines as shall be imposed on any rector, vicar, minister, or curate or registrar, shall be paid and applied to such charitable purposes, in the county within which the parish or place shall be, as shall be appointed and directed by the bishop of the diocese.

Application of penalties.

“ XIX. And be it further enacted, That the rector, vicar, curate, or officiating minister of every parish and chapelry in England, whether subject to the ordinary, peculiar, or other jurisdiction, shall transmit to the registrar of the diocese in which the parish or chapelry shall be situated, before the first day of June one thousand eight hundred and thirteen, a list of all registers which now are in such parish or chapelry respectively, stating the periods at which they respectively commence and terminate, the periods (if any) for which they are deficient, and the places where they are deposited.

List of extant register books transmitted to registrar before 1st June, 1813.

“ XX. And be it further enacted, That all and every the provisions in this act shall extend, so far as circumstances will permit, to cathedral and collegiate churches, and chapels of colleges or hospitals, and the burying grounds belonging thereto; and to the ministers who shall officiate in such cathedral or collegiate churches and chapels of colleges or hospitals, and burying grounds respectively, and shall baptize,

Act to extend to churches and chapels not parochial.

marry, or bury any person or persons, although such cathedral or collegiate churches or chapels of colleges or hospitals, or the burying grounds belonging thereto, may not be parochial, or the ministers officiating therein may not be, as such, parochial ministers, and there shall be no churchwarden or churchwardens thereof; and in all such cases, the books hereinbefore directed to be provided, shall be provided at the expense of the body having right to appoint the officiating minister in every such cathedral or collegiate church or chapel of a college or hospital; and copies thereof shall be transmitted to the registrar of the diocese within which such cathedral or collegiate church or chapel of a college or hospital shall be, by the officiating minister of such church, in like manner as is herein directed with respect to parochial ministers, and shall be attested by two of the officers of such church, college, or hospital, as the copies of parochial registers are herein directed to be attested by churchwardens: Provided always, that nothing in this act contained shall extend to repeal any provision contained in an act passed in the twenty-sixth year of the reign of his late majesty King George the Second, intituled An Act for better preventing Clandestine Marriages."

Marriage act,
26 G. 2. c. 33.
Proviso for.

SCHEDULES to which this Act refers.

SCHEDULE (A).

1.

BAPTISMS solemnized in the Parish of St. A. in the County of B. in the Year One thousand eight hundred and thirteen.						
When Baptized.	Child's Christian Name.	Parents Name.		Abode.	Quality, Trade, or Profession.	By whom the Ceremony was performed.
		Christian.	Surname.			
1813. 1st February No. 1.	John son of	William Elizabeth		Lambeth.		
3d March No. 2.	Ann daughter of	Henry Martha		Fulham.		

SCHEDULE (B.)

1.

MARRIAGES solemnized in the Parish of St. A. in the County of B.
in the Year One thousand eight hundred and thirteen.

A. B. of { the } Parish
and C. D. of { this } Parish
were married in this { Church } by { Banns } with consent of { Parents }
this { Chapel } by { Licence } in the Year { Guardians }
Day of
By me, I. I. { Rector }
{ Vicar }
{ Curate }

This Marriage was solemnized between us { A. B. }
{ C. D. }

In the presence of { E. F. }
{ G. H. }

SCHEDULE (C.)

1.

BURIALS in the Parish of A. in the County of B. in the Year One
thousand eight hundred and thirteen.

Name.	Abode.	When Buried.	Age.	By whom the Ceremony was performed.
John Wilson No. 1.	Duke Street, Westminster.	1813. 1st May.	62	

SCHEDULE (D.)

I do hereby certify, that I did on the
day of baptize according to the rites of the united church o
England and Ireland, son (or daughter) of and
his wife, by the name of

To the rector [or, as the case may be] of

I do hereby certify, that on the day of
 A. B. of aged was buried in [stating
 the place of burial], and that the ceremony of burial was
 performed according to the rites of the united church of Eng-
 land and Ireland, by me,

To the rector [or, as the case may be] of

SCHEDULE (E.)

To the Registrar of the Diocese of	
at	
A. B. } C. D. }	Churchwardens (or chapelwardens) of the parish (or chapelry) of [or such other description as the case shall require.]

THE
PARSON'S COUNSELLOR.

PART II.

THE
LAW OF TITHES OR TITHING.

TO

HIS WORTHY AND REVEREND SON-IN-LAW,

MR. ANTHONY TROLLOP,

RECTOR OF NORBURY, IN DERBYSHIRE.

DEAR SON,

It is now above thirty years since the Tithing Table, published many years ago, came to my hand; and upon perusal thereof finding that the common laws and canon laws differed in many things, I thought it would be a work grateful to the clergy, and useful to others, to publish something in order to the reconciling of them: to which end I gathered together some materials; but the war coming immediately on, and after that the ecclesiastical courts being laid aside, and other courses found out for the recovery of tithes, I desisted the farther prosecution of that design, until it was revived at your request, seconded by some other reverend divines; whereupon looking up

my old notes, and adding such judgments and resolutions that I have since come to the knowledge of, the whole is reduced to the form I here present it to you. You have most right to it, and I heartily wish it may be of as great service and advantage to you, and all the reverend clergy, as is desired by him that is

Your affectionate

Loving father,

S. D.

THE
PARSON'S COUNSELLOR.

PART II.

THE
LAW OF TITHES OR TITHING.

CHAPTER I.

What Tithes are, the several sorts and kinds thereof, and in what manner due.

HAVING in the former part of this discourse shewed the worthy and reverend clergymen in what manner they may lawfully and justifiably attain to such preferments in the church as they are capable of, and in what manner they may avoid all the perils and dangers that attend the beneficed clergymen: it rests now that I shew them what profits they may justly challenge to belong to their church preferments, and in what manner to be paid, and how to be recovered, if need require. And first of tithes, which the canonists define tithes to be,

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A tenth part or portion of increase, commanded to be paid to the sons of Levi for their ministry, wherein they served in the tabernacle. Definition.

Or, as some others define them they are, “ *Omnium bonorum licite quasitorum quota pars Deo divina institutione debita.*”

But the common lawyers define them to be,

An ecclesiastical inheritance collateral to the estate of the land, and of their own proper nature due only to an ecclesiastical person, by the ecclesiastical laws. Co. 11. 13. b.

4 Leon. 47.

And for that reason no unity of possession can extinct or suspend them; but they, notwithstanding such unity, remain in esse, and may be demised or granted, notwithstanding such unity: but may more properly, in my judgment, be defined to be,

A tenth part, or some other thing in lieu thereof, of all the increase yearly arising forth of the profits of the lands and stocks, or raised by the industry of the parishioner, and properly due to the clergy that have the cure of the souls in the parish where they arise.

Division.

And by some canonists tithes have been divided only into two kinds, that is, predial and personal: and in this manner of division they comprehend all manner of tithes that arise either immediately or mediately from the land, under the name of predial tithes; which they again distinguish into predial, mediate, and immediate; under which they comprehend the tithes of corn, hay, wood, herbs, and all other things that either come from the ground by manurance, or of its own nature; and under the name of tithes predial mediate, is comprehended the tithes of all manner of cattle and other things that receive their nourishment from the ground.

Doct. & Stud.
l. 2. c. 55. p.
168. b.

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Linwood, c.

Quoniam prop-
ter verbis divi-
dend. est deci-
ma.

2 Inst. 649.

Roll, 1. 635. a.

But tithes by the common lawyers (and which division I shall observe in my discourse) are divided into predial, mixt, and personal: and according to this division all tithes that arise from the ground, as before is said, immediately, are only accounted to be predial; and those that arise from cattle and other things, that receive their nourishment immediately from the ground, they call mixt; and those that arise from the labour and industry of man alone, personal.

Linwood, c.

Quoniam prop-
ter verbis tali-
bus decimis.

Tithes again both by the common lawyers and canonists are divided into great tithes, in Latin majores, seu grossæ decimæ; and into small tithes, in Latin minores, or minutæ decimæ. And in this division, corn, hay, and wood are all accounted gross or great tithes. But there has been some question, whether tithe wood should be accounted a great or minute tithe; and re-

solved that if a vicar be only indowed with the small tithes, and have by reason thereof always had tithe wood, that in such case it shall be accounted a small tithe, otherwise it is to be accounted amongst the great tithes. And wood has been twice adjudged to be a small tithe, as Littleton reports.

Rolls, 1. 643.
v. 2.
2 Bulst. 27.
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Littl. Rep. 244.

But all manner of tithes of gardens, herbs, roots, fruit, saffron, woad, whether sowed in fields or gardens, flax, hemp, hops, rape, and all other predial personal and mixt tithes are accounted inter minutas decimas; but in Udal's and Tindal's case, Hutton, 77. in some cases hops, woad, &c. may be great tithes in places where they are much sowed (73).

Cro. El. 467.
Hutton, 77.
Cro. Car. 28.
Rolls, 1. 643.
v. 3.
Palmer, 219.
220.

And herein the custom of England is kind to the poor vicars, making many things to be allowed for minute tithes that are not so in others.

Linwood, c.
Quoniam prop-
ter verb. talibus
decimis.

I have been the longer in this division of tithes, between great tithes and small tithes, because many vicarages are endowed with the small tithes only; and in some old endowments you will find the word altar-agium, which by custom may as well comprehend the small tithes, as such profits as arise from the altar.

Spelm. Gloss.
28. Cro. El. 578.
Hetly, 155.
Winch. 70.
Quo jure debit.

Now perhaps it may be expected I should say something to satisfy the reader by what law tithes became due under the gospel. But in that point I find so great a difference between the canonists, school men, and divines, that it would be a great presumption in me to take upon me to determine the point; the rather because I am informed by a reverend, learned, and grave divine, that the learned Selden retracted his opinion therein; and what it was you may see in the places noted in the margin.

Heylin's Hist. of
Presbytery, 391.
Seld. Hist. de-
cim. c. 5. sect. 4.
c. 7.

This retraction of Selden's is also published in Dr.

(73) Hops have been ranked with hemp, saffron, and tobacco, and it is declared that all such new things shall be minutæ decimæ. Wallis v. Payne, Gwill. 1557. 6 Bac. Abr. 733.

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Comber's preface, to the first part of his History of Tithes. But Mr. Wood (*Athenæ Oxon.* part 3. f. 108.) says he was forced to do it. Which seems plain by these two passages of Mr. Selden.

“Cum Richardus Montacutius (postea Episcopus Norwicensis) in se recepisset Historiæ Decimarum, rege annuente, confutationem, rex mihi acrius interdicens responso aliquo, mihi dixit, si aut tu ipse aut quis amicorum in confutationem illam (quæ paulo post furore plenissimo Anglice exiit) scripseritis, in vincula te conijciam. Quod confutationis futuræ, puto, non exigua per se confutationis instar fuit. Vindiciæ de Scriptione Maris Claus. 19.”

“Sed adjiciendi plura de homine (speaking of Dr. Montague) locus hic non est; uti nec plura aperiendi de lite illa decimarum acriter nimis, non dico quam feliciter, a compluribus contra nos, manum interea de tabula, non sine jussu principali, cui libentissime parebamus, secure retinentes disputata. Numerosus sane est libellorum, quos ea occupat, cumulus; sed diu est quod annosa satis, et satis vexata, prudenter, puto, sopita est. De dis syris (Edit. Amstel.) p. 285, 286.”

And in the end of the epistle to the reader. The question.

But so far as I have observed, they all agree in this, that tithes quoad sustentationem cleri vel ministrorum Dei are jure divino: so that the sole question amongst all these learned men is about the quantity, or quota pars. But be they due jure divino, jure ecclesiastico, or jure humano, I conceive the difference cannot be great, since, as it must necessarily be confessed, they have been given and consecrated Deo et sanctæ ecclesiæ; and so being dedicated to God and his service (in my poor judgment) the taking them away from the proper use and end, cannot be less sacrilegious, than if they were without dispute jure divino. I shall not therefore stuff this present discourse with the arguments of any side, but shall leave the learned to their own conceits, it serving my purpose that they be due by any law, divine, human, or ecclesiastical. My next examination shall be to whom they are due.

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Doct. & Stud.
l. 2. c. 55. f. 164.
b. 165. e.

CHAPTER II.

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To whom Tithes are due, and by whom to be paid.

HAVING shewed in the former chapter what tithes are, and the several kinds thereof, I shall in the next place shew to whom the same are due.

That there were infeudations of tithes before the parochial rights were settled, is without dispute both here in England, and in other Christian kingdoms and commonwealths: in which particular the curious may satisfy themselves in Mr. Selden's History of Tithes, and other authors. And it is more clear, that before the time that the parochial right of tithes were settled, that the owners of lands might grant their tithes to ecclesiastical or religious persons (a multitude of precedents whereof the reader for his satisfaction may find in the *Monasticon Anglicanum* of Mr. Dugdale:) so that by this means the whole tithes of some parishes, and divers great portions out of other parishes, were granted to abbots, priors, &c. and some to the parsons and rectors of other parishes; which is the reason why at this day there are several portions of tithes held from the parish churches by impropriators and rectors of other parish churches.

When the parochial right of tithes was first settled, there hath been (as should seem) a vulgar error. For it is frequently said in our common law books, that before the general council of Lateran, which was held 1179, that every one was at liberty to give his tithes to what spiritual, ecclesiastical, or religious person he pleased; but that by that council the parochial right of them was settled. Neither was this an error of the common lawyers only, for Mr. Linwood, a learned

To whom tithes are due to be paid.

Selden's Hist. decim. 178, &c. Tho. Aq. Sum. 20. 2æ. q. 88. art. 3. conclusions.

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When the parochial right of tithes first began. 10 H. 7. 8. a. 43 E. 3. 5. Doct. & Stud. l. 2. c. 55. Co. 2. 44. b. Dyer, 84, &c.

doctor of the civil and canon laws, that lived in the time of H. 5. about two hundred and fifty years ago, tells us, that

Linwood, c.
locat. et conduct.
verb. portion.

“ Bene potuerunt laici decimas in feudum retinere, et eas alteri ecclesiæ dare ante concilium Lateranense, non tamen post,” &c.

Selden's Hist.
decim. 231.
2 Inst. 641.
Selden de Dec.
289. 488.

But there is no canon in that council to be found, whereby the parochial right of tithes was settled, nor was the parochial right of tithes settled till the year 1200, and then not by any canon, but by a decretal epistle of Pope Innocent the Third, a brief of which epistle here follows, as I find it in Mr. Selden's History of Tithes, and in Sir Edward Coke's Institutes.

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Innocent 3. Ep.
Decret. l. 2. p.
452. Edit. Colen.
Selden's Hist. of
Tithes, 231.

“ Pervenit ad audientiam nostram, quod multi in diocesi tua decimas suas integras vel duas partes ipsarum non illis ecclesiis, in quarum parochiis habitant, vel ubi prædia habent, et a quibus ecclesiastica percipiunt sacramenta, persolvunt; sed eas aliis pro sua distribuunt voluntate: cum igitur inconueniens esse videatur et a ratione dissimile, ut ecclesiæ, quæ spiritualia seminant, metere non debeant a suis parochianis temporalia, et habere, fraternitati tuæ (being directed to the archbishop of Canterbury) autoritate præsentium indulgemus, ut liceat tibi super hoc, non obstante contradictione vel appellatione cujuslibet seu consuetudine hactenus observata, quod canonicum fuerit ordinare, et facere quod statueris per censuram ecclesiasticam firmiter observari: nulli ergo, &c. Confirmationis, &c. Datum Lateran. 2 Nonas Julii.”

Innocent 3. tells us in his Epistles, that tithes are due to the parish priest de communi jure. Vid. Decretal. Greg. l. 3. de decimis c. 3. Cum in tua diocesi, et ibid. c. 29. Cum contingat.

I must acknowledge I give the reader this a little imperfect for want of the original; and it was Sir Edward Coke's case also; for I perceive he borrowed his from Mr. Selden.

But some have fancied (and perhaps not without reason; for this seems not to be a general decree, but a particular instruction to the archbishop of Canterbury) that the parochial right of tithes was not generally settled of long after, that is, by a canon made in the

council of Lyons, which was in the year of our Lord 1274, under Gregory the Tenth, in which council, it is said, there is a canon for the settling the parochial right of tithes, but not found among the canons of that council. But whether that were the original, or a confirmation of some other decree or council, I dare not take upon me to judge; but certain it is, that about this century the parochial right of tithes was settled in general. But though this decretal epistle of Pope Innocent the Third be not general, yet it was obligatory as to the province of Canterbury; so that in that province the parochial right of tithes may take its date from the time of that decretal epistle, which was, as above is said, in the year 1200.

Vide Selden's
Hist. of Tithes,
147.

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Godolph. Rep.
Can. 358.

Mr. Doctor Godolphin in his *Repertorium Canonikum* seems not satisfied, that it is a vulgar error in our books, that before the council of Lateran, every one was at liberty to give his tithes to what spiritual or religious person he pleased; and to prove a settlement of a parochial right of tithes by a council of Lateran, he cites a canon made by Innocent the Third in the second council of Lateran held in the year of our Lord 1120, sixty years before the council held under Alexander the Third, 1179, or as some have it 1180, where he says it was decreed that the religious persons, viz. the Cisterians, Hospitallers, Templars, and those of St. John of Jerusalem, which by the Popes Paschal and Adrian were exempted from payment of tithes, should pay the same to the parochial incumbent, whereby a parochial right of tithes was settled by a Lateran council, as he concludes.

Page 358.

Linwood, 81. b.
Selden de Dec.
157.

But I wonder the doctor should mistake himself so much; for first, there was no Lateran council in the year 1120, and he himself in his catalogue of the councils mentions none to be held that year, but assigns the second Lateran council to be held in the year 1131, wherein the doctor is again mistaken; for the second Lateran council that is not reckoned among the general

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councils, was held under Paschal the Second, 1112. And the second general council held in the Lateran was held under Innocent the Second, anno 1139, but of neither of these councils are any acts to be produced; besides, Pope Innocent the Third entered not upon the papacy till 1199, and so could hold no council 1120.

But I presume the doctor meant the council of Lateran held under Innocent the Third, 1215, where there is a canon something like that the doctor mentions; for by that council it is decreed, that the Cisterrians, and all other orders privileged from the payment of tithes (without enumerating any more of the orders) should pay tithes of such lands as they should purchase after that council, although they held them in their own proper hands; "*Ecclesiis quibus ratione prædiorum antea solvebantur, nisi cum ipsis ecclesiis aliter duxerint componendum:*" but this can settle no parochial right, for it is only that the tithes shall be paid to the churches, quibus antea solvebantur. And that the parochial right of tithes was settled before that council, appears clearly by the very next canon of that council; for there being complaints made in that council that divers clerks, as well regular as secular, upon grants and leases of their lands, took covenants of their grantees and tenants to pay their tithes to the grantors in prejudice of the parish priests, it was therefore decreed, "*Quod quicquid fuerit occasione hujusmodi pacti præceptum ecclesiæ parochiali reddatur;*" this word *reddatur* proves sufficiently that the parochial right was settled before that time; and Pope Innocent the Third, in several of his epistles, declares that they are due to the parish priests *de communi jure*.

And that the parochial right of tithes was not settled by any general council, but by a papal constitution, appears clearly by what Sir Robert Parning says, who lived within an hundred years of this time, and was after chief justice of the Common Pleas, who could not be ignorant how the parochial right of tithes was settled;

Decret. Greg.
l. 3. tit. 30.
cap. 34.

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Selden de Dec.
137.
Can. 55.

Greg. Decret.
l. 3. de decim.
c. 30. Cum tua
Dioces. & ibid.
c. 19. cum con-
tingat.

Selden de Dec.
294.

7 E. 3. 5. a.

and he says, that in ancient time before a new constitution made by the pope, the patron of a church might grant tithes within his parish to another parish.

But whether the parochial right of tithes was settled the one way or the other, it seems that all former grants were nullified, or otherwise the constitution had wrought small effect to the end it was designed, the greatest part of the tithes being before that time granted to monasteries, as may be observed in the *Monasticon Anglicanum*.

But notwithstanding this constitution, many of the abbots held out against the parish priests, who durst not, or were not able to contest them, and after claimed the tithes by prescription, that is to say, by forty years possession, which is a prescription allowed by the ecclesiastical courts; and that is the reason that many portions of tithes are at this day held by impropiators that had been gained by the abbots by such prescriptions, and not by their ancient grants, and by this means they got their prescription *de non decimando*: for the canon law does allow one clergyman to prescribe against another, but not a layman by any means to the prejudice of the church. But if a clergyman, secular or regular, continue to have the possession of a portion of tithes in another parish quietly forty years, this shall make him a good title against the proper incumbent, and the same law holds *de non decimando*: for if a clergyman religious, secular, or regular, hold any land forty years together tithe free, he shall hold tithe free for ever; but if a layman hold lands tithe free a thousand years, it avails him nothing by that law.

But after the parochial right of tithes was settled, it is clear, that no layman was capable of tithes in pernanacy, but in particular cases, till the statutes by which the monasteries and religious houses were dissolved, enabled them: but in some special cases laymen were capable of tithes in pernanacy, as in the case of Pigot and Heron cited in the bishop of Winchester's case,

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Seld. de Dec.
161.

Greg. Decret.
l. 2. tit. 26. c. 6.
ad aures nostras.

Ibid. c. 7. cau-
sam quæ, &c.

Selden's Hist.
decim. 398. and
in his Review,
478.

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Co. 2. 44. a.
Laymen capable
of tithes in per-
nanacy.
Co. 2. 45. a.

where the case is put, that the lord of a manor, and all those whose estates he had in the manor time out of mind, had paid to the parson of D. (in which parish the manor lay) for the time being, a certain sum for the maintenance of divine service in contentation of all tithes arising within the said manor, and that in consideration thereof he, and all those whose estates he had in the said manor by the time aforesaid, had and enjoyed all the tithes arising in the said manor: and in this case it was adjudged, that the lord of the manor might have these tithes in pernancy, and sue for the same in the spiritual court; but a man cannot claim tithes generally as part of, or belonging to a manor.

More, 599.

Laymen capable of tithes in pernancy by the statutes of the dissolution of abbeys.

But since the several statutes made for the dissolution of monasteries, those tithes which were appropriated to the religious houses so dissolved are become lay-fee, and any laymen by the laws of this realm are capable of them in pernancy, and may sue for the same in the spiritual courts.

All the tithes belonging to the rector prima facie.

Portions by prescription. Greg. Decr. prescrip. 14 H. 4. 17. a. 44. Ass. p. 25. Rolls, 1. 657. o.

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Selden's Hist. of Tithes, 161.

How prescriptions are to be proved.

Selden's Hist. decim. 364. 209.

Selden, 399.

But since the parochial right of tithes was settled prima facie, all tithes not appropriated belong to the rector of the parish church wherein they arise; yet notwithstanding the parson of one parish may prescribe to have a portion of tithes in the parish of another; and so might abbots, priors, and other religious persons prescribe to have portions of tithes in parishes whereof they had not the advowsons, and by consequence the patentees from the crown, and the impropiators may claim the same by prescriptions in the abbots, priors, &c. and the usage since the dissolution will serve to prove the prescription and usage in the abbots, &c. that they held the same so time out of mind. But no layman at this day is capable of tithes in pernancy but under the statutes of dissolution, unless by a grant by the bishop, parson and patron made before the disabling statutes.

Extra parochial tithes. 7 E. 3.

As for extra-parochial tithes, there have been some differing opinions. Sir William Herle was of opinion,

that they belonged to the bishop of the diocess, as general parson of his whole diocess, grounding his opinion, as it should seem, upon the canon law; but there was never any such canon received or approved in this kingdom.

Mr. Selden is of opinion, that tithes of increase of lands not limited to any parish may be disposed of arbitrarily in like manner as other tithes might before the parochial right of payment was established. Selden de Decimis, 365.

Selden's Hist. decim. 108.

But it hath been resolved both in parliament and by several judgments at common law, that all extra-parochial tithes belong to the king, who is a mixt person, and capable of tithes at the common law in pernancy.

21 Ass. 75.
2 Inst. 647.
Rolls, l. 657. o.
10 H. 7. 13. a.
Co. 5. part 128.

Now having shewed in general who are capable of tithes in pernancy at this day, and to whom of common right they belong, I shall proceed to shew to whom they are due in some particular cases.

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Ryley's Records, 50.

If a parson lease his glebe lands, and do not also grant the tithes thereof, the tenant shall pay the parson tithes. Nay, though the parson lease his lands "cum omnibus proficuis et commoditatibus eidem spectantibus," rendering rent, "pro omnibus exactionibus et demandis quibuscunque;" yet notwithstanding the tenant shall pay the parson the tithes arising upon these lands.

In particular cases to whom tithes are due.
Cro. El. 161.
Against the parson's own lease.
Owen, 39.
Portmanv. Hind, M. 31 & 32 El.
B. R. Co. 11.
13. b. Dyer, 43.
p. 22. est quare.
Hetly, 31.
Against his feoffment.
Co. 1. 111. a.
C. 11. 13. b.
Cro. El. 261.

The like law it is, if an impropriator, vicar, &c. make such lease, &c.

And as the parson shall have tithe of his own tenant, so he shall have of his feoffee: and if a parson hath lands in the same parish whereof he is parson, and demises his tithes, he shall pay tithes to his farmer.

If a parson sow his ground, and then sell the emblements (I mean the corn growing upon the ground) the buyer of the corn shall pay the tithe of it to the parson that sowed and sold the corn.

Dyer, 43. p. 21.
Moyle v. Ewre.
H. 11 Jac. B. R.
Rolls, 655. k. r.

So if a parson sow his glebe land, and then lease the

land, the tenant shall pay his parson landlord tithe of this corn.

C. 10. 88. b.
21 H. 6. 30. a.
Uphaven v.
Humphries,
40. El. per
Poph. & Gawdy
v. Fenner.

There have been some opinions, that if the parishioner sow his lands, and before severance the parson die, that in this case the parson's executors and not his successor should have the tithes. Br. Emb. 2. cont.

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Br. Embl. 9.
acc. 2. contra.

And there have been some opinions, that if the parson sow his glebe and die before severance, that his executors should not pay tithes of his corn. Br. Emblements.

To whom the
tithes in the va-
cation belong.
Stat. 28 H. 8.
c. 11.

But both these cases, if they had been law, are put out of doubt by the statute of 28 H. 8. which hath given all the tithes and other profits belonging to the rectory to the successor, from the death of the last incumbent, which hath taken away all pretence the executors could have in such cases. But notwithstanding this statute, I take the law to be clear that the executor of the parson shall have the corn sown by his testator in his lifetime, as the executors of other tenants for life have by the law.

Rolls, 655, k. 3.
C. L. 55. 6.
Cap. Nullus
Rector verb.
decesserint.
Whether the vi-
car and parson
shall pay to each
other. More,
910, 457.

And so it is settled by the statute of 28 H. 8. before-mentioned: but if the parson, vicar, &c. sow the land and be deprived, resign or accept another living, the successor shall have the tithe (74).

Crompton's case
p. 7. Car. 1. B. R.
Hetly, 135.
Cro. El. 578.
Winch. 70.
Tithes may be-
long to a chapel.
More, 457. 910.
Hetly, 135.
Winch. 701.
13 Ass p. 2.
Dyer, 87. Rast.
Ent. Tresp. in
dismes 4. &
Præmunire in
Rome 4.

It hath been held, that the vicar upon a general endowment shall not pay tithes of his glebe to the parson, or the fruits that arise from the same, "Quid decimas ecclesia ecclesiæ reddere non debet," without special words.

So if a vicar be endowed of all the small tithes arising within the parish, yet he shall not have the small tithes arising upon the glebe lands of the parson.

Tithes by prescription may be appendant to an ancient chapel.

(74) Where there has been no incumbency for several years, the successor is intitled to the tithes of the whole interval. Hard. 329.

And note, that by the canon law, personal tithes are to be paid where the party communicates, but predial to the parson within whose parish the land lies, Lindwood, cap. Sancta Ecclesia. De decimis, in the gloss verbo negotiationum.

Decret. Greg. de decim. Cum sunt Gloss. verbo diversa. 17 Car. 2. cap. 8. [229]

By an act of parliament made in the seventeenth year of the reign of King Charles II. it is enacted, That every owner or proprietor, owners or proprietors of any impropriation, tithes or portions of tithes in any parish or chapelry within the kingdom of England, or dominion of Wales, is, are, or shall be, by virtue of this act enabled and empowered to give and bestow, unite and annex the same, or any part thereof, unto the parsonage or vicarage of the said church or chapel where the same do lie or arise, or settle the same in trust for the benefit of the same parsonage or vicarage, or of the curate or curates there successively, where the parsonage is impropriate, or no vicar endowed, according to his or their respective estates, without any licence of mortmain, any law or statute to the contrary notwithstanding.

A law for the reuniting impropriations to parish churches,

And it is farther enacted by the same act, That if the settled maintenance of such parsonages, vicarages, churches and chapels so united, or of any parsonage or vicarage with cure, in the kingdom of England or dominion of Wales, shall not amount to the full sum of one hundred pounds per annum, clear and above reprises, that then it shall and may be lawful for the parson, vicar or incumbent of the same and his successors, to take, receive and purchase to him and his successors, lands, tenements, rents, tithes or other hereditaments, without any licence of mortmain, any law or statute to the contrary notwithstanding.

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This is an excellent law, which I hope may turn very much to the benefit of the church, and there is another beneficial law for the church, made in the 29th year of the reign of the late King Charles the Second, that relates, Whereas divers archbishops, bishops, deans and chapters, and other ecclesiastical persons, in obedi-

29 Car. 2. cap. An act for the confirming and continuance of augmentations.

ence to his majesty's letters, bearing date the first of June in the twelfth year of his majesty's reign, and out of a pious care to improve poor vicarages and curacies, where the endowments thereof were found too small to afford a competent maintenance to those that serve the cure, have, since his majesty's happy return, upon the renewing of leases of rectories of tithes impropriate or appropriate, made, or may hereafter make, divers reservations beyond the ancient rent, to the intent the same should or might become payable to the said vicars or curates, in augmentation of their endowments, which have been for the most part enjoyed accordingly.

[231] But in regard such reservations were not made to the vicars or curates, or if they were, no convenient remedy could be had by such vicars or curates, for the recovery thereof, and they were not at the time thereof capable of taking any to their own use, whereupon the provision will depend upon the good pleasure of the successor, and may in time be disappointed. For establishing whereof, it is enacted, that all and every augmentation of what nature soever, granted, reserved or agreed to be made payable since the first day of June in the twelfth year of his said majesty's reign, 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 lessor, but intended to be to and for the use or behoof of any vicar or curate, or by any archbishop, bishop, dean, provost, dean and chapter, archdeacon, prebendary, or other ecclesiastical corporation, person or persons whatsoever, so making the said reservation, out of any rectory impropriate or portion of tithes belonging to any archbishop, bishop, dean, provost, dean and chapter, or other ecclesiastical corporation, person or persons, shall be deemed and adjudged to 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 rectory or portion 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 and estate on which the said augmentations were granted, reserved or agreed to be made payable as afterwards: and the said vicars and curates shall have remedy for the same, either by distress upon the rectory impropriate, or portions of tithes charged therewith, or by action of debt against that 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 were 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.

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Provided always, that no future augmentation be confirmed by virtue of this act, which shall exceed one moiety of the clear yearly value, above all reprise, of the rectory impropriate out of which the same shall be granted or reserved.

None to be confirmed which exceed one moiety of the rectory, &c.

And to the end the said vicars and curates may the better make appear the certainty of the said augmentations; be it enacted, &c. that every archbishop, bishop, dean and chapter respectively, on or before the 29th day of September next coming, shall cause every lease or grant wherein any augmentation is made, to be fairly entered into a book of parchment, to be kept by their respective registers for that purpose. And every dean, archdeacon, prebendary or other ecclesiastical person respectively, shall cause every lease or grant whereupon such augmentation hath been made, by himself, his predecessor or predecessors, to be entered in the said

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book to be kept by the register of the bishop of the diocess, for entering whereof no fee shall be paid, nor any thing demanded, save only a reasonable reward to the clerk for the entering the same, not exceeding 5s. which said entry being examined by the respective archbishop, bishop or dean, and by them respectively attested in the same book to be a true copy of the original lease or grant, and the augmentation in the same was intended for such use, shall be as a record, a true copy whereof proved by witnesses to be a true copy, shall be deemed, taken, adjudged and expounded to be good and sufficient evidence in the law, wherein the said vicars and curates respectively shall and may by virtue of this act from time to time recover the benefit of such augmentation.

Augmentations continued, though not expressed in any new lease.

And be it further enacted, that where any archbishop, bishop, dean and chapter, or any other ecclesiastical corporation or person whatsoever, upon the renewing or granting any lease or estate, have made any agreement for an augmentation for the vicar or curate, and the said augmentation hath for any time been accordingly paid, although the said agreement is not expressed or mentioned in the said lease or grant, every such ecclesiastical person shall cause the substance of such agreement to be entered in the said book, to remain for a memorial of it to perpetuity.

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And it is further enacted, that such augmentation so entered shall likewise continue and be for ever hereafter good and available in the law, for the benefit of the vicar or curate for whom it was intended, and their successors, as well against the archbishop, bishop or ecclesiastical corporation or person who agreed for the same, and his and their successors, as against every other person enjoying the said rectories or portions of tithes intended to be charged therewith in the same manner, and for which they shall have the same remedy as they should or ought to have by virtue of this act, as

if the same had been mentioned and reserved in and by the lease.

And if any question shall hereafter arise concerning the validity of such grants, or any other matter or thing in this act mentioned and contained, such favourable constructions, and such further remedy if need be, shall be had and made for the benefit of such vicars and curates as heretofore have been had and made, or may be had for other charitable uses.

Such reservations shall have favourable constructions.

And relievable by commissioners for charitable uses.

And it is further enacted, that if upon the surrender, expiration or other determination of any lease wherein such augmentation as aforesaid, hath or shall be granted, any new lease of the premises or any part thereof be made without express continuance of the said augmentation, every such new lease shall be utterly void to all intents and purposes (75).

Leases made, wherein the augmentations shall not be mentioned, to be void.

(75) And by the 2 and 3 An. c. 11. 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 patents, 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 promotion 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, s. 1.

Power to establish a corporation, and settle thereon the first fruit and tenths.

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.

§. 3.

Power to settle
the said corpo-
ration.

And by the said statute of the 2 and 3 An. c. 11. every person having in his own right any estate or interest in possession, reversion or contingency in any lands or property in any goods, shall have power by deed enrolled in such manner and within such time as is directed by the 27 H. 8. c. 16. for inrollment of bargains and sales; or by his last will or testament in writing, to give and grant to, and vest in the said corporation and their successors, all such his estate, interest or property, or any part thereof, 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 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 direction of the said benefactor by such deed or will; and in default of such direction, in such manner as by her majesty's letters patents shall be 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 aliene 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 notwithstanding. But this is not to enable any person within age, or of non-sane memory, or woman covert (without her husband), to make such alienation. s. 4, 5.

But by 9 G. 2. c. 36. from and after June 24, 1736, no manors, lands, tenements, rents, advowsons, nor other hereditaments, corporeal or incorporeal, nor any sum of money, goods, chattels, stocks in the public funds, securities for money, or any other personal estate, to be laid out or disposed of in the purchase of any lands, tenements, or hereditaments, shall be given, granted, aliened, limited or released, transferred, assigned or appointed, or any ways conveyed or settled, to or upon any person, body politic or corporate, or otherwise, for any estate or interest whatsoever, or any ways charged or incumbered by any person in trust, or for the benefit of any charitable uses, unless such gift, conveyance, appointment or settlement of such lands, tenements or here-

ditaments, sums of money, or personal estate (other than by stocks in the public funds), be and 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, and be inrolled in the 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, 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 claiming under him. S. 1.

But by 43 G. 3. c. 107. it is enacted, that so much of the act of 2 and 3 Anne, c. 11. as relates to deeds and wills made for granting and bequeathing lands, tenements, hereditaments, goods and chattels, to the governors of the bounty of Queen Anne, for the purposes in the said act mentioned, shall remain in full force and effect notwithstanding. 9 Geo. 2 c. 36. s. 1.

In pursuance whereof the queen by letters patent, bearing date November 3d, 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 vicechancellors 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 5th, 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, or 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 more certainty in his account.

And by the 1 G. st. 2. c. 10. 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. S. 19.

And in pursuance of the said letters patent, the following rules and orders have been established, viz.

1. That the augmentation 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 200l. to be invested in a purchase at the expense of the corporation.

3. That as soon as all the cures not exceeding 10l. per annum, which are fitly qualified, shall have received our bounty of 200l., the governors shall then proceed to augment those cures that do not exceed 20l. per annum, and augment no other till those have all received our bounty of 200l. except in the cases and according to the limitations hereafter named; and that from and after such time as all the cures not exceeding 10l. a year which are fitly qualified shall have received our bounty of 200l. the like rules, orders and directions shall be from thenceforth by the governors observed and kept, in relation to cures not exceeding 20l. a year, as are now in force, and ought to be by them observed and kept in relation to cures not exceeding 10l. 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 200l. to cures not exceeding 40l. a year, where any persons will give the same or a greater sum, or the value thereof, in lands, tithes, or rent charges.

Rules and orders in pursuance of the said letters patent.

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 ^oMichaelmas 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 governor.

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 20*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 such 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.

And by the 1 G. st. 2. c. 10. it is enacted, that 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. S. 3.

Ascertaining the valuation of the livings to be augmented.

5. By the 5 An. c. 24. all benefices with cure of souls, not exceeding the clear improved yearly value of 50l. (as hath been said) are discharged from first fruits and tenths; and the bishops and guardians of the spiritualities, sede vacante, were to inform themselves of the values of all such benefices.

And by the 1 G. st. 2. c. 10. the bishops of every diocese, and the guardians of the spiritualities, 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 and contiguous thereunto, although the same be exempt from the jurisdiction of any bishop in other cases, and how much 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. S. 1.

Provided, that where by certificates returned into the exchequer by the 5 An. c. 24. the yearly value of any livings not exceeding the clear yearly value of 50l. 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. S. 2.

Agreements with benefactors for the nomination.

6. All agreements with benefactors, with the consent and approbation of the governors, touching the patronage or right of presentation or nomination 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 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 or 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 seized 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. 1 G. st. 2. c. 10. s. 8.

And the agreements of guardians on the behalf of infants or idiots, shall 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. S. 9.

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. S. 10.

And in case of such agreement made by any person seized in right of his wife, the wife shall be a party to the agreement, and seal and execute the same. S. 11.

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. S. 12.

7. And 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, impropiator of any rectory impropiated 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

Agreements with patrons and others for a stipend in case of augmentation by lot.

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 impropiator 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 the augmenting some other cure according to the rules then in force. S. 16.

Capacity of ministers for receiving the augmentation.

8. And whereas the augmentation is intended for the maintenance not only of parsons and vicars, but also of cùrates 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. 5 An. c. 24. s. 4.

Augmentation of benefices vacant.

9. And 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 held 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. 1 G. st. 2. c. 10. s. 12.

10. And 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 impropiators 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 doth 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 impropiator 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. 1 G. st. 2. c. 10. s. 4.

Benefices augmented shall be perpetual cures.

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 divested 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. S. 5.

And lapse thereof may incur.

11. And 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. 1 G. st. 2. c. 10. s. 6.

Provided that if the person intitled 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. S. 7.

Donatives, how affected by the augmentation.

12. All donatives exempt from ecclesiastical jurisdiction, and augmented by virtue of the powers given by this act, shall be subjected to the visitation and jurisdiction of the bishop of the diocese. 1 G. st. 2. c. 10. s. 14.

But no donative shall be augmented without the consent of the patron in writing, under his hand and seal. S. 15.

Exchanging of lands settled by the augmentation.

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. 1 G. st. 2. c. 10. s. 13.

By 43 Geo. 3. c. 107. it is enacted, that the said power shall be extended to all the messuages, buildings and lands belonging to every such augmented living or cure. S. 2.

And be it further enacted, that 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, any thing in any act or acts, or the rules of the said governors, contained to the contrary notwithstanding. S. 3.

14. By the 1 G. st. 2. c. 10. 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. S. 20.

Registry to be kept of all matters relating to the augmentation.

The number of livings capable of augmentation hath been certified as follows: 1071 livings not exceeding 10l. a year, which may be augmented (by the bounty alone) six times, pursuant to the present rules of the governors, which will make 6426 augmentations; 1467 livings above 10l. and not exceeding 20l. a year, may be augmented four times each, which will make 5868 augmentations; 1126 livings above 20l. and not exceeding 30l. a year, may be augmented three times each, which will make 3378 augmentations; 1049 livings above 30l. and not exceeding 40l. a year, may be augmented twice each, which will make 2098 augmentations; 864 livings above 40l. and not exceeding 50l. a year, may be each once augmented, which will make 864 augmentations. So that in the whole there are 5597 livings certified under

50*l.* a year, which will require (by the bounty alone) 18,654 augmentations before they will be advanced to 50*l.* a year each; and thereupon, computing the clear amount of the bounty to make 55 augmentations yearly, it will be 339 years from the year 1714 (which was the first year in which any augmentations were made) before all the said livings can exceed 50*l.* a year. And if it be computed that half of such augmentations may be made in conjunction with other benefactors (which is improbable), it will require 226 years before all the livings already certified will exceed 50*l.* a year. 2 Burn's Eccl. Law, 283. et seq. Vide Mr. Christian's note on this subject. 1 Blac. Com. 285. For the forms of deeds which may be used by a donor and governor of the bounty, vide 2 Burn's Eccl. Law, 295.

By the 45 G. 3. c. 84. it may be lawful for any person or persons, having in his, her or their own right, any money, goods, chattels or other personal effects at his, her or their will and pleasure, to give, or grant to, or vest in the said governors of the bounty of Queen Anne, all or any of such money, &c. without any deed or deeds enrolled or not enrolled in any manner as he, she or they can or might have done, either by deed or deeds enrolled or otherwise, before the passing of this act, s. 3. ; but this not to affect the law now in force relative to lands, tenements and hereditaments. S. 4.

By 46 G. 3. c. 133. a donation of 6000*l.* a year was granted for the augmentation of small livings not exceeding 150*l.* a year; for by that statute all such livings may be discharged from the payment of the land-tax, without any consideration for it, provided the whole annual amount shall not exceed 6000*l.*

CHAPTER III.

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*Of what things Tithes are due, and in what manner
Tithes of Hay and Corn are to be paid.*

TITHES regularly are to be paid of all things annually arising from the ground, either of themselves, or by the culture and industry of the parishioner, without any deduction of charge in their proper kinds, as soon as the same may be separated and divided from the nine parts, in sheaves, garbs or heaps. But the manner and form of the payment of tithes is for the most part governed by the custom of the place: and therefore if by custom the tenth part of corn or hay hath been measured forth growing upon the lands, as it is in some parts of Lincolnshire, this manner of tithing is to be observed; for in what manner soever the tithe hath been paid time out of mind, in such manner it still ought to be paid; and therefore where tithe corn hath been paid time out of mind, in sheaves or garbs bound up, it is no good payment to leave it in bonds unbound, as I have known some contentious parishioners do.

And it seems that the parishioner of common right ought to bind his corn in sheaves. See Rolls 1. 644. y. 5.

Quære if the parson must have notice of the setting forth of tithes. 2 Ventr. 48. (76).

Of what things tithes are to be paid.

Co. 11. 160.
F. N. B. 53 E.

Linwood, c. Quoniam propter verb. non deductis expensis.

How tithes of corn are to be paid.

Stat. 27 H. 8. c. 20. 32 H 8 c. 7.
Latch. 125.

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More, 913.

(76) Notice may be requisite by means of a special custom for that purpose, and (as Lord Mansfield thought) so intrinsically proper, that very slight evidence would be sufficient to prove a custom, Burr. 1891. but want of certainty in the custom is a fatal objection to it, Bunb. 333. It is indispensably necessary that the tithes be set out. In an

If corn be standing, the vendee shall pay the tithes, but if he set it after severance the vendor must. *Hardres*, 381. (77).

And where the custom was that the parson should have the tenth land from the hedge, and the parishioner neglects to sow the tenth land, the parson shall not have his tithe in kind, but a special action on this case for not sowing it.

How the tithe of hay is to be paid. *Hob.* 250. *Rolls*, 1. 644. y. 1, 2, 5, 6.

So for the tithe of hay, if the parishioners have used to make it into haystacks before they have set forth their tithes, they must do so still, but where there is no such custom, they may set it forth in grasscocks (78).

action in the court of C. P. for not setting out the tithes of wheat, it was said by the court, "The tithe must be so set out, and the nine parts left so long, that the parson may have an opportunity of judging by the view, whether the tithe is fairly set out or not." *Halliwell v. Trappes*, 2 *Taunt.* 55.

(77) And if nursery plants are sold standing, the vendee must pay the tithe; but if the owner pulls up the plants and sells them, such vendor is liable to pay the tithe. *Gwill.* 515. *Grant v. Hedding*. Where a man sold the toppings and loppings of oak, ash and elm, standing and uncut, the vendee cut them, and the parson sued the vendor for his tithes; the suit as against the latter was dismissed. *Gwill.* 537. *Taswell v. Athill*. But if a parishioner severs his grass, and makes it into reeks or cocks, and then sells it, no suit can be maintained against the vendee for the tithes. 2 *Rol. R.* 78.

(78) It should seem, that where by the usual mode of husbandry, clover hay is not made into cocks at all, the tithe may be set out in the swathe; but the fair and legal way of tithing clover like other hay, is when it is put into cocks. *Collier v. Howes*, *Anstr.* 481.

It has been a doubt, whether the tithe of hops was to be set out by the tenth hill, as soon as the binds were severed from the ground, or by the tenth measure after the hops were picked. *Sid.* 283. *Ledger v. Langley*. But it has since been determined by numerous cases, that the tithe of hops is to be set out by the tenth measure after they are

The same order ought to be observed in all other things arising from the ground, as rape, saffron, &c. and other fruit.

But no tithes are to be paid for the rakings of corn, unless the parishioner fraudulently scatter his corn to cozen the parson of his tithes. Roll 1. 644. y. 5. Littleton, 31.

Rakings.
2 Inst. 652.
Cro. El. 660.
More, 278.
Cro. Jac. 42.

Neither are tithes to be paid of the after-maths of meadows, nor of balks in cornfields, or of the stubble of corn: but if the meadows be so rich, that there are two crops of hay got in one year, or two crops of woad, &c. there the parson shall have tithe as well of the latter as of the former crop.

Yelverton, 86.
Hetly, 133.
Rolls, 1. 645.
Z. 11, 12 & 13.
Aftermaths.
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B. Still. Eccl.
Cases, 269.

If a man gather green peas to spend in his house, and there spend them in his family, no tithes shall be paid for the same; but if he gather them to sell or to feed hogs, there tithes shall be paid for them.

Rolls 1. 647. a.
11, 12.
Green peas.

Neither shall tithe-hay be paid for the grass growing upon head lands, which are only large enough for the turning the plough.

Infra 383.
Headlands.
Rolls 1. 646.
Z. 19.
2 Inst. 652.
Orchards.

But tithe shall be paid of the hay and corn growing in orchards, though the tithe of the fruit growing in them were paid the same year, be it apples, pears, cherries, &c.

There hath been some question about fodder gotten in the fen lands in Cambridgeshire and elsewhere, and spent upon beasts of the plough and pail, whether it should pay tithes or no; but it hath been resolved, that tithes shall as well be paid of this fodder, as of other hay spent upon the beasts of the plough and pail.

More, 683.
Cro. Jac. 47.
Fodder.

But it has been resolved, that for grass cut in meadows to feed the beasts of the plough, and not made into hay, tithes shall not be paid thereof.

Grass cut in meadows for beasts of the plough.
Wells v. Crawly,
T. I. Car. 1. B. R.
Tares, vetches, cut green.
Cro. Car. 393.

It hath been resolved, that tares, vetches, &c. cut green for the feeding beasts of the plough, by custom

picked, and before they are dried. Bunb. 20. Chitty v. Reeve. Gwill. 1531. Knight v. Halsey, 6 Bac. Abr. 739.

Jones, 375.

may be freed from the payment of tithes, but not without custom (79).

2 Leonard, 27.
C. Sancta Ec-
clesia.

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There was a canon made by Robert Winchelsea archbishop of Canterbury and his clergy, in the year 1305, whereby it was decreed, that “ Omnes et singuli parochiani integre et sine diminutione decimas inferius annotatas ecclesiis suis persolvant; scilicet, decimam lactis a primo tempore suæ novationis tam mense Augusti quam aliis mensibus; de proventibus etiam boscorum pannagiis sylvarum et cæterarum arborum si vendantur, vivariorum, piscationum, fluminum, stagnorum, arborum, pecorum, columbarum, seminum, fructuum et bestiarum guarenarum, aucupitii, hortorum, curtilagiorum, lanæ, lini, vini et grani, turbarum, in locis quibus fabricantur et fodiuntur, cygnorum, caponum, aucarum, et anatum, ovorum, thenetii agrorum, apum, mellis et ceræ, molendinorum, venationum, artificiorum, negotiationum, nec non agnorum, vitulorum, pullorum, equorum secundum eorum valorem, et omnium proventuum rerum aliarum de cætero satisfaciant competenter ecclesiis quibus tenentur, nullis expensis ratione præstationis decimarum deductis, seu retentis, nisi tantum de præstatione decimarum, et negotiationum; quod si monitionibus suis parere contempserint, per suspensionis, excommunicationis et interdicti sententias eos ad præstationem decimarum hujusmodi compellant.”

(79) In some cases the manner of paying a predial tithe is ascertained by act of parliament. 6 Bac. Abr. 739. By the 11 and 12 W. 3. c. 16. made perpetual by stat. 1 G. 1. st. 2. c. 26. 2. it is enacted, for the better ascertaining the tithes of hemp and flax, “ that every person who shall thereafter sow any hemp or flax in any parish or place within England, Wales, or Berwick upon Tweed, shall pay to the parson, vicar or impropiator of such parish or place, yearly, the sum of five shillings, and no more, for each acre of hemp or flax, before the same is carried off the ground, and so in proportion for more or less ground so sown.”

This canon being a provincial canon of this nation, and by consequence in force so far as it is not crossed by the common law, statute law, or custom of the place, I thought fit to insert, though almost all the particulars therein are spoken to in their proper places, save that I have not met with *decima vivariorum* in any other canon, which the gloss says, is “*loca in quibus pisces pascuntur, et impinguuntur,*” and sometime it is taken “*pro loco ubi feræ includuntur,*” with which Sir Robert Stapleton’s Journal partly agrees; but what tithes are to be paid for vivaries, neither the canon nor gloss tells us, and I as little can give you an account what tithes are due for curtilage. “*Thenesii agrorum,*” Mr. Linwood tells us, is, “*arborum crescentium circa agros pro clausura eorum,*” which by the common law of England are to pay no tithe; for the rest I refer to the proper chapters.

Vid. stat. 3 and 4 W. & M. c. 3. and 11 and 12 W. 3. c. 16.

Verbo Viva-
riorum.
2 Inst. 162, 199,
100.

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Sir Henry
Spelman’s Gloss
verbo Vivarium.

CHAPTER IV.

Where, and in what Cases, and in what manner the Tithes of Wood are to be paid.

How and where
tithes wood is to
be paid.

IN the time of Stratford archbishop of Canterbury, in or about the 17th year of the reign of E. 3. 1343, there was a provincial canon or declaration made to this effect:

Canon.
Linwood c.
Quoniam ex
solventibus, &c.

“ Declaramus provisione concilii sylvam cæduam illam fore, quæ cujuscunque existens generis arborum in hoc habetur ut cædatur, et quæ etiam succisa rursus ex stirpibus aut radicibus renascatur, ac ex ea decimam utpote realem et prædialem parochialibus seu matricibus ecclesiis persolvendam, nec non sylvarum possessores hujusmodi ad præstationem decimarum lignorum ipsorum excisorum in eis sicut fœni et bladorum omni censura ecclesiastica fore canonicè compellendos.”

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Exact Abridg-
ment, p. 40. nu.
51. & ibid. 80.
num. 37.

But in or about the same year there was a petition in parliament, that no man should be impleaded in a court christian for tithes of the woods or underwoods, but in places accustomed, which was answered; as heretofore the same shall be.

The like petition was in the 25th year of E. 3. and other parliaments, till at the length, in the 45th year of the same king, an act of parliament was made to this effect, reciting,

St. 45 E. 3. c. 3.
Tithes not to be
paid of great
wood.

That whereas they sell their great wood of the age of twenty years, or of greater age, to merchants to their own profits, and in aid of the king in his wars, parsons and vicars of holy church do implead and draw the said merchants in suit in the spiritual court for the tithes of the said wood, by the name of silva cædua,

whereby they cannot sell their woods to the very value, to the great damage of them and the realm: it is therefore by that law ordained and established, that a prohibition in this case shall be granted, and upon the same an attachment, as hath been used before this time.

By which it appeareth that this act of parliament was but a declaration of the common law, prohibitions and attachments thereupon in such case having been formerly used, and so was Paston's opinion, 9 H. 6.

This act of parliament was after questioned by the clergy, pretending it did not pass as an act of parliament, but only as an ordinance, and so not binding. And thereupon the commons in the next parliament petitioned, that it might be enacted, that for wood above twenty years growth, no tithes should be due, and that in all such cases a prohibition might be granted. To which was answered, that such prohibition should be granted as then before had been used.

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9 H. 6. 5. 6. a.
T. 27 E. 1. or
28. a.
Prohibition in
point.
50 E. 3. 10. a.
Exact. Abridg.
118. nu. 21.

But Sir Edward Coke in his Commentary upon Magna Charta, does sufficiently prove it was an act of parliament.

Note it is printed
in Pinson's edit.
of Statutes.

1. Because it is entered upon the parliament roll amongst other acts of parliament. 2. It is under the title in that roll of statutes of E. 3. anno regni sui 45. 3. It was proclaimed with the rest of the acts of that parliament. 4. It is penned in the form of an act of parliament, viz. (it is ordained and established.) 5. It hath the consent of the lords and commons. 6. There have been infinite prohibitions upon it. To which let me add, that in the parliament of 8 R. 2. it was owned for an act of parliament, in which parliament it is like many of the persons were present, that were at the making of the said act.

2 Inst. 643, 644.

8 R. 2.
Exact Abridg-
ment of Record,
nu. 21.

And in 9 H. 6. exception was taken to the prohibition, because it was not grounded upon this statute.

9 H. 6. 56. a.

And in the 11 H. 4. it was affirmed by Thirning to be an act of parliament, and in force.

11 H. 4. 9. a.

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Selden's Hist.
de decim. 240.
2 Inst. 643, 644.
Rolls 1. 637.

But whosoever desires more satisfaction in this point, I refer them to Mr. Selden's History of Tithes, and the other places mentioned in the margin.

Notwithstanding this act, many questions were started what was *sylva cædua*, and many petitions in parliament to have it declared, to which I find no positive answers, but sometimes referred to usage, and sometimes the king took time to advise.

But Belknap a learned judge, 50 E. 3. declares, that *sylva cædua* is to be intended of all manner of wood that may be cut and will grow again; which all manner of wood will do, as he there says, if it be preserved from cattle; and therefore the defendant in the prohibition in that case was put to traverse, that he sued not in the spiritual court for the tithes of gross woods.

So that the question at this day chiefly is, what shall be said to be gross woods, to which question

The judges of the common law have resolved, that all sort of wood that is usually employed for the building of houses, mills, &c. are gross woods, and within this statute: of which sort there are oak, ash, elm, beech, horse-beech and horn-bean, against the opinion in Molyn's case: asp is likewise esteemed a gross wood, being sometimes used for timber; but for willows, hazels, hollies, maples, birch, alders, thorns, &c. of what age or bigness soever they be, they are regularly to pay tithes (80).

Sylva cædua
quid.
50 E. 3. 10. b.

2 Inst. 643.
What shall be
said great wood.
Contra Roll. 1.
640. q. 5.
Plow. 470. a. b.
Contra Roll. 1.
640. q. 7.
Hob. 288.
Rolls 1. 640. q.
6, 7, 8.
Hob. 219.
Noy, 30.
Cro. Jac. 199.
More, 207.
Cro. El. 1.
That birch is in
some places
taken for great
wood and not
tithable.

(80) Tithe is in general due of beechen, birchen, hazel, willow, sallow, alder, maple, and white thorn trees, and of all fruit trees of what age soever they are, because the wood of these trees is not often used as timber. But if the wood of any of these trees be frequently used in a particular part of the country where timber is scarce, in building or repairing, tithe is not due of the wood of this tree, if they are of the age of twenty years. Cro. El. 1. Cro. Jac. 199. 6 Bac. Abr. 720.

But if they be cut for fencing of grounds, or for fuel to be spent in the houses of the owner within the same parish, no tithes shall be paid of them, though some be left. Cro. El. 499.

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Cro. El. 499.
609.
Lit. Rep. 241.
Rolls, 2. 298.
o. 1.
2 Inst. 652.

Cro. Car. 113. More, 683. Rolls. 1. 644. z. 1, 2, 3. Hetley, 88. 110. Of what wood tithes shall be paid.

But if by custom tithes have been paid of such wood, the custom is to be observed. Rolls, 1. 645. z. 8, 9.

So if a man cut wood for the burning of bricks, which are employed for the repair of houses and buildings of the owner within the same parish, no tithes shall be paid for it; but if he makes bricks to sell, or for making of houses of pleasure, or other than for necessary habitation, he shall pay tithe for the wood spent therein, if tithable. Burning bricks. Rolls, 1. 645. z. 10.

If a man convert his land into a nursery for fruit-trees or other trees, and sell them for profit to such as transplant them into other parishes, he shall pay tithes of them. Nurseries. Rolls, 1. 637. c. 6. Cro. Car. 526. Jones, 416.

And if the owner digs them up and sells them, then he shall pay tithe; but if he sell them standing and the vendee digs them up, then he shall pay the tithe. Hardres, 380, 381.

If a man cut his coppice-wood and pay tithe of them, and soon after grub up the roots to cleanse the ground, he shall not pay tithes of them. Grubbed wood. Rolls, 1. 637. c. 7.

Upon the whole matter it is left a little uncertain which shall be accounted gross wood; because in some countries almost the meanest sort of wood is used for building, and the judgments in our books vary, some allowing one thing for timber, which another contradicts; but the proper and undeniable wood for timber are elm, ash, and oak, which are used for timber in all countries and places. It rests now to shew in what cases such woods as are accounted gross wood shall pay tithes.

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If oak, ash, elm, &c. which are esteemed timber in the countries where they grow, be cut under one and

twenty years growth, they are accounted *sylva cædua*, and ought to pay tithe.

Loppings of trees.

2 Inst. 643.

Cro. Jac. 100.

More, 762. 908.

Plowd. 470. b.

Rolls, 1. 640.

q. 1, 3, 4.

Co. 11. 48. b.

49. a.

But the loppings of great oaks, ashes, &c. though the lops be under twenty years growth, shall not pay tithes; for they are privileged by the bodies, neither shall tithes be paid of the shoots and underwood, which grows from the roots and stocks of such timber-trees, and trees above the growth of twenty years, which have been felled (81).

(81) A bill being brought for tithe of the loppings of timber trees which had been sold for firing, it was insisted that this wood, which would otherwise have been exempted from the payment of tithes, was liable thereto, because it was sold for firing. The bill was dismissed; and it was said by Lord Hardwicke, Chancellor, "In the cases in 1 Lev. 189. and Sid. 300. the wood in question was coppice wood, which had been usually felled for firing; and consequently these cases do not conclude to the point, because such wood, of what age soever it be, is tithable. What is laid down in the case of Greenaway and the Earl of Kent is not now law; for in the case of Biby and Huxley, Hill. 11 Geo. 1. which was subsequent thereto, it was agreed that tithe is not due of the wood of a timber tree which has been once privileged from the payment of tithe, although such wood be sold for firing. Walton v. Tryon. Gwill. 827. et seq.

It is in one book laid down, that the loppings of timber trees which are of twenty years growth, are exempted from the payment of tithe, because loppings of that age may be useful in building. Plowd. 470. Soby v. Molins.

But it is laid down in divers other books that if a timber tree of the age of twenty years be lopped, tithe is not to be paid of the loppings, although they are not of twenty years' growth, for that as the tree is exempted from the payment of tithe, the loppings are likewise exempted. 11 Rep. 48. Cro. El. 478. Bac. Abr. 6. 721.

And the doctrine of the latter cited books was confirmed in this case.

In Walton v. Tryon it appeared that the loppings of the trees, for the tithe of which the bill was brought, were not

Nor shall tithes be paid of the bark of such trees as are timber-trees, and privileged from the payment of tithes.

Bark.
2 Inst. 643.
Co. 11. 49. a.

But tithes shall be paid of the mast, acorns, &c. of timber-trees, because the same is of annual increase.

Neither shall tithes be paid of timber-trees, which become dotards, and are become arida, sicca, et non portans folia in æstate nec existens maheremium.

2 Inst. 643.
Dotards.
Cro. El. 477.
Rolls. 1. 640.
q. 2.

If one lop oaks, ashes, &c. under twenty years of age, and after let them grow above twenty years of age, no tithes shall be paid of them or their lops (32).

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More, 908.
Co. 11. 49. a.
Rolls, 1640. q.
1.

of twenty years' growth; but that the trees were of the age of twenty years, before they had ever been lopped.

It was decreed by Lord Hardwicke, that if a tree was lopped before it was of the age of twenty years, all future loppings, of how many years' growth soever they may be, are liable to the payment of tithe.

(82) But in *Walton v. Tryon*, vide note 81, it was held, that if a tree was lopped before it was of the age of twenty years, all future loppings of how many years growth soever they may be are liable to the payment of tithe.

And that all germins that spring from the roots of trees that have been felled are liable to the payment of tithe.

And that if, when the wood of a coppice is felled, some trees growing therein, which are of the age of twenty years and have never been lopped, are lopped, and the loppings are promiscuously bound up in faggots with the coppice wood, tithe must be paid of the whole; for that it would be very difficult to separate the tithable wood from that which is not so, and the owner ought to suffer for his folly, in mixing the latter with the former. *Ambl. 720. 6 Bac. Abr. 722.* And Lord Hardwicke directed issues to try, first, whether the oak and ash pollards were lopped before they were twenty years old. Secondly, whether time out of mind in the parish of Mickleham, beech has been deemed timber.

And in a recent case, *Ford v. Racster*, 4 Maule and Selwyn, 130. oakwood of more than twenty years standing, not growing from acorns but from old stools, which stools belonged originally to trees which had stood more than twenty years,

Woods mixt with
great and under-
woods.

Parson's Law,
99. T. 19 Jac.
B. R. Buck-
hurst v. New-
man.

Parson of Staple-
hurst.

T. 36 El. B. R.
per Henden.

Who shall pay
the tithe of wood.
Linwood, c.

Quamquam ex-
solventibus et
verb. Sylvarum
pos. et cap.

Quia quidam
maledictionis
verb. asportam.

Rolls, 1. 656.
1. 1.

Rolls, 1. 637. f.
Prescription of
not tithing of
wood.

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It hath been held, that if a wood-ground be mixt with woods tithable and woods not tithable, and the greater part be such as are not tithable, it shall privilege the rest, and pay no tithe; but if the greater part be tithable, it shall pay the tithe of such part as is tithable; for where the greater part is great wood, the whole shall be called great wood a majore.

It hath been a question among the canonists, who shall pay the tithes of wood tithable, the buyer or the seller. Mr. Linwood, in his gloss upon the canon before recited, seems to be of opinion, that the buyer shall pay the tithes, Quia verum enim est quod decima sequitur fructus, et cum onere decimæ transferuntur fructus in alterum; and this opinion of his seems reasonable, where the owner of the wood sells the whole wood together, or parcels it out, and the buyers cut it; but if the owner of the wood cut it himself, and then sell it by parcels, there it seems reasonable, that the owner of the wood should pay the tithe; but by the common law the parson may sue the one or the other at his election.

And it is to be observed, that a whole province, county, or hundred, may prescribe in non decimando of woods, as in the wilds of Kent and Sussex, and other places, and therefore the commons in 17 E. 3. upon the making of the aforesaid canon, moved in parliament

were held not to be so clearly entitled by stat. 45 E. 3. c. 3. to exemption from tithe, as to make a verdict which subjected them to tithes, a wrong verdict: and Lord Ellenborough in giving judgment observed, "this statute does not import to exempt all wood of twenty or forty years' growth, but such only as comes under the denomination of great wood," or "gros bois." Two things therefore must concur to privilege wood from a liability to tithes, viz. its being of the age of twenty years or more, and its being gros bois. In this case Lord Ellenborough agreed with Lord Hardwicke in considering Lord Coke's position upon this point, 2 Inst. 643, to be erroneous.

that no man should be drawn in plea in the court christian for the tithes of wood or underwood, except in such places where such tithes have been used to be paid; for by the strict letter of this canon, tithes were to have been paid of all manner of wood, great and small, in all places; to which the answer is recorded, "let it be done in this also, as hath been done before time." Rolls, 1. 637.

The manner of the payment of tithe-wood must either be by the measure of the ground by poles, perches, &c. as it is in some parts of Lincolnshire, or every tenth faggot, billet, &c. as it is paid of corn and other things; but in this, as in all other cases, the custom of the place is to be observed. The manner of paying tithe wood.

But no tithe shall be paid of wood cut for hop-poles to be used in the same parish, where the parson hath the tithe of the hops. White v. Aarach, M. 15 Jac. C. B.

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CHAPTER V.

In what Cases Tithe is due for the Herbage or Agistment and Pasturage of Cattle, and who is to pay the same.

In what cases
tithe herbage is
due.

I AM now come to speak of the tithe of herbage, agistment, or depasturing of cattle, for which I find no canon, save a clause of a provincial canon of Robert Winchelsey, dated 1305, in these words :

The canon.
Linwood, c.
Quoniam prop-
ter.

“ De pasturis autem et pascuis tam non communibus quam communibus statuimus, quod decimæ fideliter persolvantur, et hoc per numerum animalium et dierum, ut expedit ecclesiæ.”

Hardres, 184.

The tithe of herbage or agistment of cattle is due, where the owner or farmer of any lands, depastures with barren cattle that yield no profit to the parson ; which is a tenth part of the yearly value of the ground so eaten, but commonly a twentieth part is accepted ; but in this, as in all other tithes, the custom and usage of the place is to be observed (83).

Cro. Car. 237.
559.
Jones, 524.

If the owner of the land agist it with foreigners cattle, the owner of the land shall pay the herbage tithe ; but if he let the ground to a tenant, then the tenant is to pay it. Vide Hardres, 184.

Who shall pay
it.
Cro. El. 365.

But no herbage tithe shall be paid for the agistment of beasts bred for the plough and pail, and so employed in the same parish ; nor for beasts fed and spent in the owner's house in the same parish. Vide Hardres, 284.

Cro. Car. 237.
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559.
2 Inst. 651.
Hetley, 93.
Rolls, 1. 641.
2. 9, 10.

(83) But a modus of one shilling in the pound for pasture, according to the value of the land, was adjudged a void modus, as was also a modus of one shilling in the pound, according to the value of the rent. 20 Bunb. *Smith v. Roocliff*. Bunb. 174. *Harrison v. Sharp*.

So if a man eat a ground with his own saddle horses, he shall pay no tithe for the same; but if an innkeeper eat up a ground with guest horses, he shall pay tithes for the herbage of them.

If a foreigner that lives in another parish depastures a ground with cattle bred for the plough and pail to be employed in a foreign parish, he shall pay tithe for the agistment of such cattle. Hardres, 184.

And there is no difference between the case of a parishioner and foreigner, where the ground is eaten with unprofitable cattle, and not bred for the plough and pail, &c. saddle horses and fattening cattle, as aforesaid, to be spent in the parishioner's house; but that the parishioner as well as the stranger shall pay tithe. But for the breeding of cattle for the plough and pail, &c. conduces to the profit of the parson in his other tithes, and therefore no herbage ought to be paid for the agistment of them; but when they are turned off from work to be fatted for sale, tithes shall be paid for herbage, because they are not beneficial to the parson in any other tithes. Shower's Rep. 193.

No tithe is due to the parson for the herbage of beasts feræ naturæ, as deer, conies, &c. without a special custom.

Fitzberbert, in his *Natura Brevium*, seems to be of opinion, that there is no tithe due for the herbage or agistment of cattle, and adds this reason, because they pay tithe of the cattle there depastured, which proves his meaning to be, that there is no tithe herbage due where the ground is depastured with profitable cattle.

Where an innkeeper eats a ground with guest horses, he shall pay for the herbage of the ground.

If a ground be eaten with profitable cattle, as milch cows, ewes, lambs, and cattle bred for plough and pail, &c. and also with barren and unprofitable cattle, and the profitable cattle exceed in number, it should seem the greater part being profitable, should free the rest, *tamen inde quære*.

Rolls, 1. 641. ro. 4.
 Bulst. 1. 171.
 Poph. 126. 142.
 Wild v. Lampton, T. infra. 249.
 15 Jac. B. R. per 3 Just v. Houghton.
 Saddle horses. Rolls, 1. 641. c. 4, 5.
 Beasts bred for the plough and pail.

Infra. 260.
 2 Inst. 651.
 Herbage of beasts feræ naturæ, F. N. B. g. [249]

Hardres, 35. Supra. 248.

Pasture eaten with mixt cattle.

Rolls, 1. 641. q. 20.
 Quære.

Rolls, 1. 640.

a. 6, 7.

Beasts of the
plough.

Ground eaten
with mixt cattle.

No tithe herbage is to be paid of the agistment of oxen, horses, or beasts of the plough, employed and used in the same parish, for they are profitable cattle to the parson. If a ground be eaten with barren and unprofitable cattle and profitable cattle together, and the profitable cattle are the less in number, I conceive there is no doubt but the landlord must pay tithe in kind for the profitable cattle, and tithe of the herbage for the rest, and not herbage for the whole (84).

(84) Although in many cases tithes are to be paid of agistments; yet this is not to be understood of cattle agisted in the after-grass of a meadow, that has in that year paid tithe-hay. *Greene v. Austen*. Bunb. 7. Gwill. 613. *Ayd v. Flower*. Bunb. 78. Gwill. 629. *Boh. 107. 6 Bac. Abr.* This was for some time a doubtful point, it being possible to produce cases, particularly from Wood's collection, which would seem to support the contrary doctrine, namely, that cattle agisted in a meadow, that had payed tithe of hay, should in the same year pay tithe of agistment. The very recent case, however, of *Batchellor v. Smallcombe*, 28th January, 1818, 3 *Mad. Rep.* 20. has for the present settled this point. The Vice-Chancellor, after taking a review of the cases cited, and comparing the relative authority of Gwillim and Wood's collections, gave reasons for preferring the authority of the former, in which few can disagree with his honour, who have been in the habits of referring to both of them. "Wood's book," said he, "is a mere collection of pleadings, with the decrees of the court in tithe cases, without stating the proofs in the cause, or any of the arguments of the counsel or reasons of the court." It may be observed that a too confident reliance on the authority of Wood has frequently been productive of erroneous notions upon this subject. "It might be reasonable," said his honour at the conclusion, "in the present improved state of agriculture, that agistment tithe should be payable for after pasture; but that is matter for consideration of the legislature; I am bound to say, that by the common law, as collected from the text writers, and a long series of decisions, it is clear, that where the land has been mown for hay, and

If there be a custom in the country to sow tares, vetches, &c. and to eat them green upon the ground

Tares and vetches eaten green.

paid tithes, agistment tithes for after pasture in the same year is not demandable."

But this exemption only takes place where no more grass is left by the scythe than is usual; for if more grass than usual is fraudulently left, the case is otherwise. *Boh. 48.* A. had a house and a large farm of arable land in the parish of Kippax, where he lived; and also five acres of ploughed land, and forty acres of pasture, in Swillington, upon which pasture he fed his cattle which were employed in husbandry, in the parish of Kippax.

The parson of Swillington libelled for tithes for the agistment of the cattle there, and thereupon the defendant suggests that by the custom of England no tithes ought to be paid for the agistment of cattle kept for plough or pail.

And it was moved for a prohibition, that the plaintiff cannot libel for the agistment of cattle, but only for such as are fed in the same parish and not elsewhere, and that the pasturage of cattle and for husbandry in the same parish, is not tithable, because the parson has tithes for them in another kind.

On the other side it was said; that the parson is to have a profit wherever the parishioner hath any benefit, and that he is an inhabitant wherever he hath land.

But the court would not grant a prohibition upon the first motion, but gave the defendant leave to mend his suggestion, by adding that he had arable land in Swillington, and did exercise husbandry there.

And afterwards in Michaelmas term, it was moved again, and the court were then of opinion, "that if the cattle depastured were not for ploughing the land in the same parish where they are fed, he shall pay tithes, though they plough in another parish; and if he had more cattle than he employed for the plough in the same parish, he ought to pay tithes for them."

But they ordered the defendant to make affidavit to ascertain the fact. *Seoles v. Lowther. 5 Mod. 96, 97. Gwil. 1029. 1 Lord Raymond, 129.*

Rolls, 1. 647. a.
8. and 16.

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Of what cattle
herbage is due.

before they are ripe, with horses and beasts of the plough, no tithe shall be paid for the same.

If a stranger or parishioner buy barren cattle, and depasture and feed them for sale, he shall pay tithe for the herbage of them.

Rolls, 1. 646. a.
13.

If a man buy oxen, steers, or horses, and depastures, and after sells them, and doth not without fraud, employ them in the plough, he shall pay tithes for their agistment. And if he work them fraudulently, to defeat the parson of his tithes, it will not serve his turn.

Rolls, 1. 647. a.
15.

So if a man buys or rears young cattle, and depastures them in a parish, and does not employ them there for a plough or pail without fraud, as hath been said, he shall pay tithe for the herbage of them.

P. 7. Jac. C. B.
Parson's Law.

But for the grass of fallows no herbage shall be paid, because it is for the bettering of the parson's tithes in the year following; nor for the grass of stubble (85).

(85) Tithe is not due for depasturing any beast upon the headland of a ploughed field; provided the headland be not wider than is sufficient to turn a plough and horses on. 1 Roll's Abr. 646. 6 Bac. Abr. 716. Sed vide *Bateman v. Aistrup*, 2 Raym. contra.

It is in general true, that tithe is due for depasturing cattle which are the property of a stranger. 6 Bac. Abr. 716. But see *Bateman v. Aistrup*, 2 Raym.

If land which has paid tithe of corn be suffered to lie fresh longer than by the course of husbandry is usual, tithe is due for depasturing a beast upon the land. *Sheph. Abr.* part 4. D. 104.

Coach-horses are liable to the payment of an agistment tithe. 3 Burn's Eccl. Law, 474. Tithe in kind of wool shall be paid only in the parish where the sheep are shorn; and an agistment tithe in the other parishes where they have been depastured. 3 Burn's Eccl. Law, 506. *Howes v. Carter*. Anstr. 560.

With regard to cattle fed on commons, it is enacted by stat. 2 and 3 Ed. 6. c. 13. that "all and every person which hath or shall have any beasts or other cattle titheable going,

feeding, or depasturing in any waste or common ground, whereof the parish is not certainly known, shall pay their tithes for the increase of the said cattle so going in such waste or common to the parson, vicar, proprietary, portionary, owner, or other their fermors or deputies of the parish, hamlet, town, or other place, where the owner of the said cattle inhabiteth or dwelleth."

In a case in the Exchequer it appeared that sheep after paying tithe of wool, had been fed upon turnips not severed, by which they were bettered to the value of five shillings each; and that they were then sold. It also appeared, that the defendant had, before the next shearing time, bought in as many as were sold; and that of these, tithe of wool was paid. It was insisted that if an agistment tithe were to be paid for the sheep sold, and tithe of wool for those bought, this would be a double tithing; but the court decreed the defendant to account for an agistment tithe for the sheep sold.

For if the turnips had been sold, and profit had been made of them in that way, they would have paid tithes. 6 Bac. Abr. 717. Gilb. Rep. in Equ. 231. *Coleman v. Baker*. Gwil. 540. *Bordley v. Teins*.

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CHAPTER VI.

Where and in what manner the Tithes of Calves, Milk, Cheese, Wool, Lambs, Pigs, &c. are payable.

How the tithes of calves, milk, wool, lambs, &c. are to be paid. It is doubted whether this canon were made by him or not.

See Linwood in the Gloss. The canon. Linwood, c. Quoniam propter.

IN the payment of these sort of tithes, I do not observe that the common law crosses the canon in any thing material, and therefore I shall recite you the provincial canon made by Robert Winchelsey, and his clergy, anno dom. 1305, which is to this effect :

“ De nutrimentis autem animalium, scilicet de agnis statuimus, quod pro sex agnis et infra sex oboli dentur pro decima : si septem sint agni in numero, septimus agnus detur pro decima rectori : ita tamen quod rector ecclesiæ qui septimum agnum recipit, tres obolos in recompensationem solvat parochiano, a quo decimam recipit : qui octavum recipit, det denarium : qui vero nonum det obolum parochiano, vel expectet rector usque ad alium annum, donec plenarie decimum agnum possit recipere si maluerit ; et qui ita expectat semper exigit secundum agnum meliorem vel tertium ad minus de agnis secundi anni, et hoc pro expectatione primi anni. Et ita intelligendum est de decima lanæ ; sed si oves albi in hyeme et alibi in æstate nutriantur, dividenda est decima ; similiter si quis medio tempore emerit vel vendiderit oves, et certum sit a qua parochia illæ oves venerint, earundem dividenda est decima sicut de re quæ sequitur duo domicilia : si autem incertum fuerit, habeat illa ecclesia totam decimam, infra cujus limites tempore tonsionis inveniuntur : de lacte vero volumus quod decima solvatur dum durat, videlicet de caseo tempore suo, et de lacte autumno et hyeme, nisi parochiani velint pro talibus facere competentem redemp-

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tionem, et hoc ad valorem decimæ et commodum ecclesiæ."

By this canon the payment of the tithes of wool and lambs is settled in this manner, that if the parishioner have under seven lambs or fleeces, he shall pay a halfpenny for every lamb and fleece; and if there be seven lambs or fleeces, and under ten, then the parson or, &c. is to allow a halfpenny for every one that is wanting; but where this canon gives the rector election to take tithes in this manner, or let them run on till a lamb or fleece be due in the ensuing year, that is not allowed by our law, for tithes must be paid annually; where sheep are kept in one parish in summer, and another in winter, the tithes are to be divided. So if one buy in sheep out of another parish, the tithe is to be divided, i. e. to each rector, &c. his proportion for the time they were respectively kept in their respective parishes; but if it be not known from whence sheep so bought in came, then the whole tithe is to be paid where the lambs fall and the sheep are shorn (86).

How wool and lamb is to be paid.

Latch. 254.
P. 14 El.
Harpur's Rep. Rolls, 2. 308.
v. 21.
And this agrees with the Levitical law.
Decimam partem separabis de cunctis fructibus quæ nascuntur in terra per annos singulos, &c. Deut. c. 14. v. 22. and 23.

(86) But it is now held, that the tithe both of wool and lamb shall be paid where the sheep or lambs are shorn.

Indeed if the sheep be carried away unnecessarily, and but a little before shearing or lambing time; this is fraudulent, and the tithes shall be paid, in such case, in that parish from whence they were fraudulently removed.

But if they shall be removed without fraud, it is held in equity, that no part of the tithe of wool or lamb will be payable in that parish, from whence they were removed, but an agistment tithe must be paid for them, as for cattle yielding no profit to the incumbent there; and that these tithes are in no case to be divided, but the whole to be paid where they lamb or are shorn, and an agistment tithe for them as unprofitable cattle in every other parish where they have been depastured; and no regard is had to the distinction whether they have continued for less than a month; fo

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By the canon the tithe of milk is to be paid in cheese whilst the parishioner makes cheese, but in autumn and winter it is to be paid in kind: but this part of the canon is generally overruled by the custom of the place; for in many places they pay the milk in kind all the year; in some places they pay only cheese, and in some neither cheese nor milk, but some small rate for it; and in some countries they prescribe to pay no tithe of their milk at all; and the custom of the place in this, as in all other tithing, is to be observed, notwithstanding the canon. But for the better explanation of the meaning of this canon, there was a second canon made, but the date thereof I cannot attain to; the tenor whereof follows:

Linwood, c.
Quoniam audi-
vimus.
Canon where
sheep, &c. shift
their pasture
from one parish
to another.

“ Quoniam, ut audivimus, super decimis et nutritis animalium inter ecclesiarum rectores propter amotiones pecorum ad diversarum parochiarum pasturas diversis anni temporibus contentiones multimodæ oriuntur: nos viam pacis præparare volentes statuendo definimus et definiendo statuimus, quod ad ecclesias in quarum parochiis oves a tempore tonsionis usque ad festum sancti Martini in hyeme continue pascuntur et cubant, decima lanæ lactis et casei ejusdem temporis, licet postea amotæ fuerint ab illa parochia et alibi tondeantur, integre persolvatur; et ne fraus fiat in casu

there is the same equity, that tithes shall be paid for one day as for thirty. 3 Burn's Eccl. Law, 503.

It seems to be admitted that the wool of lambs shall pay tithes, though the lambs had paid tithes two months before. Baker v. Sweet. Bunb. 90.

If a man pay tithe lamb at Mark's tide, and afterwards at midsummer he sheareth the residue of the lambs, to wit, the nine parts; he ought to pay tithe of the wool thereof, although there are only two months between the time of payment of the tithe of the lambs unshorn, and of the shearing of the residue, for this is a new increase. 1 Roll's Abr. 642.

prædicto, præcipimus, quod antequam oves amoveantur a pasturis vel etiam distrahantur, ecclesiarum rectoribus sufficienter de solvenda decima caveatur. Quod si infra prædictum tempus ad diversarum parochiarum pasturam transferantur, quælibet ecclesia pro rata temporis portione decimam recipiet earundem minori triginta dierum spatio in rata temporis minime computando. Si vero per totum tempus prædictum cubant in una parochia et pascantur continue in alia, inter ipsas ecclesias decima dividatur. Quod si post festum sancti Martini ducantur ad pascua aliena, et usque ad tempus tonsionis in una vel diversis parochiis sive in propriis pasturis dominorum suorum sive alterius cujuscunque pascantur, habita ratione ad numerum ovium pascua æstimentur et secundum æstimationem pascuorum ab eorum dominis exigantur decimæ: decima vero lactis et casei de vaccis et capris proveniens ubi cubant et pascuntur, ibi solvatur. Alioquin si cubant in una parochia et pascuntur in alia parochia, decima inter rectores dividatur omnino. Agni vero, vituli, pulli equini et alii fœtus decimales habita ratione ad loca diversa ubi gignuntur, oriuntur et nutriuntur, et ad moram quam traxerint in eisdem, particulariter decimentur. Quid vero pro decima debeat, ubi lac propter paucitatem vaccarum vel ovium ad caseum faciendum non sufficit; et quid pro agnis, vitulis, pullis equinis, velleribus, aucis, aut aliis hujusmodi, de quibus propter eorum modicitatem decima certa dari non potest, consuetudini locorum duximus relinquendum. Item præcipimus quod si quis post festum sancti Martini oves occiderit, vel si oves quovis casu fortuito moriantur; decimam legitimam parochiali ecclesia solvere non postponunt. Et si oves extraneæ in alicujus parochia tondeantur, decima ibidem tradetur rectori ecclesiæ, nisi sufficienter doceri posset quod pro decima alibi satisfactum ut solutionem ibidem faciendam modo legitimo valeat impedire."

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Milk and cheese.

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There may some question be made upon the first Verbo integre.

paragraph of this canon, whether the rector where the sheep are kept from shearing till Martlemas, should have the whole tithe of the sheep for the whole year? But Mr. Linwood, in his gloss, conceives it is intended the whole tithe that ariseth during that time, which for sheep will be nothing at all; but certainly it were very unreasonable that the rector of the parish where cattle are kept but for half the year, should have the whole tithes, and it cannot be intended to be any more than the proportion for the time they are so kept.

Sheep kept less than thirty days.

But by this canon, if sheep be kept less than thirty days in any parish, no rate is to be allowed the rector of that parish where they are kept so small a time.

If sheep be bought in a little before share-day, and it is not known that they answer the tithes elsewhere, the whole is to be delivered to the rector of the parish where they are shorn.

Where the milk is so little that it will not make cheese, or the calves, lambs, fleeces, colts, geese, &c. are so few in number that there will none fall to the parson, the canon gives no rule of tithing in that case, but refers it to the custom of the place: but the canonists generally hold, that custom to pay less than a tenth part is not binding; for says Linwood, "Quod laici minus solvant quam decimam non potest consuetudine introduci, quia esset contra jus divinum; plus tamen potest deberi ex consuetudine." And concludes, "Quod autem hic loquitur de consuetudine locorum, intelligas de tali consuetudine quæ non excludit solutionem decimæ, sed de tali quæ limitat ipsius decimæ solutionem ad commodum ecclesiæ, scilicet ad verum valorem vel amplius." Herein I perceive the canonists and common lawyers agree, that a custom to be free from payment of any tithe, or a rate for it, is not good, except it extend to a whole country, county, &c. and that where there is a competent livelihood for the minister beside; but the common law allows of customs and prescrip-

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Custom to pay less than the value of tithe. Verb consuet. oc.

tions, where money or some other thing is paid in lieu of tithes, though not to the full value, as shall hereafter be made appear in its proper place.

By this canon it is provided, that where cows feed in one parish, and lodge in another, that the tithes shall be divided.

For the tithes of lambs, calves, colts, &c. the tithe of them by this canon is to be apportioned with respect to the places where they were engendered, brought forth, and nourished. Poph. 197.

If a man's sheep die or be killed after Martlemas, a proportionable tithe must be paid for them.

The time of the payment of the lambs, kids, calves, pigs, &c. is regularly when they are so old, that they may be weaned and live without the dam, unless the custom of the place confine the payment to any certain time or age; and wool is to be paid at sheer day. The time when calves, lambs, pigs, &c. are to be paid. [257]

If several men's sheep depasture together in one flock, or under one shepherd, yet this shall not make them to be tithed together, but every owner shall pay his tithe of them by himself; but if the head of a family have his flock mixt with his children's sheep, which are under his tuition, and he takes the profit of them to his own use, in that case they shall be tithed together. Liuwood, c. Quoniam propter verb. lanæ. Several men's sheep depasture together.

It hath been resolved that where tithe fleeces of wool are paid, there shall be no tithe paid of the locks and belts: but this seems to be intended of locks casually lost. Cro. El. 363. T. Wool locks. More, 911. Rolls, 1. 645. z. 14, 15, 16. Bulst. 1. 3. 242. Neckings.

There is a custom in some countries to shear their sheep about the necks at Michaelmas, that the wool may not in winter be pulled off with briars, and for this sort of wool without fraud, it hath been held that no tithe shall be paid; and so of the birling of sheep without fraud, no tithe is to be paid. Rolls, 1. 645. z. 17.

If a man's sheep die of the rot or other disease, or if the owner kill or sell them as hath been said, he must pay tithe for the wool rateably. Rolls, 1. 646. z. 18. Sheep die of the rot. Latch. 254.

Though the canon direct one of seven to be paid

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Cap. Sancta
ecclesia, verb.
eorum valorem.
Linwood, c.
Quoniam prop-
ter verbis de
caseo.

only for wool and lambs, yet in most places the same order by custom is observed for calves, colts, pigs, geese, &c. which custom I presume took its rise, beginning from this canon.

By the canon law where there is no customary manner of tithing for the tithe of pigs, geese, calves, colts, &c. where they fall short often, the tenth part of the value is to be paid.

And note, that where tithe milk is paid in kind, there no tithe cheese is due, and so where tithe cheese is paid for so long, no tithe milk is to be paid (87).

(87) Milk is a mixed tithe. *Gibs.* 713. The tithe of milk is to be paid, not by the tenth part of every meal, but by every tenth meal entire. *Bunb.* 20.

If there is a custom in a parish for the manner of tithing milk, as to carry it to the church porch, or parsonage house, that must be observed by the parishioner; but if there be no particular custom or usage, the parishioner is obliged de jure to pay every tenth meal, to milk the cows at the usual place of milking into his own pails, and the parson is obliged to fetch it away from the milking place in his own pails at a reasonable time; and if he doth not fetch it away before the next milking time, the parishioner may justify pouring the milk upon the ground, because he hath occasion for his own pails; and it was determined by the whole Court of Exchequer in this case, that the milk ought not to be carried either to the church-porch or to the parson's house, and that it ought to be fetched by the parson. *Bunb.* 73. *Dodson v. Oliver.* And upon the authority of this case the case of *Carthew v. Edwards*, *Ambl.* 72, was decided. *Toller on Tithes*, 131.

In a case embracing various questions, of which the manner of tithing milk appears to be the most important, *Bosworth v. Limbrick*, *Gwil.* 1101. 1120. Mr. Baron Eyre delivered the opinion of the court as follows, "The plaintiff by his bill complains, that he hath been defrauded of one-third of his tithe milk by the setting forth the tithe on an evening and never on a morning, under a plea of the defendants, that the tenth

meal was assigned to the parson by law. They alledge, that they have duly set out to the plaintiff for his tithe every fifth evening's milk, which they say is the tenth meal, to which the parson is intitled. They having brought their cows to the pail in the morning, and beginning to count from the morning of that day to the evening and so on, the fifth evening's meal of milk makes the tenth meal, which is the parson's due.

“The plaintiff contends that the setting out every fifth evening's meal is not the due mode of tithing; that the produce of the evening's meal, from physical as well as other causes, must always be less in quantity than the morning's meal, and the witnesses on both sides agreed that the fact is so, though they differ a great deal as to the proportion.

“One of the plaintiff's witnesses made a great number of experiments, in order to ascertain the proportion in which the evening's meal fell short, and it appeared upon the result of these experiments that it frequently fell short a third, but never less than a fourth part of the morning's. It therefore follows as a necessary consequence, that a fifth evening's meal must produce the parson less upon the whole than a tenth part of the milk. This being the fact, the argument proceeds thus: the tithe of milk (as of all other tithable matters) belonging de jure to the parson, is the tenth part of the milk produced. A rule of tithing therefore, which necessarily gives to the parson less than the tenth, cannot be the true rule. This was the sum of the argument urged for the plaintiff. It was admitted, that it had been thus far settled by the few cases that are to be found on the subject of tithe milk, that neither the tenth part of every cow's milk at every meal, nor the tenth part of the whole meal, were to be set out to the parson, and that the tenth meal was the tithe to be set out. But for the plaintiff it was insisted, that the tenth meal must not be so computed as necessarily to produce less than a tenth part of the whole ten meals taken together. Upon general principles, we find it difficult to persuade ourselves that that can be a true rule of tithing, which puts it in the power of the parishioner to give the parson perhaps a twelfth, a thirteenth, or a fourteenth instead of a tenth part. A prescription to pay less than a tenth we all know would be a void prescription, unless it were assisted

by some consideration to make the parson amends for the difference between the tenth and that less, which the prescription proposed to give him. When the tenth meal was declared to be the right of the parson, it was certainly substituted in the place of the tenth quart, or the tenth dish, or the tenth part of each meal. It was not meant to give less than the tenth, but the object was to give the tenth in a more convenient and more useful form. It was therefore auxiliary to the general right of a tenth; it was intended to fortify and not to destroy that right. If, therefore, a construction can be put upon this rule of tithing, which will preserve the original spirit of it, and put it out of the power of any man to make it an instrument of wrong and injustice, this court will strongly incline to adopt such a construction. And upon consideration we think it may admit such a construction. The morning and evening meals being necessarily unequal in produce, may, and we think ought to be considered as distinct tithable matters, from each of which you may count on to the tenth, which will be the right of the parson; and that tenth will be the tenth meal of that description to which it belongs, either morning or evening; and in this way the parson will, upon the whole, have his full tenth, as much as he can have in the manner of collecting any other species of tithes whatever; instead of necessarily taking less than a tenth in the defendant's way of setting out his tithes. And, in respect to authority, upon a careful view of all the cases that we have been able to find upon this subject, we not only do not find any adjudged cases standing in our way, but we collect that the rule of the tenth meal was originally understood in the sense in which we think it ought now to be understood. There appears, therefore, to us, nothing in point of argument or authority which should prevent us from effecting the justice of the case between these parties, by declaring that the defendants ought to have paid to the plaintiff the tenth morning's meal and the tenth evening's meal of this milk, in which having failed, they will be decreed to account."

The defendants were decreed to account for the tithe of milk with costs, and the decree was affirmed on an appeal to the house of lords. *Gwil.* 1115. *Bosworth v. Limbrick and others.* 2 *Rayn.* 809. and 3 *Rayn.* 934.

Lastly, note, that where any person hath cattle tithable going in a ground or common whereof the parish is not known, the tithe is to be paid in the parish or place where the party lives that owns the cattle. Stat. 2 E. 6. c. 13.

Where sheep lodge in one parish, and depasture in another, there the tithes are likewise to be divided. Linwood, de decimis, cap. Quoniam audivimus.

CHAPTER VII.

Where and in what manner Tithe of Seeds, Fruit, Mast, Bees, &c. is to be paid.

How the tithe of seed, fruit, mast, bees, &c. is to be paid.

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Linwood, c.
Sancta ecclesia.
Rolls, 1. 640.
q. 10.
Co. 11. 49. a.
Littl. Rep. 40.

Cro. Car. 559.
Jones, 447.
F. N. B. 51. g.
Rolls, 1. 635.
c. 1.
Cap. Quoniam
propter.

TITHES are to be paid of the fruits arising in orchards and gardens in their proper kinds when gathered, unless there be some modus or rate tithe paid in lieu thereof, and so of the seed of flax, hemp, &c. is to be paid when drest up; but this must be understood where the tithe of the hemp and flax is not paid till after the seed is gathered; for if the tithe be paid before the seed is threshed, ripled out or gathered, then no tithe seed is to be paid of the rest. The tithe of crabs, mast, &c. is likewise to be paid when the same are gathered, or satisfaction is to be given if eaten with swine on the ground. But in a case reported by my lord keeper Littleton, it is held that no tithes are to be paid for acorns which fall from the trees, and are eaten up by the swine. Ideo quære. And the tithe of bees is to be paid by the tenth part of the honey and wax: the canon is that,

“ De apibus, sicut de omnibus aliis bonis juste acquisitis quæ renovantur per annum statuimus, quod decimæ solvantur et exigantur debito modo (88).”

(88) Bees being feræ naturæ are not themselves tithable. 3 Cro. Gwil. 501. Marg.

Where potatoes were brought home to the defendant's house, and placed in a brew-house, and there measured and the tithe set out, it was decided that this was not a due setting out of this species of tithes, the parson having a right to insist that a tenth part should be separated from the nine upon the spot where the potatoes are dug and before they are re-

moved; and the same rule applies to turnips, unless under special circumstances. *Gwil.* 1110. *Bosworth v. Limbrick*, *Gwil.* 944. *Beaumont v. Shilcot*.

And as of acorns and mast, tithes are to be paid, so of the fruits of all other trees whereof profit is to be made, as of apples, pears, plums, cherries, &c.

Which fruits if they are stolen and not gathered by the owner, the parson as well as the owner shall bear the loss. But if the owner doth suffer a stranger to pull or take his fruits, the tithes shall be answered. *Boh.* 69.

A defendant has been decreed to account for wild black cherries, though they grew in the hedges, and served for fencing the ground. *Buub.* 183. *Chapman v. Barlow*.

A bill was filed for an account of pine-apples, exotic shrubs, and trees, reared in hot-houses, and the defendant was decreed to account; and upon an appeal to the house of lords that part of the decision was not shaken. The cause turning principally on the following question propounded to the judges by the house, Whether notice given on the 8th day of September was a sufficient notice to determine a composition for tithes from year to year, such year commencing on the 29th of September? In answer to which the judges were of opinion, "that such notice was by no means sufficient." *Adams v. Waller*, *Gwil.* 1204.

But in a case in the Court of Exchequer, *Worrall v. Miller and Sweet*, 19th December, 1801, reported in *Toller's Treatise on Tithes*, in which an improper rector filed his bill against nurserymen within the parish, for the tithes in kind of all the produce of the nursery grounds, as well for young trees and ordinary fruits as for pines and all exotics produced in forcing houses; and the defendants admitted his claim to tithes of all the productions of their nursery grounds, which they had offered to settle and account for; but denied it in regard to any productions forced or preserved in buildings (that is to say), pines and other exotics, which they admitted they cultivated in their houses; insisting that those articles were not tithable. The court decreed that so much of the bill as prayed an account of pine-apples and other exotics, raised in hot-houses or green-houses, should be dismissed without costs; and that the rest of the bill should be dismissed with costs.

Siderfin, 443.

Nota, that it was held in the case of Crouch and Ridsen, that there can be no modus for hops, because of late date; but they may be included in a modus pro decimis minutis. And Twisden said in this case, that the law was not settled in this case, how the tithe of hops should be paid, by the pole, pound, or, &c. (89).

A pecuniary compensation is given in lieu of tithe of hemp and flax by stat. 11 and 12 W. 3. c. 16. made perpetual by 1 G. 1. stat. 2. c. 26. See chap. iii.

(89) Tithes of hops are not to be paid till after they are picked, and before they are dried; every tenth measure. Bunb. 20.

Where the defendant had set forth the tithe of hops by the tenth pole unpicked, the court of Exchequer decided upon the authority of three former decrees, that this method of setting forth was illegal. Bliss v. Chandler. Gwil. 6. 25. and 3 Burn's Eccl. Law, 492.

In a later case, the court of King's Bench held that no usage can vary the rule, that the tithe of hops must be set forth after they are picked from the bind; for as the cultivation of hops was introduced within the time of legal memory, no custom to the contrary can be supported: and this judgment was affirmed on appeal to the house of lords. Gwil. 1531. Knight v. Halsey, 2 Bos. and Pull. 172.

It has been decided that no tithe shall be paid of hop-poles. Bate v. Spracking, Bunb. 20.

All seeds, even of articles which, ripened to maturity, would be great tithes, are ranked among small tithes. Gwil. 749. Wallis v. Pain, Gwil. 859. 926. Clarke v. Staple. Cartwright v. Staples. 1173. Jeremy v. Strangeways.

CHAPTER VIII.

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Where and in what manner Tithes of Pigeons, Conies, Fish, Deer, and other Beasts and Birds feræ naturæ, are Tithable.

BY the common laws of England there is no tithe due for birds or beasts that are feræ naturæ, and therefore it hath been resolved, that no tithe shall be paid for fish taken out of the sea or river, unless by custom, as in Wales, Ireland, Yarmouth, &c. neither for the same reason, is any tithe due of deer, conies, &c. but if due by custom it must be paid.

And if a man keep pheasants, or other wild fowl within limits, by clipping their wings, yet no tithes shall be paid of their eggs or young not being reclaimed, for as much as if their wings were not cut, they would fly away.

Ferrets, hawks, popinjays, are not tithable. Fulb. Direct. 58. b. 59. a.

But of young pigeons in dovecotes or in pigeon-holes about a man's house, tithes shall be paid if they be sold; but if they be spent in the family, no tithe shall be paid for them.

It is said in Houghton and Prince's case in More's Reports, that no tithes shall be paid of tame turkies, pheasants, or partridges, nor their eggs, quia feræ naturæ; but I believe the book is misprinted, for after they are reclaimed, they cannot be said to be feræ naturæ (90).

Fulbec. Direc.
59. a.
Supra. 248.
2 Inst. 651.
Hardres, 188.
Whether tithe
be due of beasts
or birds feræ
naturæ.
Cro. Car. 264.
339.
March, 87.
Hetley, 13.
Rolls, 1. 635.
c. 4, 6, 7.
Noy, 108.
St. 2 E. 6. c. 13.
Rolls, 1. 635.
c. 3.
See March's
Reports, 26.
Rolls, 1. 636.
c. 5.
See Mod. Rep.
2d par. 77.
Hetley, 147.
Rolls, 1. 644.
z. 4, 5, 6.
More, 599.

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(90) Turkeys are now considered to be tame like other poultry, and must therefore pay tithes. Gwil. 676. Carleton v. Brightwell. And in a suit in the exchequer, it has been

The custom of tithing fish is confirmed by stat. 2 and 3 Edw. 6. cap. 13. And Bishop Stillingfleet is of opinion, that by the old constitutions fish are as tithable as other things. Still. Eccl. Cases, 272. (91).

See a review of this chapter in Stillingfleet's Eccles. Cases, 270.

decided, that no modus could extend to turkeys, because they have been lately introduced into England. Bunb. 307 marg. Gwil. 711. Brinklow v. Edwards.

(91) It seems that fish are not tithable without a special custom to that effect. Gwil. 691. Gwavas v. Kelynack, Gwil. 616. Nicholas v. Elliott.

CHAPTER IX.

What Tithes are to be paid for Mills, and what kind and nature they be of, and of what things Tithes are not payable.

THE canon is, "Cap. Quoniam propter. De proventibus autem molendinorum volumus quod decimæ fideliter et integre solvantur." Whether tithes are to be paid of mills, and how.

And Articuli Cleri, cap. 5. is to this purpose,

"Si quis in fundo suo molendinum erexit de novo, et postea a rectore loci exigatur decima de eodem, exhibetur regia prohibitio sub hac forma. Quia de tali molendino hactenus non fuerunt solutæ, prohibemus, &c. Et sententiam excommunicationis, si quam hac occasione promulgaveritis, revocetis omnino. Responsio: in tali casu nunquam exivit regia prohibitio de principis voluntate, qui et decernit talem perpetuum non exire."

It is made a question first, whether any tithes are due for mills or not? which Sir Edward Coke, in his second Institutes, says, was never judicially determined, that he knows of: and it was held in the case of a fulling-mill no tithe was due; for of profits that come only by the labour and industry of man no tithe is to be paid, and the same reason holds for corn-mills.

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2 Inst. 622.
Littl. Rep.

Cro. Car. 523.
524.

The next question is, admitting that tithes are due for mills, whether the same be predial or personal?

Sir Edward Coke is of opinion, that in case any tithe be due, it is only a personal tithe, being acquired by the labour and industry of the miller, and takes no in-

crease from the ground to make it predial. And the statute of 2 E. 6. is, "that every person shall justly set forth, yield and pay all predial tithes in their proper kinds, as they arise and happen," which cannot be applied to the miller's taking of the toll-dish, nor to fulling-mills, iron-mills, paper-mills, &c. which are all comprehended under the word mill, and no tithe can be paid in specie; for if the parson should have every tenth toll-dish, then it would often happen, that he should have twice tithe of the same corn, which is against the law; and such tithe as the tenth toll-dish has never been paid in any place that I have known or heard of (92).

(92) All corn-mills not erected before the stat. 9 Ed. 2. st. 1. c. 5. are tithable. But because many mills since erected may be to us ancient, and their first erection not known, the rule of their discharge seems to be, that all such mills whose first erection was before time of memory, and is not otherwise known by matter of record, and have not been subject to the payment of tithes, shall be intended to be erected before the statute, and so to be tithe free. But as to mills for which tithes have been paid and new mills, tithes must be paid for them. Boh. 127.

In *Newte v. Chamberlayne* it was decreed in the house of Lords, on an appeal from the court of Exchequer, that the tithes of a mill are personal tithes; and that in consequence of their being personal tithes, not the tenth of the toll or the tenth dish of the corn ground belongs to the parson, but the tenth part of the clear profits, after the charges of erecting the mill and the other charges of servants, horses, and other expenses are deducted. Vin. Abr. Dimes. M. a. 3 Burn's Eccl. Law. 516.

In the case of *Hall v. Mchet*, C. B. Macdonald said, that the tithe of the clear profit only being due, the rent is to be deducted; and in the case of a new mill occupied by the owner, a yearly value in the nature of a rent is to be set upon it and deducted. 4 W 1460.

And if it be a personal tithe, as there is great reason that it can be no other, then it must be paid with the deduction of the expenses and charges, and it is not payable but in such places where personal tithes are payable by custom. See more hereof in the twenty-second chapter.

Bulst. 3. 212.

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But the canonists hold, that the tenth toll-dish shall be paid as a predial tithe, without deduction of ex-

Cap. Quoniam
propter verbo
integre.

In the same case the Chief Baron observed, that the tithe of mills was to be considered as a prædial tithe, so far as regards its locality and the person to whom it is payable; but in the mode of accounting it is to be treated as a personal tithe.

If there is a modus in lieu of all tithes issuing out of a messuage and an ancient water-mill for corn, and a new water-mill for corn is erected within the said messuage, or if the stream on which an ancient mill stood is diverted by the owner (and not by the act of God) and a new mill erected upon the same stream, they shall not be discharged by virtue of any former modus. Roll's Abr. 641. And where new stones are added to ancient mills, these are to all intents and purposes two mills, and the former cannot be covered by a modus protecting the latter. 3 Atk. 17.

But if there hath been an ancient corn-mill, for which a modus hath been paid for time immemorial, and afterwards by continuance of time the mill-stream changeth its course and goeth in a place a little distant from the ancient stream, and thereupon the owner of the mill pulleth it down and rebuildeth it in the new place where the stream now runneth, this shall be discharged of tithes by force of the ancient modus, for this cometh by the act of God and not by the act of the party. 1 Roll's Abr. 641. It has been holden, that copper-mills, fulling-mills, shaving-mills, glass-houses, tin or lead mines, paper-mills, and such like, pay no tithe, because the profits arise from the labour and industry of man. 2 Cro. 523. Gwill. 354. Johnson v. Daredridge. Unless perhaps there be a special custom to support it. 3 Atk. 19.

penses; which doth not agree with the common law, and is therefore not binding.

But in many places there is a rate tithe paid for mills, which is good by custom.

But there are great diversity of opinions as to tithe of mills, for which the reader may further consult Cro. Jac. 429. Selden de Dec. 423. 2 Inst. 621. March. Reports, 15.

For windmills, see Decret. lib. 3. Tit. 3. cap. 23. fol. 450.

CHAPTER X.

Whether Tithes ought to be paid of Hawking, Hunting, Fishing, Fowling, &c.

THESE are all comprehended under personal tithe, for that these things being obtained by the labour and industry of the party, and the things obtained are *feræ naturæ*, and not of their own nature tithable in their proper kind, unless the particular custom of the place require it, and therefore I shall refer these to the twenty-second chapter, where I shall speak of personal tithes.

Tithe of hawking, hunting, fishing, fowling, if due.

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 CHAPTER XI.

Of Tithes of Ducks, Geese, Hens, Swans, and other domestic Fowls and Birds.

THE tithe of all tame and domestic fowl is to be paid in their eggs or young in their proper kind, according to the custom of the place. Geese, ducks, and swans are usually paid in their kind, but of hens and turkies, commonly in eggs, but therein the custom of the place is to be observed. But note, that where they pay tithe of the eggs, there is no tithe of the young, nor e converso tithe eggs paid, where they have the tithe of the young.

Of the tithes of domestic birds and fowl.

CHAPTER XII.

Of what things Tithes shall not be paid.

Calthorp's Reports, 108.

Of what things tithes shall not be paid.

Co. 11. 16. a.

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Hob. 11.

Calthorp's Reports, 103, 110.

Things of pleasure.

11 H. 8. 4. b.

2 Inst. 651.

Calthorp's Reports, 109.

Things that increase not.

Rolls, 1. 636.

d. 1.

Doct. and Stud. 174.

1 Mod. Rep. 35.

2 Mod. Rep. 77.

More, 908.

Cro. El. 277.

2 Inst. 651.

Rolls, 1. 637.

e. 1.

Doct. and Stud. 174.

Baxter v. Hope.

H. 8 Jac. C. B.

Rot. 1. 109.

TITHES regularly are not due of dwelling-houses, and yet a modus may be due for a house as well as for land; and it shall be intended, that it was a modus for the land before the house was built.

No tithes shall be paid for hounds, apes, popinjays, et similia, because they are things only of pleasure.

Neither shall any tithes be paid of those things which do not increase from year to year; and therefore no tithes shall be paid for stone got out of quarries, pit-coals, turfs, slates, bricks, quarrels, tiles, earthen pots, nor of any thing made of earth, nor of marle or lime got for the improvement of the ground; nor of tin, lead, copper, or other metal gotten out of the ground, but by custom tithes of such things may be due and payable. Stillingfleet's Eccl. Cases, 265.

Servants in husbandry shall not pay personal tithes, neither shall any tithes be paid of marriage goods.

No tithes shall be paid of aftermaths, stubbles, or rakings of corn without fraud. Stillingfleet's Eccl. Cases, 269. Sembl. contra (93).

(93) Tithes of aftermowth, that is the second mowth, shall be paid de jure without a special prescription to be discharged by payment of tithes out of the first mowth, and then it shall be discharged. 1 Roll's Abr. 640. And the author observes, p. 2. c. 3. "But if the meadow be so rich, that there are two crops of hay got in one year, &c. there the parson shall have tithes as well of the latter as of the former crop." Vide in chap. 19. what barren lands are exempted from payment of tithes by stat. E. 6. c. 13.

No tithes shall be paid of birds or beasts that are *feræ naturæ*, &c. unless they be sold.

Tithes shall not be paid of broom or gorse used for fuel within the parish.

No tithes shall be paid of gravel and chalk. 1 Mod. Rep. 35. per Twisden.

St. 2 E. 6. c. 13.
More, 910.
Rolls, 1. 640.
q. 12, 13, 16,
17.
2 Inst. 651.
Lit. Rep. 311.
More, 909.

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CHAPTER XIII.

What force custom has, as well in the form and manner of Tithing, as in the discharge of the payment thereof; and wherein custom and prescription differ.

St. 2 E. 6. c. 13.
What force
custom has in
the manner of
tithing.

By the statute of 2 E. 6. it is enacted, "that every of the king's subjects should from thenceforth truly and justly, without fraud or guile, divide, set out, yield, and pay all manner of their predial tithes in their proper kinds, as they should arise and happen in such manner and form as had been of right yielded and paid within forty years next before the making of the said act, or which of right or of custom ought to have been paid."

In this act there are three qualifications.

1. It enjoins the payment of such tithes as had for forty years then past been of right yielded and paid.
2. Such as of right ought to have been paid.
3. Such as by custom ought to have been paid.

Tithes due by custom are of two kinds.

1. Where there is a *modus decimandi*, and by custom money, or some other thing, is paid in lieu of tithes.

2. Where tithes hath by custom been paid of things not tithable, as of lead in Derbyshire, tin in Devonshire and Cornwall, fishing in the sea, as in South Wales, where the custom is, that if the parishioner of one parish land his fish in another, the tithes are divided between the parson of the parish where the fisher lives, and the other where he landed his fish; but if the parishioner land his fish in the parish where he himself dwells, then the rector of that parish has the whole tithes.

And this is confirmed by the stat. of 2 E. 6. cap. 13.

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Selden de Decimis, 285, 286.

Tithe ale.
Rolls, 1. 642.

And I have heard that in some countries they pay tithe ale, and tithe of limekilns, &c. which in their own

natures are not tithable. Tithe ale is said to be paid at Market-rising, in Lincolnshire.

And as by custom things may be made tithable, which in their own natures are not so; or one thing may by custom be paid in satisfaction or discharge of another; so custom hath a great influence upon the form and manner of tithing, for the direction of the time, place, and order of payment of tithes.

And as custom may make things tithable, which of their own nature are not tithable; so a custom of a province, county, or hundred may discharge the payment of tithe of a thing which in its own nature is tithable, so there be a competency for the maintenance of the ministry beside.

And therefore in the wilds of Kent and Sussex they do pretend by custom to be free from the payment of tithe wood, or any thing in lieu of it; and so in several countries they pay no tithes of their milk, *Dunton v. Moyle, Finch*, 36 Eliz.

And as custom may prevail in not tithing; so it may, as has been said, make things tithable which in their own natures are not tithable, as the rent of houses, pigeons eaten in the house, wood spent in the house. And by custom tithe may be paid of salt, brick, lime, ale, chickens, and other things not tithable.

Now the difference between a custom and a prescription is this; every custom must have dimension, and alleged to be within some certain province, county, city, hundred, &c. for if it be a general custom of England, it is common law, and such custom must be common to all within such limits; but if it be confined to one certain person, house, land, or other thing, there it becomes a prescription, which is a younger daughter to custom, and therefore when a man comes to plead a custom, the manner of pleading is to allege that within such a county, hundred, or town, there is, and from the time whereof the memory of man is not to the contrary, there hath been such a custom used and approved in

2 Inst. 664.
Selden de Decim. pref. 8, 9.
Hob. 250.

Custom of not tithing, where good,

Hob. 266.
Bulstr. 2. 245.
Doct. and Stud. cap. ult.
Rolls, 1. 642. b. 1. and p. 5, 6, 8.
Co. 11. 16. a.

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Custom to pay tithes of things not tithable.

Rolls, 1. 642. s. 7.

Difference between custom and prescription.

the same, that is to say, that, &c. alleging the custom as it is.

How to plead a prescription.

But when you come to plead a prescription, you only allege that you, and all those whose estate you have in such lands, have time out of mind paid so much annually to the parson of D. in full satisfaction and exoneration of all the tithes arising upon the said lands, &c.

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Wherein custom and prescription differ.

So that custom and prescription differ in these things, that custom must be limited and confined to some certain place; prescription is at large; custom is common to all the persons and lands within the limits wherein it is alleged, but prescription is confined to certain persons or things. But in this they agree, that they must be constant without interruption, and perpetual from the time whereof the memory of man is not to the contrary; for if there have been frequent interruptions, there can be no custom or prescription obtained; but after a custom or prescription is once duly obtained, a disturbance for ten or twenty years shall not destroy; for *multiplex interruptio non tollit præscriptionem semel obtentam*.

1 Inst. 114. b.
2 Inst. 653.
2 Inst. 654.

How the ecclesiastical laws look upon customs and prescriptions.

In what they differ from the common law in this matter.

But I must here observe to the reader, that though the civil and ecclesiastical laws do in some cases take notice of custom and prescription; yet in this they differ from the common law, that they allow a usage for forty years to be a good proof of a custom or prescription, grounding their judgments upon a decretal epistle of Pope Alexander the Third, anno dom. 1180. But this kingdom never allowed of that epistle, or yielded any obedience thereunto; so that as well in spiritual as temporal prescriptions and customs, if they come to be tried at common law, as all prescriptions concerning tithes must be, they must be proved to have been used beyond the memory of any man to the contrary; for if any man living, or any authentic record, or other evidence, prove it was otherwise at any time since the first year of Richard the First, which was anno dom. 1189, the custom or prescription fails.

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2 Inst. 653.

And the influence custom and prescription have in the manner of tithing, is confirmed by three several acts of parliament.

What influence custom and prescription have in the manner of tithing.
27 H. 8. c. 20.

First, by the statute of 27 H. 8. whereby it is enacted, "That every subject of England, &c. according to the ecclesiastical laws and ordinances of the church of England, and after the laudable usages and customs of the parish, or other place where he dwelleth or occupieth, shall yield and pay his tithes, offerings, and other duties of holy church, &c."

By this statute the ecclesiastical laws and canons are affirmed for the payment of tithes; but in such cases as they are contrary to the common law or customs of the place, they do not bind.

Next, this act confirms and allows all usages and customs of the place where the tithes arise, which are to be preferred before all canons and constitutions in manner of tithing.

The next statute is that of 32 H. 8. whereby it is enacted, "that every person, &c. shall fully, truly, and effectually set out, yield and pay all and singular tithes and offerings aforesaid, according to the lawful customs and usages of the parishes and places where such tithes or duties should grow, arise, come, or be due."

32 H. 8. c. 7.

This act seems only to extend to customary tithes, and so doth the statute of 2 E. 6. which is,

2 E. 6. c. 15.

"That every of the king's subjects should from thenceforth, truly and justly, without fraud or guile, divide, set out, yield and pay all manner of their predial tithes in their proper kind as they arise and happen, in such manner and form as hath been of right yielded and paid within forty years next before the making of the said act, or of right or custom ought to have been paid."

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But more of these statutes in their proper place. I shall now proceed to show what liberty and privilege the parson, vicar, &c. hath in the grounds where the tithes arise, for the drying, ordering, and carrying away their tithes.

CHAPTER XIV.

What Privilege and Liberty the Parson, Vicar, &c. hath in the Ground where the Tithes arise, for the drying making, ordering, and carrying away the same.

2 E. 6. cap. 13.
What privilege
the parson, &c.
hath in the lands
where the tithes
grow.

By the statute of 2 E. 6. it is enacted, "that at the tithing time of predial tithes, it should be lawful for every party to whom any tithes ought to be paid, or his deputy or servant, to see the said tithes to be set forth and severed from the nine parts, and the same quietly to take and carry away."

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This statute, as to the taking and carrying away, seems only declarative of the common law. But as to coming upon the lands to see the tithes set forth, seems to me to be a new authority given by this law, for the owners of the land are de jure bound to set forth their tithes duly and rightly; and if they fail therein, the parson, vicar, &c. have their remedies; and if the parishioner do justly and truly set forth his tithes, although the parson, vicar, &c. be not present, or had no notice given him to be present, yet this had been a good setting forth before this statute. But it is a fair and just way to do it in the presence of the parson, vicar, &c. And note, this act is warily penned in the singular number, that the party himself, his agent or servant, may come to see the tithes set forth, but must not come with a greater number.

Rolls, 2. 302.
q. 19.

And note, that the parson, vicar, impropiator, or farmer cannot come himself, and set forth the tithes without the licence and consent of the owner of the corn, hay, &c. for if the parson, vicar, &c. shall of his own head tithe the corn, hay, &c. of any land-holder

within his parish, &c. and carry it away, he is a trespasser, and an action will lie against him for it.

Jones, 90.

But a parson, vicar, &c. may de communi jure, after the tithes are set forth, come himself or his servants, and spread abroad, dry, and stack his corn, hay, &c. in any convenient place or places upon the ground where the same grew, till the same be sufficiently weathered, and fit to be carried into the barn, &c. But the parson, vicar, &c. must not take a longer time for the doing thereof than what is convenient and necessary; and what shall be said a convenient and necessary time, the law doth not, nor can define; for the quantity of hay, corn, &c. and the weather in this case is to be considered; and what shall in this, and all other cases of like nature, be said a reasonable and convenient time, is to be determined by the jury, if the point come in issue triable by a jury: but if it come to be determined upon a demurrer, or other matter of law, the judges of the court where the cause depends are to resolve the same (94).

Linwood, c.
Quia quidem
and cap. erroris
damnabilis.

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12 E. 4. 6. a.
Rolls, 1. 643.
x. 2.

(94) If a tenant cut down corn and before carrying it off his term expire, yet he must set out the tithes. 1 Brownl. 123. Gwil. 258. *Kipping v. Swain*. For he still remained owner of the corn, and if corn be cut down and a stranger take it away before severance of the tenth part from the nine, an action on the statute will lie against him. 2 Rol. R. 440. *Gwyn v. Merryweather*, and vide Sir S. Toller's *Treatise on Tithes*, 68.

Where a defendant by his answer alleged that after cutting his corn, the fences being bad, he removed the whole crop into the adjoining field for greater security, and then (after notice given in church) he tithed it, and no one coming to receive the tithe he took care of it for four or five days, after which such tithe perished on the ground; and insisted that such removal was not done with a fraudulent intention, still the court were of opinion that the removal was unlawful. Gwil. 796. *Thomas v. Rees*. And in *Smallcross v. Towle*, 13 East, T. R. 261, Lord Ellenborough

And if the parson, vicar, &c. shall exceed a convenient and necessary time in the drying, ordering, and carrying away their tithes; and the parishioner shall receive damage thereby; an action of the case will lie against them for their negligence in this behalf.

But no action will lie against the parson, vicar, &c. in such a case, unless the parishioner have duly set forth his tithe, and given notice thereof to the parson, vicar, &c.

And the parson, vicar, &c. may carry his tithes from the ground where they grew, either by the common way, or any such way as the owner of the land useth to carry away his nine parts (95).

Hughes's Rep.
329.

Styles, 342.

Styles, 348.

Lampen v.

Woodner, P.

1 Car. 1. B. R.

per Latch.

Halsey v.

Halsey, H.

6 Car. 1. B. R.

Rolls, 1. 643.

x. 3.

*used in Dadds
branch - Dec 268.*

observed in his judgment, "corn must be tithed in the first convenient state in which the tithe can be collected after the corn is cut, which is in sheaves; and if the farmer adopt any mode of tithing which excludes or abridges the due means of the parson's comparing the tenth sheaf with the other nine, it is bad."

But whatever the owner is obliged to do of common right, the custom of every place is to be observed; and therefore (if the custom be to measure out the tenth part of the grass standing for the tithe thereof, and that the parson cut and make it, this is good) and in this and all other cases, when the tithe of the grass is set forth, and the owner is not bound to make the parson's tithe into hay; the parson de jure may make the grass into hay upon the land on which it grew, although the usage time out of mind hath been to the contrary; and it is needless for the parson to allege a custom for the doing it. Wats. 49. Nevertheless the validity of the custom of measuring out a tenth part of the grass standing may now be doubted. Gwil. 1561. Knight v. Halsey.

(95) It was observed by Sir J. Mansfield, C. J. in the case of Cobb, clk. v. Selby, 2 Bos. and Pull. N. R. 466. that "the general rule is confined to the close in which the tithes arise. It does not follow that the rector is entitled to go over any other lands of the farmer which are used by him as a road. The parson cannot maintain this point, that

But if the owner of the soil, after he has duly set forth his tithes, will stop up the ways, and not suffer the parson, vicar, &c. to carry away his tithes, or to spread, dry, and stack them upon the land, this is no good setting forth of his tithes without fraud, within the statute of 2 E. 6. but that the parson, vicar, &c. or other owner or farmer, may have an action upon the said statute, and may recover the treble value; or may have an action of the case for such disturbance, as I conceive; or he may, if he will, break open the gate, fence, &c. which hinders him, and carry away his tithes; but in that he must be cautious that he commit no riot, nor break any gate, rails, lock, hedges, more than necessarily he must for his passage.

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Bulst. 1. 108.

And note, that the parson, vicar, &c. when he comes with his carts, teams or other carriages to carry away his tithes, must not suffer his horses, oxen, &c. to eat and depasture the grass growing in the grounds where the tithes arise, much less the corn there growing or cut; but if his cattle (as cannot be avoided) do in their passage, against the will of the drivers, here and there snatch some of the grass, &c. this is excusable.

And if the parishioner duly set forth his tithe of hay or corn, and will not permit the parson, vicar, &c. to make the hay, or spread and dry the corn, as he ought, it amounts to a subtraction of the tithes, and the parson

Rolls, 2. 284.
f. 21.

whatever road the farmer uses for his own convenience and occupation of his farm, though not the usual road from the close in question, the parson may use also," and by Chamber, J. in the same case, "a farmer often uses ways in a variety of directions leading to the public road. If the parson is entitled to any of them, it may occasion great inconvenience. I think that the rule goes no farther than this, that the tithe-owner is entitled to make use of the road ordinarily used for the ordinary occupation of the close in which the tithe is taken."

may sue for the subtraction of such tithes in the spiritual court, and no prohibition lies in this case (96).

(96) Upon the trial of an action on the stat. 2 and 3 Edw. 6. for not setting out the tithes of hay amongst other things, at the York spring assizes, 1809, before Lawrence J. the evidence as to the hay was, that on the day on which it was cut the owner teded it abroad, and on collecting it together again, into what were in that country called lap-cocks or foot-cocks, he set out every tenth cock. It was admitted that the grass in that state was not fit to put into stack; it was neither hay nor grass; and when the defendant's hay was again spread out, there was not room for the plaintiff to spread out his tithe to dry without treading on the defendant's hay; as much space was left however for spreading out the tithe as the ground that the tithe had grown upon. Lawrence, J. was of opinion, that the tithe of hay was properly set out, and the court of Common Pleas confirmed his decision. *Halliwell, Clk. v. Trappes.* 2 Taunt. 55.

CHAPTER XV.

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*To what Charges the Glebe Lands belonging to a Rectory,
and the Tithes are subject.*

SIR Edward Coke tells us, “ Quod nullus pro decimis, quæ sunt spirituales, de aliqua reparatione pontis, seu aliquibus oneribus temporalibus onerari debet.”

2 Inst. 541.
What charges
tithes and
church lands are
subject to.

That tithes being spiritual, were not subject to temporal charges at the common law.

And Sir Edward Coke is of opinion, that at this day, if tithes be in the hands of temporal men, they are by reason of them contributory to temporal charges.

2 Inst. 641.

And upon a doubt of Mr. Justice Yelverton, who was justice of assize in the bishopric of Durham, as Sir Nicholas Hide, heretofore chief justice of the King's Bench, has reported, it was resolved by all the judges of England, that tithes are at this day chargeable with all charges imposed by any act of parliament, wherein they are not excepted, as upon the statute of 43 Eliz. to the poor, and to maimed soldiers, King's Bench, Marshalsea, bridges, &c. But they are not subject to any charges temporal, or by the common law.

P. 5 Car. 1.
Callis 132.

And so it was lately held by my Lord Chief Justice Hales and the court of King's Bench, for watch and ward and repair of the highways: and this case then vouched by the chief justice.

Styles, 162. per
Rolls.

Webb v.
Batcheler,
T. 1675. B. P.
per Hunt.
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But tithes at this day are subject to pay first fruits or annates, in Latin primitiæ, which are the first year's profits of every spiritual benefice at a new incumbent's entry into his living; they were anciently exacted by the pope of Rome, when he had small revenues to support the public charge of his place. And Polydore Virgil tells us, “ Caterum nullum inventum majores Ro-

First fruits.
See more of this
matter and
tenths, 4 Inst.
120, 121.
Cowel verbo
Annates.
How these differ
from the first
fruits under the

law. Vide
 Tho. Aquinas,
 2o, 2æ, 786.
 Art. 4. Polyd.
 Virgil. De in-
 ventione rerum,
 l. 1. c. 2. p. 498.

mano pontifici cumulavit opes quam annatum quas vocant."

And Polydore Virgil tells us, that Pope Boniface the Ninth first introduced them, though others ascribe them to John the Twenty-second. See Platina in the Life of Boniface the Ninth.

But some are of an opinion (and not without reason) that annates were much ancients than Pope Boniface the Ninth, who entered upon the papacy in the year 1389, and John the Twenty-second, not till the year 1410. But it appears by our parliament rolls (which are infallible evidence) that this payment had reached England, in the 25th year of the reign of E. 3. which was in the year of our Lord, 1351, in which year there was a complaint made by the commons in parliament, that the pope had reserved to his own collation as well the abbies and priories, as also other the great benefices, whereof any ecclesiastical or religious persons had the patronage; and that he had lately reserved all the dignities in England, and the provenders* in cathedral churches, by which means the pope had the first fruits of all the said benefices. By this complaint it should seem the pope had yet got in but one leg, that is, to have the first fruits of those livings, to which he himself collated: a pretty piece of simony.

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* Prebends, I suppose.

Anno 1376.
 Rot. Parl.
 n. 100. and
 6 H. 4. nu. 21.
 6 R. 2. 50.
 1 R. 2. nu. 66.
 4 R. 2. nu. 44.

In the 50th year of the same king, the commons renew their complaint again, and amongst many grievances from the court of Rome there complained of, one is, that the pope's collector that year (a thing never before done) had taken the first fruits of every benefice, whereof he made provision or collation, whereas he was used to take first fruits only of benefices vacant in the court of Rome.

And 9 H. 4. cap. 8. not in the print, there is a statute expressly against payment of them upon the pain in the statute of provisors, which is a premunire.

And if Walsingham says true, "Summus Pontifex (Anno 1316) reservavit camerae suae, primos fructus

Hist. Wals. p.
 108.

beneficiorum omnium in Anglia, per triennium vacantium."

So that it is apparent, that in some cases first fruits were paid long before Boniface the Ninth, or John the Twenty-second; but perhaps the pope before them had not made it an universal payment (97).

These were often complained of as a great oppression upon the clergy, as Henricus Hostiensis, who lived in the time of Pope Alexander the Fourth, witnesseth; but however upon the abolishing of the pope's usurpations here in England, the poor clergy were not acquit of this exaction, but the same was by the statute of 26 H. 8. settled upon the then king, and his successors. [278]

St. 26 H. 8. c. 3.

The first fruits are not here in England rated at the full and utmost value of the living they are to be paid for, but according to the valuation taken and made in

(97) These were originally a part of the papal usurpations over the clergy of this kingdom, first introduced by Pandulph the pope's legate, during the reigns of King John and Henry the Third, 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 whole 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 Henry III., and afterwards advanced in value by commission from Pope Nicholas III. A. D. 1292. 20 Ed. I. which valuation of Pope Nicholas is still preserved in the exchequer. The tenths, or decimæ, were the tenth part of the annual profit of each living by the same valuation, which was also claimed by the holy see, under no better pretence than a strange misapplication of that precept of the levitical law, which directs, that the Levites should offer the tenth part of their tithes as a heave offering to the Lord, and give it to Aaron the high priest. 1 Bla. Com. 283.

the said 26th year of king H. 8. and now used in the first fruits office.

1 El. cap. 4.

And these first fruits are by a statute made 1 Eliz. not to be paid all at once; but one quarter of them is to be paid at the end of six months from the time of the induction, collation, &c. another fourth part at the end of twelve months, another fourth part at the end of eighteen months, and the last quarter part thereof at the end of two years.

1 El. cap. 4.

And by a statute made 1 Eliz. all vicarages not exceeding ten pounds, and all parsonages not exceeding ten marks, according to the valuation in the first fruits office, are discharged from the payment of first fruits (98).

And if an incumbent die, or be legally removed out of his living without fraud, then after such death or removal, the remaining half yearly payments of the first fruits, which were not become due, are discharged by the said statute of 1 Eliz.

St. 26 H. 8. c. 3.
When the first
fruits are to be
paid.

And by that statute the dean and canons of Windsor are discharged of the payment of first fruits.

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And by the statute made in the 26th year of H. 8. beforementioned, it is enacted, that every archbishop, bishop, dean, prebendary, archdeacon, parson, vicar, &c. before he have any actual or real possession or meddling with the profits of his living (this must be between institution, collation and induction) must pay or compound for, and give security for the payment of his first fruits in the first fruits office: and that an obligation taken for the same should be of the force of a statute of the staple, and that if any such presume to enter into his living before such payment or security given, or composition made, he is to forfeit double the value.

(98) By the 5 An. c. 24. all ecclesiastical benefices with cure of souls, not exceeding the clear yearly value of 50l. by the improved valuation of the same, shall be discharged for ever from the first fruits and tenths. S. 1.

But his majesty and his royal predecessors have not been severe in this case to take the penalty, but upon failure their officers of the exchequer have sent out process to the sheriff, to put the negligent parsons, vicars, &c. in mind of this duty, and upon coming in and paying the charge of the process, and paying or giving security for the first fruits, they are discharged.

But the parsons, vicars, &c. must be careful to pay in their half yearly payments, as the same become due, and take up their bonds, or else new process will issue to the increase of their charge.

Perhaps some may be so curious that they will desire to know, why vicarages not exceeding ten pounds should be freed of this charge, and parsonages of ten marks should pay them: now the reason of that was, that the vicarages in time of popery, and when the valuation was taken, had a great income by voluntary offerings, which falling to little or nothing upon the dissolution of monasteries, this favour was afforded them in their first fruits.

The next charge parsons and vicars are subject to, are the tenths, that is, a tenth part of the yearly value of all their church livings; this payment was first exacted from the clergy by the pope, about the 20th year of E. 1. and a valuation was then made by his authority, of all church livings, at which rate the pope was answered his tenths, but he never had any tenths of such land as was given to the church after that time. These payments (as appears by our histories) the pope of Rome sometimes granted to the kings of England, when the kings pleased them, or rather when they feared their power; but upon the abolishing the pope's power, which was in the 25th year of H. 8. these tenths were given to the king the year following by the aforesaid statute of 26 H. 8. and to be paid at Christmas yearly, and the bishop of the diocess is to collect them, and they are to be paid according to the valuation taken the same year, and now in the first fruits office, and are

Why vicarages are charged higher in the first fruit office than parsonages.

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Tenths.

It should seem these were imposed by Boniface the 8th to maintain his wars in Sicily. Extravag. com. l. 3. p. 269. 2 Inst. 628.

St. 25 H. 8.

St. 26 H. 8. c. 3.

not paid that year the first fruits are paid, but are allowed out of them, because it is intended that the king has the whole year's profit.

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 St. 26 H. 8. c. 3. But immediately upon the reformation many clergymen scrupled and denied to pay these tenths to the king, being a duty properly due to the pope, and therefore the refusal or neglect to pay them to the king, being certified by the bishop that had the collection of them, is made a cause of deprivation, not only of the living for which they refused to pay their tenths, but also of all their spiritual preferments.

St. 2 & 3 E. 6. cap. 20. But by the statute of 2 and 3 E. 6. that severity was moderated; so that now the refusal or neglect to pay them, and so certified by the bishop, makes only that living void, for which the tenths shall be so refused. But his majesty and his royal predecessors have rarely put the severity of this law in execution, but make out process in the exchequer to compel the payment; however since the penalty is so great, every clergyman ought to be very careful to avoid the danger.

More, 541.
 Dyer, 116. p. 69.
 Cro. El. 244. An apparitor came to a parson newly inducted, and told him he must pay his tenths to such a person, naming him, at such a day and place, four miles off; and this was adjudged no good demand to make his living void within the statute, but such demand which will make a living void within the statute, must be positive by one that has power to demand and receive it.

And note, that the bishop's certificate is not peremptory; but may be traversed, and the party that demands the tenths must be sufficiently authorized. See Cro. Eliz. 80.

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 St. 27 H. 8. c. 3. There is a provision made by an act of parliament in the 27th year of H. 8. for those incumbents that shall be forced to pay the tenths due in the time of their predecessors, that they may levy the same upon any goods they can find of their predecessors upon the church living; and if they be not redeemed within twelve days after they shall be distrained, then the same shall be praised

The remedy where the successor pays tenths due by his predecessor.

by two or three indifferent persons to be sworn, and so many of them sold as will satisfy the arrear with cost; and if no such goods can be found, then the successor to take his remedy against his predecessor, his executors or administrators, or others to whom his goods shall come, by bill in chancery, or in action of debt at common law (99).

There is another charge to which the parsons, vicars, &c. are subject for their church livings, which is called procurations or proxies; and these are duties due and payable to the archdeacons at the time of their visitations, which are not paid by any certain rule, but by some ancient taxation; for anciently the religious houses and clergymen at their own charge entertained the bishops and archdeacons in their visitations, but at length their attendants were so many, and their trains so great, that the clergy and religious houses were horribly oppressed with entertaining of them; to avoid which, the clergy and religious houses came to this composition, every one to pay such a proportion to their visitors to be freed from that great oppression; and therefore the canonists define them to be, "*Exhibitio sumptuum necessariorum facta prælatis qui diocæses peragrando ecclesias subjectas visitant,*" and this payment is continued to this day, not only of those livings which are still enjoyed by the clergy, but also of the impropriations being saved by the statute of 31 H. 3.

Procurations.

Sir John Davies
Rep. 1, 2, 3.

See more of this matter, Linw. cap. ut singula Ecclesiastica. That by a canon made by Steph. Langton about 1222, the archdeacons were to bring but seven horses in their trains, and to stay but one day, and to invite nobody.

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31 H. 3. cap. 13.

(99) "At length the piety of Queen Anne restored to the church what had been thus indirectly taken from it. This she did, not by remitting the tenths and first fruits entirely, but in a spirit of the truest equity, by applying these superfluities of the larger benefices to make up the deficiencies of the smaller. And to this end she granted her royal charter, which was confirmed by the statute 2 An. c. 11. whereby all the revenue of first fruits and tenths is vested in trustees for ever, to form a perpetual fund for the augmentation of poor livings." 1 Bla. Com, 285.

and confirmed by the statute of 34 H. 8. and remedy given for them with costs, both in the spiritual court and at common law.

Cap. Quoniam
autem verb.
una tantum.

And note, that if there be a parsonage and a vicarage endowed, there is but one of them to pay procurations, but which of them must pay, is to be directed by custom or the indowment, if extant.

Note likewise, that donatives are not to pay procurations, because they are not within the visitation of the ordinary; and so for free chapels, for the same reason.

Cap. Quamvis
lex naturæ.

And if there be a parsonage which has a chapel depending on it, that is, where both are in the parson's cure, no procurations are to be paid for the chapel.

Synodals.

Synodals is another charge upon the parsons, vicars, &c. and is likewise paid to the archdeacon, not by any certain rule, but by some ancient taxation; so that some pay more, and some less.

St. Jerome in
his Epistle to
Evagrius, says
Diaconi elegant
de se quem in-
dustriam nove-
rint, et archi-
adiaconum vo-
cant.

I must confess I cannot find how this payment first became due, but by the name it should seem to be a contribution to the archdeacon's charge in the synods, they being anciently elected by the deacons themselves as their representative.

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Dugdale's War.
126. b.

But it should seem, that the archdeacons claim these synodals for their Easter visitation: and the bishops have laid some claim to them, but as my author conceives, without any just reason, the archdeacon and his officers performing the labour, and undergoing the charge.

Since my first publishing of this book, a learned and worthy divine sent me a book, written by a learned and ingenious person, amongst other things concerning synodals, whereby he expected I might receive some satisfaction concerning the original and growth of them, at whose candle I should thankfully have lighted mine own, if it had given a clear light; but when I came to read the book, I found the author endeavour to prove them one and the same with the cathedraical duty,

whose reasons to that purpose I can by no means subscribe to.

First, because Mr. Linwood, a very learned civilian and canonist, reckoning up the onera ecclesiastica, tells us, “*Quædam enim sunt quæ dicuntur episcopalia, et inter hæc continentur synodaicum, cathedraicum,*” &c. so that it appears he conceived them two several and distinct charges.

Cap. Quoniam
autem verb.
onera ecclesi-
astica.

Secondly, the cathedraicum is by the canons restrained not to exceed two shillings, whereas anciently the bishops had a third part of the offerings, and in consideration thereof were to repair the churches, and they had this payment in consideration of the third part of the offerings, and were acquitted of the repair of the churches. But I could never learn that the cathedraicum was ever paid in England, and the reason may be, because the churches in England have always been repaired by the parishioners by custom. Now the cathedraicum being limited to two shillings, and finding upon inquiry, that the synodals are not confined to any certain sum, but for the most part more than two shillings; it is very improbable that they are one and the same.

Causa 10. q. 3.
Quid vero et
placuit ut nullus
et Concil. Braca.
cap. 2.

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Thirdly, the cathedraicum is annexed to the bishop's chair, and in recompense of a duty not transferred to any other; but for aught I could ever learn the synodals have been always paid to the archdeacons; and therefore for these reasons I take them for several and distinct duties, as Linwood seems to take them.

The same author gives an account of some difference that has been moved between the archdeacons and the clergy, whether procurations are due to the archdeacons when the bishop visits: in which case the same author has given his verdict clearly for the archdeacons, and grounded his opinion upon reason, custom and authority.

First, his chief and only reason is, because the archdeacon pays his tenths as well for that year the bishop visits, as for the other two; and therefore he concludes

it very reasonable he should have that for which he pays tenths.

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But I conceive there is a great mistake in this argument, for I am not satisfied the archdeacons pay any tenths for their procurations, but for the crops annexed to their archdeaconries and their jurisdiction; for it were against reason to charge them to pay tenths for that they eat and drink in their visitations; and the tenths ought to be of the clear profit; but where the procurations are paid in money it should seem tenths are due.

But admitting upon the valuation in the 26 H. 8. the procurations were valued (for in that of 20 E. 1. they could not be valued, not being then reduced into money, nor of long after) then the argument runs no farther, than that, because the archdeacon pays a tenth part against reason, therefore the clergy must pay the whole.

Vide extra.
com. de decimis
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But the reason against the archdeacons in my judgment is much stronger. I shall not take upon me to examine whether their jurisdiction be ordinary or delegated. I will admit custom has made it in some measure ordinary, though much might be said against it; I will let that point pass unquestioned, but from the beginning it was not so. But let that be as it will, it is clear there was no jurisdiction annexed to archdeaconries originally; the first step was over the deacons, as shall be showed hereafter: it is without all doubt, that originally all jurisdiction over the clergy was in the bishops, and they in their own persons visited the churches within their diocesses, for the first 600 years after Christ.

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4 Concil. Tole-
tan. cap. 35.
2 Concil. Braca.
cap. 1.

But in the fourth council of Toledo, which was held about the 630th year after Christ's birth under Honorius I., it was decreed, "Episcopum per cunctas diocæses parochiasque suas per singulos annos ire oportet;" what to do? not only to eat and drink, but "ut exquirat quo unaquæque basilica in reparatione sui in-

digeat." But "si ipse aut languore aut aliis occupationibus implicatus id explere nequiverit, presbyteros probabiles aut diaconos mittat, qui et reditus basilicarum et reparationes et ministrantium vitam inquirent."

This is the first commission that I can find for bishops to make substitutes to inquire, but the jurisdiction still reserved to the bishop to admonish, examine and punish; but here is no news of archdeacons as yet in power.

The first news I hear of any thing tending to any jurisdictionem was over the deacons; for Gratian tells us, "Archidiaconus, subdiaconis et levitis ad quem ista pertinet ministeria. Et ad ipsum nunciat episcopum excessus diaconorum:" so that it seems the petit jurisdiction the archdeacons begun with, was to inspect the behaviour of their brother deacons, and to give the bishop an account of their miscarriages in the nature of a monitor only.

Distinct. 25.
perlectis.

The next news I hear of them is a complaint against them, "Quod in plerisque locis ipsi super presbyteros quandam exerceant dominationem:" but staid not there, but "ab eis censum exigunt," (which the bishops could not do) whereupon it is commanded, "quod sint contenti regularibus disciplinis, et teneant propriam mensuram quam ab episcopis eis injungitur; hanc per parochias suas exercere studeant, nihil per cupiditatem et avaritiam præsumentes." Here it appears that they had gained some employment under the bishop over some certain parishes, but with a limited jurisdiction; they must keep their measures, must not exceed their bounds.

Distinct. 94.
dictum est.

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By this it appears that the archdeacons are merely substitutes to the bishop, and what authority they have is derived from him, his chief office being to visit and inquire, et episcopo nuntiare; and therefore the bishop takes what causes he pleases to his own cognizance, and leaves some petit business to the determination of the

Hob. 16.

Ergo dicantur
oculi episcopi.

archdeacon. This being granted, which cannot be justly denied, it is against all the reason in the world, that the bishop by easing of himself by appointing a deputy vicar or vicegerent should double the charge upon his clergy.

As for the custom alleged for this duty, before I give an answer to it, it will be necessary to examine how the canon law stands in the point.

Cap. ut singula
ecclesiastica.

And by our own provincial canons I find it is especially provided, that the archdeacons should receive no procurations, “ nisi illo die quo personaliter visitant ecclesiam procurantem;” and it goes farther, “ nec redemptionem pro visitatione præsumant.” What can be more clear? and what can this redemption mean, but procurations in money, as is now used?

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Verbo visita-
tione.

And the gloss, to make still more clear, tells you, “ forsan quia episcopus eodem anno visitavit et suspendebat jurisdictionem archidiaconi, et sic archidiaconus vult ab eis aliquid loco procurationis exigere quod non licet ut hic, ubi non visitavit.”

Cap. Quamvis
lex naturæ.

And by another canon made by John Stratford, archbishop of Canterbury, and his clergy, about the year 1345, it is forbidden, “ Ne quis procurationem ratione visitationis solvendam ab aliqua præsumat recipere ecclesia, nisi visitationis officium diligenter eidem impenderit, scrutatis personaliter, et inspectis per ipsum cum effectu quæ fuerint indaganda. Vide 4 Concil. Later. sub Innocent 3. ca. 33.” to the same purpose.

Ibidem verb.
ratione visita-
tionis.

By this canon likewise there are no procurations to be paid without personal visitation. But for the better understanding of this canon I must observe to the reader that there are two other sorts of procurations, the one by pact or covenant, the other by custom, that are no ways related to visitations, and therefore the canon well distinguishes, *ratione visitationis*.

And after that canon has taken care for moderating the excessive charge of the visitors in their visitations, it leaves it to the choice of the visited. “ An in pecunia

quantitatis solitæ, vel in victualibus visitantes eosdem voluerint procurare, optionem reservamus.”

And Mr. Linwood tells us, in those days it was a common use in England, that the archdeacon received in money, nomine procurationis, seven shillings and six-pence, that is, eighteen pence for himself and his horse, and six shillings for his six attendants and their horses.

There is by the same canon provision made, that where there is a church and a chapel depending of it, which is not presentable, but within the charge and cure of the parson, that in that case there shall be but one procuration for both, and that he that shall take more, shall ipso facto be suspended ab officio et beneficio, till he has paid double the sum received to the cathedral church of that diocess.

Lastly, this canon concludes with the duty of the archdeacon and other ordinaries in their visitations, that “tam in ecclesiis quam ornamentis eorum, cœmitemporum clausuris et mansorum domibus reperientes defectus, iis sub pecuniariis pœnis præcipiunt reparare,” &c.

So it appears by these canons, that there are no procurations due to the archdeacons, unless they visit personally; and if it be demanded, why in person, and why ecclesiastic? the close of this canon tells you.

Now you shall hear what Othobon, the pope's legate, in a national synod held in St. Paul's, London, in May 1268, says to this matter, “Cum autem (says he) ratione visitationis procuratio debeatur, si quid exequatur vel recipiatur hujusmodi ratione cessante, jam male recepti et indebiti nomen subiit. Cum igitur intellexerimus quod plerique prælati procuraciones a subditis exigunt, licet visitationis officium non impendant; nos tam ecclesiarum indemnitati quam* prælatorum saluti consultius providentes, districtius inhibemus, ne quis eorum procuracionem, quæ ratione visitationis debetur, ab ecclesia quacunque recipiat, nisi cum eidem visitationis officium impendit; qui vero receperit, donec restituerit, ab ingressu ecclesiæ sit suspensus.”

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Verb. Solet solvi.

See Causa 10.
q. 1. Relata to
the same pur-
pose.

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* Nota.

So that it appears by these canons, the archdeacon, when the bishop visits, ought not to have procurations, but is expressly forbid to exact them. Now how far a custom shall prevail against a canon (I mean such custom as the ecclesiastical courts allow of forty years continuance) belongs to the determination of the canonists. And the author tells us, page 25, from them, that that custom is said to be *rationabilis*, and by consequence *inviolabilis*, that is, binding, “*Quæ nec divino juri contradicit, nec obviat canonicis institutis.*”

Concil. Later.
4. sub Innocent
3. Can. 33.
Accords.
Gregory's De-
cretals, cap. ad
nostram audi-
entiam de con-
suetudine causa
10. q. 1.—relata.

I could say much more to this purpose, but it belongs to the canonists, to whom I leave it.

But if the author intend such custom as is allowable at common law, when he says canons cannot be of such force as to annihilate and overthrow national laws and customs, I must grant he is therein very right.

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But in this case there can be no such custom; for every custom allowable at the common law must have its commencement before the first year of R. 1. which was anno Dom. 1189, but the decree of Pope Benedict XII. which first gave way to commuting procurations into money *volentibus*, was about the year 1337, and money payments in lieu thereof were not settled here in England of long time after; and therefore they cannot be claimed by any custom or prescription at common law.

Vas electionis
extravagan.
li. 5. de censi-
bus, &c.

For the case of proxies in Ireland, which he vouches forth of Sir John Davies Irish reports, I conceive makes nothing at all to this question; for it is not at all moved in that case, whether there were a double proxy due, the one to the bishop when he visits, and another to the archdeacon that sits still: but I presume the author makes use of that case to prove, that procurations may be due *ratione visitationis*, when there is no visitation: and I will agree they may by act of parliament; and in that case, there are two acts of parliament for them.

But Sir William Capel's case, vouched in Lutterel's case, may be conceived to make something to this pur-

pose, where the case shortly is, that one held his land inter alia by the rent of five shillings pro wardo castri, and upon avowry for this rent, the tenant pleaded that the castle was down, and therefore no rent due, and upon demurrer adjudged against the tenant; and very great reason, for the rent was reserved in respect of the land, and not in respect of the castle, for the reservation of the rent is reddendum inde, that is, for the land five shillings annuatim pro wardo castri; and the saying the castle is down does not answer the debet: but if the land for which the duty arises be evicted by a more ancient title, the rent is gone; so that this case being rightly understood, makes against the archdeacons rather than for them; for in their case the annual payment is paid for procurations. Procurations are due, ratione visitationis; then when the bishop that has the ancients right to visit, inhibits his deputy, and does the work himself, to whom do the wages belong?

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Decret. Greg.
lib. 2. cap. 16.
cum ex officii.

And note, that by the canon law no man may prescribe to be free from procurations ratione visitationis.

Here I could willingly end my discourse, for I doubt I have said enough to displease some; but no good man ought, nor I hope will take any offence at what has been said, or at what I am about to say; and therefore I shall add a word or two concerning the archdeacons and their visitations (100).

It appears by what has been said, that for the first six hundred years after Christ, the bishops in their own persons visited "cunctas diocæses parochiasque suas singulis annis," and they had seven deacons in every city, that is, diocess, 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

Concil. Toletan.
4. cap. 35. &
Braca. ca. 7.

(100) Procurations are suable only in the spiritual court, and are merely an ecclesiastical duty. Lord Raym. 450. And may be levied by sequestration or other ecclesiastical process. Gibs. 1546.

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thereupon, as should seem, they cantonized their great diocesses into archdeaconries, and gave them commissions to visit and inquire, and to give them an account of all at the end of their visitations, as is before related; and the bishops reserved the third year to themselves to visit their churches, and thereby to inform themselves how the archdeacons, their substitutes, performed their duties, how they domineered over the clergy, and were reduced to their true measures. You have heard after upon complaint of the oppression, they and others used in their visitations by their excessive numbers of attendants, in one of the councils of Lateran the number of their attendants was limited, and by canons of our own several restrictions have been made against the exorbitances of visitors.

Dist. 94. dictum est.

Cum Apostolus Sub. Alex. 3. 1179. c. 4.

Ut singula ecclesiastica.

Cap. cum Apostolus.

3 Council of Lat. 1176, sub Alex. 3. cap. 2.

Quamvis lex naturæ.

By one canon in the time of Archbishop Langton, they are commanded that in their visitations their attendants shall not exceed the number limited in the general council of Lateran (whereby an archbishop in his visitation is allowed forty or fifty men and horses, a bishop twenty or thirty, archdeacons five or seven, an archpriest two): and further restrained the visitors, that they should invite nobody to their visitation entertainments.

But this did not do the work intended in easing the clergy; therefore after in the time of Stratford archbishop, by the canon before remembered it is farther provided, that if any "plures visitare voluerit ecclesias una die, procuratione unica in victualibus vel pecunia, ad quam omnes et singulas sic die unico visitatas proportionabiliter faciat contribuere; prout tradunt canones, sit contentus. Et si nocte præcedente visitationem in quavis ecclesia faciendam ad sumptus rectoris seu vicarii visitandi, seu die visitationis in prandio steterit, cum eisdem veram æstimationem sumptuum hujusmodi in procuratione, si eam in pecunia visitans licite duxerit exigendam, computare, seu allocare, vel pro ea in toto studeat compensare. Ita quod nec ultra sumptus hujus-

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modi solidam procuracionem in pecunia, nec amplius quam deductis eisdem sumptibus de procuracione in pecunia exsolvenda supererit, præsumat recipere vel exigere quovismodo. Si quis autem aliter fecerit, donec indebite recepta restituerit, ab ingressu ecclesiæ noverit se suspensum."

And by the before-mentioned decree of Othobon it is ordered, that bishops and other inferior officers in their visitations, "in superflua comitiva seu evictionum numero, vel alias in expensis gravare subditos non præsumant ultra quantitatem et numerum determinatum in constitutione Innocentii papæ quarti, ne," &c.

Naturalis dispositionis.

But Pope Benedict XII. good man, made an edict or constitution decretal, whereby he settled what every clergyman, &c. should pay by way of commutation in lieu of their procurations, and this was about the year 1337. But the good pope left in the election of the visited, whether they would pay their procurations in money or victuals; but it was long after, as should seem, before this decree was generally received in England; (which makes me believe the archdeacons were more moderate here than elsewhere). For when Linwood published his Provincial Canons, which was about the year 1423, it was not generally received in England; which was almost an hundred years after. But the certain time that procurations here in England were turned into rent, I cannot find out: but the effect of this innovation was, that when procurations were reduced to an annual rent, the visitations were degenerated into an audit of receipts, and called a visitation, where the parson draws up a thing called a presentment containing (omnia bene), which by the churchwardens is delivered to the visitor or his deputy, and procurations paid, and the visitation is ended; when for the most part nothing is well, or as it should be: the churches kept like swine-sties (I beg pardon for the comparison, I wish it were not too true) the floors broken up, the windows broken down, the church and buildings belong

Vas electionis ubi supra. Extravag 1. 5. de censibus.

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ing to the parsonage and vicarage houses dilapidated, the parson non-resident, pews in the church built so high and disorderly, that the behaviour of the people therein cannot be observed, books and ornaments of the church wanting or embezzled; and it is not likely the parson and churchwardens should present these things, when themselves are commonly most in fault; and besides the churches, the churchyards how are they used, their fences neglected, swine rooting in them, muck-heaps thrown in them, and profane gaming and other debaucheries used in them, shame to see or hear of?

Causa 10. q. 1.
Relata est.

There was complaint in the council of Toledo, “*Quod quidam episcopi negligebant suas parochias visitare singulis annis ad prædicandum et ad confirmandos pueros, procuraciones tamen exigebant, ac si ecclesias visitarent: quod ex avaritia et negligentia procedat.*” There it was decreed in that council, “*ut hoc de cætero non faciant episcopi, sed solícite et diligenter greges visitent, cupiditatem vitantes, et negligentiam dimittentés.*”

Certainly if there was cause of such complaint in those days, there is much more now.

By the canons
of King James
they are to visit
every year. Can.
86.

I do not speak this, as though it were now a duty incumbent upon the reverend bishops to visit in person ecclesiastical; their age and great employments, and the canon gives leave to do it by their substitutes the archdeacons: but if their lordships would be pleased to enjoin their archdeacons to visit every third year ecclesiastical, when their lordships hold their triennial visitations, and give their lordships a personal account how they found all things, it would work a great reformation in the miscarriages before mentioned; and the archdeacons would certainly be ready to obey such a command, “*Ne magis videantur lucris pecuniariis inhiare, quam ecclesiarum velle conservare statum, et salutem animarum quærere:*” and then it were reason they should have their procurations that year also.

Othobon, cap.
Naturalis dis-
positionis.

The same worthy author that has brought me into this discourse, tells us of another charge by the name of Pentecostals or Whitsunday farthings; these are but a charge upon some particular churches, where by custom they have been paid, and seem to be of the nature of offerings: but I have never met with any thing more of them, than what I have received from that learned author.

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See Selden's
Hist. of Tithes,
219, 222, & 224.

Lastly, I will conclude with an accidental, but a grateful charge, which is, that if the founder or benefactor to a church, or their posterity, becomes necessitous, they are from the same church to receive relief. "Si enim omnibus aliis (says the canon) necessitatem sustinentibus pro solo religionis intuitu in usum res ecclesiæ largiuntur, quanto magis consulendum est, quibus retributio debetur?"

4 Concil. Tolet.
c. 37.

All these charges and more the secular clergy undergo, which take away a considerable part of their revenues.

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CHAPTER XVI.

How far prescription will prevail in the manner of tithing, and in what cases the parson, vicar, &c. shall be bound by a modus decimandi.

The force of a modus decimandi in tithing. Linwood, ca. Quoniam propter verbo redemptionem.

Co. Select Cases, 46. Dyer, 79. p. 49.

Common law and canon differ concerning customs, &c.

Tho. Aq. Sum. 2. 2æ. p. 87. art. 1. 2 Inst. 652.

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St. 25 H. 8. Cap. 19. Fine.

1 Inst. 344. a.

The difference between custom and prescription.

THE canonists, and those that are of opinion that tithes are due jure divino, decry all customs and prescriptions that either diminish the tenth part, or acquit the whole; for in truth, no custom or prescription can be good which is positively against the law of God.

And that is the reason why it is frequently said in our law books, that the ecclesiastical courts will not allow a modus decimandi.

But the common lawyers allow tithes to be due jure divino secundum quid, that is, quoad sustentationem cleri, but not quoad decimam aut aliquam aliam certam partem; and therefore they allow of a manner of tithing which diminisheth the quantum, or a custom of not tithing for this or that particular thing, so there be a sufficient maintenance for the clergy besides: and of the same opinion are some of the most eminent schoolmen. And in this, as in all other things where the common law, and canon, or ecclesiastical laws differ, the common law is to be preferred; for no canons are of force in England, which are contrary or repugnant to the laws, statutes, and customs of this realm, or to the damage or hurt of the king's prerogative royal; but all other canons provincial still remain in force, and are confirmed by a statute made in the 25th year of H. 8. which statute is declaratory of the common law. Co. 2 Inst. 658.

The difference between custom and prescription I have showed before in the thirteenth chapter.

But before I proceed upon this subject, I must beg leave of the reader to say something more in vindication of the common law, which in this point I conceive does not differ materially from the ecclesiastical and civil law; for if I do not very much mistake the canonists and civilians, they do at this day allow of real compositions in discharge of tithes, that is, where the parson, patron, and ordinary do by deed agree to accept of a certain sum of money yearly, or so much land or other profit in discharge of the tithes growing and arising upon such lands as they agree for. Now what is this but a *modus decimandi*? and a prescription to maintain this *modus*, is no more than a supply to prove a real composition, which was made beyond all memory and lost; and it were against all justice and reason, that if a man should be plundered of, or lose his deeds, that he should thereby lose his estate. And it must necessarily be intended, that every *modus decimandi* that has continued time out of mind, must have a reasonable and legal commencement, and must be intended that it began by a real composition.

A rent-charge cannot be created but by deed, and yet it may be claimed by prescription, supposing a deed preceded, the like law is of all commons, &c.

Sir Thomas Ridley, a learned civilian, in his view of the civil and ecclesiastical laws, inveighs against prohibitions, and the common law in case *de modo decimandi*; and endeavours to insinuate to the reader, that the spiritual courts allow prescriptions *de modo decimandi*, and that the common lawyers do the spiritual courts great wrong to affirm the contrary. But he himself in the next precedent section tells the reader, that a prescription to pay less than a full tenth part, is both against the canon law, and against the law of God itself. Now in every prescription *de modo decimandi*, it is to be intended the rate tithe was the full value of the tithe at the time of the original composition; for it cannot be presumed that the bishop, patron, and

The common law viudicated.

Linwood, c. Quoniam propter verb. Redemptionem.

8 E. 4. 13. b. &c.

Seld. Hist. Decim. 408. [301]

P. 181.

Linwood, cap. Quoniam propter verbo redemptionem. Consuetudo nec præscriptio juvat laicos quoad decimam præscribendum vel retinendum. cap. Quoniam ut audivimus verb. consuetudine locorum quod laici

*minis solvant
quam decimam,
non potest con-
suetudine intro-
duci, quia esset
contra jus divi-
num.*

Co. 13. 152.

ordinary, would make a composition to the prejudice of the church; and if the rate tithes do not now reach the value, it is to be intended that either the tithes are improved, or else that money is now become of less value, which makes the present inequality.

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Put the case then, that in the time of H. 1. (for the purpose) the lord of the manor of Dale made a real composition with the parson of D. that he and his heirs for ever, then after would pay to the parson and his successors, five pounds yearly, for the tithes of his demesnes; and this composition was confirmed by the patron and bishop as it ought, and five pounds was the full value of the tithes at that time. I think it will not be denied me but this was a good real composition, and that if afterwards the tithes had become of less yearly value, the lord of the manor had been bound by the composition to pay the five pounds per annum. Then suppose on the other hand, that the lord of the manor after this composition being thereby encouraged, made great improvement of his demesnes, by which the tithes are become of much greater yearly value, or that money by the discovery of the West Indies (as the truth is) be become of less value: is there not then the same reason to bind the parson as to bind the lord in the other case? which being granted, as in all justice and reason it must, and the lord having no other evidence to make good his bargain but his composition, and that in the late wars was plundered, or his house by accident burnt, mislaid, or embezzled; shall he therefore lose his composition which he must now be forced to claim by prescription (his composition being lost) because the tithes are of greater yearly value than five pounds, as the civilians would have him, or shall he be admitted to maintain his right by the common law, I appeal to the judicious and indifferent reader which is more just? Now the judges of the common law, well knowing what the judges of the ecclesiastical courts will do in this case, and likewise that at this day

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there is no rate tithe can come near the true value of the tithe wheat about the time these compositions were made, not being perhaps above twelve pence or two shillings the quarter, and now for the most part twenty times as much (not because wheat is of greater value than it was, but because money is of less) they do in this case frequently grant prohibitions to try whether there be such a custom or no; and if they find there is no such custom, they send the cause back by consultation to the ecclesiastical court, to be there determined; but if they find there be such a custom, they will not trust the ecclesiastical judge any more with it, but leave the party to take his remedy for the modus in the ecclesiastical court. And for the very same reason prohibitions are granted upon real compositions. And by the ecclesiastical law tithes are due of minerals, turfs, fishing in the sea, &c. which the common law denies, and therefore if suits be in the ecclesiastical courts for any of these things which are due by the spiritual, but not by the common law, the judges of the common law do grant prohibitions to stay their proceedings.

And St. German in the Doctor and Student puts this case, that if it were ordained for a law, that all payments of tithes from thenceforth should cease, and that every curate should have a certain portion of land assigned to him, or a rent or annuity which should be sufficient for his maintenance and those that served under him, or that every householder should give a certain sum to that use, that this were a good law, and grounded his opinion upon this saying of Doctor Gerson, a great doctor in divinity, "*solutio decimarum sacerdotibus est de jure divino quatenus inde sustentetur; sed quoad tam hanc vel illam assignare, aut alios in alios redditus commutare positivi juris existet.*"

And this commuting tithes into annual salaries is frequently practised in the protestant churches beyond sea, as I have been informed.

Lib. 2. cap. 55.
f. 167. a.

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Selden de Decimis, 164, 177, 188, 194. and Prefat. 21.

Prescriptions
are confirmed
by parliament.

And these prescriptions de modo decimandi are not only allowed by the ancient common laws of this realm, but confirmed by act of parliament.

St. 2 E. 6. c. 13.

For by the statute of 2 E. 6. it is enacted, "that no person shall be sued or otherwise compelled to yield, give, or pay any manner of tithes, for any manors, lands, tenements, &c. which by the laws and statutes of this realm, or by any privilege or prescription are not chargeable with the payment of any such tithes, or that be discharged by any composition real."

And having said thus much in vindication of the common law, I shall proceed to shew what prescriptions and customs, de modo decimandi vel de non decimando, are good and allowed at common law.

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Who may not
prescribe in non
decimando.
Seld. Hist. de-
cim. 409.
Rolls, 1. 653.

First, no layman can prescribe in non decimando, that is, to be discharged absolutely of the payment of tithes, and to pay nothing in lieu thereof, unless he begin his prescription in a religious or ecclesiastical person, and derive a title to it by act of parliament.

Who may pre-
scribe in non
decimando.
Winch. 65.
Brownl. 1. 31.
Co. 2. Evesque
Winchester's
Case.
Rolls, 1. 653.
H. 3. 5.
Rolls, 1. 653.
H. 6.

But all spiritual and religious persons, as bishops, abbots, priors, deans, prebends, parsons, vicars, &c. may prescribe in non decimando, and their farmers may make use of such prescriptions to free themselves from the payment of tithes.

And hence it is, that the parson or vicar of one parish, that hath part of his glebe lying in another parish, may prescribe in non decimando for it, that is, as hath been said, to be free from the payment of any manner of tithe for it.

Churchwardens
not.

But churchwardens who have land belonging to their churches cannot prescribe in non decimando, because they are neither religious nor spiritual persons.

A parish or particular town cannot prescribe in non decimando. March. Rep. 26.

Rolls, 1. 653.
H. 7.

A clergyman
may prescribe
for himself and
tenants.

It hath been held that a bishop may prescribe that he and his tenants for life, years, and will, and his copyholders have been freed from the payment of tithes;

the reason alleged is, because it might commence by a real composition for the whole manor. And in all cases where a spiritual person prescribes in non decimando his tenants and farmers shall take the benefit thereof.

But if any of the abbies, priors, &c. that came to the crown by the statute of 27 H. 8. were discharged of the payment of tithes by prescription de non decimando, yet the patentees of these lands shall not have the benefit of such prescriptions, but shall pay tithes.

Neither can the king's patentee be freed from the payment of tithes of those lands which the king, whilst he had them in his own hand, prescribed to be freed from the payment of tithes, because it is a personal discharge in the king, for the question arising upon lands disafforested, there might be several reasons why he paid no tithes; first, because the grounds were depastured with beasts feræ naturæ for which no tithes were due, or for that the king was not bound by the decretal epistle of Pope Innocent the Third, who settled the parochial right of tithes, or by reason the king being a mixed person, might prescribe in non decimando. But if the king prescribe in non decimando for lands, and grants them over, the presentee shall not by such prescription be discharged, nor shall the king be discharged if the same lands come to him again (101).

Rolls, 1. 653.
H. 4.
C. 2. 45. a.

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St. 27 H. 8.
c. 28.
Rolls, 1. 654.
J. 1. contra.
Hob. 309.

Rolls, 1. 655.
l. 2.
Patentee del
Roy.
Helly, 52. 60.
Cro. Car. 94.
dubitatur.
Brownl. 1. 31.
contra.

Cro. Car. 94.
Dubitatur.
Ideo quære.
vid. Selden de
Decimis.
Roll, 2. 655.
Hardres, 315.

(101) This privilege, although, generally speaking, personal in the king, extends to his lessee for years or at will, for the possession of such tenant is in point of law the possession of the landlord; and therefore such lessee of the crown may also be discharged from tithes by a prescription de non decimando in the king and his farmers. If the law were different this royal privilege would in a great measure be nugatory, since the king cannot cultivate his lands himself; but it extends to such lessee for years or at will only. Toller on Tithes, 168. 9.

But the king's patentees of those abbey lands that came to the crown by the statute of 31 H. 8. may take advantage of a prescription *de non decimando* in the abbot, prior, or other religious person by the force of that statute, and the enjoyment of the lands since the dissolution freed from the payment of tithes during memory, is a good proof *a posteriore*, that the abbots, priors, &c. held the same discharged from the payment of tithes.

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A country may prescribe in non decimando.
Lib. Intr. tit. Prohibit.
Co. 2. 44. b.
Doct. and Stud. I. 2. c. 55. f.
166, 167. b. 174. b. Roll. 1. 653. H. 10, 11, 12, 13. Hundred may prescribe in non decim. for it is the custom of the county which is the best law that ever was. March Rep. 25.

The inhabitants of a county, hundred, or country, as the wilds of Kent and Sussex, may prescribe not to pay tithes of wood, milk, or any other particular thing, so there be a competent livelihood for the clergy besides.

Who may prescribe *de modo decimandi*.
Co. 2. 44. a. b.
Cro. El. 599.
758. 784.

But every layman may prescribe *de modo decimandi*, that is, that such a man being lord of such a manor, and all those whose estate he hath in the said manor, have from the time whereof the memory of man is not to the contrary, had and enjoyed to his and their own uses all the tithes arising, &c. within the said manor, paying so much yearly to the parson of D.

Cro. El. 784.
Noy. 132.

And a lord of a manor may prescribe for himself, and his copyholders, for they are part of the demesnes to the manor; or the copyholder may prescribe in the name of his lord.

Hob. 40, 41.
A modus to pay two things, and one fails.

If a *modus decimandi* be to pay two things, as two shillings for a park, and a shoulder of every buck killed in the park, and all the deer die or are killed up, yet notwithstanding the prescription holds good for the two shillings.

Hob. 43
Prescriptions must not sleep.

But every prescription or *modus* must have a continuance, for it cannot be good at one time, and asleep at another, neither can a wilful denial destroy a *modus decimandi*: and it is taken for a rule in Dr. Leyfield

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and Tisdale's case, that where no tithes are regularly and legally due, as for a house, &c. there can be no modus decimandi alleged.

And yet it hath been held, that a tithe by prescription may be paid for a house, because it might be due for the land before the house was built. Ideo quære.

A modus to pay tithes without the view of the parson is not good, because it conduces to fraud, and is now against an act of parliament.

So a modus that because you have paid your tithe of your cows, you have been freed of the tithes of oxen, steers, heifers, &c. is not good; that is, to pay your tithes in kind of one thing, thereby to free another tithe.

But where tithe is only due by custom, as for fish taken in the sea, there less than a tenth part may be good.

And it hath been held a void prescription to pay a load of hay yearly in discharge of all his tithe hay, that is, to pay a part in discharge of the whole.

So for a parishioner to prescribe that he, &c. has time out of mind repaired the church, and by reason thereof hath been discharged of the payment of tithes, is no good prescription, for the parson not being bound to repair the church has no recompense: but if it had been, that he had repaired the chancel, and in consideration thereof had been freed of the payment of tithes, that had been a good modus, ratio patet (102).

Hob. 11.
Modus for
houses.

Co. 11. 162.
Hob. 11.
Quære.
Rolls, 1. 140.
b. 5.
Hob. 107.

Rolls, 1. 651. d.
16, 17, 18, 19.
Cro. El. 446.
Co. Select Cases,
45.
More, 454.

Noy, 108.

5 Co. 117. a.
C. L. 212. b.
Cumberland's
case, per Rol.
P. 15 Jac. B. R.
What prescrip-
tions de modo
decimandi are
good.
2 Leo. 70.

Rolls, 1. 649. 1.
d. 8, 9.

(102) To make a good and sufficient modus the following rules must be observed: first, It must be certain and inviolable, for payment of different sums will prove it to be no modus, that is, no original real composition; because that must have been one and the same, from its first original to the present time. Secondly, The thing given in lieu of tithes must be beneficial to the parson, and not for the emolument of third persons only: thus a modus to repair the church in lieu of tithes is not good, because that is an advantage to

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 Wool and i amb.
 Rolls, 1. 648.
 c. 1. 649. d. 7.

It hath been held a good prescription, that the parishioner hath time out of mind paid the tithe wool of all the sheep he has shorn, though never so lately bought in, and in consideration thereof hath been freed of the payment of the tithe of those he had sold before sheer-day.

Rolls, 1. 648.
 c. 4.

It hath been held a good prescription, to have paid the tenth fleece or pound of wool, so there were any allowance for the odd fleeces or odd weight.

Rolls, 1. 649.
 d. 5.

It hath been adjudged a good modus that in consideration the parishioner hath shorn and wound the wool, to be free of paying tithes of the neckings and birlings without fraud.

the parish only; but to repair the chancel is a good modus, for that is an advantage to the parson. Thirdly, It must be something different from the thing compounded for; one load of hay in lieu of all tithe hay is no good modus; for no parson would bonâ fide make a composition to receive less than his due in the same species of tithe; and therefore the law will not suppose it possible for such composition to have existed. Fourthly, One cannot be discharged from payment of one species of tithe by paying a modus for another. Thus a modus of one penny for every milch cow will discharge the tithe of milk kine, but not of barren cattle: for tithe is of common-right due for both; and therefore a modus for one shall never be a discharge for the other. Fifthly, The recompense must be in its nature as durable as the tithes discharged by it; and therefore a modus that every inhabitant of a house shall pay four-pence a year in lieu of the owner's tithes is no good modus; for possibly the house may not be inhabited, and then the recompense may be lost. Sixthly, The modus must not be too large, which is called a rank modus; as if the real value of the tithes be sixty pounds per annum, and a modus is suggested of forty pounds, this modus will not be established; though one of forty shillings might have been valid; 2 Bla. Com. 30.; for a modus must be ancient; therefore if it is any thing near the present value of the tithe it will be supposed to be of late commencement, and will for that reason be set aside. 3 Burn's Eccl. Law, 448.

It is a good prescription, that the parishioner hath time out of mind paid a halfpenny for every lamb sold before May-day; but if the parishioner sell his lambs fraudulently a few days before May-day, on purpose to defraud the parson, &c. it is no good discharge. Rolls, 1. 652.
g. 1.

A prescription to pay wool in kind, if kept till clipping-day, but if sold before, to pay a halfpenny a fleece, as Mr. Marsh reports, was held no good prescription, tamen quære. Marsh, 79.

It hath been held a good modus, that in consideration that the parishioner hath mowed, reaped, and shocked the corn, and paid his tithe in the shock, that he hath been freed of the payment of any tithes of the rakings; but, as Sir Edward Coke says, there needs no modus as to rakings, without fraud. For corn.
More, 474.
Littel. Rep. 31.

To prescribe to have paid the tenth sheaf or shock as it falls out, is no good prescription to free the parishioner of any other tithe, it being no more than is due. [310]
Rolls, 1. 648.
b. 6.

A modus that in consideration that the parishioner hath sowed, reaped, bound, and set up the corn one year to be free from the payment of herbage the next year of the same land, was held good, tamen quære. Rolls, 1. 649.
d. 4.

But it is no good consideration, that in consideration the parishioner has ploughed, sowed, mowed, cocked, and set out the tithes of part, that therefore he should be freed of paying tithes of a small parcel left standing. Rolls, 1. 650.
d. 11.

A man may prescribe to pay the tenth acre or rood of wood standing, and the parson, &c. cut it himself, as is used in some parts of Lincolnshire. Wood.
Rolls, 1. 648.
b. 7.

It hath been held a good modus to pay one calf in seven, and if under, a halfpenny a piece, and if he sell any calf to pay the tenth part of the price; and it hath been held a good modus to pay tithe cheese from May-day till Michaelmas to be discharged of the whole tithe of the cows; and no tithe is due for cheese but by custom, and the labour of milking and making into cheese is added, whereas nothing but the tithe of milk is due by law. Calves and
milk.
Rolls, 1. 648.
c. 2.
Rolls, 1. 651.
d. 19.
Cro. El. 609.
786.

Rolls, 1. 651.
d. 17.

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Rolls, 1. 651.
d. 18.

Eggs.
Rolls, 1. 648.
c. 3.

Land in lieu of
tithes.
Rolls, 1. 649.
d. 16.

Cro. El. 587.
8 E. 4. 14. a.
Headlands,
balks, &c. and
hay.
Rolls, 650. d. 10.
Noy, contra, 15.

Hetty, 147.

Rolls, 1. 650.
d. 13.

Rolls, 650. d.
13.

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Noy, 31.

Cro. El. 276.

But it is no good modus to pay for every milch cow two-pence, and for every calf one penny, in discharge of the tithes of all other cattle; but it is a good modus for the calves and milk only; so a modus to pay a tithe calf in satisfaction of the tithe of all manner of cattle is not good.

A modus to pay thirty eggs in Lent in satisfaction of all the tithe of eggs has been held a good modus.

It is a good modus that the parson time out of mind hath had so much, or such a parcel of meadow or land in satisfaction and discharge of all the tithes of hay, &c. arising upon such land.

It is no good modus to be free from the payment of tithe hay arising upon hades, balks, greenslips, or doals eaten by beasts of the plough, in regard the parishioner hath sowed, mowed, reaped, shocked, and prepared the corn, &c. But the contrary hath been held, *ideo quære*.

But in consideration that the parishioner hath made the grass growing in such a close, and then paid the tithe of it, he hath been free of the payment of the tithes of the balks and hades, has been held good (103).

It is not a good modus that the parishioner having spent all his hay upon the beasts of the plough, that therefore he should be free from payment of tithe hay.

But a modus that in consideration the parishioner hath cut, dried, and shocked the corn, he hath been freed from the payment of tithe hay, has been held a good prescription.

A modus that the parishioner hath time out of mind got rushes and strewed the church, and in consideration thereof hath been discharged of the payment of tithe hay, has been adjudged no good modus; but if it

(103) It should seem that headlands or meres, balks and butts in corn-fields, large enough only for turning the plough, are not liable by the general law to pay tithe of the hay growing on them. Gwill. 427. Anon. Bunb. 183. Gwill. 657. Chapman v. Barlow.

had been to strew the parson's seat, or to deliver straw to the parson to strew the church, had been a good modus.

But a modus to pay to the dean and chapter, though spiritual persons and lords of the manor, is not a good discharge against the parson. Syderf. 258.

And it hath been held a good modus, that in consideration the parishioner has made the hay into grass-cocks, that therefore he hath been discharged of the tithe of the aftermath; but Sir Edward Coke declares for law, that there needs no modus to be alleged, but that aftermath is of itself freed from the payment of tithes, and so I take it the law is held at this day (104).
 Rolls, 1. 647.
 b. 1, 2, 3, 4.
 648. d. 1, 2.
 649. d. 3, 4.
 Hetly, 133.
 Hob. 250.
 More, 910.
 Cro. El. 660.
 2 Inst. 652.

A modus to pay the tenth part of all the honey and wax of bees killed, has been held a good modus for the tithe of bees. Bees.
 Rolls, 1. 652.
 d. 15.

But there have been some opinions, that there is no tithe due by the law for bees, because they are feræ naturæ. But nevertheless both by custom and canon they may be titheable, and so they are in most places.

A custom or prescription to pay no tithe for the herbage of beasts bred up for the plough and pail hath been allowed to be a good custom: but of this see more before in the fifth chapter. Herbage.
 Bulstr. 2. Price
 v. Mascal.
 More, 909.

It is no good modus that the owner of the land hath paid all his tithe for his cattle there depastured, therefore to be free of the tithe herbage for guest-horses. Guest-horses.
 Rolls, 1. 650. d.
 [313]
 14.

It hath been held that no tithes shall be paid for the Fuel.
 More, 909.

(104) As it is now, however, decided that grass is of common right tithable when it is put into grass cocks, 1 Rolls, a. 644, that additional labour and trouble will not have been used, which is necessary to make the modus a valid one. It is now also held, that tithes of aftermath, where there is no prescription or custom against the claim, ought to be set forth and paid. 1 R. A. 640. Comyns, Dig. Dismes. Gwill. 531. Margetts v. Butcher.

fuel spent in the dwelling houses in the same parish it grew, without alleging any modus at all.

Cro. Car. 113.
Norton v.
Farmer. T. 4.
Car. 1. C. B.

But it should seem that in this last case there needs no modus at all to be alleged, but that for the fuel spent in the owner's house in the same parish, there is no tithe due of common right. Ideo quære.

Parks.
Rolls, 1. 651. e.
1 and 4.
Mascal v. Price.
P. 13 Jac. B. R.
Hob. 39.
Hutton, 58.

If a man prescribe to pay six shillings and eight-pence, for all the tithes arising and happening in such a park, and the park is disparked and turned to tillage, the prescription is gone.

But if in this case he had made his prescription, that in consideration of six shillings and eight-pence yearly paid to the parson, &c. he had been freed of all the tithes arising upon six hundred acres of land, called D. Park, this had been a good prescription, and should have freed the park.

Rolls, 1. 652.
e. 5.
More, 909.
Boothby v.
Reynels.
M. 20 Jac. B. R.
M. 10 Jac. 10.
641. B. R.

So if the prescription of a park have been to pay six shillings and eight-pence, and a shoulder of every buck killed in the park, in discharge of all tithes arising within the same, in this case, though the park be disparked, and no deer left, yet the modus remains, and shall discharge the whole tithe.

And it has been held a good modus to give a buck and a doe yearly to the rector, &c. in discharge of all the tithes arising within the park, although they be feræ naturæ; and it shall hold though the park be disparked.

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Hutton, 57.
Noy, 146.
Owen, 34.
Noy, 148.
More, 909.

But if the modus have been only for the herbage of the park, and if it be disparked and sown with corn, the modus is gone.

Modus for land.
Hutton, 58.

If a parson, &c. have had an acre or piece of meadow ground time out of mind, in discharge of all the tithe hay arising upon such a farm, this shall only discharge the hay upon the ancient meadowing, and not the hay of ground converted from pasture or tillage to meadowing.

Rolls, 1. 651.
e. 1.

But if one have a modus for all the demesne of his

manor, and erect a new mill, this shall be comprehended within the modus, and shall not pay any tithes. 2 Inst. 490.

But if a man have a modus for all the hay and grass upon twenty acres of land, and converts the same to tillage, or into a hop-yard, he shall pay tithes thereof. So it appears a great difference where the modus goes to all manner of tithes in general, and where to particular tithes. Rolls, 1. 651. e. 2.

* Where a modus is alleged to pay a certain sum to the vicar in discharge of any tithes due to the parson, this being a dispute of the right between two clergymen, ought to be determined in the ecclesiastical court; but it seems to be a good modus as to the parishioner, and so it was held in the case of Pool and Reynels, in the King's Bench, Mich. 10 Jac. But Mr. Ware reports a case to be adjudged H. 18 Jac. B. R. that it was no good modus, and that Henden vouched one Bank's case to be adjudged accordingly. Ideo quære. But it seems a good modus, for this being originally a modus between the parson and parishioner, the vicar might be endowed with the modus; but this must be intended also where the endowment is time out of mind, and not to be produced, or where the vicar hath it specially in his endowment. * Where a modus to the vicar shall discharge against the parson, and e converso. More, 907. Coke's Select Cases, 37. [315] Cro. El. 137. Hutton, 57. 10 Jac. 1. 641. Modus to pay a rate to the vicar for tithes due to the parson.

A payment to the parson by custom may be good against the vicar (105). Yelverton, 86. contra Bulstr. 3. 220.

(105) By another authority, however, it seems that although a parishioner ought to pay so much to the rector, it is no excuse for tithes due to the vicar. Cro. El. 71. 276. 7 Com. Dig. Dimes. A modus decimandi is not good where the thing alleged to be paid is not ancient, as a modus cannot be alleged for tithes of hops. Gee v. Pearch. Gwill. 1557. Nor of turkies. Bunb. 307.

But in *Wood v. Harrison*, *Ambl.* 563. a modus was laid for clover and objected to, the introduction of clover being of a modern date; but the court said it was a species of grass, and would be covered by a modus of grass made into hay, and directed an issue accordingly.

Leonard, 1. 94.
Cro. El. 71.
Bulstr. 1. 220.
Wintel v. Child,
M. 14 Jac. B.R.

But to pay a rate to the parish clerk is no good discharge of tithes against the parson or vicar, unless the parson be bound by custom to find the parish clerk, nor is a modus to the parson a good discharge against the vicar. Secus if there be a recompense. Cro. El. 136.

And so having shewed what prescriptions de modo decimandi, and de non decimando, are good and allowable at the common law, in the next place I shall shew how a modus decimandi or prescription may be destroyed or lost.

CHAPTER XVII.

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How a Modus Decimandi or Prescription may be lost or destroyed.

IF a man have a modus for a mill, which is removed of necessity to a new place, because the water invito has changed its course, here though the mill be removed, the modus remains.

Rolls, 1. 652.
f. 1, 2.
What matter will destroy a modus.

But if the owner of such a mill shall of his own accord, and without any cause of necessity, remove his mill to a new place, in this case he shall loose his modus.

If a man have a modus decimandi for two messuages and two mills to pay twenty shillings per annum, and he erects a new mill in one of the messuages, the modus shall not extend to free the new mill.

Rolls, 1. 652.
f. 2.

There have been opinions that unity of possession, that is, to have fee-simple in the rectory, and likewise in the land to which the modus is annexed, should destroy a prescription or modus decimandi (106).

Stepney v. Warren.
P. 41 El. B. R.

(106) But it is now decided that unity of possession does not destroy a modus; thus in a case in which a prescription was alleged, that the queen, and all those whose estate she hath had, used to pay to the rector of Kingswood two shillings and four-pence yearly, in satisfaction of all the tithes of certain lands in Kingswood; and it appeared in evidence, that the queen had the estate of the abbot of Kingswood, who was owner of the land, and rector in fee in right of his abbey, whence it was inferred that the prescription was void, inasmuch as the abbot could not pay himself, nor could the queen, who has now the estate of the abbot; but that the prescription ought to have been stated, that when the queen demised the land, the occupier had used to pay the modus,

Sir John Hollis'
Case, T. 9 Jac.
B. R.

But if a man have four water corn-mills, for which he hath time out of mind paid a modus of four shillings per annum, and pulls down one of them, yet the modus remains, and he shall still pay the four shillings (107).

the court were clearly of opinion, that unity of possession is not a perpetual discharge of tithes, nor of the recompense in lieu of them; and consequently, that the retainer might be regarded in the light of a payment to himself. *Chambers v. Hanbury.* Gwill. 208. *Moore,* 527.

(107) Where land is converted to other uses, so where the prescription is for hay and grass specially, in so many acres of land; if the land is converted into a hop-garden or tillage, the prescription is gone. 3 *Burn's Eccl. Law,* 454.

But a modus shall not be destroyed by a payment of tithes in specie for twenty years. 2 *Inst.* 653.

If parishioners, without consent of parson, divide and inclose a common which was covered by a modus, the modus is destroyed; but if the parson is a party to an act of parliament passed, by which it is agreed that all shall enjoy their rights of severalty as they did their rights of common before, it is not destroyed. *Stockwell v. Terry,* Gwill. 823. 1 *Ves.* 115.

CHAPTER XVIII.

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By what Conveyances, and by what Names Tithes may be granted, conveyed, demised, &c. and what Demises Parsons and Vicars may make of their Glebe and Tithes.

REGULARLY tithes at this day cannot be granted or demised but by deed in writing under hand and seal, or by matter of a higher nature, as fines, recoveries, &c. But in such cases, as they are become lay-fee they may be devised by will in writing as lands may; but they cannot be granted by copy of a court-roll, because they cannot be parcel of a manor.

Stiles, 261.
By what conveyances tithes will pass.
Hungerford v. Hawland.
T. 36 El. ro. 560. per Owen.
Cro. El. 814.

But tithes cannot be conveyed or demised by any parol agreement, unless it be to the owner of the land for one year by way of retainer: * and some opinions have been, that it is good for more years. Ideo quære (108).

Brettyman v. Woodward.
P. 31.
El. ro. 17. b.
R. B.
Noy, 89.
Cro. Jac. 137.
Hetly, 3.

Hughes, 233. Bellamy v. Bapthorp. M. 2 Car. ro. 179. B. R. Co. 4. 35. a. Latch, 175. Noy, 81. 121. * Yelverton, 94, 95. Brown, 2. 11. Ideo quære.

Tithes impropriate are at this day, by the several statutes of dissolution, become lay-fee, and will pass by the name of hereditaments; but by the grant of a portion of tithes, the tithes belonging to a rectory will not pass.

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(108) If a tithe owner agree with another to suffer him to take the tithes of corn and hay for six years, and he suffer him accordingly, though such an agreement be not a good lease, nor does any interest pass by the same in the tithes, yet it is good ground to found an action to recover the payment stipulated for in return. 2 Show. 307. Eaton v. Sherwin.

There have been some opinions that a man may without deed sell his tithes to the laudholder for more years than one, but not lease them without deed (109).

Tithes impropriate may be passed from one to another by deeds of bargain and sale, enrolled according to the statute of 27 H. 8. they may be transferred in use upon good consideration by deeds of covenant to stand seised, or by fines or common recoveries, and may be sued for by writs of assize, of novel disseisin, writs of entry, writs of right, or other real actions, or by *ejectione firmæ*.

But upon a lease for lives of tithes, no rent can be reserved to be recovered at or by the common law, for no action of debt will lie, or distress can be taken, et *ubi non est remedium, ibi non est jus*.

But upon a demise of tithes for years, a rent may be reserved, because an action of debt will lie upon such lease upon the contract (110).

(109) By the statute of frauds, 29 Car. 2. c. 3. all greater interests in lands and hereditaments than for a term of three years must be created by writing.

(110) By the statute 5 G. 3. c. 17. the same power of bringing actions for debt, which by a former statute, 8 Anne c. 12. s. 4. had been granted to lessors against tenants for life as to proper rents, is extended to sole and aggregate ecclesiastical corporations, heads and fellows of colleges, and others having power of leasing, to recover rent reserved on tithes and incorporeal hereditaments, although leased for life or lives.

It may not be improper here to take a review of the laws affecting the leases of ecclesiastical corporations, sole and aggregate. "From laying all which together," says Blackstone, "we may collect that all colleges, cathedrals, and other ecclesiastical or eleemosynary corporations, and all parsons and vicars are restrained from making any leases of their lands, unless under the following regulations: First, They must not exceed twenty-one years, or three lives from the making. Secondly, The accustomed rent, or more, must be yearly reserved thereon. Thirdly, Where there is an old

lease in being no concurrent lease shall be made, unless where the old one will expire within three years. Fourthly, No lease (by the equity of the statute) shall be made without impeachment of waste. Fifthly, All bonds and covenants tending to frustrate the provisions of the statutes of 13 and 18 Eliz. shall be void.

“ Concerning these restrictive statutes there are two observations to be made. First, that they do not by any construction enable any persons to make such leases as they were by common law disabled to make. Therefore a parson or vicar, though he is restrained from making longer leases than for twenty-one years or three lives, even with the consent of patron and ordinary, yet is not enabled to make any lease at all so as to bind his successor without obtaining such consent. Secondly, That though leases contrary to these acts are declared void, yet they are good against the lessor during his life, if he be a sole corporation; and are also good against an aggregate corporation so long as the head of it lives, who is presumed to be the most concerned in interest. For the act was intended for the benefit of the successor only; and no man shall make an advantage of his own wrong.” 2 Bla. Com. 320, 1.

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CHAPTER XIX.

What barren Lands are free from the payment of Tithes within the Statute of 2 E. 6. cap. 13.

2 Ed. 6. ca. 13. IN the statute of 2 E. 6. there is a proviso to this effect:

“That all such barren heath 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 from henceforth after the end and term of seven years next after such improvement fully ended and determined, pay tithes of corn and hay growing upon the same, any thing in this act to the contrary in any wise notwithstanding.”

This clause was added for the encouragement of tillage and improvement of lands by water or otherwise; and therefore though here be no words of discharge of the payment of tithes, during the first seven years, yet by a reasonable intendment, the same shall be discharged from the payment of corn and hay, for the first seven years after the improvement; and that is proved by the subsequent clause, whereby it is provided,

2 Inst. 656.
Dyer, 170. b.
P. 5.

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Plowd. 204. a.
396. b.

“That if any such barren waste or heath ground hath before this time been charged with the payment of any tithes, and that the same be hereafter improved and converted into arable or meadow, that then the owner or owners thereof shall during the seven years next following from and after the same improvement, pay such

kind of tithes as was paid for the same before the said improvement, any thing in this act," &c.

So that it appears plainly by this proviso, that it was the intent of the makers of this law only to free these improved lands from the payment of such tithes as were produced by the improvement, which must be hay or corn and no other.

Next, suppose a man have barren lands within this law, which are free from the payment of tithes by prescription, real composition, &c. It should seem by the penning of the aforesaid proviso, that he should pay tithes for the same after the seven years, this proviso only providing for such lands as are freed by act of parliament.

But that doubt seems cleared by the next precedent proviso in this very act, whereby it is provided,

"That no person shall be sued or otherwise compelled to yield, give, or pay any manner of tithes for any manors, lands, tenements, or hereditaments, which by the laws and statutes of this realm, or by any privilege or prescription, are not chargeable with the payment of any such tithes, or that be discharged by any composition real."

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So that this proviso preserves all former legal discharges.

But the great question upon this law is, what shall be said to be barren heath or waste ground within this law, and Sir Edward Coke defines barren lands in these words:

"Terra sterilis est terra infœcunda nullum ferens fructum." But that definition will not hold in this case, for it does appear by the second proviso, that such barren lands are intended that are barren quoad agriculturam, that is, such barren heath or waste ground that of its own nature, without improvement by lime, marl, manure, &c. will not bring forth corn or hay.

2 Inst 655, 656.

Dyer, 170. p. 5.
Co. Ent. 462,
463.

6 E. 6. per
Bendloes.
2 Inst. 656.
Hill, 9 Jac. C. B.
ex motione
Houghton.

2 Inst. 656.
More, 909.

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Co. 10. 86. b.
Co. 6. 18. a.

More, 433.
3 Bulst. 165.
2 Inst. 656.

But if the ground be not fit for tillage, yet if it be not suapte natura barren, it is not within this law. As if a wood be stubbed and grubbed up, and made fit for the plough, and reduced to tillage, it shall pay tithes presently; for wood-ground is terra fertilis et fœcunda.

So if marsh, meadow, or other land, by neglecting to scour the trenches or sewers, or by sudden inundation be drowned; or if by ill husbandry or negligence fertile land be overrun with gorse, whins, broom, fern, bushes, briers, &c. yet they shall not have the benefit of this proviso, because, of their own natures, they are fertile and apt for tillage, and the parson, vicar, &c. shall not lose his tithe by the ill husbandry of the parishioner.

If lands were barren heath or waste ground at the time of the making of this act, and were improved, and had or might have had the benefit of this law, and after return to their barrenness, the owner of such lands, shall not have the benefit of this law a second time upon a second improvement; but I take the law to be otherwise, if the lands had been improved before the time of the making this law, and were then become barren again, for there I take it, upon a new improvement the owner of such lands shall have the benefit of this law.

Marsh lands new gained from the seas, and fen lands gained from the fresh waters by draining, banking, &c. are not within the meaning of this law to be freed from the payment of tithes, during the first seven years after the gaining.

But the determination of this point, which is or which is not barren land within this statute, commonly falls out to be determined by common jurors, which, notwithstanding the direction of the judge, are seldom so favourable to the church as they ought (111).

(111) But courts of equity, on the facts appearing before them, have frequently decided whether lands were barren or not, in the sense of the statute, without the intervention of

This proviso only charges the payment of corn and hay after the seven years; and the second proviso provides only for the payment of such like tithes as were formerly paid before the improvement, for the first seven years after the improvement, and makes no provision for the payment of other tithes, save corn and hay, after the seven years: so that it may seem to imply a discharge of all tithes, but corn and hay after the seven years: but to this I answer, that there being several laws both statute and canon, made formerly for the due payment of tithes, and no negative words in this act, it shall not abrogate those laws to the prejudice of the church by implication.

27 H. 8. c. 20.
 32 H. 8. c. 7.
 confirmed by the
 statute of 2 E. 6.
 Canons Pro-
 vincial, cap.
 Quia quid ma-
 ledictionis, cap.
 Erroris dam-
 nabilis,
 cap. Quoniam
 propter, cap.
 Quoniam ut au-
 divimus, &c.
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a jury. Gwill. 823. Stockwell v. Terry, 1336. Jones v. Le David.

In Stockwell v. Terry, Gwill. 823. Lord Hardwicke thus expresses himself on this subject: " Land, if in its own nature it is fit for tillage, but by reason of wood, or other accidental circumstance, it was not turned into tillage before, upon the taking away of that accidental circumstance it shall pay tithes presently on being turned into tillage; for the act does not consider the expense, but that you may by possibility be paid, as by the timber, underwood, &c. But if afterwards this land will not produce, unless dunged or chalked, the court has considered this as evidence of its being barren in its own nature, and not proper for corn, without additional improvement." And where defendants set up, to a bill for tithes, a claim of exemption under the 2d and 3d Edw. 6th. c. 13. and produced much evidence of the land in question requiring to be cleared and levelled, and that gave more than usual trouble in ploughing, and cost more than the customary expense in manuring it with lime, the court ordered an issue to try whether the lands, of which the tithes were demanded, " were of such a nature as (exclusive of the labour and expense of clearing the same from furze or whins, and preparing the same for ploughing), necessarily required extraordinary expense of kming, and manuring, or labour, to bring them into a proper state of cultivation." Kingsmill v. Billingsley, 3 Price, 465.

CHAPTER XX.

What a real Composition is, and in what Cases Lands shall be freed of the Payment of Tithes by such Composition real.

Where tithes shall be discharged by a real composition, and what it is.

THAT which we call a real composition is, where the present incumbent of any church, together with his patron and ordinary, do agree by deed under their hands and seals, or by fine in the king's court, that such lands shall be freed and discharged of the payment of all manner of tithes for ever, paying some annual payment, or doing some other thing to the ease, profit, or advantage of the parson or vicar, &c. to whom the tithes did belong. And these real compositions have ever been held and allowed here in England to be a good discharge of the payment of tithes: and from these real compositions it is intended all prescriptions de modo decimandi first took their rise and beginning, though I doubt most at this day have grown up from the negligence and carelessness of the clergy themselves (112).

Co. 4. 44. a.
2 Inst. 655.
Doct and Stud.
l. 2. cap. 55. f.
ult.

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(112) The difference between a *modus decimandi* and a composition real seems to be this, that a *modus* must have existed beyond time of memory, and nothing but immemorial usage is required to prove it; whereas a composition real must have commenced within time of memory, and its commencement must be shown. Gwill. 1397. Sawbridge v. Benton, and 2 Gwill. 612. yet the actual deeds under which the composition took place need not be shown, *ibid.* but proof must be made that they once actually existed. 3 Bro. 217.

And such compositions may be made by the parishioner alone without the patron and ordinary, but it then binds only for the life of the incumbent, and will be avoided by his resignation, deprivation, or being absent eighty days in a year from his cure, if he have cure of souls (113).

Vide Linw. cap. Quoniam propter verbo redemptionem, upon this matter.

But it seems some of the canonists and civilians are of opinion, that all compositions between the lay and clergy to be discharged wholly of payment of tithes, or to pay less in recompense than the full value, are invalid, but otherwise between clergymen; but by the common law, which must govern here, there is no such difference allowed, but all real compositions made as aforesaid are good and valid.

But note, that no composition made by parol or word of mouth only, and not reduced into writing under hand and seal, is binding at all, unless it be upon record as by fine, &c. Hob. 176.

But I conceive at this day no real composition can be made to bind the successor of the parson or vicar that makes the same, for they are now restrained by the statute of 13 Eliz. to make any grants other than for twenty-one years, or for three lives, with the other qualifications mentioned in the said act. 13 El. cap. 10.

So that it seems clear to me, that parsons and vicars at this day, notwithstanding the confirmation of the patron and ordinary, cannot charge their benefices or any thing belonging to them, other than for twenty-one years or three lives as aforesaid, and that only by leases confirmed by patron and ordinary of things [325]

(113) By statute 43 G. 3. and subsequently by 57 Geo. 3. c. 99. the statute 13 Eliz. c. 20. with all explanations, &c. made by several statutes in the 14th, 18th, and 43d years of her said majesty, by which it was enacted, that no lease made of any benefice, &c. shall endure any longer than when the lessor shall be resident without absence above fourscore days in any one year, is repealed.

usually demised; whereupon the accustomed yearly rent or more is reserved.

So that what has been said concerning real compositions is only to be intended of such as were made before that and other latter statutes; for I take it a real composition at this day will only bind the parson himself, whilst he is a parson resident, and serving the cure, quod nota (114).

More, 915.

And it hath been held, that if there be two proprietors or farmers of tithes, that an agreement with the one shall bind his companion.

Linwood, c.
Quoniam prop-
ter verbo re-
demptionem.
Greg. Decret.
l. 1. 445. c. 2.
Statuimus.

The canon law allows a composition with laymen for tithes received, but not for tithes to come.

See a decretal of Alexander III. whereby the pope confirms compositions betwixt clergymen.

(114) Such a composition, made since the 13th Eliz. though confirmed by a decree of the court of chancery, is not binding upon the succeeding incumbent. 2 Woodd. 107.

CHAPTER XXI.

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What Monastery Lands are, or may be free from the Payment of Tithes.

IT is without dispute, that none of the abbey and priory lands, that came to the crown by the statute of 27 H. 8. or before, are freed or discharged of the payment of tithes by the statute of 31 H. 8. cap. 8. or by any other law or act of parliament.

Jones, 317.
188. stat. 27 H.
8. c. 28. What
monastery lands
shall be freed
from payment
of tithes.

But in the statute of 27 H. 8. there was a proviso, that notwithstanding that act the king might by his letters patent, under the great seal of England, continue any of the said monasteries, and that proviso is left out of all the modern prints, only Rastal in his abridging of that statute makes some mention of it.

Now the reader must observe once for all, that all monasteries under two hundred pounds per annum were to have been dissolved by the statute of 27 H. 8. and are therefore usually called the smaller abbeys, and those of two hundred pounds a year and upwards were not dissolved till the 31st year of H. 8. and are commonly called the great abbeys.

And upon these two statutes this case lately happened in the exchequer chamber between Walklate, farmer of the rectory of Uttoxeter, in the county of Stafford, to the dean of Windsor, and Wilshaw, owner of the farm in that parish, that was parcel of the possessions of the abbey of Croxden in the same county, which was one of the small abbeys, and of the Cisterian order; which order was freed of the payment of tithes, as shall be showed hereafter, and this abbey was discovered by the defendant Wilshaw to be continued by letters patent under the great seal of England, and so not dissolved

*Barnes & Pincas
& Young's Coll 12*

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31 H. 8. c. 13. till the statute of 31 H. 8. whereupon the defendant was dismissed, and the court clearly held the lands discharged of payment of tithes by the statute of 31 H. 8. I mention this case for the singularity, not for any nicety in the learning of it (115).

31 H. 8. c. 8. By the statute of 31 H. 8. before mentioned, there is a clause to this effect :

The clause of 31 H. 8. that frees abbey lands.

“ That the king and his patentees, which then had, or then after should have any monasteries, abbaties, priories, nunneries, colleges, hospitals, houses of friars, &c. or any manors, lands, &c. which did belong to them, should have, hold, retain, keep and enjoy the said manors, &c. according to their estates and titles, discharged and acquitted of the payment of tithes, as freely and in as large and ample manner as the said abbots, &c. or any of them had, held, occupied, possessed, used, retained, or enjoyed the same, or any part thereof at the days of their dissolution.”

And the reader is to observe, that the abbots, &c. at the time of their dissolution held their lands discharged four manner of legal and regular ways, which were allowed by the laws of this realm, to wit,

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Hob. 297. 296.

1. By the bulls of popes. 2. By real compositions with the parson, &c. patron, and ordinary. 3. By prescription. And 4. By order.

But there is another sort of discharge, though not a legal one, has been allowed in this case to make a fifth sort of discharge, and that is perpetual unity, where the abbot has had the rectory of any church and lands in the same parish time out of mind, which have been held free from the payment of tithes by all the time of memory; and of these several discharges I will speak in order.

And first, of discharges by the popes' bulls, it is to be understood, that when the pope usurped a power over

the clergy here in England, he did at his pleasure grant exemptions to this or that abbey, or to whom else he pleased, to be freed from the payment of tithes, which was allowed as a good discharge against the parsons and vicars, who in many places suffer by these bulls to this day, these bulls being turned into prescriptions, &c.

The second sort of discharges was by real compositions between the parson or vicar, and the abbots, priors, &c. confirmed by patron and ordinary; of these we have spoken at large before in the twentieth chapter, and therefore shall not repeat it, but pass to the third sort of discharges.

Real compositions.

The third sort of discharges is by prescription, of which we have likewise spoken at large before in the sixteenth chapter, to which I shall refer the reader.

I shall only observe to the reader again in this place, that the abbots, priors, and other religious persons might prescribe generally to be free from the payment, or to be discharged of the payment of tithes without any recompense to the parson, &c. but a layman could not prescribe absolutely to be free from payment of tithes, but *sub modo*, that is, paying or doing something to or for the parson, vicar, &c. in recompense and satisfaction of the tithes, as you may at large see in the chapter here before.

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And it is to be observed, that no abbot, prior, &c. could make any such prescription by the common law, that was not founded before the time of memory, that is before the first year of R. 1. which is the time of the limitation of all prescriptions at the common law, which rejects the practice of the canon law, which, as should seem, allows the limitation of a prescription or custom to forty years.

2 Inst. 653.

But *quere* of this, for the 2 Inst. here cited refers to Coke on Lit. § 170. where Littleton cites this opinion and another opinion after, which last, according to my Lord Coke's Pref. to his 1 Inst. p. 3. a. is Littleton's own law. Yet Littleton makes a *quere* on it, and seems

to prefer the opinion here set down. See Tyrel's *Bibl. Polit.* 591, 592.

It may reasonably be demanded, how this manner of discharge can be made out at this day, since there is now no person living that can prove how the abbots held and enjoyed their lands? to which I answer, that what was done before the dissolution of abbeys must now be proved by what has been done since; for if monastery lands have been held all the time of memory since the dissolution, freed from the payment of tithes, it shall be intended, that they were so held before; and therefore they have not paid or been questioned since.

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*see Statute
 13th Edw. 1. c. 12.*
 Discharge by
 order.

The fourth sort of discharge is by order, and this discharge also for the most part depends upon popes' bulls or grants, who at pleasure granted exemption to what orders they pleased.

*Causa 16. q. 1.
 decimas.
 2 Inst. 652.
 Seld. Hist. decim.
 120.
 Decret. Gregorii
 ex parte tua de
 decimis.
 Seld. de decim.
 406.
 Dyer, 277, 278.
 4 Concil. Lat.
 Can. 56. Causa
 16. q. 1. c. 2.
 Decim. et ibi
 questi sunt.*

About the year of our Lord 1150, the most religious orders then in being were discharged of the payment of tithes; but about that time Pope Adrian IV. reduced them to Cistertians, Hospitaliers, and Templars; and about the year 1215, Pope Innocent III. added the Præmonstratenses. But the privileges granted to these orders extended only to the lands these orders held in their own manurance, and not to any which was held by their tenants or farmers (116).

Stat. 2. H. 4.
 c. 4.

But about the beginning of the reign of H. 4. the Cistertians attempted to have enlarged their privilege to their tenants and farmers, which tending to the ruin of many poor parsons and vicars that had cure of souls, was complained of in a parliament held in the second year of H. 4. Whereupon it was enacted, that not only the Cistertians, but all other orders that put any

(116) The bull of Innocent III. not having been received and allowed in England, did not exempt the order of Præmonstratenses from paying tithes, and therefore a title to hold lands free from tithes cannot be derived under this order. *Townley v Tomlinson, Gwill. 1004.*

bulls in execution for the discharging any of their lands from the payment of tithes in the hands of their tenants and farmers, shall incur a premunire, that is, forfeit all their goods and the profits of their lands during life, and be likewise imprisoned during the offender's life; which gave such a check to that proceeding, that I do not find any thing of that nature after attempted.

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The Templars after, in the council of Vienna, which was held in the year of our Lord 1311, and in the fourth year of E. 2. were condemned for heresy, and all their possessions by act of parliament made in the seventeenth year of the same king, were transferred to the Hospitaliers or knights of St. John of Jerusalem, who enjoyed them till the thirty-second year of the reign of King Henry 8. at which time by act of parliament they were settled upon the crown.

The Templars.
2 Inst. 432.

Stat. 17 E. 2. c.

32 H. 8. c. 24.

But where it is said in Kelway, that the Templars were condemned of heresy in the eighth year of E. 2. and their lands given the same year to the Hospitaliers, it is a great error; for it is clear, that the council of Vienna was held in the fourth year of that king, and chiefly called against the Templars; and it is as clear that their lands were not here in England settled upon the Hospitaliers till the seventeenth year of the same king.

Kelway, 174. a.

And though the lands of the lesser monasteries be not within the benefit of the statute of 31 H. 8. to be freed of the payment of tithes; yet they ought to enjoy all such privileges as are annexed to the land, and therefore such lands, in whose hands soever they come, shall be freed of the payment of tithes, by real compositions and prescriptions de modo decimandi, but not by prescriptions de non decimando, unity of possession, order or bulls of popes: but in all those cases the parsons and vicars have the advantage by the dissolution of all those abbeys that were dissolved by the statute of 27 H. 8. For the parsons and vicars shall in such cases be restored to their tithes again, which in all justice

Where the lesser
abbeys may be
freed of tithes.

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Jones, 3, 372,
373.

they ought in all other cases, if the parliament had been pleased.

The lesser monasteries, that is, which were under 200*l.* per annum, of the orders of Cisterians and Præmonstratenses, were, as hath been said, dissolved by the statute of 27 H. 8. have lost the privilege of being discharged of the payment of tithes, unless they were continued as the abbey of Croxden was; but those monasteries of those orders that came to the crown by the statute 31 H. 8. retain the privilege of those orders in not paying tithes. But this is to be understood only for such time as the owners hold them in their own manurance; for if they let them out to tenants, they shall have no more privilege than the tenants of those orders of the Cisterians and Præmonstratenses had, which was none at all.

But it must be owners in fee-simple or fee-tail, and not tenants for lives or years.
Hardres, 174.

Jones 2, 3, &c.
Cro. Jac. 607.
Hob. 306.

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Lands of the lesser abbeys granted to the bigger not freed.

But note, that if the king after the dissolution of the lesser monasteries (which had been of any of the orders that were discharged of the payment of tithes) had granted any of their lands to any of the greater monasteries which were not dissolved till the statute of 31 H. 8. yet those shall not retain the privileges the abbots had at the time of the former dissolution; the right immediately reverting by the dissolution to the parsons and vicars to whom the tithes of right did belong, the greater abbeys could not hold them legally discharged at the time of the second dissolution: so that there is a manifest difference between this and the case of Walklate and Wilshaw before remembered, for in that case the monastery was continued, and not dissolved till the statute of 31 H. 8.

Lands purchased after the privileges granted, not freed.
Conc. Later. 4.
can. 55.
Selden's Hist. of Tithes, 121.

And it is to be observed, that no lands acquired by any of the monasteries of those orders which were so freed from payment of tithes after the council of Lateran, which was in the year of our Lord 1215, and by consequence none that were founded after that council, are discharged of the payment of tithes, either in their own or their tenants' hands, for by that council the privilege

was limited to such lands as these orders had at the time of that council.

And although any abbey lands, of the great abbeys which were of the Cistercian and Præmonstratensian orders were in the hands of tenants for years at the time of the dissolution, yet the king and his patentees after the leases determined shall hold them discharged, whilst the patentees and owners hold them in their own hands, but the king's tenants shall hold them discharged because of the royal prerogative of his person, not being intended fit for husbandry.

Dyer, 277. b.
p. 60.
Cro. Jac. 559.

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Having now said thus much of the four legal manner of discharges before mentioned, I shall proceed to that of perpetual unity, which cannot be said to be a legal discharge of the payment of tithes: yet because the abbots, priors, &c. at the time of the dissolution held the lands discharged of the payment of tithes, though not legally discharged of tithes, it hath been resolved by many judgments and settled, that this is a good discharge within the meaning of the aforesaid clause of 31 H. 8. Now that which we call a perpetual unity, is, as hath been said, where an abbot, prior, &c. time out of mind hath been seised of the lands out of which the tithes arise, and the rectory within which parish the lands lie.

5 Perpetual
unity.
Co. 247. b. &c.
Co. 11. 14. b.
Dyer, 349. p. 16.
More, 528.
Hob. 311. 306.
298. 300.
2 Inst. 655.
More, 46, 47.
Cro. Jac. 608.

Definition.

And it is to be observed that every perpetual unity, that shall discharge the lands from the payment of tithes, must have these four qualities:

First, It must be *justa*, that is, by good and lawful title.

Secondly, It must be perpetual, that is, the abbey must be founded and endowed with the land and rectory before the time of memory, which by the rules of the common law, as has been said, must be before the first year of R. 1. for if by any records, deeds, or other legal and good evidence it can be made appear, that either the land or rectory came to the abbey since the said first year of R. 1. the union is not perpetual; and yet

Co. 11. 44. b.
Hob. 300.

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if the appropriation be ancient, as in the time of E. 4. or before, though the lands cannot be discharged upon the score of perpetual unity; yet they may by prescription, if in truth the lands were held discharged of the payment of tithes.

Cro. Jac. 454.
Co. 2. 48. a.

Thirdly, Such unity as shall discharge lands of the payment of tithes within this law, must be *æqualis*, that is, the abbots, priors, &c. must be seised in fee-simple, as well of the lands upon which, &c. as of the rectory.

Lastly, Such unity must be *libera*, that is, free from the payment of any manner of tithes, for if their farmers at will, years, &c. have paid any manner of tithes to the abbots, priors, &c. or their farmers of the rectories, the perpetual unity will not serve. And therefore where such perpetual unity is pleaded in discharge of tithes, the adverse party may reply, that the tenants or farmers before the dissolution paid some sort of tithes, and so avoid the perpetual unity.

Having first given the reader satisfaction that all the lands that came to the crown by the stat. of 27 H. 8. and before, can have no benefit of the discharge given by the statute of 31 H. 8. and having also showed how many ways lands may be discharged from payment of tithes that came to the crown by the said statute of 31 H. 8., it rests now that I should say something of those lands that have since come to the crown by the statutes of 32 H. 8. cap. 24. 37 H. 8. cap. 4. and 1 E. 6. cap. 14.

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Co. 2. 47. a.
How other lands
stand that came
not to the crown
by 31 H. 8.

It is a rule taken in the Archbishop of Canterbury's case, that neither the letter nor the meaning of the statute of 31 H. 8. extended to free or discharge any lands from the payment of tithes, save those that came to the crown by that act; for as that book says, it is absurd that the branch of the statute of 31 H. 8. concerning tithes, should be extended to a future act, that the makers of the statute of 31 H. 8. without the spirit of prophesy, could not have the prescience of.

More, 913.
Cro. Jac. 57.
Hill, 2 Jac.

And as to those that came to the crown by the statute

of 32 H. 8. c. 24. it was adjudged in the case of Spurling and Quarles, that they are not discharged of the payment of tithes.

And after, in the case between Urry and Bowyer, 8 Jacobi in the Common Pleas, this point was moved again, and the court was divided.

But there is a latter judgment that seems to oppose these former resolutions; it was between one Witton and Sir Richard Weston, that was afterwards lord treasurer, Trin. 14 Car. 1. B. R. and the question was, whether those lands of the Hospitaliers that came to the crown by the statute of 32 H. 8. cap. 24. were discharged of the payment of tithes by that statute of 32 H. 8. or by the former statute of 31. and in that case Dodridge and Jones, justices, held that they were discharged within the statute of 31 H. 8. and they did in effect deny the books before cited to be law; the Chief Justice Hide was of opinion, that they were not discharged by the statute of 31 H. 8. but by that of 32. So that by their three opinions, the defendant Sir Richard Weston had judgment; but Whitlock was of opinion, that those lands were not discharged of the payment of tithes by the one statute or the other: now, upon the whole matter, I shall submit to the judicious reader's judgment, whether this latter resolution be of any weight to shake the former resolutions; since, in this case, though there were three for giving judgment for the defendant, yet to the point controverted upon the statute of 31 H. 8. there were two against two, and that they were not discharged by the statute of 32. there were three against the Chief Justice Hide. So that I conceive the law remains according to the former resolutions, that there are no lands freed from the payment of tithes by any statute, but those that come to the crown by the statute of 31 H. 8. tamen inde quære (117).

Jones, 192, &c.
Latch. 89.
Hughes, 392.
Bridgm. 32.

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(117) But it seems now to be determined, by numerous cases, that the possessions of the order of St. John of Jerusalem,

Syderfin, 320.

If an abbot, prior, &c. that by order, prescription, &c. held his land discharged of the payment of tithes, had granted away his land to a college, &c. the college should not hold them discharged.

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Jones, 185.
Co. 2. 47. a.

I must confess I have met with no judgments upon those lands which came to the crown by the statute of 37 H. 8. but those being the same with those that came to the crown by the statute of 1 E. 6. c. 14. I conceive neither those that came to the crown by either of those latter statutes have any privilege at all; and it is agreed in that very case of Witton and Weston, that those lands that came to the crown by 1 E. 6. could not have any benefit by the clause of discharge in the statute of 31 H. 8.

So that I shall conclude, that there is no land can have any privilege at this day to be discharged of tithes that belonged to the abbots, priors, &c. but such only as came to the crown by the statute of 31 H. 8. cap. 13.

which came to the crown by statute 32 H. 8. c. 24. are exempt from tithes in the hands of the king and his grantees by force of the 21st section of the statute 31 H. 8. c. 13. Gelo, Eq. Rep. 225. Gwill. 663. Urrey v. Bowyer, Gwill. 250. The serjeant's case, Gwill. 281. Fosset v. Franklin, Sir Thomas Raymond, 225. Gwill. 1579. Whitton v. Weston, Gwill. 410.

CHAPTER XXII.

What personal Tithes are, and in what Manner they are payable.

THE canonists define personal tithes thus :

“Decimæ personales sic dictæ, quia potius in respectu personæ solvuntur quam rei, ut puta de artificio, negotiatione et militia.” And by the canon,

“Decimæ personales solvantur de artificibus et mercatoribus, scilicet de lucro negotiationis, similiter de carpentariis, fabris cœmentariis, textoribus, pandoxatricibus, et omnibus aliis operariis stipendiariis, ut videlicet dent decimas de stipendiis suis, nisi stipendiarii ipsi aliquid certum velint dare ad opus vel ad lumen ecclesiæ, si rectori ipsius ecclesiæ placuerit.” And Mr. Linwood in his Gloss adds,

Linwood, cap. Quoniam propter verb. decimæ personales. What personal tithes are, and where payable. The canon.

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Verbo negotiationis.

“Et scias quod in istis decimis mere personalibus, quæ considerantur ex solo lucro, deducuntur expensæ tam in re quam circa rem et extra rem factæ. Et nota, quod de solo lucro debetur hæc decima ; unde si emens mercem eam non vendat, sed donet vel sibi retineat, non tenetur decimare, quia non lucratur.”

So that it appears by the canon law, that every one ought to pay for a personal tithe a tenth part of all his clear gains, deducting his charges and expenses for a personal tithe ; but if a man buy merchandizes, and do not sell them to profit, or give them, or make use of them himself, no tithe is to be paid, because there is no gain made of them.

Now let us see what the statute of 2 E. 6. says to us concerning personal tithes ; and by that statute it is enacted,

2 E. 6. c. 13.

“That every person exercising merchandizing, bargaining and selling, clothing, handicraft, or other art or faculty, being such kind of persons, as then before within

The statute for personal tithes.

forty years had accustomedly used to pay such personal tithes, or of right ought to pay (other than such as be common day-labourers) shall yearly pay for his personal tithes, the tenth part of his clear gains, his charges deducted.

[340] “ And where handicraft men have used to pay their tithes within this forty years, the same custom of tithes is to be observed; and if any person refuse to pay his personal tithes, &c. it shall be lawful to the ordinary of the same diocess to call the same party before him, and by his discretion to examine him by all lawful and reasonable means, other than by the parties own corporal oath concerning the true payment of the said tithes.”

This act of parliament restrains the canon law in two things; first, where the canon 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 accustomedly 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; and by this act the day-labourer is freed of the payment of his personal tithes.

It cannot be intended upon this act, that if such tithes have been sometimes paid within forty years, that they are therefore due, but they must have been accustomedly, that is, constantly paid for forty years, next before the act.

And if it be demanded how such payment must now be proved forty years before the making of the said act? I answer, as in other like cases, à posteriore, by what has been done all the time of memory since the act.

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Selden, de Dec.
56, 57.

There has been some question amongst the schoolmen and canonists, whether personal tithes ought to be paid of unlawful gain, to which you shall hear what a great schoolman and doctor says.

Tho. Aquinas,
Sum. 2. 2. æ.

“ Quod si aliqua male acquiruntur dupliciter uno

modo, quia ipsa acquisitio est injusta, puta quæ acquiruntur per rapinam, furtum, seu usuram, quæ homo tenetur restituere, non autem de eis decimam dare, tamen si aliquis ager sit emptus de usura, de fructu ejus tenetur usurarius decimas dare, quia fructus illi non sunt de usura, sed ex Dei munere: quædam vero dicuntur male acquisita, quia acquiruntur ex turpi causa, sicut de meretricio et histrionatu, et aliis hujusmodi, quæ non tenentur restituere unde de talibus tenentur decimas dare, secundum modum aliarum personalium decimarum, tamen ecclesia non debet eas recipere, quoad sunt in peccato, ne videatur eorum peccatis communicare, sed postquam pœnituerint, possunt ab eis de his recipi decimæ."

q. 87. art. 20.
Whether due of
ill-gotten profit.

So that by this great doctor's opinion it seems, that of ill-gotten gain, of which restitution ought to be made, no personal tithe is due; and yet if by ill-gotten gain a field be purchased, tithe ought to be paid of the fruits thereof: but of ill-gotten gain, where no restitution is to be made, there tithes ought to be paid, but not received by the church till the sinner have repented him of the evil, and after such repentance the church may receive them.

Linwood, cap.
Quoniam propter
verb. injuste
acquisit. In the
gloss, et Greg.
decret. cap. ex
transmissa in
the gloss verbo
injuste.

These personal tithes are accounted amongst the offerings, of which we are to speak next, and ought by the parishioner to be offered to the church where due; but I am of the opinion of him that said, "Hæ decimæ personales magis difficultate et subtilitate quam utilitate existunt."

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It hath been resolved, that servants in husbandry shall not pay any personal tithe.

Rolls, 1. 646.
a. 1.

Hawking, hunting, fishing, fowling, &c. fall under these rules of personal tithes. Of Jews, Linwood, 12. a. Of Jews and Saracens, Selden, de Dec. 152. (118).

(118) Vide chap. 8 and 9. concerning tithes of fish and mills, the only species of personal tithes perhaps now payable. Toller on Tithes, p. 44.

CHAPTER XXIII.

What Oblations, Offerings, &c. are, and where due.

Oblations and offerings what, and where due.

OFFERINGS are defined by the canonists to be,
 “ Quæcunque a piis, fidelibus Christianis offeruntur Deo et sanctæ ecclesiæ, sive res soli, sive mobiles sint, nec refert an legantur testamento, aut aliter donentur.”

Greg. 78. habetur de consecrat. div. 1. can. 4.

It seems that in the time of popery there was an expectation, that every one present at mass should offer something; for St. Gregory tells us, “ Quod omnis Christianus procuret ad missarum solennia aliquid Deo offerre.”

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And by a canon in the council Matic. it is decreed,
 “ Ut omnibus dominicis diebus altaris oblatio ab omnibus viris et mulieribus offeratur, tam panis quam vini, ut per has immolationes,” &c.

Becan. Sum. Theol. 3. q. 86.

But Becanus, a learned jesuit, is more moderate; for he tells us, “ Quod nemo tenetur ad illas oblationes, nisi vel necessariae sint ad sustentationem ministrorum, vel consuetudo ad eas alicubi obliget.”

Can. Damas. Pap. Et habetur, 10. q. 1.

And these offerings belonged properly to the priest or minister of the church or place where they were made; for so is the canon of Pope Damasus.

“ Quod oblationes quæ intra sanctam ecclesiam offeruntur, tantummodo sacerdotibus qui quotidie servire videntur, licet comedere et habere,” &c.

But it seems that private chapels carried away many of the offerings belonging to the mother churches; to avoid which Othobon, the pope's legate here, made a canon to remedy that mischief to this purpose,

Cap. de Oblationibus.

“ Quod capellani ministrantes in capellis hujusmodi, quæ salvo jure matricis ecclesiæ sunt concessæ, universas

oblationes et cætera quæ ipsis non recipientibus ad ecclesiam matricem provenire deberent, ipsius ecclesiæ rectori sine difficultate restituant, cum illud tanquam alienum, juste nequeant retinere. Si quis autem restituere contempserit, suspensionis vinculo, quousque restituerit, se noverit innodatùm.”

So that it seems by this canon, that chapels that had parochial rights, the chaplains of them might retain the offerings; but where the parochial rights were saved to the mother church, the chaplains of such chapels were to account to the rector of the mother church for the offerings made at such chapels.

There was another canon made by Simon Mepham archbishop of Canterbury, and his clergy, in the year of our Lord 1328, reciting,

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Cap. Quia quidam maledictionis, &c.

“ Quia quidam maledictionis filii in nubentium sollenniis, purificationibus mulierum, mortuorum exequiis, et aliis, in quibus ipse Dominus in ministrorum suorum personis solebat oblationum libamine populariter honorari, ad unius denarii, vel alterius modicæ quantitatis oblationem, populi devotionem restringere sunt moliti, residuum oblationis fidelium suis pro libito, vel alienis usibus multoties applicantes: præsentis declaratione consilii declaramus et pronunciamus, omnes et singulos in præmissis, vel eorum aliquo imposterum delinquentes, vinculo majoris excommunicationis involvi.”

So that upon the whole matter it appears, there were some offerings free and voluntary, which the parishioners or others were not bound to perform, but ad libitum. There were others by custom certain and obligatory; as those for marriages, christenings, churching of women, burials, &c. and that these were all due, and belonged to the parish priest or minister, that officiated at the mother church or chapel, that had parochial rights; the other chapels that had not parochial rights, were to account to the rector for the parish church: now let us

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see what the statute of 2 E. 6. says, by which it is enacted,

2 E. 6. c. 13.
The statute for
offerings.

“ That all and every person and persons, which by the laws and customs of this realm ought to make or pay their offerings, shall yearly from thenceforth well and truly content or pay his or their offerings to the parson, &c. of the parish or parishes, where it shall fortune or happen him or them to dwell or abide,” &c.

These offerings, which were free and voluntary, are now vanished, and are not comprehended within this law; but those that were customary and certain, as for communicants, marriages, christenings, churching of women and burials, are confirmed to the parish priest, vicars and curates of the parishes, where the parties live that ought to pay the same; and they are only recoverable in the spiritual court; or an action (I conceive) may be formed upon this statute at common law. See Stillinfl. Eccl. Cases, 240, &c. (119).

(119) Oblations established by custom might be recovered under stat. 7 and 8 W. c. 36. as small tithes before two justices of the peace to the amount of 40s.; now, by the stat. 53 Geo. 3. c. 127. they may be recovered in a similar manner to the amount of 10l. Offerings are due by the common law at the rate of two-pence a head. Bunb. 173.

By the stat. 37 H. 8. c. 12. s. 12. every householder in London, paying 10s. rent or above, shall be discharged of offerings; but his wife and children, or others, taking the rites of the church at Easter, shall pay two-pence for their offerings yearly. London is excepted out of the 27 Hen. 8. c. 20. by s. 2., out of 2 and 3 Ed. 6. c. 13. by s. 12., out of 7 and 8 Will. 3. c. 6. by s. 5.; and as the stat. 53 G. 3. c. 127. only extends to the same cases, and is subject to the same provisions as the 7 and 8 of Will. it consequently will not extend to London.

CHAPTER XXIV.

What Mortuaries are, and in what Cases they are due at this Day, and how much is to be paid for the Same. [346]

BY a provincial canon made by Simon Langham, archbishop of Canterbury, and his clergy, in the year of our Lord 1378, it was decreed, Where, and what is due for mortuaries.

“ Quod si decedens tria vel plura cujuscunque generis in bonis suis habuerit animalia, optimo cui debitum de jure fuerit reservato, ecclesiæ suæ, à qua sacramenta recepit, dum viverit, sine dolo, fraude, seu contradictione qualibet pro recompensatione subtractionis decimarum personalium, nec non et oblationum, secundum melius animal reservetur post obitum pro salute animæ suæ ecclesiæ suæ hujusmodi liberandum : quod si duo tantum in bonis decedentis extiterint animalia, de mansuetudine ecclesiæ exactio quælibet nomine mortuarii remittatur : quodque si mulier viro superstite obierit, ad solutionem mortuarii minime coerceatur ; sed si post obitum mariti, in domo cum familiæ regimine vidua per annum supervixerit, juxta formam superius scriptam ad mortuarium obligetur : hac autem interpretatione, consuetudini laudabili super mortuariis in nostra provincia aliter observare nolumus præjudicium generali ; quin si decedens numerum hujusmodi animalium habuerit seu non habuerit virve aut uxor prius vel post decesserit, super præstatione mortuarii consuetudo ecclesiastica observetur ; ad solutionem autem debiti de jure vel consuetudine mortuarii renuentes, volumus per ordinarios locorum censura ecclesiastica coarctari.” Cap. Statutum et infra, &c.
The canon.

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How far this canon was obeyed in England I can give no account, but I have not found the English

willing to have their estates taken from them by canons, nor have found that any prohibitions have been granted in case of mortuaries; nor have I observed any complaints in parliament against them (save that in the time of 2 R. 2. it is prayed, that parsons and vicars might not require mortuaries of the armour of any man; but that it might remain to their executors) till the 21 H. 8. and then they were settled by the statute as follows:

St. 21 H. 8. c. 6.
The statute of
mortuaries.

1. "That no man shall pay a mortuary unless he died possessed of goods to the value of ten marks, that is, six pounds thirteen shillings and four-pence.

2. "That no mortuary should be paid or demanded, but in such places where they have used to be paid or given.

3. "That they should be paid but in one place, and that at the parties most usual dwelling and habitation, and there but one mortuary, and that after the rate following: that is to say,

4. "That if the decedent at the time of his death, had in moveable goods to the value of ten marks clearly, his debts first paid, and under the sum of thirty pounds, then he should pay three shillings and four-pence and no more, and this must be in moveables, and not in chattels, as leases for years, &c.

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5. "That if the decedent died possessed of moveables of the value of thirty pounds, and under the value of forty pounds, to pay six shillings and eight-pence for a mortuary.

6. "If the decedent's goods be of the value of forty pounds or upwards, then to pay ten shillings for a mortuary.

7. "That no married woman, child or person, not keeping house, should pay any mortuary, nor a way-faring man, or other that was not resident where he died, but those to pay where they were last resident.

8. "The parson or vicar are not by this act barred of any legacy given, or offering to be made to them.

9. "No mortuary to be paid in Wales, Calais or Berwick, or in the marches of Wales, but where accustomed.

10. "It is provided, that the four Welsh bishops, and the archdeacon of Chester, may, notwithstanding this act, take their accustomed mortuaries.

11. "That where less hath accustomedly been taken for mortuaries than is limited by the act, there no more than is due by the custom shall be taken."

Sir Edward Coke is of opinion, that there were no mortuaries due before this act by any law, but by custom only; by reason of the words in the statute of *circumspecte agatis*, which are, "*ubi mortuarium dare consuevit*," &c.

2 Inst. 491.
Mortuaries due only by custom. See for this *Stilling. Eccl. Cases*, 2, 8.

This duty was formerly only suable for in the court christian, but now I conceive an action of debt will lie at common law upon this statute, for though this statute is only negative, that they shall not take above such rates, yet it implies an affirmative, as the statute of 2 E. 6. for barren grounds, and the statute for the sheriffs' fees, and other statutes.

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Spelm. Rem.
115, *contra*.

But if a suit be commenced for a mortuary in the spiritual court, no prohibition shall be granted to stay their proceeding there, unless they proceed contrary to the statute (120).

Sanders. de oblig. Conscient. Prelect. 6. § 18. fol. 167, contra.

Jeoffries v. Wood, Hill, 22, and 23 Car. 2. B. R.

For those mortuaries that prelates anciently paid to the kings of this realm, I shall not trouble the reader, but refer those that are curious to inform themselves, to Sir Edward Coke's *Commentary upon Magna Charta*, and his *Jurisdiction of Courts*.

Mortuaries to the king by bishops.

2 Inst. 491.
4 Inst. 338.

(120) If the custom be denied, and the spiritual court will not admit that plea, a prohibition will go, and they shall not try the custom there. *Cro. El.* 151. But where the custom of paying a mortuary was owned, and the only question in the spiritual court was, whether it belonged to the vicar or impropriator, a prohibition in such case hath been denied. *1 Keb.* 919.

10 H. 4. 1. b.

In the 10th of H. 4. a vicar claimed a mortuary by custom, and not by the canon, or any other law, quod nota.

Their names.

These mortuaries are in some places called corse presents, or corse presentees, as Doctor Cowel says, because where due, they used to pay them before the corse was buried, when it was brought to be buried.

Cro. Car. 237, 238.

Bishop of Chester, his demand as archdeacon of Chester.

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The bishop of Chester claimed by custom upon the death of any priest, dying within the archdeaconry of Chester for a mortuary, his best horse or mare, saddle, bridle and spurs, his best gown, a cloak, his upper garment next it, his best hat, his tippet, his best signet or ring, and this custom was denied by the plaintiff in a prohibition, but what the success was I have not heard; but the mortuaries due to the archdeacon of Chester are excepted; and the bishop of Chester holds that archdeaconry, as I have been informed, in the nature of a commendam, and executes it by a deputy (121).

Office of executor.
Lib. 6. § 16.

Mr. Swinborn is of opinion, that these mortuaries are to be paid out of the decedent's part of the personal estate where the wife and children are to have their reasonable part; the reason he gives is, because mortuaries are of the nature of legacies. But I must confess I am not of his opinion; for I look upon it as a debt, or duty, to which the personal estate is subject. See Stillingfleet's Eccl. Cases, 246.

(121) By stat. 28 G. 2. c. 6. the clause in 21 H. 8. c. 6. by which it was made lawful for the archdeacon of Chester to take such mortuaries of the priests within his diocese and jurisdiction, as he had been accustomed to, was repealed, and the living of Wareton was annexed to the see of Chester in compensation of such mortuaries. 2 Burn's Eccl. Law, 565.

By the 13th of Eliz. c. 5. all alienations of lands or goods to defraud creditors and others of their just debts, damages, penalties, forfeitures, heriots, mortuaries and reliefs, shall (as against such claimants) be utterly void, and of non-effect.

CHAPTER XXV.

How Tithes are to be paid in London.

THE livelihood of the secular clergy in London consisted heretofore chiefly in voluntary offerings and personal tithes, which little differ from voluntary offerings. For though a great doctor tells us that,

“ In præcipuis festivitibus tenetur quis offerre, et cogi potest, maxime cum sit quasi generalis consuetudo ubique terrarum,” &c.

Tithes in London, how to be paid.

Hostiensis, c. Omnis Christianus.

And if you ask him which are those feasts at which the people are bound to offer, he tells you, “ dies Dominicos, et dies festivos.”

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Idem de Paroc. Sect. In quibus, &c.

But there being no canon or law that prescribes any certainty in the quantity, value, or things to be offered, I can give them no properer a name than voluntary or free-will offerings. But no sooner was popery abolished in this nation, but these voluntary offerings and personal tithes soon came to little. And notwithstanding it was enacted by the statute of 2 E. 6. that all that by law or custom were bound to make their offerings should thenceforth pay them to the parson, &c. yet that did not much amend the matter, so that the maintenance of the secular clergy in London was brought to a very low ebb, there being no tithe, as hath been said, chargeable upon houses, unless by way of a *modus decimandi*, whereupon the clergy of London in the 37th year of the reign of King H. 8. made their application to the parliament, and obtained an act of parliament for the confirming a decree made by the archbishop of Canterbury, and divers other great lords of the kingdom, to settle the matter, the effect whereof follows, which is printed amongst the other acts of parliament.

Vid. Selden de Dec. Pref. 8.

Stat. 37 H. 8. c. 12.

The decree.

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1. "That the citizens of London from thenceforth for ever, shall pay yearly without fraud or guile to their parsons, &c. for the time being, for every ten shillings rent of all houses, shops, warehouses, cellars, and stables, within the said city of London, and the liberties of the same, 16*d.* ob. and for every twenty shillings rent, two shillings and nine-pence, and so ascending for every ten shillings rent.

2. "That if any dwelling-houses, shops, &c. should be leased by fraud or covin, reserving less rent than hath been accustomed; or shall by reason of fine, or by fraud or covin, make any lease without reserving any rent, then the farmer or tenant shall pay after the same rate, the said house, &c. was last let for without covin; but note, that if the house, &c. be let at as great a rent, as the same was set at the time of the making of the said statute, then no fraud can be averred, although a fine or income was given for the said lease.

2 Inst. 659.

3. "That if a house, &c. be leased, and no rent at all reserved, then such house, &c. shall pay such rate as the same was let for at the time of the making of the said statute; but where greater rent is reserved, it is to pay according to the best improved value.

2 Inst. 660.
Lit. Rep. 141.
ib.

"But where houses had been always held by the owners, and, by consequence, no rent paid, that is casus omissus in this statute, and such houses will be freed of payment of tithes by this law (122.)

(122) By the decision of Sir W. Grant, M. R. in *Antrobus v. the East India Company*, 15 Ves. jun. 9. the law is now held to be otherwise; his honour observing, "that to principle and authorities there was nothing to be opposed but a dictum of Lord Coke, for it was not in point in the cause, that where houses have never been let, that is a casus omissus and no tithe is payable: a proposition which can by no means be supported."

Where an act of parliament charges every house generally

“ But if it were a house that yielded rent at the time of the making the decree, and be now let without rent, it shall pay tithe according to the rate it was set for at the making of the decree, although no fine at all were paid for such lease. Lit. Rep. ubi supra.

5. “ The tithes upon this decree cannot be sued for in the ecclesiastical court, because the act itself declares how they shall be recovered. [353]

6. “ That if the owners held the houses themselves, then they shall pay tithe after the rate the same were set for at the time of the decree.

7. “ That if any person take any house, &c. by lease, and he and his executors, &c. live in part of it, and set out part, the principal farmer or taker, his executors, &c. shall pay their tithes for his and their parts after the rate aforesaid, and of such part as is farmed out according to the rate it is set at. And in the same manner tithes are to be paid, where one takes a lease of several houses, and lets out part, and holds any part himself.

8. “ That if any farmer, or his assigns, shall farm all the houses, &c. so farmed to one or divers tenants, the tenants shall pay tithes according to the rent reserved.

9. “ That if dwelling-houses shall be converted into warehouses, or è converso, yet they shall pay tithe according to the rate aforesaid.

10. “ That if a dyehouse or brewhouse be let with the implements, then a third penny of the tithes after the rate abovesaid to be abated.

11. “ That where a mansion-house with shops, sta-

in the parish, and does not expressly discharge the dean, it was held, that he was liable to pay tithes in respect of his deanery; and, a fortiori, premises which being once chargeable, have become since part of his deanery, and according to the improved value. *Warden of St. Paul's v. Dean*, 4 Pri. 77.

bles, wharfs with crane, timber-yard, or gardens belonging to the same, and occupied together, shall afterwards be severed, or were severed within eight years before the decree, that then the farmers of the shops, stables, &c. shall pay tithes according to the rate abovesaid.

[354] 12. " That these tithes shall be paid quarterly, at Easter, Midsummer, Michaelmas, and Christmas.

13. " That any householder, that holds an house of ten shillings rent, or above, shall be acquit of his offerings; but his wife, children, and servants shall pay two-pence yearly for their four offering days receiving at Easter.

14. " That if any house of ten shillings rent or above, shall be let by parcels under ten shillings rent, then the owner, if he live in any part of the house, or the chief tenant, shall pay the tithe after the rate as the same house was accustomedly letten before such division; and the sub-tenants, that hold less than ten shillings per annum, without fraud or covin, shall pay two-pence yearly for their offerings.

15. " That no tithe shall be paid for any gardens belonging to any mansion-house, and which are held for pleasure; but if such garden contain half an acre of ground or more, and shall make any yearly profit by sale, then the same to be paid for, according to the rate abovesaid.

16. " This act is not to extend to the houses of noblemen or noblewomen, whilst they are kept in their own hands, and not let for rent, and which formerly paid no tithe, so long as the same continue unletten, nor to the halls of any craft or companies, so long as the same are unletten, and in times past paid no tithes.

[355] 17. " That sheds, stables, cellars, timber-yards, and tenter-yards, which never were parcel of, or belonging to any dwelling-house, and which have not been used to pay tithes, shall be acquit of the payment of tithes, as hath been accustomed.

18. " But if by custom any lesser rate have been paid than the rate of two shillings and nine-pence in the pound, then the accustomed rate only to be paid.

19. " The Lord Mayor of the city of London, by the advice of counsel, is authorised by the said act to hear and determine all differences arising upon this decree, and give costs according to the intent thereof.

20. " That if the Mayor do not make an end of such differences within two months after complaint; or if any person find himself aggrieved by his decree, then the Lord Chancellor, within three months after complaint to him made, shall make an end of the differences with costs, &c.

21. " That if rents fall, by reason of decay or burning, to less than they were accustomedly letten, that then the tithes during such term shall be paid according to the rent reserved."

This is a short abstract of that great decree, which I have inserted here for the use of the clergy of that city: I shall only add some other resolutions upon this decree, and conclude this chapter.

In a case between Dr. Meadhouse and Dr. Taylor, it was resolved, that suits for tithes upon this decree should be before the Mayor in writing, and not by parol.

Noy, 130.
Where suits for tithes in London shall be determined.

2. That a reservation by a lessor for life upon a lease by him made for years, shall not bind him in reversion to pay tithes according to that rate.

3. A rent for half a year, and after for another half year, is a yearly rent within this decree.

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It hath been resolved, that abbey lands within the city of London and the liberties thereof, are not freed from the payment of tithes within the statute of 31 H. 8. because the statute and decree for the payment of tithes within the city and liberties of London was made after the statute of 31 H. 8. and their privileges are not reserved.

Cro. El. 276.
More, 912.

It hath been resolved, that if the rents be continued

Vers. Scudamore.

5 Jac. C. B.
Cro. Jac. 6. 613.

as they were at the time of the making of the statute, though upon new fines, that the tithes shall be paid accordingly. But if upon new fines less rent be reserved, it shall pay tithes as it did before.

And if no rent be reserved, nor fine paid; the parson shall have his tithes according to the rent at the time of the decree.

But if a house have always been held by the owners, and no rent paid, it shall pay no tithes within the decree (123).

The decree was enrolled, 5 Martii, 38 H. 8. although the inrollment cannot be found.

Infra, [382.]

And it was resolved, that if the Mayor of London shall make any decree against law, a prohibition lies; for the exposition of all acts of parliament belongs to the judges of the common law.

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And it hath been resolved, that though a house in

(123) Vide note 122, relative to houses which never have been let. It has been decided, that the rate ordered by the decree and statute to be paid out of the rent of houses in London in lieu of tithes, is assessable on the improved rent of such houses. *Sheffield v. Pierce*, Gwill. 503. *Joatt v. Warren*, *ibid.* 1054. But in general the defendant in such case is at liberty to set up a customary payment to protect himself against the claim of tithe under the statute. *Bennet v. Trespass*, Gwill. 633. *The Warden and Minor Canons of St. Paul's v. Morris*, 9 Ves. jun. 155. and *the Warden, &c. of St. Paul's v. Kettle*, and *e contra*, 2 Ves. and Beam. 1.

It is held to be no defence to a demand for tithe of a house in London, that it stood on the site of old houses which never paid any tithe. If it had been shown that a less rate had been paid for them, it would have been a defence to that extent; but an entire exemption shall not prevail. *Toller on Tithes*, 246. *Bramston v. Heron*, Gwill. 1314. *Semble*, in all cases of buildings the tithes must be calculated upon the improved annual value, and even for buildings on the sites of houses which never paid rent. *Kynaston v. E. I. com.* cited 4 Price, 84. in notis.

London stand void without any tenant at all, that yet notwithstanding it shall answer tithes to the parson.

Dr. Burgess,
parson of St.
Magnus, v.
Symonds.
Scaccar. M.
4 Car. 1. per
Henden.
2 Inst. 660.

And it hath been resolved, that if any suit be brought in the ecclesiastical court, or any other court than is directed by the act, a prohibition lies (124).

Lastly, where the decree says (where no rent is reserved by reason of any fine or income paid beforehand) that is put only for example; for if no rent be reserved for this, or any other cause or consideration, it is within the meaning of this clause.

But if any tithes in London be due by custom, they may be sued for in the Exchequer, notwithstanding the statute.

Lit. Rep. 102.

And it was held by the Court of Exchequer, that that court has jurisdiction for tithes in London upon this statute, because there is no negative restrictive words in the statute.

Hardres, 116.

I cannot tell by what improvidence I missed, in all my former editions of this book, taking notice of an act of parliament made in the 22d and 23d of King Charles the Second, for the better settlement of the maintenance of the parsons, vicars, and curates in the parishes of the city of London, burnt by the late dreadful fire there, which is a law very necessary to be known, by which it is enacted, "That the annual certain tithes of all and every parish and parishes within the said city of Lon-

An act of parliament for settling maintenance upon ministers of the churches that were burnt in London.

(124) In the case of the Warden and Minor Canons of St. Paul's v. Crickett, 2 Ves. jun. 563. Lord Loughborough observed, with reference to the case of Skidmore and Eire here alluded to by the learned author, that it was an unhand-some struggle for jurisdiction, and that the prohibition was carried further than in just reason it ought.

If the Lord Mayor refuse his warrant for levying sums due by the assessment of 1681, the Court of Chancery has jurisdiction to inquire whether the Lord Mayor has done right in so doing, and can issue its warrant to levy the sums assessed. Ex parte Croxall, 3 Atk. 639. Gwill. 812.

[358] don, and the liberties thereof, whose churches have been demolished or in part consumed by the late fire, and which parishes by virtue an act of this present parliament, intituled, 'An additional act for the rebuilding the city of London, uniting of parishes, and rebuilding of the cathedral and parochial churches within the city of London, remain and continue single as heretofore they were or are by the said act annexed or united into one parish respectively,' shall be as follows, that is to say, the annual certain tithes or sums of money in lieu of tithes.

Of the Parish of Allhallows, Lombard-street	£110	0
Of St. Bartholomew, Exchange	-	100 0
Of St. Bridget alias Brides	-	120 0
Of St. Bennet Finck	-	100 0
Of St. Michael, Crooked-lane	-	100 0
Of St. Christopher	-	120 0
Of St. Dionis Back-church	-	120 0
Of St. Dunstan in the East	-	200 0
Of St. James, Garlick-hithe	-	100 0
Of St. Michael, Cornhill	-	140 0
Of St. Michael Bassishaw	-	132 11
Of St. Margaret, Lothbury	-	100 0
Of St. Mary, Aldermanbury	-	150 0
Of St. Martin, Ludgate	-	160 0
Of St. Peter, Cornhill	-	110 0
Of St. Stephen, Coleman-street	-	110 0
Of St. Sepulchre	-	200 0
Of Allhallows, Bread-street, and St. John Evangelist	-	140 0
Of Allhallows the Great, and Allhallows the Less	200	0
[359] Of St. Alban, Wood-street, and St. Olave, Silver-street	-	170 0
Of St. Ann and Agnes, and St. John Zachary	140	0
Of St. Augustin and St. Faith	-	172 0
Of St. Andrew Wardrobe, and St. Anne, Blackfriars	-	140 0

Of St. Antholin and St. John Baptist	-	£120	0
Of St. Bennet Gracechurch, and St. Leonard, Eastcheap	- - -	140	0
Of St. Bennet, Paul's-Wharf, and St. Peter's, Paul's-Wharf	- - -	100	0
Of Christ-church and St. Leonard, Foster-lane		200	0
Of St. Edmond the King and St. Nicholas Acons	- - -	180	0
Of St. George, Botolph-lane, and St. Botolph, Billingsgate	- - -	180	0
Of St. Lawrence Jury, and St. Magdalen, Milk-street	- - -	120	0
Of St. Magnus and St. Margaret's, New Fish- street	- - -	170	0
Of St. Michael Royal and St. Martin Vintry		140	0
Of St. Matthew, Friday-street, and St. Peter Cheap	- - -	150	0
Of St. Margaret Pattens, and St. Gabriel Fenchurch	- - -	120	0
Of St. Mary at Hill and St. Andrew Hubbard		200	0
Of St. Mary Woolnoth, and St. Mary Wool- church	- - -	160	0
Of St. Clement Eastcheap, and St. Martin's Orgars	- - -	140	0
Of St. Mary Abchurch, and St. Lawrence Pountney	- - -	120	0
Of St. Mary Aldermary, and St. Thomas Apostle	- - -	150	0
Of St. Mary-le-bow, St. Pancras, Soper-lane, and Allhallows, Honey-lane	- - -	200	0
Of St. Mildred, Poultry, and St. Mary Cole- church	- - -	170	0
Of St. Michael, Wood-street, and St. Mary Staining	- - -	100	0
Of St. Mildred, Bread-street, and St. Mar- garet Moses	- - -	130	0
Of St. Michael, Queenhithe, and Trinity	-	160	0

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Of St. Magdalen, Old Fish-street, and St. Gregory	-	-	-	£120	0
Of St. Mary Somerset, and St. Mary Mountshaw	-	-	-	110	0
Of St. Nicholas Coleabbey, and St. Nicholas Olives	-	-	-	130	0
Of St. Olive Jewry, and St. Martin, Ironmonger-lane	-	-	-	120	0
Of St. Stephen, Walbrook, and St. Bennet Sherehog	-	-	-	100	0
Of St. Swithin and St. Mary Bothaw	-	-	-	140	0
Of St. Vedast, alias Fosters, and St. Michael Quern	-	-	-	160	0

[361] “ 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 and continue to be esteemed, deemed, and taken to all intents and purposes to 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 his or their respective successors, or to other persons for his or their use) of the said respective parsons, vicars, and curates, who shall be legally instituted, inducted, and admitted into the respective parishes aforesaid.

By whom and how the said assessment shall be made.

“ And that the said several sums of money for tithes may be more equally assessed upon the several houses, buildings, and all other hereditaments whatsoever, within all the said respective parishes, be it enacted, &c. That the alderman of such respective ward or wards within the said city, wherein any of the said parishes lie, and his and their deputy or deputies, and the common-councilmen of such respective ward or wards, with the churchwardens and one or more of the parishioners of such respective parish wherein the maintenance aforesaid is respectively to be assessed, to be nominated by

such respective alderman, deputy, common-councilmen, and churchwardens, or any five of them, whereof the alderman or his deputy to be one, shall at some convenient and seasonable time before the twentieth day of May, in the year of our Lord one thousand six hundred and seventy-one, assemble and meet together in some convenient place within every of the respective parishes, in such respective ward wherein the maintenance aforesaid is to be assessed, and they, or the major part of them so assembled, shall proportionably assess upon all houses, shops, warehouses and cellars, wharfs, quays, cranes, water-houses (which water-houses shall pay in their respective parishes where they stand and not elsewhere) and tofts of ground (remaining unbuilt) and all other hereditaments whatsoever (except parsonage and vicarage houses) the whole respective sum by this act appointed, or so much of it as is more than what each impropiator is by this act enjoined respectively, to allow in the most equal way that the said assessors, according to the best of their judgments can make it, which said assessments shall be made and finished before the 24th day of July then next ensuing.

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“ And be it further enacted, by the authority aforesaid, that if any variance or doubt shall happen to arise about any sum so assessed as aforesaid, or that any parishioner or parishioners, owner or owners of any house, shop, warehouse or cellar, wharf, quay, crane, water-house, toft of ground, or other hereditament, within any of the said parishes, shall find himself or themselves aggrieved by the assessing of any sum or sums of money in manner and form aforesaid, that then upon complaint made by the party or parties aggrieved, to the Lord Mayor or court of aldermen of the said city, within fourteen days after notice given to the party or parties assessed, of such assessment made, to the said Lord Mayor and court of aldermen, summoning as well the party or parties aggrieved as the alderman and such other as made the said assessment, shall hear and

How unequal assessments shall be relieved.

determine the same in a summary way, and the judgment by them given shall be final, and without appeal.

The assessment may be reviewed and laid again.
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“ Provided that any assessment or rate to be made or laid by virtue of this act, shall and may in all or any of the parishes aforesaid, in like manner be reviewed or altered or laid again within three months after the twenty-fourth day of June, 1674, according to the aforesaid rules, and any such assessment or rate shall or may be again reviewed or re-assessed within three months after the twenty-fourth day of June, in the year of our Lord 1681. And that all and every such new assessment and rate shall be liable to the like appeals as aforesaid, and shall be collected, levied, and paid as any other assessment or rate mentioned in this act may or ought to be.

How unequal assessment shall be relieved in default of the Lord Mayor and court of aldermen.

“ And if the said alderman, deputy, common-councilmen, and parishioner or parishioners so appointed as aforesaid, shall, after summons and request made in that behalf unto them, by the Lord Mayor and court of aldermen, or the incumbent or incumbents of any of the said respective parish or parishes, refuse and neglect to meet and make such assessments, as aforesaid, then it shall and may be lawful to and for such person and persons as shall be thereunto authorised and required by the said Lord Mayor and court of aldermen to make such assessment as by the said alderman, deputy, common-councilmen, churchwardens, parishioner, or parishioners, aforesaid, should or ought to have been made.

There shall be three several transcripts of the assessments, and how to be disposed.

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“ And be it further enacted, &c. that the said assessors within ten days after such assessment made, and the respective appeals (if any be) determined, shall make three transcripts thereof in parchment, containing the respective sums to be payable or appointed to be paid out of all and every the premises within such respective parish, and subscribe the same under their hands, within twenty days after such subscription, as aforesaid, one of

the said transcripts shall be returned to the Lord Mayor of the city of London, to be kept and preserved by the said Lord Mayor, in and amongst the records of the said city, for a perpetual memorial thereof, and another of the said transcripts shall be returned into the registry of the Lord Bishop of London, to be kept and reserved as aforesaid, and the other of the said transcripts shall remain and be kept in the vestry of such respective parish, for a perpetual memorial, as aforesaid.

“ And for the surer and better payment of the said respective sums of money, so to be assessed and taxed towards the raising of the said maintenance of their respective parsons, vicars, and curates of the said respective parishes, as aforesaid, Be it enacted, &c. that all and every such respective sum and sums of money, so to be assessed and taxed as aforesaid, towards the raising of the said maintenance of the said respective parsons, vicars, and curates of the said respective parishes, shall be paid to the said respective parsons, vicars, and curates, and their successors respectively, at the four most usual feasts, (that is to say) at the annunciation of the blessed Virgin Mary, 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 and times as the incumbent or incumbents of such respective parish shall begin to officiate or preach as incumbent or parson in the respective church belonging to such respective parish, or in some other convenient place or places in such respective parish or parishes, to be nominated or appointed by the Lord Bishop of London for the time being, or by the Archbishop of Canterbury in any place within his peculiars.

Where and to whom the said monies assessed shall be paid.

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“ And in any parish or parishes where any impropriations be, be it enacted, &c. that all and every the impropriator or impropriators of any of the said parishes,

What impropriators shall pay towards this charge.

shall pay and allow what really and bonâ fide they have used, and ought to pay and satisfy to the respective incumbent of such respective parish, at any time before the late fire, and the same shall be esteemed and computed as part of the maintenance of such incumbent; notwithstanding this act, or any clause, or matter, or thing therein contained.

The sums assessed how to be recovered upon refusal, &c.

“ And be it further enacted, &c. that if any of the inhabitants in any of the respective parish or parishes as aforesaid, shall, or do refuse or neglect to pay to the respective incumbents aforesaid, of any of the respective parishes, any sum or sums of money to him respectively payable, or appointed to be paid by this act, or any part thereof, contrary to the true intent and meaning of this act, (being lawfully demanded at the house or houses, wharf, quay, crane, cellar, or other premises whereout the same is payable) that then it shall and may be lawful to and for the Lord Mayor of the city of London for the time being, upon oath to be made before him of such refusal or neglect, to give and 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 tithe or sums of money so due, and in arrear and unpaid, by distress and sale of the goods of the party or parties so refusing or neglecting to pay, restoring to the owner or owners the overplus of such goods over and above the said arrear of the said monies so due and unpaid, and the reasonable charges of making such distress, which he is to deduct out of the monies raised by sale of such goods.

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What remedy if the Lord Mayor or court of aldermen neglect or refuse to do their duties.

“ Provided always, &c. that in case the Lord Mayor or court of aldermen shall refuse or neglect to execute any of the respective powers to them by this act granted, or to perform all and every such thing related either to the assessing or levying of the respective sums aforesaid, as they are by this act authorised and required to perform, that then it shall and may be lawful for the said Lord Chancellor, or lord keeper of the great seal

of England for the time being, or any two or more of the barons of his Majesty's Court of Exchequer, by warrant or warrants under his or their respective hands and seals, to do and perform what the said Lord Mayor and court of aldermen, according to the true intent or meaning of this present act, might or ought to have done, and by such warrant either to empower any person or persons to make the respective assessments as aforesaid, or to authorise the respective officers or person or persons appointed to collect the sums aforesaid, to levy the same by distress and sale of the goods of any person or persons that shall refuse or neglect to pay the same in manner and form aforesaid.

“ Provided always, &c. that where any of the parishes within the said city have, since the late fire, by death or otherwise, become vacant, the surviving or remaining incumbent of the other parish thereto united, or therewith consolidated, shall have and enjoy, and have like remedy to recover the tithes hereby settled to be paid, as if he had been actually presented, admitted, instituted, and inducted into both the said parishes since the union and consolidation thereof.

“ 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 this act, or any part thereof, other than the persons hereby authorised to have cognizance thereof: nor shall it be lawful to or for any parson, vicar, curate, or incumbent to convent or sue any person or persons 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 authorised and appointed by this act for the hearing and determining of the same in manner aforesaid.

“ Provided always, that it shall and may be lawful to and for the warden and minor canons of St. Paul's church, London, parson and proprietors of the rectory of the parish of St. Gregory aforesaid, to receive and

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Where one of the incumbents dies his fellow shall have his part.

These assessments not to be sued for in any other court.

The warden and minor canons of St. Paul's to enjoy the rectory of St. Gregory.

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, any thing therein to the contrary notwithstanding" (125).

(125) By a local and personal act passed in the 44th of G. 3. c. 89. entitled "An act for the relief of certain incumbents of livings in the city of London," the following new assessments in lieu of tithes were granted :

St. Alban, Wood-street	-	-	-	£283	6	8
Allhallows, Bread-street	-	-	-	283	6	8
Allhallows, Lombard-street	-	-	-	200	0	0
Allhallows the Great and Allhallows the Less	-	-	-	333	6	8
St. Andrew Wardrobe, and St. Anne	-	-	-	233	6	8
St. Anne, James, and St. John Zachary, Aldersgate	-	-	-	233	6	8
St. Anthony and St. John Baptist	-	-	-	200	0	0
St. Austin and St. Faith	-	-	-	286	13	4
St. Bartholomew, Exchange	-	-	-	200	0	0
St. Benedict Finch	-	-	-	200	0	0
St. Benedict Gracechurch, and St. Leonard, Eastcheap	-	-	-	233	6	8
St. Benedict and St. Peter's, Paul's Wharf	-	-	-	200	0	0
Christ Church and St. Leonard's, Foster-lane	-	-	-	333	6	8
St. Clement Eastcheap, and St. Martin's Orgers	-	-	-	233	6	8
St. Dionis Backchurch	-	-	-	200	0	0
St. Dunstan, East	-	-	-	333	6	8
St. Edmund the King, and St. Nicholas Acons	-	-	-	300	0	0
St. George, Botolph-lane, and St. Botolph, Billingsgate	-	-	-	300	0	0
St. James, Garlic-hithe	-	-	-	200	0	0
St. Lawrence Jury, and St. Magdalen, Milk-street	-	-	-	200	0	0
St. Magnus, London Bridge, and St. Margaret, New Fish-street	-	-	-	383	6	4
St. Margaret, Lothbury, and St. Christopher	-	-	-	366	13	8
St. Margaret Pattens, and St. Gabriel Fen-church, Rood-lane	-	-	-	200	0	0

St. Martin, Ludgate	-	-	-	£266	13	4
St. Mary Abchurch, and St. Lawrence Pountney	200	0	0			
St. Mary Aldermanbury	-	-	-	250	0	0
St. Mary Aldermary, and St. Thomas Apostle	250	0	0			
St. Mary-le-Bow, St. Pancras, Soper-lane, and Allhallows, Honey-lane	-	-	-	333	0	0
St. Mary Hill, and St. Andrew Hubbard	-	-	-	333	6	8
St. Mary Magdalen, Old Fish-street, and St. Gregory	-	-	-	200	0	0
St. Mary Somerset, and St. Mary Mountshaw	200	0	0			
St. Mary Woolnoth, and St. Mary Woolchurch	266	13	4			
St. Matthew, Friday-street, and St. Peter Cheap	-	-	-	250	0	0
St. Michael Bassishaw	-	-	-	220	18	4
St. Michael, Cornhill	-	-	-	233	6	8
St. Michael, Crooked-lane	-	-	-	200	0	0
St. Michael, Queenhithe, and Trinity	-	-	-	266	13	4
St. Michael Royal, College-hill, and St. Martin, Vintry	-	-	-	233	6	8
St. Michael, Wood-street, and St. Mary Staining	200	0	0			
St. Mildred, Bread-street, and St. Margaret Moses	-	-	-	216	13	4
St. Mildred, Poultry, and St. Mary Colechurch	283	6	8			
St. Nicholas Coleabbey, and St. Nicholas Olaves	216	13	4			
St. Olave Jewry, and St. Martin, Ironmonger-lane	-	-	-	200	0	0
St. Peter, Cornhill	-	-	-	200	0	0
St. Stephen, Coleman-street	-	-	-	200	0	0
St. Stephen, Walbrook, and St. Bennet Sherehog	200	0	0			
St. Swithin, London Stone, and St. Mary Bothaw	233	6	8			
St. Vedast Foster's, and St. Michael Quern	-	-	-	266	13	4

Parishes without the city walls.

St. Bride	-	-	-	200	0	0
St. Sepulchre	-	-	-	333	6	8

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CHAPTER XXVI.

The Twenty-sixth Chapter shows, in what Court the Right of Tithes is determinable, and how, and in what Manner to be recovered; and in what Cases Prohibitions are usually granted, and how prosecuted and defended.

2 Inst. 661. 490.
Seld. Hist. Decim. 412. Lamb.
Saxon Laws, 45.

Selden, Jani Anglorum, 76, 77.
Dalton's Sheriff, 410, 411.

Seld. 414.

THAT tithes were anciently determinable in the county and hundred courts, is asserted both by Sir Edward Coke and Mr. Selden; and the same appears by the laws of King Ethelstan long before the Conquest; and Mr. Selden is of opinion, that the bishop's consistory here in England was not settled till the time of William the Conqueror, who by his charter commands, "Ut nullus episcopus vel archidiaconus de legibus episcopalibus amplius in hundredo placita teneant, nec causam quæ ad regimen animarum pertinet ad iudicium secularium hominum adducant, sed quicumque secundum leges episcopales de quacunque causa vel culpa interpellatus fuerit, ad locum, quem ad hoc episcopus elegerit et nominaverit, veniat, ibique de causa sua respondeat, et non secundum hundredum, sed secundum canones et leges episcopales rectum Deo et episcopo suo faciat." And closes thus: "Hoc etiam defendo, ut nullus laicus homo de legibus, quæ ad episcopum pertinent se intromittat;" yet notwithstanding, as Mr. Selden observes, the jurisdiction of tithes was not so settled in the bishop and ecclesiastical courts, but there were suits for tithes as well in the temporal as ecclesiastical courts, whereof he gives some instances. And amongst the laws of King H. 1. I find this clause: "Si quis rectam decimam superteneat, vadat præpositus regis et episcopi, et terræ domini cum presbytero, et

Seld. 414, &c.

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Leg. H. 1. c. 11.
Lamb, 182.

ingratis auferant; et ecclesiæ cui pertinebit, reddant, et nonam partem relinquunt ei qui decimam dare noluerit."

But the law hath been now long settled that the ecclesiastical courts have in some cases the power to determine the right of tithes, and in all cases to hold plea for the subtraction and withholding of tithes, and confirmed by several acts of parliament.

To the first, if a dispute happen between two parsons, to which of them the tithes belong, whether to the one by parochial right, or the other as a portion belonging to his rectory by prescription, and both parsons claim by presentation under the same title, so that the right of patronage comes not in dispute, the right of these tithes shall be determined in the ecclesiastical court, and no prohibition or indicavit shall hinder it, and this suit in the ecclesiastical court is called a spoliation.

35 H. 6. 30.
38 H. 6. 22.
per Fortescue.
Where the spiritual court may determine the right of tithes.

And this jurisdiction is so peculiar and annexed to the spiritual courts, that if the one parson should bring an action of trespass at the common law against the other parson, for the taking or carrying away corn or other things set out for tithe, the defendant may by way of plea show, that the goods in question were tithes set forth and severed from the nine parts, and that he is parson of Dale, and that he and all his predecessors time out of mind have had these tithes as a portion which belonged to his church, and that the plaintiff being rector of the parish where they grew, claims them as his tithes and demand judgment, if the king's court will hold plea; by such plea the king's court shall be ousted of jurisdiction. But if the dispute in such action fall out in pleading to be about the bounds of the parishes, then the king's courts shall not be ousted of jurisdiction.

38 H. 6. 21.
5 H. 5. 40.
14 H. 4. 17. a. b.
Where the temporal courts have no jurisdiction. [370]
tion of tithes.

* And so it is, if the question be between the farmer, bailey, or servant, of the one parson, and the farmer, bailey, &c. of the other, or the other parson himself; in such cases, though the dispute does appear to be concerning the right of tithes between the parsons, yet

* 5 H. 6. 10.
50 E. 3. 20.
38 E. 3. 6.
39 E. 3. 23.
5 H. 5. 10.
1 H. 6. 5.
44 E. 3. 39.

20 H. 6. 17.
 2 H. 4. 15.
 31 H. 6. 11.
 2 E. 4. 15.

the court shall not be ousted of the jurisdiction because they are not both clergymen.

But in all these cases where the right of tithes is in dispute between one parson and another, in whose names soever the suit is in the spiritual court, I perceive no prohibition lies, if both parsons come in by the same title of patronage, so that the right of patronage came not in dispute.

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 40 E. 3. 28.
 35 H. 6. 39.
 Noy, 147.
 More, 907.
 West, 2. c. 5.
 Circumspecte
 Agatis, articuli
 Cleri, c. 2.

And I take the law to be the same where the question arises between the parson who is patron, and the vicar, whether tithes belong to the parson or vicar.

Where the spi-
 ritual court
 cannot deter-
 mine the right of
 tithes.

But where the right of tithes is controverted between two clergymen, which come into their churches by several patrons, there in that case the spiritual court hath not jurisdiction to determine the right of the tithes, if they amount to the fourth part of the yearly value of the church; but the title is to be determined by writ of right of advowson of tithes, as shall be showed more at large, when I shall come to show in what cases the right of tithes is determinable in the king's court. But in that case, if the tithes in question do not amount to the fourth part of the yearly value of the church, the ecclesiastical court may determine the right in a spoliation.

F. N. B. 37 E.

But it should seem that if they claim both by one patron there, though the whole tithes come in debate, the title shall be determined in the spiritual court by a suit in the nature of a spoliation.

Spiritual juris-
 diction confirm-
 ed by several
 acts of parlia-
 ment.

By the statute
 de circumspecte
 agatis.

But the jurisdiction of the ecclesiastical courts to hold plea for the subtraction and withholding of tithes, as the same hath been very ancient, so it hath been confirmed by several acts of parliament, as I shall show; the first of which is that of circumspecte agatis, made in the ninth year of E. 1. by which it is enacted, that, "Si rector petat versus parochianos oblationes et decimas debitas et consuetas; vel si rector petat versus rectorem de decimis majoribus vel minoribus, dummodo non petatur quarta pars valoris ecclesie: item si

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rector petat mortuarium in partibus ubi mortuarium dari consuevit: item si prælatus alicujus ecclesiæ vel advocatus petat à rectore pensionem sibi debitam, omnes hujusmodi petitiones sunt faciendæ in foro ecclesiastico, &c.” and concludes, “ In omnibus prædictis casibus habet judex ecclesiasticus cognoscere, regia prohibitionem non obstante.”

There hath been some question made, whether this were an act of parliament or not; but it is proved by Sir Edward Coke, by many unanswerable reasons, to be an act of parliament, and so agreed by Mr. Selden, and almost all others.

Secondly, Admitting it to be an act of parliament, it hath been doubted, whether it extended farther than to the diocess of Norwich, it seeming to be appropriated by the penning to that diocess alone; but by the general opinion of the learned, it extends to all other diocesses, and Norwich is only put by way of example.

And the prudent penning of this law by our ancestors deserves the reader's observation, how careful they were to preserve their own rights, and avoid the encroachments of the clergy, who were in those days very powerful. For, first, they would not give way to the canons to destroy their customs and prescriptions allowed by the common law, and therefore give the spiritual judge jurisdiction of tithes and oblations (*debitas et consuetas*) only.

2. They would not expose their rights of patronage to the determination of the spiritual judge, and therefore this condition is annexed: “ *Dummodo non petatur quarta pars valoris ecclesiæ.*”

3. Lastly, They would not subject themselves to pay mortuaries according to the canon law, but *ubi dare consuevit*; so that if any suit were sued for tithes, offerings, mortuaries, not due as well by custom as common law, a prohibition lay and doth lie at this day.

The second statute concerning the jurisdiction of the spiritual courts in case of tithes, is the statute of Arti-

That it is an act of parliament.
2 Inst. 487.
Seld. Hist. decim. 424.

And extends to all England.
2 Inst. 487.
Seld. Tithes, 413 Plo. 36. b.
Hatton of Statutes, 15. 17. 40, 41.
Co. 1 Inst. 366. b.
Observations in the penning of it.

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culi Cleri, but I shall pass it by here till I come to speak of the writ of indicavit.

18 E. 3. cap. 7. The next statute I meet with that concerns this matter, is the statute of 18 E. 3. cap. 7. which I shall pass by also till I come to the determination of the right of tithes by seire facias.

1 R. 2. cap. 13. There was another statute made 1 R. 2.: it is cap. 13. for the punishing of such as indicted those that sued in the spiritual courts for subtraction of tithes, or compelled them to desist by bonds or otherwise; but that law being now become obsolete, and beside my purpose, I shall proceed to the statute of 27 H. 8. by which it is enacted,

27 H. 8. c. 20. [374] “ That every subject of England, Ireland, Wales, Calais, and the marches of the same, should according to the ecclesiastical laws and ordinances of the church of England, and after the laudable usages and customs of the parishes or other places where he dwells or occupies, yield and pay his tithes and offerings, and other duties of holy church; and that for subtraction of such tithes, &c. may by due process of the king's ecclesiastical law, convent the person, &c. so offending, before his ordinary or other competent judge, &c. having authority to hear and determine the right of tithes, &c. And compel the party offending to do and yield their duties in that behalf. And in case the ordinary, &c. for any contempt, contumacy, disobedience, or other misdemeanor of the party defendant, shall make information to any of the king's most honourable counsel, or the justices of the peace of the shire where the offender dwells, to assist and aid the ordinary, &c. and to order and reform any such person, in any cause before rehearsed, that then he of the king's counsel, or such two justices of the peace, whereof one to be of the quorum, to whom such information or request shall be made, shall have power to attach, or cause to be attached the person, or, &c. against whom such information shall be made, and to commit the same persons to

ward, there to remain without bail or mainprise until he, &c. shall have found sufficient surety to be bound by recognizance or otherwise, before the king's counsellor, or, &c. or any other like counsellors or justices, &c. to the use of the king, to give due obedience to the process and proceedings, decrees and sentence of the ecclesiastical court wherein such suit, &c. shall depend or be. And farther gives power to the said counsellor, or to two justices of the peace, whereof one to be of the quorum, to take, receive, and record such recognizance and bonds."

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There is a proviso in this act, that it shall not extend to London.

And another proviso, that the party sued may have all legal defences, appeals, and prohibitions.

And it is to be observed that this law extends to all sorts of tithes, mixed and personal, as well as predial.

Observations upon this law.

Next he that will have the benefit of this law must sue for the single value, and not for the double value upon the stat. of 2 E. 6.

Thirdly, the plaintiff in the ecclesiastical court may proceed upon this act for contempt, contumacy, or misdemeanor, as well before as after sentence.

Fourthly, the security upon this act may as well be by bond as recognizance.

Lastly, observe the wary penning of this act; they must pay their tithes and other church duties, according to the ecclesiastical laws and laudable customs and usages of the place; next if it be demanded before whom suit upon this statute shall be made, it is answered by the statute itself, it must be before such judge as hath jurisdiction of the cause, so that it creates or enlarges no jurisdiction.

The next act of parliament concerning this matter is the statute of 32 H. 8. by which it is enacted, "that all and singular persons, &c. shall fully, truly, and effectually divide, set out, yield, or pay all and singular tithes and offerings, according to the lawful custom and

32 H. 8. c. 7.

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usages of the parishes and places where, &c. and in case any person, &c. do detain or withhold any of the said tithes or offerings, or any part or parcel thereof, that then the person lay, or, &c. shall or may convent the person, or, &c. before the ordinary, according to the ecclesiastical laws, &c. and so proceed to sentence according to the process and course of the ecclesiastical laws.

“ And that if any party appeal against the judge’s sentence, he shall then assess the costs of his suit therein before expended, and shall compel the appellant to pay the said costs by the compulsory process and censures of the said laws, taking security of the said party, to whom the said costs shall be paid, to repay the same, if the appeal be adjudged against him.

“ And if any person, after sentence definitive given against him, shall obstinately and wilfully refuse to pay their tithes, or the sum adjudged, that then two justices of the peace, whereof one shall be of the quorum, shall, &c. upon information, certificate, or complaint to them made by writing by the said ecclesiastical judge, &c. cause the party refusing to be attached and committed to the next gaol, there to remain till he, &c. have found sufficient sureties to be bound by recognizance or otherwise before the same justices to the use of the king to perform the said definitive sentence.

“ Provided that no person, or, &c. to be sued or otherwise compelled to yield, give, or pay any manner of tithes for any manor, lands, &c. which by the laws or statutes of this realm are discharged, or not chargeable with, &c. tithes.

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“ Provided that this act shall not extend, or be expounded to give any remedy, cause of action or suit, in the courts temporal against any person, &c. which shall refuse or deny to set out his or their tithes, or which shall detain, withhold, or refuse to pay his tithes or offerings, or any parcel thereof. But that in all such cases the person or persons, being ecclesiastical or lay

persons, having cause to demand or have the said tithes or offerings, or thereby wronged or grieved, shall take and have their remedy for their said tithes and offerings in every such case in the spiritual courts, according to the ordinance in the former part of the said act mentioned, and not otherwise, any thing," &c.

1. It appears by the preamble of this law, that this act was particularly designed for the relief of impropiators, who, before this act, were not capacitated to sue in the spiritual courts for the subtraction of tithes, and were hard put to it to find any other relief.

Observations
upon this statute.

2. Where by the former act the party for contumacy, &c. might be compelled to give security before sentence, in this case of the lay impropiators the party cannot be compelled to give security till after definitive sentence.

3. Upon this law there must be two sureties at least; upon the former one sufficed.

4. The security in this, as the former, may be by bond or recognizance.

5. Whosoever will have the benefit of this act, must sue particularly upon this law for the single value, and not for the double value upon the statute of 2 E. 6.

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6. This law extends, as the former did, to all manner of tithes and offerings.

7. London is excepted out of this act, as it was in the former.

8. This law only extends to customary tithes, and not for tithes due by canon and ecclesiastical laws.

9. This act only extends to such as shall obstinately and wilfully refuse to perform the sentence of the ecclesiastical judge, and for no other contempt or neglect.

10. Lastly, This act restrains the suit to the ecclesiastical court upon this statute; otherwise an action, as should seem, might have been brought at common law upon this statute for not set setting forth, &c. of their tithes.

But divers defects appearing in this law, especially

to the lay impropiators, they obtained a more effectual law for their purpose in 2 E. 6. by which it is enacted, St. 2 E. 6. c. 13. "That if any person carry away his corn or hay, or other predial tithes, before the tithe thereof be set forth, or willingly withdrawn his tithes of the same, &c. that then upon due proof thereof made before the spiritual judge, or any other judge to whom heretofore he might have made complaint, the party so carrying away, withdrawing, letting, or stopping, shall pay double the value of the tenth or tithe so taken, lost, withdrawn, or carried away, over and besides the costs, charges, and expenses of the suit in the same, the same to be recovered before the ecclesiastical judge according to the ecclesiastical laws."

[379] There is a proviso in this act, that gives occasion of many prohibitions, to this effect :

"That no person shall be sued, or otherwise compelled to yield, give, or pay any manner of tithes for any manors, lands, tenements, or hereditaments, which by the laws and statutes of this realm, or by any privilege or prescription are not chargeable with the payment of such tithes, or that be discharged by any composition real."

Extends only to predial tithes.

This paragraph of this statute as to the double value, extends only to predial tithes, as corn, hay, wood, flax, hemp, fruit, &c. but for mixed and personal tithes, there is a provision after in this act.

Sole jurisdiction to the spiritual courts.

There is also another proviso in this statute, as in the former, which restrains all suits for subtraction of tithes to be sued in the ecclesiastical court, and that it shall not be lawful to sue any withholder of tithes, obventions, &c. in any other court; and that if the ecclesiastical judge shall give sentence, no prohibition or appeal depending, and the party condemned do not obey the sentence, that then such judges may excommunicate the party, and if he wilfully stand excommunicated by the space of forty days next after publication thereof, in the parish church of the place or

parish, where the party excommunicated is dwelling or most abiding, then the judge ecclesiastical may certify the king in the Chancery, and require process of excom. capiend.

Excommunicato capiendo given.

This clause extends to all manner of tithes, offerings, &c. but this gives no double damages for them, as the former cause doth for predial tithes.

There is another clause in this act, that gives ground likewise for many prohibitions, which is to this effect,

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“ That the aforesaid clause shall not extend to give any judge ecclesiastical jurisdiction to hold plea of any matter, cause, or thing repugnant to, or against the effect, intent or meaning of the stat. of Westm. 2. c. 5. the stat. of Articuli Cleri, circumspecte agatis, sylvæ cæduæ, the Treatise de Regia Prohibitione, Stat. 1 E. 3. c. 10. or any of them, or to hold plea in any matter, wherein the king's court ought to have jurisdiction, any thing therein,” &c.

Note, That by these three statutes before mentioned, the jurisdiction of tithes is confirmed and restrained to the ecclesiastical courts.

That by the statute of 27 H. 8. process for contempt is given before sentence.

Observations upon all the statutes.

By that of 32 H. 8. process for contempt is given after sentence definitive: but observe the different penning.

And by this last statute a writ of excommunicato capiendo is given, if the party continue obstinate by the space of forty days, after an excommunication published against him; so that a man would think here were as good remedies provided for the recovery of tithes in the ecclesiastical court as could be imagined; but the interruptions that are frequently given by prohibitions, as shall be shewed hereafter in due place, very much frustrate the effect of the proceedings in those courts.

And note, That a modus decimandi is properly to be

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2 Inst. 490.

Noy, 81.
 Heily, 27. 133.
 Latch. 210.

sued for in the ecclesiastical courts; but if the prescription be denied, it shall be tried in a prohibition.

And so having said so much concerning the ecclesiastical jurisdiction for the determining the right of tithes, and relief against subtraction of tithes, I shall in the next place shew, in what courts, in what cases, and in what manner, they are determinable in the temporal courts.

Selden, 422.
 In what cases
 the temporal
 courts have and
 may determine
 the right of
 tithes.

Mr. Selden, in his history of tithes, reckons up five manner of ways, whereby the right of tithes may be determined in the temporal courts. 1. In prohibitions, whereby the spiritual courts are forbidden to hold plea, where matters happen which are only triable at the king's court, or where those courts proceed against any statute or the common law, &c. 2. By writ of right of advowson; whereunto may be annexed the writ of *indicavit*. 3. By *scire facias*. 4. By process mandatory to command the payment of tithes. 5. By suits and actions upon the beforementioned statute of 27 H. 8. 32 H. 8. and of 2 E. 6. to which may be added the trials at common law by actions of trespass, assize, &c. and the proceedings directed by the statutes 7 and 8 W. 3. c. 6. 10 and 11 W. 3. c. 15. and 7 and 8 W. 3. c. 34. And of these in order.

In what cases
 prohibitions
 used to be
 granted.

And first of prohibitions, which are frequently obtained out of the courts at Westminster, courts of great sessions in Wales, and the county palatines, &c. upon these grounds following.

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 Hob. 286. 42.
 247.
 2 Inst. 6. 10.
 Co. Entr. 459.
 d. 460. b.
 Co. 2. 44.
 Dyer, 74. p. 49.
 Modus deci-
 mandi.

1. Upon a *modus decimandi*, where the defendant in the spiritual court suggests, that he and all those whose estate he hath in the lands, &c. in which, &c. have time out of mind paid so much yearly in money, or given some other recompense in satisfaction of all the tithes arising upon the lands, or of all the tithe hay or corn, &c. this manner of tithing being by prescription, which is only and properly triable at common law, if pleaded, in the spiritual court or not pleaded, or allowed or not

allowed as a good plea, there is a ground of a prohibition; and what prescriptions and *modus decimandi* are in this case approved of by the common law, I must refer the reader to the proper chapter before.

2. If the bounds of a parish come in dispute, whether the place where the tithes arise be in this or that parish, this is a matter triable by jury, and therefore upon a suggestion of this matter a prohibition will be granted.

3. If lands be pretended to be discharged of tithes by the statute of 31 H. 8. or any other statute, a prohibition lies, because it properly belongs to the judges of the common law to expound all statutes, &c. so if the suggestion be grounded upon the statute of 2 E. 6. for barren grounds, &c.

4. If one sues in the spiritual courts for the tithes of things not tithable by the common law, for which see cap. 12. before, or for the tithes of great woods above twenty years growth, it is a ground for a prohibition.

No tithes shall be paid of heads and balks in the common fields, but shall be privileged by the corn.

5. If a suit be brought in the spiritual court for the taking and carrying away of tithes, after the tithes are set forth and divided from the ninth part by the parishioner, unless the suit be between two ecclesiastical persons in their proper rights, a prohibition lies, because it is matter triable at common law.

6. If the spiritual court will not admit a legal defence, as a release, an accord with satisfaction, an award, &c. or if the spiritual judge refuse to admit the defendant to traverse the plaintiff's title, that he is not parson, vicar, &c. a prohibition will be granted; but if the defendant in the spiritual court allege such matter against the plaintiff there, which is properly triable in that court, as simony, &c. in such case no prohibition will be granted.

7. If the spiritual court shall disallow the proof of the setting forth of the tithes by one witness, prohi-

Cap. 6. antea
Bounds of the
parish, Noy,
147.
Co. 7. 44. b.
Rolls, 2. 291.
l. 1. &c.
5 H. 5. 10.
Cro. El. 228.
Monasterylands
discharged of
tithes.
Atkins of Chan-
cery, 43. Co.
Pref. to 4 Rep.
1. b. supra 356.
Co. Ent. 450. C.
453. d. Porter
v. Rochester,
M. 6 Jac. C. B.
Rolls 2. 307. v.
13.
Suits for things
not tithable.
[383]
Littl. Rep. 13.
supra, 237.
Roll. 2. 286. f. 4.
For matters de-
terminable at
common law,
38 E. 3. 5.
Cro. El. 228.
642.
Roll. 2. 302. q.
19, 23, 24. v. 16.
For irregular
proceedings of
the spiritual
courts.
Cro. El. 656.
Roll. 2. 509. q.
6, 8, 9. 301. q.
14, 15.

More, 909.
 Hetley, 87.
 Disallow proof
 by one witness.

bitions have been granted. Contra, Co. 12. 65. Ideo quære.

There are many more cases wherein prohibitions have been granted, but these are the most frequent, and may serve for a taste. And indeed prohibitions are granted in all cases, where they exceed their jurisdiction.

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 2 E. 6. c. 13.
 Must produce a
 copy of the libel.

By the statute of 2 E. 6. it is enacted, that no prohibition shall be granted in matters of tithes in any of the king's courts, unless the party that requires the same bring and deliver to some of the court where he prays such prohibition, a true copy of the libel subscribed by the hand of the party, and the suggestion under-written, and that if he do not prove that suggestion by two honest substantial witnesses, in the same court within six months after the prohibition granted and awarded, then the party delayed shall have a consultation without delay, and double costs to be assessed by the court where the consultation is so granted, to be recovered in an action of debt, &c. wherein no essoin, &c. shall be allowed.

Must prove the
 suggestion
 within six
 months.

Observations
 upon this clause.
 Hoskins v.
 Stroade, T. 5.
 Car. ro. 988.
 B. R. Cockeram
 v. Davyes.
 Hill, 2^d Jac.
 Poph. 159.
 Jones, 231.
 Cro. Car. 308.
 2 Inst. 662.

This clause of this statute seems to give the parson, vicar, &c. a double remedy where the suggestion is not proved within six months, that is, a consultation, and secondly, double costs; but in both these they are in some measure frustrated in their expectations: for as to the first, after such consultation a new prohibition may be obtained; and besides, there are several cases wherein the party cannot or need not prove his suggestion, notwithstanding this statute, as where the suggestion is in the negative, which regularly cannot be proved. Secondly, if the suggestion be grounded upon any matter of law, as in case the suit be for things not tithable, great wood, things feræ naturæ, &c. this appearing in the libel, a prohibition lies, and there needs no proof of the suggestion.

2 Inst. 662.

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 Cobbe v. Hunt,
 5 Jac. B. R.

If a suggestion contain two matters, and the one

ought to be proved within six months, and the other here, though the party fail in proving that part that ought within this law to have been proved, yet no consultation shall in this case be granted.

A slight proof will serve in this case; as to say, they have known it so, or that common fame is so. Noy, 28.

And if the suggestion be proved before a judge within the six months, though not recorded till after, it suffices. Noy, 30, 44.

If a man make an insufficient proof of his suggestion in a prohibition, it may be supplied at any time during the six months within the statute. Littl. Rep. 185.

To the second, here is double costs to be awarded for want of proving the suggestion, and no execution given, but an action of debt to recover it; which is but a bad remedy in this case, when the party shall only recover the costs, and have no costs allowed him in the second suit.

If a man have a prohibition, and do not prove the suggestion within the six months, and the defendant takes issue upon it, which is found against him, in this case the defendant shall have no costs. Noy, 81.

So upon the whole matter here is a plausible clause in an act of parliament, and little benefit by it.

It is to be observed that some prohibitions are in themselves peremptory, as where there is a suit in the spiritual court for things not tithable, and appearing so in the libel, in which cases a consultation shall never be granted: and so it is, if the suit be for carrying away tithes after they are set forth, unless it be between clergymen in their own rights: and so it is where the matter is determinable at common law, and the same appearing in the libel. In what case prohibitions are peremptory in themselves.

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But where a *modus decimandi*, a custom of not tithing, a privilege within the statute of 31 H. 8. for abbey lands, and in such other cases, where the suggestion is grounded upon matter of fact, which is doubtful to the court, those prohibitions are not peremptory till the matter of fact be tried and found true by verdict.

Where ex post facto.

More, 919.

And note, that the reversioner may have a prohibition upon a suit against his tenant.

But it is a question whether two that are sued severally in the spiritual court may be upon the same modus joined in a prohibition.

Hetley, 147.

The manner of proceeding in the obtaining, prosecuting, and defending of prohibitions, is in this manner.

How to prosecute and defend prohibitions.

The party that is sued in the spiritual court, and desires a prohibition, moves the court, and for the most part makes his suggestion ore tenus at bar: if the suggestion be such upon which a prohibition cannot be denied, the court usually gives rule, that the party shall at a certain day come to show cause why a prohibition should not be granted, and that in the interim proceedings in the spiritual court should be stayed. Upon serving this rule in due time, and oath made of it, if the plaintiff in the spiritual court do not appear at the day, and show good cause to the contrary, the prohibition awarded, and the rule made peremptory; but if the court be doubtful, whether the matter be sufficient to ground a prohibition or no, then, or at the prayer of the defendant, the court will order the plaintiff to draw up his suggestion into form, and then the court will consider of the matter, or the defendant may demur to it, and the matter argued by learned counsel, and then the court, as they see cause, will either award the prohibition, or discharge the rule. But if the matter suggested be a good ground for a prohibition, but is in itself false or doubtful, the defendant in the prohibition may demand a declaration of the plaintiff's attorney, which is grounded upon a supposed attachment, for not obeying the prohibition; to which the defendant may plead as counsel shall advise him, and traverse, and put in issue the matter of the said suggestion, or such other matter as counsel shall advise, which is to be tried by a jury of the country; if it pass with the plaintiff, then is the prohibition become peremptory; but if the verdict pass for the defendant regularly, a

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consultation is awarded, that is, a writ directed to the judge of the spiritual court, authorizing him to proceed, notwithstanding the prohibition.

If a man be sued in the spiritual court for the tithes of wood, herbage, &c. and a prohibition granted because the wood was burnt in the house, or the cattle bred for the plough or pail, the defendant may plead, that the wood or cattle were sold, and traverse the suggestion.

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Littl. Rep. 367.

It has been made a question, whether two that are sued severally in the spiritual court, may join in a prohibition upon the same modus.

Hetley, 147.

Now by a statute made in the 50 E. 3. it is enacted, that where a consultation is once duly granted upon a prohibition made to the judge of holy church, that the same judge may proceed in the cause by virtue of the same consultation, notwithstanding any other prohibition thereupon to be delivered; provided always, that the matter in the libel of the said cause be not ingrossed, enlarged, or otherwise changed.

St. 50 E. 3. c. 4.
Where a prohibition may be had after consultation.

But this statute has been several times held to extend to such causes only where consultations are judicially granted upon examination of the cause, and not where they pass of course, as for want of proof of a suggestion, or upon nonsuit for want of prosecution, or where the first was granted for want of a copy of the libel, or such like.

Jones, 231.
Cro. Car. 208.
Proph. 159, &c.

More, 917.

Sometimes the court grants a consultation sub modo, as where the matter of the libel is in the disjunctive, and as to one part the court has jurisdiction, and to the other not, there the court may grant a consultation as to that part the spiritual court has jurisdiction of, and let the prohibition stand as to the other.

Co. 5. 68. a.
Co. 12. Rep. 44.
Consultations sub modo.

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Or a consultation may be granted, so that the spiritual court allow such plea, of such proof.

Summers v. Sir R. Bulkley,
T. 32. El. B. R.
Poph. 58.
Hob. 179.

Note, that the six months for the proof of the suggestion is according to the calendar, and not twenty-eight days to the month.

How the six months to prove a suggestion is to be accounted.

Co. 5. 68. a.

And note, in the cases before put, the prohibition shall be general, and the consultation special, quoad, &c.

Where no consultation shall be granted upon a verdict for the defendant.
Hob. 300.
Dyer, 171.
p. 5, 6.

And it is taken for a rule in Sir Henry Hobart's Reports, that if a prohibition be faulty, yet the defendant shall never have a consultation, if it appear to the court that the suit in the ecclesiastical court was not well grounded.

And therefore where one sued for the tithe corn of sixty acres of land, and the defendant suggested it was barren ground, and paid no tithe, and prayed and had a prohibition, and the jury found that thirty acres of it were so, and that the other thirty were barren, but had paid tithe wool and lamb, and a consultation denied, because it appeared the plaintiff had no cause to sue for tithe corn.

Noy, 28.

So if one lay a modus for the whole town, and prove it for himself only, no consultation shall be granted.

More, 911.
Austen v. Pigot,
Cro. El. 736.

So in a prohibition it was suggested, that the parson had twenty acres of land, and ten acres of wood in discharge of all tithes, and the proof was, that he had twenty acres of land only, and a consultation denied, because it appeared he had no cause of suit.

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Prohibition
after sentence.
Hob. 97.
Noy, 70.
Winch. 8.
Cro. El. 595.
Hob. 67.

Regularly a prohibition ought not to be granted after sentence, unless it appear the sentence were obtained in the vacation, or by surprise, so that the party had not time to pray it sooner, or upon matter arising after the sentence, and the granting or not granting rests much in the discretion of the court.

After consulta-
tion.

And so sometimes upon new matter arising, after a consultation a prohibition may be granted, notwithstanding the aforesaid statute of 50 E. 3. as where the spiritual court after consultation proceeds to try matter determinable only at law, or if after a consultation the spiritual court will make an unjust decree as to award treble damages: and so in all cases if the spiritual judge will proceed illegally, and against the common law, after consultation a new prohibition may thereupon

Hob. 286.
Hughes, 245.
Hill, 11 Jac.
C. B.
Baldum v.
Geory.

be obtained, but not upon any matter alleged in the libel (126).

(126) After a consultation a prohibition may be granted, if there be any material additions inserted in the libel. *Earl of Clanricard v. Lady Denton*, Gwill. 363.

The general grounds for a prohibition to the ecclesiastical courts are either a defect of jurisdiction, or a defect in the mode of trial. If any fact be pleaded in the court below, and the parties are at issue, that court has no jurisdiction to try it, because it cannot proceed according to the rules of the common law, and in such a case a prohibition lies. Or where the spiritual court has no original jurisdiction, a prohibition may be granted even after sentence; but where it has jurisdiction, and gives a wrong sentence, it is the subject matter of appeal and not of prohibition, per Lord Kenyon, 3 T. R. 4.

The following is a short summary of the reasons of granting and methods of proceeding upon prohibitions. The party aggrieved in the court below applies to the superior court, setting forth, in a suggestion upon record, the nature and cause of his complaint in being drawn ad aliud examen, by a jurisdiction or manner of process disallowed by the laws of the kingdom; upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues, commanding the judge not to hold, and the party not to prosecute the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion; and then for the more solemn determination of the question, the party applying for the prohibition is directed by the court to declare a prohibition; that is, to prosecute an action by filing a declaration against the other upon a supposition or fiction (which is not traversable) that he has proceeded in the suit below, notwithstanding the writ of prohibition; and if, upon demurrer and argument, the court shall finally be of opinion that the matter suggested is a good and sufficient ground of prohibition in point of law, then judgment, with nominal damages, shall be given for the party complaining; and the defendant, and also the inferior court, shall be prohibited from proceeding any farther. On the other hand, if the superior court shall think it no competent

The virtue and
vices of prohi-
bitions.

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Prohibitions of themselves are excellent things, where they are used upon just, legal, and true grounds; and have often avoided the usurpations of the popes and spiritual courts: but by the corruption of these later times they are grown very grievous to the clergy, being too often granted upon feigned and untrue suggestions, which it is impossible the judges should foresee without the spirit of prophecy. And I think I may presume to say, that where one was granted before Queen Elizabeth's time, there have been a hundred granted in this last age, and they are a very great delay and charge to the clergy, and it were well, in my poor judgment, if the reverend judges would think of some way to restrain them, or to make them pay well for their delay, by making the plaintiff enter into recognizance to pay such costs, as the court out of which they issue should award, in case they should not prove their suggestion in convenient time, or some such other course as they in their great wisdom shall think just and meet.

And so having done with the first manner of determining the right of tithes at the common law, I shall proceed to the second, which is by writ of right of advowson, to which likewise belongs the writ of *indicavit*, which in itself is no other but a mere prohibition to the ecclesiastical judge; and first of the *indicavit*.

Indicavit at
common law.

There have been some opinions, that the writ of *indicavit* is grounded upon the statute of *Circumspecte Agatis* and *Articuli Cleri*, cap. 2. But it is very clear this writ lay at common law; and it appears in our

ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for prohibition in the court above, and a writ of consultation shall be awarded; so called, because upon deliberation and consultation had, the judges find the prohibition to be ill-founded, and therefore by this writ they return the cause to its original jurisdiction, to be then determined in the inferior court. 3 Bla. Com. 113.

books, that it was the opinion of some learned judges that it lay in all cases where the right of patronage might come in dispute, and of this opinion Sir Edward Coke seems to be.

And Bracton, a learned judge, who wrote in the time of H. 3. hath the very writ in his book, which was long before the statutes above-mentioned; and he saith, that this writ lies, “ Si contentio fuerit inter rectores de aliquibus decimis; quæ æstimari possunt usque ad quartam, quintam vel sextam partem advocacionis. Et ultra quam partem non extenditur prohibitio, prout sibi videtur.”

38 H. 6. 20. a. per Moile.
4 E. 3. 27. b. per Markham.
2 Inst. 364. Lay for any tithes.
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Bracton, l. 5. c. 4. 402. b.
For a sixth part.

But whatsoever the common law was, it was now settled by the statute of Circumspecte Agatis, and Articuli Cleri, cap. 2. that unless at least the tithes in demand be of the fourth part of the value of the church, this writ lieth not: the statute of Articuli Cleri, c. 1. is “ Si sit contentio de jure decimarum originem habens de jure patronatus, et earundem decimarum quantitas ascendat ad quartam partem bonorum ecclesiæ, locum habeat regia prohibitio,” that is to say, a writ of indicavit.

Articuli Cleri, c. 2.

And this writ lies, as hath been said, where one parson demands tithes against another parson to the fourth part of the value of the church or more, which comes into their churches by several patrons; for if the incumbents come in both by one patron, the right of the advowson cannot come in question, and by consequence this writ lies not.

2 Inst. 491. Where the indicavit lies.

Suppose there be a parson with a vicarage endowed, whereof the parson is patron; and a suit be for tithes belonging to the parson, to the value of a fourth part of the parsonage, but not to a fourth part of the parsonage and vicarage: it should seem in this case, though the vicarage were derived out of the parsonage, and may again be re-united to that, nevertheless by reason of the several patrons an indicavit will lie in this case.

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F. N. B. 45. c. b.
12 E. 4. 13.
When.

And it is to be observed, that this writ doth not lie before libel, nor after definitive sentence; for the party that prays this writ, must show a copy of the libel in the court of chancery before he can have it.

2 Inst. 364.
The form of this writ not altered by the statute.

And though the law be restrained at this day to a fourth part of the value of the church, where before it was at large, yet the form of the writ remains; and if the thing in demand be under the fourth part of the value, it must be showed in pleading by the other side.

F. N. B. 45. b.
Lies of offerings.

And this writ lies as well for offerings as for tithes; when such writ is sued and served, and the proceeding in the spiritual court stopt, then the plaintiff there is to sue his writ of right of advowson, of such a portion of tithes as the case requires; and this is given by the statute of Westm. 2. cap. 5. in these words, “ Et cum

Westm. 2. c. 5.

per breve de indicavit impeditur rector alicujus ecclesie ad petendas decimas in vicina parochia, habeat patronus rectori sic impedito breve ad petendam advocationem decimarum petitarum:” but this must be intended where the patron has the fee-simple of the advowson. And the indicavit is to be brought in the name of the patron and his clerk against the other incumbent, that sues in the ecclesiastical court and his patron; but the writ of right of advowson is to be sued by the one patron against the other, and the patron demandant shall allege explees taken by his incumbent of great and small tithes.

By whom.
F. N. B. 45. b.
But where the same parson is patron and incumbent.
12 E. 4. 13. b.

But if the patron against whom the indicavit is sued be but tenant in tail, tenant for life or years, then he cannot maintain a writ of right, but must demand and appear to a declaration upon an attachment, and plead his title, which must be proceeded in, as in other prohibitions; and when the title of the patronage is determined at the common law, then the cause must be remitted to the ecclesiastical court, where sentence must be given according as the law has determined the right, and this appears by the form of the indicavit, which is special, “ Vobis præcipimus ne placitum illud teneatis,

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F. N. B. 30. b.
The relief of tenant in tail, purveyances, &c.
2 Inst. 364.

The proceeding remitted.

Regist. 36. a.
33. b.

donec discussum fuerit in curia nostra ad quem illorum pertineat ejusdem ecclesie advocatio."

And there is a note in the register, that this writ lies of a vicarage, prebend, et aliis similibus as well as of a rectory: and the form of the writ is thus; "Præcipe A. quod reddat B. advocacionem decimarum quartæ partis vel medietatis ecclesie," &c. F. N. B. 30. c.

But these writs, as well as other real actions, are grown obsolete and seldom put in practice, and therefore thus much shall suffice of the nature and proceeding in them.

The third manner of proceeding for the determining the right of tithes at common law was by scire facias, which was grounded either upon letters patent, fines, or other judicial records, of which Mr. Selden instances several precedents; but this manner of trial being taken away by the stat. of 18 E. 3. c. 7. I shall say no more of it. Scire facias.
18 E. 3. c. 7.

Seld. Hist. decim. 430, &c.
Co. 2 Inst. 640, &c.

The fourth sort of determining the right of tithes at common law, mentioned by Mr. Selden, is writs mandatory, commanding the payment thereof, whereof he gives some few instances; but these having never been frequent, and for long time discontinued and grown out of use, I will not trouble the reader with them, but refer the curious reader to Mr. Selden's History of Tithes, and proceed to the fifth manner of determining the right of tithes at the common law, which is grounded upon the late statutes. [395]
Writs mandatory.

Seld. 444, &c.

For the statute of 27 H. 8. there hath been sufficient said already; for that of 32 H. 8. that concerns the temporal jurisdiction, I shall leave it till the last, and proceed to show what authority is given to the temporal courts by the statute of 2 E. 6. cap. 13. being the first law that ever gave the temporal courts jurisdiction for the parson against the parishioners for subtraction of tithes, in which there is a clause to this effect. 2 E. 6. c. 13.

And it is enacted by that statute, after it has confirmed the former statutes of 27 H. 8. c. 20. and 32 H. 8. Treble value.

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c. 7. that every of the king's subjects should from thenceforth truly and justly without fraud or guile set out, yield, and pay all manner of their predial tithes in their proper kinds, as they arise and happen in such manner and form as hath been of right yielded and paid within forty years next before, &c. or custom ought to have been paid, and that no person thenceforth should take or carry away such or like tithes, which had been yielded or paid within the said forty years, or of right ought to have been paid in the place or places titheable of the same, before he hath justly divided or set forth the tithes thereof, the tenth part of the same, or otherwise agreed for the same tithes with the parson, &c. under the pain of the forfeiture of the treble value of the tithes so taken and carried away.

2 Inst. 650.

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This clause being compared with the former clause, almost penned in the same words for the double value, would make a man at a stand what the meaning of the parliament was; and it was forty years (when almost all that were at the making of this act were dead) before it was found out, that an action of debt lay upon this clause at common law for the treble damages; to wit, Pasch. 29 Eliz. in the exchequer, in an information by the queen's attorney against one Wood for the treble value, as forfeited to the queen. In which case it was resolved, that an action of debt lay at the common law for the treble damage, for not setting forth of tithes; for wheresoever an act of parliament gives a forfeiture against him, that doth dispossess, &c. the owner of his property, as here he doth of his tithes, there the forfeiture is given to the party grieved or dispossessed. Since which resolution actions of debt have been frequently brought in all the courts of Westminster, by parsons, vicars, proprietors, owners and farmers of tithes, as well lay as spiritual upon this statute, but being so long before it was found out, that an action lay at common law upon this statute, the plaintiffs in the recital of the statute alleged it to be made the fourth of February,

2 E. 6. whereas in truth the parliament begun the first of E. 6. and was held by prorogation the fourth of February, 2 E. 6. And this being discovered by an action between Oliver and Colier, P. 6 Jac. B. R. brought upon this statute, wherein the statute was misrecited as aforesaid, and exception taken to it in arrest of judgment, the court upon good advisement overruled the exception by reason of the multitude of precedents, and affirmed the rule, that "multitudo errantium parit errori patrociniū." Vide Hardres, 343.

Washington's
Rep. 241.

1 Brownl. 100.
Yelvert. 126.
Dyer, 171. p. 6.
Stile, 122.

Now considering that this is become a very frequent action in use, I conceive it will not be improper to the present occasion, to communicate to the reader what I have observed and learned in this kind of actions, not only concerning the forms of declarations, pleadings, verdicts and judgments, but likewise what evidence is necessary upon the general issues of non culpa, and nil debet, for the plaintiff and defendant: and in the first case consider in what cases, and by whom, and against whom this action may be brought.

* If two be joint tenants, and they enter and occupy jointly, the action must be brought against them jointly; but if one only enter and occupy, the action must be brought against him that only occupies alone.

* Hutt. 121,
122.
By whom and
against whom
actions lie in this
statute.

Nota, that the action lies by executors, but not against executors.

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Syderf. 88. 181.

But if there be two tenants in common, and one of them sets out his tithe, and the other carries it all away, there the action shall be brought against him, that carries it all away alone.

If the parson have two parts of the tithe, and the vicar a third part, and one man farms all, he may sue for all in one action.

Noy, 3.

If the husband and wife in the right of the wife be entitled to tithes, they shall join in this action, because the damage is to survive: but a parson and a vicar cannot join, but if they join in a lease to a third person, their farmer may sue for all in one action; but in

Noy, 136.
1 Brown. 86.
Yelvert. 63.
Cro. Jac. 83.
More, 912.

the first case, I see no reason but that the husband may bring the action alone, and so I have known it often done.

The form of the declaration.
Pellet v. Henworth, p. 1657.
B. R.

In an action brought upon this statute, the severance was alleged before the sowing, and exception taken after verdict; but the exception was disallowed, because the showing of the sowing was superfluous, and so aided by the verdict.

Cro. Jac. 324.

The taking was alleged after the defendant's term was ended, and yet held good.

More, 911.

M. 40 and 41 Eliz. a judgment was arrested, because the suit was brought "ad respondendum tam domino regi quam parti;" but this case I very much doubt, for being against a statute law it is a contempt finable, though the plaintiff have the forfeiture, as upon the statute of Hue and Cry, &c. and I take the case inter Luvered and Owen, M. 4. Jac. C. B. for the better law, where it was held good.

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Hetley, 121.

In an action of debt, upon the statute of 2 E. 6. a parson sued for tithe in a foreign parish, without showing how he was entitled to them, which was moved in arrest of judgment after verdict, notwithstanding it was held good. Another exception was, that he had not alleged that the defendant was subdit. domini regis, but likewise overruled, because he was alleged to be an occupier of lands.

Vid. Cro. Jac. 324.

Cro. El. 170.

Upon an action brought by two upon this statute, who made their title by a lease from a patentee of the king, and exception was taken, because they did not show the patent, but disallowed. First, because the letters patent did not belong to the plaintiffs. Secondly, because the plaintiffs did not demand the tithes themselves, but damages for a tort. Another exception was taken to the declaration, because the plaintiff alleged the defendant did not agree with them, and did not say, or either of them, but held good by intendment.

2 Bulst. 65,
228, 183.
1 Brown. 86.

And it hath been adjudged, that in this action, the plaintiff needs not to show his title especially, but it is

enough for him to allege that he is proprietor, farmer or rector, generally, without showing how.

Noy, 3.
Yelvert. 63.
Cro. Jac. 68.
361.
2 Brown. 70, 71.

And it hath been held good, though the plaintiff in his declaration do not express the quantities or loads of the corn or hay carried away.

And so it is, though you do not express in your declaration the kinds of the grain carried away.

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2 Inst. 650.

Where a man alleged, that he was farmer of all the tithe-corn arising, &c. upon sixty acres of land in D. and did not allege which they were in certain, and yet allowed for good. Secondly, the plaintiff alleged the defendants occupiers, but did not say, whether jointly or in common, and yet held good. Thirdly, the plaintiff had alleged no time of the carrying away, but having alleged no time of the severance, and the carrying away, coming in with a conjunction copulative, it was held well enough.

Coke v. Smith,
H. 7. Car. 1. 10.
587. B. R. per
Latch.

In an action brought upon this statute, the plaintiff averred in his declaration, that he was subditus dicti domini regis, having recited the statute, and it was held naught, because it must necessarily be intended E. 6. and not of the present king.

Cro. Jac. 324.
2 Bulstr. 144.

In an action upon this statute the defendant pleaded a recovery in the ecclesiastical court; but it was held no good plea at common law; but I conceive it would be a good evidence upon nil debet pleaded, otherwise the parishioner were in an ill condition.

Pleas in this
action.
Porter v.
Rochester,
Hill, 9 Jac. B. R.

In this action non culp. and non debet have been both held good issues, but it is no good plea to plead, that the plaintiff sowed the corn, and sold it to the defendant, because this matter will not excuse the payment of tithes.

Wortley v. Em-
pringham, P.
42 El. B. R.
Hob. 218.
Cro. El. 766.
Cro. Jac. 361.
More, 914.

Now having brought the cause to issue upon nil debet or non culp. we will show in the next place, what will be good and material evidence, as well for the plaintiff as defendant.

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First, if the plaintiff be a parson, vicar, or other ecclesiastic, and have not been some considerable time in possession of his living, in which I have not observed

What evidence
is necessary in
this action, ex
parte quer.

any constant rule amongst the judges in their practice, but ten years quiet possession for the most part is allowed by the judges for an evidence of the plaintiff's title, unless some material objection be made against it to draw it into question; but if the plaintiff have been put for some short time in possession, or the possession litigious, then the judges usually put the plaintiff to prove his institution and induction; and now he must prove, that he was in episcopal orders at the time of his institution, otherwise his institution is void. By the late act of uniformity he must produce a certificate under the hand and seal of the bishop, &c. that instituted him, that he subscribed the declaration mentioned in the act of uniformity, and must prove he subscribed the same in the presence of the bishop, or, &c. and he must prove, that within two months after he was inducted, upon some Sunday, or Lord's day, during divine service, he read the thirty-nine articles of religion in the parish church into which he was inducted, and that he did declare his unfeigned assent and consent to all things therein contained; and he must likewise prove, that within two months after actual possession of his living, he read morning and evening prayer in his church upon some Lord's day, and openly and publicly before the congregation declared his assent and consent to the use of all things therein contained and prescribed, in these words: "I, A. B. do here declare my unfeigned assent and consent to all and every thing 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, or ordaining and consecrating Bishops, Priests and Deacons*" (127).

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(127) In an action for subtraction of tithes, proof of the defendant's former acknowledgment of the plaintiff's title to

The parson, vicar, &c. having thus made himself a title, must proceed to prove the taking and carrying away the corn, hay, &c. and the value; and, if need be, that the land lies within the parish, &c. but this the judges put them to prove first of all commonly.

But if the plaintiff be a farmer or patentee under the crown he must prove his title; but if he have been any considerable time in possession, and the title not controverted, the judges seldom put the plaintiff to show any more title but his bare possession and enjoyment, and that others pay him tithes.

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And so having showed what is necessary the plaintiff should be prepared to prove, I will proceed to show what defence the defendant may make.

The defendant upon the general issue of not guilty, &c. may prove that he duly set forth his tithes; but if he afterwards carried them away, it will not serve his turn; so if he sell his corn privately to another, and after he has sold it privately, cuts and carries it away, the action lies against the first owner: the same law is, where the owner of the land privately sell his corn to another, who privately cuts and carries it away.

Ex parte defendantis,
Brown. I. 34.

2 Inst. 649.

If there be two farmers sue, and the defendant pleads *nil debet*, and upon the trial prove an agreement with one of them, this shall bind his companion.

More, 919.

And the defendant may prove that another has a better title to whom he has paid his tithes, or compounded with him for them.

the tithes is sufficient evidence as against the defendant a wrong-doer, Philipps's Ev. 181., and in a suit for tithes in the spiritual court, where the defendant pleaded that the plaintiff had not read the thirty-nine articles, the court put the defendant to prove the fact, though a negative; upon which he moved the court of King's Bench for a prohibition, but it was refused. *Ibid.* 158.

Fifteen years possession of a benefice was held to be *prima facie* evidence of a regular induction, and having read the thirty-nine articles. *Chapman v. Beard, Gwill.* 1482.

Or he may prove, that the parson came in by simony, or any other matter that makes his presentation, institution or induction void, or any other defect in not reading the articles, &c.

Or he may prove, that he set forth his tithes, and a stranger carried them away; or may give in evidence, a lease or grant from the plaintiff himself, or to any other to whom he can make a good title, but such leases and grants must be in writing, unless for one year only, to the owner of the land, which hath been held good by way of retainer.

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Verdict.

The jury, if they find for the plaintiff, are to find how much of the debt demanded by the declaration is due to the plaintiff, which they are to do by trebling the value of the tithe subtracted, wherein they are usually assisted by the court.

Judgment.

The judgment is always given for the debt found by the jury without costs, because this action is grounded upon a penal law, where no action lay at common law, neither shall the defendant have any costs if the verdict pass for him: but if the jury should upon the trial give cost and damage, the plaintiff may release them and take his judgment: but if judgment be given for the plaintiff in an action brought upon this statute by nihil dicit, non sum informatus, or demurrer, the plaintiff shall have judgment for the whole debt demanded by his declaration (128). And if an action upon this statute

More, 915.

Cro. Jac. 361,
62.

(128) At common law the plaintiff in this action was not entitled to costs, but he now is, to a certain extent, under the stat. 8 and 9 W. 3. c. 11. s. 3. Neither was defendant entitled to costs under stat. 23 Hen. 8. c. 15., though the plaintiff were nonsuit, or defendant had a verdict; for an action on this statute is not one upon contract, or for an immediate personal wrong to the plaintiff, but for a misfeasance. *Downton v. Finch*, 2 Inst. 651.; but defendant is now entitled to his costs in such cases under the 8 and 9 W. 3. *Buller's Nisi Prius*, in notis 192.

be brought against two or more, and verdict only pass against one, or part of the defendants, the plaintiff shall have judgment against those against whom the verdict passes, though the others be acquitted. Stiles, 317, 318.

Note, that this statute, as to the treble value and double value, extends only to predial tithes, and not to personal, mixed, or other church duties. Nota.

The chancery likewise by English bill holds plea of tithes, as may be made out by many precedents. Savil, 69.
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The exchequer likewise by English bill holds plea for a single value, for subtraction of all manner of tithes, oblations, &c. of which great use hath been made since the late wars; and there they decree the single value with costs, and the future payment, which is of great advantage to the plaintiffs, and these suits are not interrupted with prohibitions; but these suits are often very costly too: for if a *modus decimandi*, or the bounds of the parish come in question, and the proof not very clear, they are frequently sent to trials at law, which gives delay and increases the charges very much. This jurisdiction, I take it, is much fortified since tenths and first fruits were annexed to the crown: but suits of this nature were rarely brought in this court before the war: however, there are some ancient books prove, that this court on the law side has assumed the jurisdiction of tithes, but the reporter reports it with a *quod mirum*. Jurisdiction of
the exchequer.

38 Ass. p. 20.
44 E. 3. 43, 44.

Where the king's copyholder pleaded a *modus*, it must be tried in the exchequer, and for this cause a prohibition was granted. Lane, 59.

It is evident in our books of law, that the right of tithes were frequently determined at common law in actions of trespass for taking away of tithes, unless both parties were clergymen; and sometimes assizes have been brought at common law for tithes between lay persons. And it is held in the 25 H. 8. that where the lord of a manor claimed tithes in consideration of finding a chaplain at such a chapel, and the parishioners claimed them likewise upon the same consideration, 50 E. 3. 20.
2 H. 4. 15.
20 H. 6. 17.
1 H. 6. 5.
2 E. 4. 5.
44 Ass. p. 25.
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38 E. 3. 5.
22 E. 4. 21.
25 H. 8. Pr.
Jurisdiction, 95.

that the right of these tithes being between lay persons was triable at common law only.

38 E. 3. 5.

And at this day, if tithes be once set forth and divided from the nine parts by the owner of the corn, and any person that has not right to them carries them away; the suit for this trespass must be in the temporal, and not in the spiritual.

Stat. 32 H. 8.
cap. 7.

And by the statute of 32 H. 8. it is enacted, that in all cases where any person, &c. which then had, or then after should have any estate of inheritance, freehold, &c. in or to any parsonage, vicarage, portion, pension, tithes, oblations, and which then were, or then after should be made temporal, or admitted to be, abide and go to, or in temporal hands and lay uses, and profits by the law, &c. should then after fortune to be disseised, deforced, wronged, or otherwise kept or put out from their lawful inheritance, estate, seisin, possession, occupation, term, right or interest, of, in, or to the same, or, &c. by any other person, or, &c. claiming or pretending to have interest or title to the same, that then, and in every such case, &c. the person, &c. so disseised, &c. the heirs, wives, &c. shall and may have their remedy in the king's temporal courts, and other temporal courts, as the case shall require for the recovering, &c. such inheritance, &c. by writs original of, *Quod ei deforceat*, *præcipe quod reddat*, *assize*, &c. as the case shall require, &c. So that since this statute the case is put out of all doubt, that for such tithes, &c. which are become lay-fee, the right, title and possession is become determinable at the common law; and all manner of real actions, ejectionments, and other personal actions, are brought there as the case requires daily.

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Hardres, 130.

There was a bill exhibited by a vicar in the exchequer, and the vicar who was plaintiff did not show how the tithes he sued for became due, whether by prescription or endowment, and exception taken to it at the hearing; but because the defendant had admitted the plaintiff vicar, and that the tithes were due and insisted upon

the payment, the exception was overruled, but the book allows it to have been a good cause of demurrer.

And yet H. 15. Car. 2. inter Stone and Ludlow, such a bill upon demurrer was held good. Ideo quare. Hardres, 321, 322.

An English bill was exhibited in the Exchequer for the tithe of houses in London, to have a discovery of the improved rents, and the defendant alleged a modus, and exception taken to the answer because the defendant did not discover the rents; but the court held Hardres, 132, 133.

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that the modus being alleged by way of answer, the defendant ought to answer all the bill, and discover the rents; but if he had alleged it by way of plea, he had not been bound to answer any other part of the bill; and if the plea were overruled, then the defendant should answer interrogatories to the particulars.

In a bill in the exchequer for tithes, the plaintiff did not allege, that he was content with the single value according to the common form, and for that cause was demurred to and overruled, because this court had jurisdiction before the stat. of 2 E. 1. was made (129). Hardres, 190.

(129) In a bill, where the waiver of the double penalty was omitted altogether, and which only prayed an account of the single value of the tithes, the court held the omission to be immaterial, and that the waiver, though not express, was implied. *Wools v. Walley*, Gwill. 1383.

The court will not dismiss the bill of a vicar who claims by it tithes throughout a whole parish, and only proves his claim in part of it, on that ground; nor if the issues, directed as to the parts wherein he has not made out his title, should be found against him on the trial. *Cunliffe v. Taylor*, 3 Price, 231. Wood. B. dissentiente.

But although a defendant may in equity insist on several species of defence, provided they be consistent, if he undertake to prove a general exemption, and prove merely one which is partial, he cannot have the benefit of the latter. *Leigh v. Maudsley*, Bunb. 295.

The difference of practice in suits for tithes between the courts of Exchequer and Chancery is, that in the former the

account is decreed up to the time of filing the bill, in the latter up to the time of the master's report. 3 Atk. 591. *Bell v. Read*, Gwill. 804.

In order to sustain a bill for tithes, a layman need only state, that he is entitled to them, and need not state, that he is seised of the impropriate rectory. *Lowther v. Bolton*, Gwill. 1120. *Crayhorne v. Taylor*, 2 Gwill. 650.

A rector claiming tithes out of his parish is bound to make out his case satisfactorily, for he is not standing on his common-law right; where, therefore, a money payment has been long acquiesced in, even after a verdict obtained by a former rector in his favour, the court would only direct an issue, and not a commission, to ascertain the boundaries of such extra-parochial lands, before there had been a previous inquiry whether the plaintiff was entitled to any. *Sanders v. Longden*, 4 Price, 117. A rector seeking to reclaim tithes of which a vicar has been once endowed, is bound to make out his case by clear and satisfactory evidence. Proof of payment of tithes of seeds to the rector will not alone affect the right of the vicar, on account of the prevailing erroneous notion that seeds are a great tithe. *Dorman v. Curry*, 4 Price, 109. And the rector coming to question his own grant is not entitled to an issue as matter of right. *Ibid.*

Terriers are instruments frequently adduced as evidence in cases of tithes, and, as is observed by C. B. Macdonald, "are well known in the law. By the canons it is directed, that an inquiry shall be from time to time made of the temporal rights of the clergymen in every parish, and returned into the registry of the bishop, the proper guardian of those rights, for his information. That return is called a terrier, and has authenticity from being found in the proper place. Then this paper, purporting to be an instrument taken notice of in the law, must stand or fall according as it has the requisites of such instrument to render it authentic." *Miller v. Foster*, at Warwick Sum. Ass. 1794. The proper repository is the registry of the diocese, or a copy from the parish registry may be admitted, if the original cannot be found. *Atkins v. Hatton*, Gwill. 1406. A terrier from the archdeacon's registry is also admissible. *Potts v. Durant*, 4 Gwill. 1450. A paper purporting to be a terrier found in the charter chest of a college, which had property in the

In a bill in the exchequer for tithes, the defendant Hardres, 322. pleaded that the lands out of which the tithes arose belonged to such a monastery, which was discharged from payment of tithes by their order, but did not show of what order the monastery was, and yet held good. Vide stat. 7 and 8 W. 3. c. 6. 10 and 11 W. 3. c. 15. and 7 and 8 W. 3. c. 34.

And now having showed in how many courts, and how many ways tithes may be recovered, it calls to my mind the fable of The Fox and the Cat, who had but one way to shift for herself when the huntsmen came,

parish, was thought to be inadmissible to disprove a modus. 4 Gwill. 1406. In some cases a terrier has been admitted though not brought from one of the regular repositories. Thus a terrier found in the registry of the dean and chapter of Litchfield was admitted to be evidence against one of the prebendaries. *Miller v. Foster*, 4 Gwill. 1405. n. A terrier is strong evidence against the parson; but it is never admitted for him unless it be signed by a churchwarden, or (if the churchwardens are nominated by him) by some of the substantial inhabitants of the parish. *Earl v. Lewis*, 4 Esp. N. P. C. A terrier, though not signed by the impropriate rector, nor by any person for him, is evidence against him, as to tithes claimed by him in the parish. *Potts v. Durant*, Gwill. 1450.

Old terriers, recording that tithe of hay is payable in kind, signed by the rector, churchwardens, overseers, and some of the resident parishioners, are good evidence to rebut a presumption of a farm modus attempted to be established by proof of a money payment having been uniformly rendered within living memory, and the absence of any evidence, even of reputation, that the tithe had ever been taken in kind, and that although such terriers are not proved to have been signed by any person interested in the farm. *Mytton v. Harris*, 3 Price, 19.

Terriers are generally signed by the minister of the parish; but this does not appear to be essentially necessary. *Ibid.*

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but that one proved better and more secure than all the shifts the fox had boasted of; for upon the whole matter, it were much better for the reverend clergy, if they had one ready way to recover single damages with their costs of suits at common law, where they might not be interrupted by prohibitions, and clashing of jurisdictions, and tossed from one court to another, than all these ways I have mentioned. And it is a wonder to me, that there being hardly a lord in parliament, nor many of the house of commons, that have not some part of their estates in impropriations, though they had no kindness to the church, yet for their own interest and concerns, have not to that purpose preferred some law in parliament before this time; which might be done in a few lines, by giving an action of the case at common law for the subtraction of tithes with costs, or if the parliament should think fit the smaller sort of tithes might be determined in a summary way by the justices of peace, with an appeal to the judges of assize; but this I humbly submit, as I do all the rest, to better judgments (130).

(130) A summary method of recovering small tithes under the value of forty shillings, was given by statute 7 and 8 W. 3. c. 6. by complaint to two justices of the peace: and by another statute of the same year, the same remedy was extended to all tithes withheld by quakers under the value of ten pounds. By the 7 and 8 W. 3. c. 6. 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 way fail in the true payment of such small tithes, offerings, oblations, obventions, or compositions by the space of twenty days at most after

If small tithes
are not paid
within 20 days
after demand,

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. S. 1.

it shall be lawful to complain to two justices not interested.

“ And on such complaint the said justices shall summon in writing under their hands and seals, by reasonable warning, every such person against whom such complaint shall be made; and after his appearance, or, upon default of appearance, the said warning or summons being proved before them upon oath, the said justices shall proceed to hear and determine the said complaint, and upon the proofs, evidences, and testimonies produced before them, shall, in writing under their hands and seals, adjudge the case, and give such reasonable allowance and compensation for such tithes, oblations, and compositions so subtracted or withheld as they shall judge to be just and reasonable, and also such costs and charges, not exceeding ten shillings, as upon the merits of the case shall appear just. S. 2.

Who may summon the parties complained of, and on default of appearance determine the complaint and give allowance with costs not exceeding 10s.

“ And if any person shall refuse or neglect, for the space of ten days after notice given, to pay or satisfy any such sum of money, as upon such complaint and proceeding shall by two such justices be adjudged as aforesaid; in every such case the constables and churchwardens of the said parish, or one of them, shall, by warrant under the hand and seals of the said justices to them directed, distrain the goods and chattels of the party so refusing or neglecting as aforesaid: and after detaining them (not less than four days nor more than eight, 27 G. 2. c. 20.) in case the said sum so adjudged, together with reasonable charges of making and detaining the said distress, be not tendered or paid by the said party in the mean time, shall make public sale thereof, and pay to the party complaining so much of the money arising by such sale, as may satisfy the said sum so adjudged, retaining to themselves such reasonable charges for making and keeping the said distress as the said justices shall think fit (and also deducting their reasonable charges of selling the said distress: returning the overplus, if any shall be, to the owner upon demand. 27 G. 2. c. 20.) S. 3.

On refusal to pay in 10 days after notice, the constables, &c. may distrain, and after 3 days sell the same, and satisfy the sum and charges, rendering the overplus.

Justices to administer an oath.

“ And the said justices shall have power to administer an oath. S. 4.

Not to extend to London, or any place otherwise settled by act of parliament.

“ Provided that this act shall not extend to any tithes, oblations, payments, or obventions, within the city of London or liberties thereof; nor to any other city or town corporate, where the same are settled by act of parliament. S. 5.

No complaint to be heard unless made within two years.

“ And no complaint shall be heard and determined by the said justices, unless the complaint shall be made within two years next after the times that the same tithes, oblations, obventions, and compositions did become due. S. 6.

Persons aggrieved to appeal to the sessions, who are to determine the matter.

“ Provided also, that any person finding himself aggrieved by any judgment to be given to two such justices, may appeal to the next general quarter sessions 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 appellants, to be levied by distress and sale of the goods and chattels of the said appellants, 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. S. 7.

If judgment be confirmed, justices to give costs.

No judgment to be removed unless the title be in question.

Persons complained of insisting on any composition, &c. and giving security to pay costs, justices not to give judgment.

“ Provided that 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 to 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 judg-

ment 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. S. 8.

And complainant may prosecute in any other court.

“ And every person who shall by virtue of this act obtain any judgment, or against whom any judgment shall be obtained, before any justices of the peace out of sessions, for small tithes, oblations, obventions or compositions, shall cause or procure the said judgment to be inrolled at the next general quarter session to be held for the said county or other division; and the clerk of the peace shall upon the tender thereof inroll the same, and shall not receive for the inrollment of any one judgment any fee or reward exceeding one shilling; and the judgment so inrolled, and satisfaction made by paying the sum adjudged, shall be a good bar to conclude the said rectors, vicars, and other persons, from any other remedy for the said small tithes, oblations, obventions or compositions, for which the said judgment was obtained. S. 9.

Judgment to be inrolled at the next sessions by the clerk of the peace,

and to bar vicars from any other remedy.

“ And if any person against whom such judgment shall be had, shall remove out of the county or other division before the levying of the sum adjudged; the justices who made the judgment, or one of them, shall certify the same under hand and seal to any justice of such other county or place wherein the said person shall be an inhabitant; who shall by warrant under his hand and seal, to be directed to the constables or churchwardens of the place, or one of them, levy the sum so adjudged to be levied upon the goods and chattels of such person as fully as the said other justices might have done, if he had not removed as aforesaid. S. 10.

Persons removing, justices may certify the judgment, and other justices by warrant may levy the sum adjudged.

“ And the justices who shall hear and determine any of the matters aforesaid, shall have power to give costs, not exceeding ten shillings, to the party prosecuted, if they shall find the complaint to be false and vexatious, to be levied in manner and form aforesaid. S. 12.

Justices may give costs not exceeding 10s.

“ And if any person shall be sued for any thing done in the execution of this act, and the plaintiff in such suit shall discontinue his action, or be non-suit, or a verdict pass against him, such person shall recover double costs. S. 13.

If the plaintiff be nonsuit, person sued to have double costs.

“ Provided that any clerk or other person, who shall begin any suit for recovery of small tithes, oblations, or obven-

Suits for tithes not exceeding 40s. to have no benefit by this act.

tions, not exceeding the value of forty shillings, in his majesty's court of exchequer, or any of the ecclesiastical courts, shall have no benefit by this act for the same matter for which he hath so sued. S. 14. (made perpetual by 3 Ann. c. 18.)

If quakers refuse to pay tithes, &c. justices, on stating what is due, may compel them thereto if the sum be under 10l.

“ By stat. 7 and 8 W. 3. c. 34. whereas by reason of a pretended scruple of conscience, quakers do refuse to pay tithes and church rates; it is enacted, that 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 any ways interested in the said tithes), upon the complaint of any parson, vicar, farmer, or proprietor of tithes, churchwarden or churchwardens who ought to have, receive, or collect 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.

Persons aggrieved may appeal to the next quarter sessions, who are finally to determine. If judgment be confirmed, to give costs. No judgment to be superseded by certiorari.

“ 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 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. S. 4.

“ Provided, that in case any such appeal be made as aforesaid, no warrant of distress shall be granted until after such appeal be determined. S. 5.

No distress till appeal be determined.

“ And by the 1 G. 1. st. 2. c. 6. the like remedy shall be had against any quaker or quakers for the recovery 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 such church or chapel, or any ways interested in the said tithes), upon complaint of any parson, vicar, curate, farmer, or proprietor of such tithes, or any churchwarden or chapelwardens, or other person who ought to have, receive, or collect any such tithes, rates, dues, or payments as aforesaid, are authorised and required to summon, in writing under their hands 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. S. 2.

Clause extending to rates, dues or payments belonging to any church or chapel.

“ Now by 53 G. 3. c. 127. two or more justices of the peace are authorised 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,

Justices of peace may determine complaints respecting tithes not exceeding 10l.

The conclusion
of the whole.

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I have now finished this small tract, whereby I wish the reverend clergy may receive as much satisfaction as I desire, or they can expect. And I shall now conclude all with a list of those monasteries, the lands of which are only capable to be discharged of the payment of tithes, by order, bull, prescription, real composition, or otherwise, that every clergyman may satisfy himself without farther inquiry, whether such monastery lands as shall happen to be in his parish, &c. may have the benefit of the statute of 31 H. 8. to be freed from the payment of tithes. And in the list following I have set down the times of the foundations of the several monasteries, that being material to know; for if they were founded since the first year of R. 1. they cannot prescribe in

and by all such means, and subject to all such provisions and remedies by appeal or otherwise, as contained in the stat. 7 and 8 W. 3. s. 1. touching small tithes, oblations, and compositions, not exceeding forty shillings, and one justice shall be competent to receive the original complaint and to summon the parties to appear before two or more justices of the peace: and by the same statute, s. 6. the provisions of the stat. 7 and 8 W. 3. c. 34. s. 4. and stat. 1 Geo. 1. st. 2. c. 6. s. 2. are extended to any value not exceeding fifty pounds, and one justice is made competent to receive the original complaint, and to summon the parties to appear before two or more justices."

Provision as to
quakers neglect-
ing to pay
tithes, &c. ex-
tended to any
sum not exceed-
ing fifty pounds.

In conclusion it may not be superfluous to make one observation on the title of this work. The word "parson," although at first sight it may convey with it associations of a disrespectful nature, in consequence of a familiar, clownish, and indiscriminate use, (to adopt the language of Blackstone) is a synonymous word for "rector," and is the most legal, honourable, and beneficial title, that a parish priest can enjoy, because such a one, observes Sir Edward Coke, and he only, is said *vicem seu personam ecclesiæ gerere*.

non decimando. I have also for the most part set down what order the houses were of, that the reader may satisfy himself whether they were of any of those orders that were privileged from the payment of tithes. For the valuations I have followed Mr. Dugdale, as being a sure author, having observed many errors in that of Mr. Speed.

In the perusal of this catalogue you will find how many foundations were made of monasteries in the first century after the conquest, and till the reign of King John; that if they had continued at that rate, the greatest part, if not all the land in England, had by this day been monastery land. But in King John's time they began to slack; and in the ninth of H. 3. the statute of mortmain was made, after which you will find but few religious houses (as they were called) founded.

Magna Charta.

The Cistercian order came into England about the year of our Lord 1128, and in the ensuing table you may see how well they prospered, that in so short a time there should be so many of the greater abbeys of that order; but it should seem this order began sooner. See *Monasticon Angl.* li. 1. p. 695. m. 1098.

Dugdale, 145.

Stow's Survey of London, 930.

The black canons regular of St. Augustine first came into England, as Mr. Stow says, in the year 1108, and were first placed in Trinity Church, within Aldgate, London. But I rather think he is mistaken in the time, for I find some monasteries of that order before that time. However, the ensuing catalogue will inform you of their increase.

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And it is without dispute that the increase of monasteries, especially those of privileged orders, tended very much to the prejudice of the secular clergy that had the cure of souls; for besides the orders they were privileged, they appropriated all the churches they could obtain; and how ill they were served, a man may in some measure observe that peruses the statute of 15 R. 2. and 4 H. 4. for it appears by them that they

Endowment of
vicarages.

15 R. 2. c. 26.

Palmer's Rep.
219.

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14 H. 4. c. 12.

endowed no vicarages at all upon the appropriating churches, or so meanly that the vicars could not live upon them, and no hospitality was practised. And therefore the parliament of England, which has always put a stop to the usurpations and exorbitances of Rome, and to prevent the religious houses destroying the church, in the 15th year of the reign of King Richard the Second, made a law, "That the diocesan of the place where any church was to be appropriated, should take care the vicarage should be well and sufficiently endowed, besides a portion to the poor." But this act not having the effect was desired and expected, the bishops of those times being over-awed by his holiness's mandates, or participating too much of his qualities, a second good act was made in the 14th year of King Henry the Fourth, whereby it is enacted, "That all those appropriations that were made since the former statute without such endowments, were declared to be void. And that no religious person (that is, monks and friars) should be made vicar in any church appropriated or to be appropriated by any means in time to come, and that no vicarage should be appropriated by these statutes, and divers other statutes cited in this work upon several occasions." It is easy to guess what opinion they had, even in the times of popery, of these people called religious men.

I have now made too long a digression; and will therefore proceed to the catalogue I promised the reader.

A CATALOGUE

Of the several monasteries, that upon the general survey taken in the 26th year of H. 8. were returned to be of the annual value of 200*l.* per annum and upwards within England and Wales, and by consequence dissolved by the statute of 31 H. 8. and by that means are capable of being discharged of the payment of tithes ; with the date of their foundations, as near as I can compute, with what orders they were of. In which observe, that A. stands for Abbey, P. for Priory, Ben. for Benedictines, Cist. for Cistercians, Præm. for Præmonstratenses, Car. for Carthusians, C. S. A. for Canons of St. Austin, F. for founded, T. for Tempore ; and in the valuations I have rejected all ob. and q.

BERKS.

	<i>£.</i>	<i>s.</i>	<i>d.</i>
Reading, Ben. F. T. H. 1. -	1938	14	3
Bushelham, A. C. S. A. F. 13 E. 3. -	285	11	0
Abingdon, A. Ben. F. 720. - -	1876	10	9

BEDFORD.

Newnham, P. C. S. A. T. H. 1. -	293	5	11
Elmestow, A. Ben. F. T. W. Conquest	284	12	11
Wardon, A. Cist. F. 4 Steph. 1138 -	389	16	6
Chicksand, P. White C. Gibertines, F. T.			
W. Ruf. - - -	212	3	5
Dunstable, A. C. S. A. F. T. H. 1. -	344	13	3
Woeburn, A. Cist. F. T. Johannis Regis	391	18	2

BUCKS.

Ashrugge, Coll. C. S. A. F. T. E. 1.	416	16	4
Noteley, A. C. S. A. F. T. H. 1. 1112	437	6	8
Missenden, A. Ben. F. 1293 - -	261	14	6

CANTABR.

			£.	s.	d.
Thorney, A. Ben. F. 972	-	-	411	12	11
Barnwel, P. C.S.A. F. T. H. 1. 1092			256	11	10
Ely, P. Ben. ab. 970	-	-	1084	6	9 $\frac{1}{2}$

CESTR.

S. Werburge, A. Ben. F. 1095	-	1003	5	11
Combermeere, A. Cist. F. 1134	-	225	9	7

CORNUB.

Bodmin, P. C.S.A. F. 936	-	-	270	0	11
Launceston, A. C.S.A. T. W. Conquest			354	0	11
St. German's, A. C.S.A. F. T. Ethel-					
stani Regis.	-	-	243	8	0

CUMBR.

Carlisle, P. C.S.A. F. T. W. Ruf.	-	418	3	4
Holmeoltrum, A. Cist. F. 1135	-	427	19	3

DERB.

Darley, A. C. S. A. F. T. H. 2.	-	258	14	5
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DEVON.

Ford, A. Cist. F. 1133	-	-	374	10	6
Newham, A. Cist. F. circa 1246	-		227	7	8
Dinkswel, A. Cist. F. 1201	-	-	294	18	6
Hertland, A. C.S.A. F. T. H. 2.	-		306	3	2
Torre, A. Præm. F. T. R. 1.	-	-	396	0	2
Buckfast, A. Cist. F. T. H. 2.	-		466	11	11
Plimpton, A. Cist. F. T. E. 1.	-		241	17	9
Tavestock, A. Ben. F. 961.	-	-	902	5	7
Exon, P. Cluna. F. T. H. 1.	-	-	502	12	9
Bockland Monachorum or Buckland, A.					
Cist. 1278	-	-	241	17	9 $\frac{3}{4}$
Valuation of Plimpton	-	-	912	12	8 $\frac{3}{4}$

DORCET.

Abbotsbury, Ben. F. circa 1016	-	390	19	2
Middleton, A. Ben. F. per R. Ethelstan		578	13	11

	£.	s.	d.
Tarrent, A. Cist. F. per H. 3.	-	214	7 9
Shafton, A. Ben. F. 941	-	1166	8 9
Cerne, A. Ben. F. T. R. Edgari	-	515	17 10
Sherborne, A. Ben. F. circa 370	-	682	14 7

DUNELM.

St. Cuthbert, A. Ben. F. circa 824	-	1366	10 9
Tinmouth, P. Ben. F.	-	397	10 5

ESSEX.

Berking, A. Ben. F. 680	-	862	12 5
Stratford Langthorn, A. Cist. F. 1135	-	511	16 3
Waltham, A. C. S. A. F. circa 1060	-	600	4 3
Walden, A. Ben. F. 1136	-	772	18 1
St. Oswith, A. C. S. A. F. 1120	-	677	1 2
Colchester, A. C. S. A. T. H. 1.	-	523	17 0
Coggeshall, or Coxhall, Cist. 1142	-	251	2 0

GLOUC.

Bristol, A. C. S. A. F. circa T. H. 1.	-	670	13 11
Hales, A. Cist. F. 1246	-	357	7 8
Winchcomb, A. Ben. F. 787	-	759	11 9
Tewsbury, A. Ben. F. 715	-	1598	1 2
Cirencester, A. C. S. A. F. T. H. 1.	-	1051	7 1
Kingswood, A. Cist. F. 1139	-	244	11 3
Gloucester, A. Ben. F. 680	-	1946	5 9
Lanthon, P. juxta Glouc. C. S. A. F.	-	648	19 11
1136	-		

HANTS.

St. Swithins Winton, A. Ben. F. 634	-	1507	17 2
Hyde, A. Ben. F. per Regem Elfred	-	865	18 0
Wherwel, A. Ben. F. T. Edgari Reg.	-	339	8 7
Romsey, moniales, Ben. F. 907	-	393	10 10
Twinham, P. C. S. A. F. ante 1042	-	312	7 0
Bello loco, A. Cist. F. 1204	-	326	13 2
Southwick, P. C. S. A. F. T. H. 1.	-	257	4 4
Tichfield, A. Præm. F. T. H. 3.	-	249	16 1

THE PARSON'S COUNSELLOR.

HERTFORD.

	£.	s.	d.
St. Albans, A. Ben. F. 755 - -	2102	7	1

HUNTS.

St. Neots, A. Ben. F. circa T. H. 1.	241	11	4
Ramsey, A. Ben. F. 969 - -	1716	12	4

KANT.

St. Austins prope Cant. A. Ben. F. 605.	1413	4	11
Ledis, P. C. S. A. F. 1119 - -	362	7	7
Feversham, A. Clun. F. 1147, per R.			
Steph. - - -	286	12	6
Boxley, A. Cist. F. 1144 - -	204	4	11
Roffen, A. Ben. F. 600 - -	486	11	5
Malling, A. Ben. per Regem Edm. -	218	4	2
Dertford, A. C. S. A. F. 49 E. 3. per ips. R.	380	0	0
Canterbury, Ch. Ch. P. Ben. Ab. 600	2349	8	5 $\frac{3}{4}$

LANC.

Whalley, A. Cist. F. 1172 - -	321	9	1
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LEIC.

Leicester, A. C. S. A. F. 1143 -	951	14	5
Croxden, A. Præm. circa T. R. 1. Reg.	385	0	10
Launda, A. C. S. A. F. T. W. Ruf.	399	3	3

LINCOLN.

Lincoln, St. Cath. P. Gilbert, F. T. H. 2.	202	5	0
Kirkstead, A. Cist. F. 1139 - -	286	2	7
Revesly, A. Cist. F. 1142 - -	287	2	4
Thornton, A. C. S. A. F. 1139 -	594	17	10
Bardney, A. Ben. F. 712. - -	366	6	1
Croyland, A. Ben. T. Reg. Ethelred, 716	1803	15	10
Spalding, A. Ben. F. 1052 - -	761	8	11
Sempringham, A. Gilb. F. 1148, 14 Steph.	317	4	1
Epworth moniale, Carthus. 10 R. 2. fund.	237	15	2
Barlings, or Oxeney, A. Præm. 1154	252	5	11 $\frac{1}{2}$

LONDON and MIDD.

	£.	s.	d.
St. John Jerusal. P. F. T. H. 1. 1100	2385	12	8
St. Barthol. Smithfield, C. S. A. F. 1102	653	15	0
St. Mary Bishopsgate, Pr. F. 1187, 9			
R. 1. - - -	478	6	6
Clerkenwell, P. Ben. F. T. reg. Steph.	262	19	0
London Minors, Ben. F. T. E. 1. -	318	8	5
Westminster, A. Ben. F. T. Edgari.	3471	0	2
Sion, A. C. S. A. F. per reg. H. 5. -	1731	8	4
London, domus, Cart. fundat. T. E. 3. reg.	642	0	4
S. Clare extra Algate monial. F. 1292	418	8	5
St. Mary Charter-house, Carth. F. 1371	736	2	7
St. John's Holywell, monial. nigr. F. 1318	347	1	3
St. Mary East-Smithfield, A. Cist. F. 34			
E. 3. - - -	602	11	10

NORFOLK.

Thetford, A. Clun. F. 1103 - -	312	14	4
Wymundham, A. Ben. F. 1139 -	211	16	6
Hulmo, A. Ben. F. per Canutum reg.	583	17	0
Westdreham, A. Præm. F. T. H. 2.	228	0	0
Walsingham, A. C. S. A. F. circa T.			
Steph. R. - - -	391	11	7
Castle Acre, A. Clun. F. 1090 -	306	11	4
West Acre, A. Clun. F. T. W. Ruf.	260	13	7
Norwich, P. Ben. 1100 - -	874	14	6 $\frac{3}{4}$

NORTH'TON.

Burgi St. Pet. A. Ben. F. per ro. fere			
R. Mer. - - -	1721	14	0
Pipewell, A. Cist. F. 1143 - -	286	11	8
S. Andreas, P. Clun. F. 1067 -	263	7	1
Sulby, A. Præm. F. T. Steph. reg. -	258	8	5

NOTT.

Lenton, P. Clun. fund. T. H. 1. -	329	5	10
Thugarton, P. C. S. A. F. T. H. 1. -	259	9	4

THE PARSON'S COUNSELLOR.

	£.	s.	d.
Welbeck, A. C. S. A. F. T. reg. Steph.	249	6	3
Warsop, P. C. S. A. fundat.	-	239	10 5
Bella Valla, Pri. Carth. F. circa 16 E. 3.	227	8	8
Newstead, P. C. S. A. F. T. E. 3.	-	219	18 8

These two last are under value in Mr. Dugdale,
but thus per Speed.

NORTHUMBR.

Tinmouth, a cell to St. Albans, a nunnery	511	4	1
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OXON.

Godstow, A. Ben. F. T. Steph. reg.	274	5	10
Eynesham, A. Ben. F. T. Ethelred, reg.	441	12	2
Osney, A. C. S. A. F. T. H. 1.	-	654	10 2
Thama, A. Cist. F. T. H. 1. per Speed	256	13	7
Oxford, P. per Speed, fund. ante Conq.	224	4	8
Dorchester, per eundem A. C. S. A. F. 635	219	12	0

SALOP.

Hagmond, A. C. S. A. F. 1100	-	259	13 7
Lilleshul, A. C. S. A. F. Adelfleda, R.			
Merciæ	-	229	3 1
Wigmore, A. C. S. A. F. 1172, per Speed	267	2	10
Wenlock, P. Clun. F. 1181, vel antea	401	0	7
Salop, A. C. S. A. F. 1081, per Speed	615	4	3
Hales Owen, A. Præm. fund. T. R. Joh.	337	15	6

SOMERSET.

Glassenbury, A. Ben. circa 300 F.	-	3311	7 4
Bruton, A. C. S. A. F. T. conquest	-	439	6 8
Henton, P. Carth. F. T. H. 3.	-	248	19 2
Witham, P. Cart. F. per H. 2.	-	215	15 0
Taunton, P. C. S. A. T. H. 1.	-	286	8 10
Bathon, A. Ben. F. T. H. 3.	-	617	2 3
Keynesham, A. C. S. A. F. T. H. 1.	419	14	3
Michelney, A. Ben. F. 740	-	447	4 11
Buckland, P. Cist. F. T. E. 1.	-	223	7 4
Athelney, P. Ben. 888	-	209	0 3¼
Montacute, Clun. Temp. W. C. or H. 1.	456	14	3¼

STAFF.

		£.	s.	d.
De la cres, A. Cist. F. 1153	-	227	5	0
Burton, sup. Trent. A. Ben. F. T.				
Eadredi R.	-	267	14	3
Croxden, A. Cist. cont. Fundat.				

SUFFOLK.

S. Edmundi Bury, A. Ben. F. 1020		1659	13	11
Butley, A. C. S. A. F. 1171	-	318	17	2
Sibeton, A. Cist. F. 1150	-	250	15	7
Ixworth, P. C. S. A. F. T. Conq.	-	280	9	5

SURREY.

Merton, P. C. S. A. F. T. H. 1. 1121		957	19	5
Shene, P. Carth. F. 1414	-	777	12	0
Chertsey, A. Ben. F. 666	-	659	15	8
Newark, P.	-	258	11	11
St. Maries Overs. A. C. S. A. F. 7 H. 1.		624	6	6
Bermundesey, A. C. S. A. F. 7 H. 1.		474	14	4

SUSSEX.

Lewes, A. Clun. F. T. W. R.	-	920	4	6
Roberts-brige, A. Cist. F. T. H. 2.		248	10	6
Battayle, A. Black Monks. F. 1066		987	0	11

WARW.

Combe, A. Cist. F. T. Steph. R.	-	311	15	1
Kenelworth, A. C. S. A. F. T. H. 1.	-	538	19	0
Merival, A. Cist. F. 1148	-	254	1	8
Nuneaton monial, Ben. F. T. H. 2.	-	253	14	5
Coventry, P. Ben. ab. 1043	-	538	4	0

WILTS.

Malmesbury, A. Ben. F. circa 670	-	803	17	7
Bradenstock, P. C. S. A. F. T. Conq.		212	19	3
Edington, P. C. S. A. F. 1352	-	442	9	7
Ambresbury, A. Ben. F. 1177	-	495	15	2

	£.	s.	d.
Wilton, A. Ben. F. T. Ethelwolpi R.	601	1	1
Fareley, a cell to Lewes per Speed, F.			
1125, Clun. - - -	217	0	4
Lacock, A. C. S. A. F. 1232, per Speed	203	12	3

WIGORN.

Malverne, A. Ben. F. 1083	-	308	1	5
Evesham, A. Ben. T. Offæ.	-	1183	12	9
Pershore, A. Cist. F. 1138	-	643	4	5
Halesowen, A. Præm. F. T. John reg.		282	13	4
Brodesly, A. Cist. F. 1138	-	388	9	10
Worcester, P. Ben. T. Edgar	-	1229	12	8 $\frac{1}{4}$

EBORUM.

St. Mary Eborum, A. Ben. F. 2 W. Ruf.		1550	7	0
Selby, A. Ben. F. T. Conq.	-	729	12	10
Kirkstal, A. Cist. F. 1147	- -	329	2	11
De rupe, A. Cist. F. 1147	- -	224	2	5
Monks Burton, A. Clun. F. circa 1186		2039	3	6
Nostel, A. C. S. A. F. T. H. 1.	-	492	18	2
Pomfrait, A. Clun. F. T. Conq.	-	337	14	8
Gisborne, A. C. S. A. F. T. Steph. reg.		628	3	4
Whitby, A. Ben. F. T. Conq.	-	437	2	9
Montegratiæ, A. Carth. F. circa 1396		323	2	10
Newburge, P. C. S. A. F. 1145	-	3067	8	3
Belland, A. Cist. F. 1134	- -	238	9	4
Kirkham, A. C. S. A. F. T. H. 1.	-	269	5	9
Melsa, A. Cist. F. 1136	- -	299	6	4
Brilington, C. S. A. F. T. H. 1.	-	547	6	11
Walton, a Gilbertines, F. T. Steph. reg.		360	16	10
Bolton in Craven, P. C. S. A. F. T. H. 1.		212	3	4
Rival, A. Cist. F. 1132	- -	278	10	2
Jerval, A. Cist. F. T. Steph. Reg.	-	234	18	5
Furnes, A. Cist. F. 1127	- -	805	16	5
De Fontibus, Cist. F. 1132	- -	998	6	8
Warter, P. C. S. A. F. T. H. 1.	-	221	3	10
Rithal, per Speed	- - -	351	14	6

			£.	s.	d.
Old Maulton, A. F. T. Steph. R. per					
Speed	-	-	257	7	0
S. Michael juxta Hull, Carth. F. 1377			231	17	3

WALLIA.

Valla de Sancta Cruce, Com. Denbigh,					
Cist. F. T. E. 1.	-	-	214	3	5
Strada Florida Cardigansh. Cist. Clun.					
F. T. Conq.	-	-	1226	6	0

Gloria Deo Patri, Deo Filio, et Deo Spiritui Sancto.
Amen.



APPENDIX.

No. I.

Form of the Grant of a perpetual Advowson.

THIS indenture made the day of in the year of the reign of our sovereign lord of Great Britain and Ireland, king, defender of the faith, and so forth, and in the year of our Lord Between A. B. of in the county of esquire, of the one part, and C. D. of in the county of gentleman, of the other part; Witnesseth, that the said A. B. for and in consideration of the sum of of lawful money of Great Britain, to him in hand paid at or before the sealing and delivery hereof, the receipt whereof he the said A. B. doth hereby acknowledge and himself therewith fully satisfied, and paid, and thereof and of every part thereof doth hereby acquit, release and for ever discharge the said C. D. his heirs, executors, and administrators, and every of them by these presents; and also for divers other good causes and valuable considerations him the said A. B. thereunto moving, he the said A. B. hath given and granted, and by these presents doth fully, freely, and absolutely give and grant unto the said C. D. his heirs and assigns for ever, all that the advowson of the rectory or parsonage of E. in the county of and all the estate, right, title, interest, property, claim, and demand whatsoever of him the said A. B. of, in, and to the said advowson, and to the donation, presentation, and free disposition, and right of patronage of the said church: To have and to hold the said advowson and premises aforesaid hereby given and granted, or meant, mentioned, or intended to be hereby given and granted, with the appurtenances, unto him the said C. D. his

heirs and assigns, to and for the sole and only^d proper use and behoof of the said C. D. his heirs and assigns for ever, and to and for no other use, intent, or purpose whatsoever. And the said A. B. hath granted, and by these presents doth grant for himself and his heirs, that they will warrant to the said C. D. and his heirs the aforesaid advowson of the said church and premises aforesaid, and every of them, with the appurtenances, unto him the said C. D. his heirs and assigns, against him the said A. B. his heirs and assigns, and against all persons whatsoever claiming or to claim the same, or any right or title thereunto, by, from, or under him, them, or any of them. And the said A. B. doth hereby, for himself, his heirs, executors, and administrators, covenant, promise, grant, and agree to and with the said C. D. his heirs, executors, administrators, and assigns, and to and with every of them by these presents, in manner and form following; that is to say, that he the said A. B. is at the time of the sealing and delivery hereof, and until the execution of these presents, the true, right, and undoubted patron of the said church of E. and of the rectory aforesaid: and hath good right, full power, and lawful, and absolute authority, to grant and convey the same to the said C. D. his heirs and assigns in manner and form as aforesaid; and that it shall and may be lawful to and for the said C. D. his heirs and assigns, from time to time, and at all times for ever hereafter, whenever the said church shall or may, by the death, resignation, deprivation, cession, or change of all or any the rectors or incumbents thereof, or otherwise happen to become vacant, to present some other honest, learned, and well qualified clerk to succeed in the said church as the rector or parson thereof, and to do all other acts which to the office of patron of the said rectory doth of right belong or appertain, as fully and amply as he the said A. B. his heirs or assigns, might or could do if these presents had not been made, without any let, suit, hindrance, molestation, interruption, or disturbance whatsoever of or from him the said A. B. his heirs or assigns, or any other claiming under him, them, or any of them: And that he the said A. B. his heirs and assigns, and all other persons whatsoever, having or claiming any right or title to the said advowson under him or them, shall and will from time to time, and at all times hereafter, upon the reasonable

request, and at the proper cost and charges of the said C. D. his heirs and assigns, in the law make, do, levy, execute, and suffer all and every such further and other lawful and reasonable act and acts, grant and grants, conveyances and assurances in the law whatsoever, for the farther, better, and more perfect and absolute granting, conveying, and assuring of the said advowson of the said church to the said C. D. his heirs and assigns, be it by grant, confirmation, fine, or recovery, or in any other manner as by the said C. D. his heirs and assigns, or his or their counsel learned in the law, shall be reasonably devised, advised, or required: All which further and other assurance and assurances so to be made of the said premises shall be and enure, and shall be adjudged, deemed, and taken to be and enure, and are hereby declared to be and enure to the sole, only, and proper use of the said C. D. his heirs and assigns for ever, and to and for no other use, intent, or purpose whatsoever. In witness whereof the parties abovesaid to these presents have interchangeably set their hands and seals, the day and year first abovementioned. 1 *Burn's Eccl. Law*, 48.

No. II.

Grant of a next Avoidance.

This indenture made the day of in the year of our Lord Between A. B. of in the county of gentleman, of the one part, and C. D. of in the county of gentleman, of the other part; Witnesseth, that the said A. B. for divers good causes and considerations, him the said A. B. thereunto moving, hath given and granted, and doth by these presents give and grant unto the said C. D. his executors, administrators, and assigns, the first and next donation, nomination, presentation, and free disposition of the rectory or parsonage of the church of E. in the county of F. and that it shall and may be lawful to and for the said C. D. his executors, administrators, and assigns, whensoever, howsoever, and by whatsoever means, by death, resignation, privation, cession, permutation, or by any other ways or

means whatsoever the aforesaid church of E. shall first or next happen to be void, to present any one fitting, honest, and learned man thereunto; and to do all other things which belong to the office and duty of a patron; and to do for the fulfilling of such first and next vacation or avoidance only as fully and amply as he the said A. B. in that behalf might do, if these presents had not been made. And the said A. B. doth hereby for himself, his heirs, executors, administrators, and assigns, covenant, promise, and grant to and with the said C. D. his executors, administrators, and assigns, that he the said A. B. hath full power and lawful authority to give, grant, and dispose of the next presentation of and in the aforesaid rectory and church of E. to the said C. D. his executors, administrators, and assigns as aforesaid. And further, that he the said A. B. his heirs or assigns shall and will, from time to time, and at all times hereafter, at the reasonable requests, and costs, and charges of him the said C. D. his executors, administrators, and assigns, make, do, and execute, or cause to be made, done, and executed such further and other reasonable act and acts, thing and things, conveyance and assurance in the law whatsoever, for the further, better, and more absolute giving and granting of the said next presentation of, in, and to the aforesaid rectory and church of E. unto him the said C. D. his executors, administrators, and assigns, as by him the said C. D. his executors, administrators, and assigns, or his or their counsel learned in law, shall be reasonably devised or advised and required. In witness whereof the parties to these presents have hereunto interchangeably set their hands and seals the day and year first abovewritten. 1 *Burn's Eccl. Law*, 50.

No. III.

Form of a Presentation.

To the most reverend father in God, R. by divine Providence lord archbishop of Canterbury, primate of all England and metropolitan; (if it be to the archbishop of York, the word [all] must be omitted. If to any other bishop,

then thus :) To the right reverend father in God, R. lord bishop of or in his absence to his vicar-general in spirituals, or to any other person having, or who shall have sufficient authority in this behalf: I, Sir W. P. baronet, true and undoubted patron of the rectory of the parish church of [or, of the vicarage of] in the county of and in your diocese of now vacant by the death [or resignation, or otherwise, as the case shall be] of A. B. the last incumbent there, do present unto you C. D. clerk, master of arts, humbly requesting that you will be pleased to admit the said C. D. to the said church, and to institute and cause him to be inducted into the same, with all its rights, members, and appurtenances, and to do and execute all other things in this behalf which shall belong to your episcopal office. In witness whereof, I have hereunto set my hand and seal, the day of in the year 1 *Burn's Eccl. Law*, 149.

No. IV.

Form of a Nomination to a Chapel of Ease, or Perpetual Curacy.

To the right reverend father in God lord bishop of A. B. of &c. sendeth greeting: Whereas the curacy of in the county of and diocese of is now void by the death of C. D. last incumbent there, and doth of right belong to my nomination: These are humbly to certify your lordship, that I do nominate E. F. clerk to the curacy aforesaid; requesting your lordship to grant him your licence for serving the said cure. In witness whereof, I have hereunto set my hand and seal, the day of in the year of our Lord 2 *Burn's Eccl. Law*, 57.

No. V.

Form of a Nomination to a Chapel, augmented by Queen Anne's Bounty.

To the right reverend father in God, C. lord bishop of A. B. of gentleman, sendeth greeting. Whereas

the curacy of the chapel of in the county of and in your lordship's diocese of is augmented, or shortly intended to be augmented, by the governors of the bounty of the late Queen Anne, for the augmentation of the maintenance of the poor clergy; by reason whereof it is requisite, that a curate should be duly nominated and licensed to serve the said cure, pursuant to the statute in that case made; I, the said A. B. do hereby nominate C. D. clerk (the person employed by me in serving the said cure) to be curate of the said chapel of and do humbly pray your lordship to grant him your licence to serve the said cure, and to perform all divine offices therein accordingly. In witness whereof, I have hereunto set my hand and seal, the day of in the year of our Lord *Ecton. 460.*

No. VI.

Form of a Donation.

To all to whom these presents shall come. Know ye, that I, A. B. of in the county of esquire, have given and granted, and by these presents do give and grant to my beloved in Christ C. D. clerk, the office or place of curate [or as the case shall be] of the chapel of in the county of now lawfully vacant, and to my donation and free disposition in full right belonging, and by these presents do make, constitute, and appoint him the said C. D. curate of the said chapel; to have, hold, and enjoy the said office or place of curate in the chapel aforesaid to him the said C. D. during his natural life, with all and every the salaries, stipends, rights, and appurtenances to the same office or place of curate aforesaid, in any wise belonging or appertaining, as fully, freely, and perfectly, and in as ample manner and form as any other hath or ought to have held and enjoyed the same. In witness whereof, I have hereunto set my hand and seal, the day of in the year of our Lord *Ecton. 459.*

No. VII.

Another Form.

To all to whom these presents shall come. A. B. of in the county of esquire, lord of the manor of in the county of sendeth greeting. Whereas the chapel of in the county aforesaid, is now vacant, and to my donation in full right belongeth; know ye, that I the aforesaid A. B. have given and granted to my beloved in Christ C. D. clerk, the aforesaid chapel of with all its rights and appurtenances, and by the tenor of these presents do induct him the said C. D. into corporal possession of the said chapel, with all its appurtenances. In witness thereof, &c. *Ecton. 461.*

 No. VIII.

The Form of a Deed of Gift of Money to Queen Anne's Bounty, to be executed by the Donor: as the same has been settled and generally used since the Mortmain Act, 9 G. 2. c. 36.

This indenture made the day of in the year of our Lord Between A. B. of C. in the county of D. 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; Witnesseth, that the said A. B. hath given and granted, and by these presents doth give and grant, unto the said governors, the sum of to be by them disposed of and laid out for a perpetual augmentation of the [vicarage] of E. in the county of F. and diocese of G. pursuant to the rules and orders made and established under the great seal of Great Britain, for the disposition of the said bounty; which said sum of the said A. B. doth hereby covenant and promise to and with the said governors, to pay forthwith into the revenue of the said governors, to take effect in possession for the use and purpose aforesaid.

immediately from the making hereof. In witness, &c.*
 2 Burn's Eccl. Law, 294.

No. IX.

*Form of an Instrument usually executed by the
 Governors of Queen Anne's Bounty, when a
 Benefactor desires it.*

Whereas A. B. of C. in the county of D. hath by his deed indented, bearing date the day of last past, duly attested and enrolled in his majesty's high court of Chancery, given and granted unto the governors of the bounty of Queen Anne for the augmentation of the maintenance of the poor clergy, the sum of £200 for the augmentation of the [vicarage] of E. in the county of F. and diocese of G. Now the said governors do hereby promise to give the sum of £200 out of their revenue, to be added thereto: the whole to be disposed of and laid out for the perpetual augmentation of the said [vicarage] of E. pursuant to the rules and orders made and established under the great seal of Great Britain, for the distribution of the said bounty. Provided always, that the said gift and grant be made complete and effectual, according to the statute made in the ninth year of the reign of his late majesty king George the Second, intituled, "an act to restrain the disposition of lands whereby the same become unalienable." In witness whereof, the said governors have caused their common seal to be hereunto affixed this day of in the year of our Lord
 2 Burn's Eccl. Law, 295.

No. X.

Nomination of a Curate.

To the right reverend father in God, Charles, lord bishop
 of These are to certify your lordship, that I, A. B.

* This deed, when executed, must be acknowledged before a master or master extraordinary in Chancery, and afterwards inrolled in Chancery.

rector [or vicar] of in the county of and in your lordship's diocese of do hereby nominate and appoint C. D. to perform the office of a curate in my church of aforesaid; and do promise to allow him the yearly sum of for his maintenance in the same; humbly besecching your lordship to grant him your licence to serve the said cure. In witness whereof, I have hereunto set my hand and seal, the day of in the year of our Lord 2 *Burn's Eccl. Law, 55.*

No. XI.

Form which may be used as a Title for Orders.

To the right reverend father in God, Richard, lord bishop of London. These are to certify your lordship that I, A. B. rector [or vicar] of in the county of and in your lordship's diocese of London, do hereby nominate and appoint C. D. to perform the office of a curate in my church of aforesaid, and do promise to allow him the yearly sum of for his maintenance in the same, and to continue him to officiate in my said church until he shall be otherwise provided of some ecclesiastical preferment, unless by fault by him committed, he shall be lawfully removed from the same. And I do solemnly declare, that I do not fraudulently give this certificate only to entitle the said C. D. to receive holy orders, but with a real intention to employ him in my said church, according to what is before expressed. Witness my hand this day of in the year of our Lord 3 *Burn's Eccl. Law, 54.*

No. XII.

*Form of a Testimonial for Deacon's Orders if
from a College.*

We, the master and fellows of College, in do hereby testify, that A. B. whose life and behaviour we have

known for the space of three years now last past, is a person of good life and conversation. Given under the seal of our college, the day of in the year of our Lord*
 3 *Burn's Eccl. Law*, 54.

No. XIII.

If not from a College.

We whose names and seals are hereunto set, do hereby testify, that A. B. whose life and behaviour we have known for the space of three years now last past, is a person of good life and conversation. Given under our hands and seals, the day of in the year of our Lord 3 *Burn's Eccl. Law*, 54.

No. XIV.

Form of a Testimonial for Priest's Orders.

We, do hereby testify, that A. B. whose life and behaviour we have known for the space of three years now last past, is a person of good and honest life and conversation, and professeth the doctrine expressed in the articles of religion 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 one thousand five hundred and sixty-two. Given under, &c. 3 *Burn's Eccl. Law*, 54.

* Five instruments ought to be transmitted to the bishop not less than twenty days before the time of ordination by every person desiring to be ordained. First, A signification of his name, degree, and place of abode. Second, A certificate of publication having been made in the church of his design to enter into holy orders. Thirdly, Letters testimonial of his good life and behaviour. Fourthly, Certificate of his age. Fifthly, The title upon which he is to be ordained, and moreover, if he comes for priest's orders, he must exhibit to the bishop his letters of orders of deacon.

No. XV.

Another Testimonial for Orders, either Priest's or Deacon's, according to Dr. Grey.

To the right reverend father in God, Richard, lord bishop of Lincoln. Whereas A. B. of college, in desiring to be admitted to the holy orders of deacon [or priest] hath requested our letters testimonial of his laudable life and integrity of manners to be granted to him: We whose names are underwritten do testify by these presents, that the aforesaid A. B. for three years last past of our personal knowledge hath led his life piously, soberly, and honestly; hath diligently applied himself to the study of good learning, and hath not (so far as we know) held or published any thing but what the church of England approves of and maintains; and moreover, we think him worthy to be admitted to the holy order of deacon [or priest]. In witness whereof we have hereunto subscribed our names, the day of in the year of our Lord 3 *Burn's Eccl. Law, 55.*

 No. XVI.
Another Form.

To the right reverend father in God, Charles, lord bishop of Carlisle. Whereas, our beloved in Christ, A. B. bachelor of arts, hath declared unto us his intention of offering himself a candidate for the holy orders of deacon, and for that end hath requested our letters testimonial of his good and honest life and conversation, and other due qualifications to be granted to him: We whose names and seals are hereunto set do testify by these presents, that we have personally known the life and behaviour of the aforesaid A. B. for the space of three years now last past; and that he hath, during the said time, been a person of good and honest life and conversation, and that he professeth the doctrine expressed in the articles of religion 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 one thousand five hundred and sixty-two: and we do believe in our consciences, that the said A. B. is qualified to be admitted (if it shall so please your lordship) to the holy order of deacon (or priest). Given under our hands and seals the day of _____, in the year of our Lord _____. 3 *Burn's E. L.* 56.

No. XVII.

Form of appointing a domestic Chaplain.

Know all men by these presents, that I, the right honourable A., lord _____, baron of _____, have admitted, constituted, and appointed the reverend B. C., clerk, my domestic chaplain, to have, hold, and enjoy all and singular the benefits, privileges, liberties, and advantages due and of right granted to the chaplains of noblemen by the laws and statutes of this realm. Given under my hand and seal, the day of _____, in the year, &c. 3 *Burn's E. L.* 101.

No. XVIII.

Form of dismissing a domestic Chaplain.

Whereas I, the right honourable A. lord _____ baron of _____ by writing under my hand and seal, bearing date the day of _____, did admit, constitute, and appoint B. C. clerk, my domestic chaplain, to hold and enjoy all benefits, privileges, and advantages belonging to the same; now by these presents, I, the said A. lord _____ do, for divers good and lawful causes and considerations, dismiss and discharge the said B. C. from my service as domestic chaplain, and from all privileges and advantages to him granted as aforesaid. Given under my hand and seal the day of _____, in the year, &c. 3 *Burn's E. L.* 101.

No. XIX.

Certificate of the Values and Distances of Livings for the Purpose of obtaining a Dispensation.*

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 E. 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 , and that they are distant from each other about miles. Witness my hand the day of .
3 *Burn's E. L.* 107.

* The method which a presentee must pursue to obtain a dispensation is as follows:

He must obtain of the bishop, in whose diocese the livings are, 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 lie in two dioceses, then two certificates as aforesaid are to be obtained 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. He must exhibit to the archbishop his presentation to the second living, and also bring 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, vide App. No. 20. And he must in like manner exhibit to the archbishop his letters of orders of deacon and priest.

And he must also exhibit to the archbishop 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 registrar of such university.

And in case he be not doctor or bachelor of divinity, nor doctor of law, nor bachelor of canon law, he is to procure a qualification as chaplain to some nobleman, or to some other person empowered by law to grant qualifications for pluralities (which is also to be duly registered in the faculty office) in order to be tendered to the archbishop according to the statute. And if he has taken any of the aforesaid degrees which the statute allows as qualifications, he is to procure a certificate thereof in manner before mentioned, and to exhibit the same to the archbishop Ecton, 444, and vide p. 33.

No. XX.

Form of a Testimonial for procuring a Dispensation for a Plurality.

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 any thing but what the church of England approves and maintains. In witness whereof we have hereunto set our hands and seals this day of in the year of our Lord . 3 *Burn's E. L.* 107.

No. XXI.

Form of a Dispensation to hold two Livings.

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 promulged 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, 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 mean time 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 bishop shall not take due care therein. Provided nevertheless, that these presents do not avail you any thing, unless duly confirmed by the king's letters patent. Given under the seal of our office of faculties, this _____ day of _____, &c. 3 *Burn's E. L.*

No. XXII.

Form of a Petition for a Licence of Non-residence under 57 G. 3. c. 99.

To the right reverend lord bishop of , the humble petition of the reverend A. B., rector of , in the county of .

Sheweth,

That your petitioner is desirous to obtain your lordship's licence of non-residence, on account of (here state the grounds for the licence of non-residence), and your petitioner hereby states that the duties of the said are performed by his curate, the reverend C. D., who is licenced, and to whom he allows the yearly stipend of pounds, with the surplice fees, and the use of the rectory house, wherein he resides, and the garden and offices. That his said curate does not serve any other ecclesiastical preferment, and does not hold any donative, perpetual curacy, or parochial chapelry, and does not officiate in any other church or chapel: and that the gross annual value of the said is pounds.

Your petitioner therefore humbly prays your lordship to grant him a licence of non-residence.

A. B. rector of .

Witness his hand, this day of .

No. XXIII.

Form of Notification of Non-residence by reason of Residence on another Benefice.

I, A. B., rector of , in the county of , and diocese of , do hereby, according to the 23d section of stat. 57 G. 3. c. 99. notify to the right reverend , lord bishop of , that during the year (or as the case may be), during months in the year I was non-resident on my said rectory of , by reason of my residence during that period on my vicarage, or (as the case may be) of , in the

county of _____, and diocese of _____, and that the gross annual value of my said rectory of _____ amounts to (or as the case may be, does not amount to) or exceeds, (or does not exceed) 300l.

Dated this _____ day of _____ . A. B. rector of _____ .

No. XXIV.

Form of Notification of Non-residence in the Cases enumerated in the 10th Section of the 57 G. 3. or under the Provisions of any Act not repealed by that Act.

I, A. B., rector of _____, in the county of _____, and diocese of _____, do hereby notify to the right reverend _____, lord bishop of _____, that during the year _____ (or as the case may be, during _____ months in the year), I was non-resident on my said rectory of _____, being all that year exempt from residence thereon, as (here state the grounds of exemption*), and that the gross annual value of my said rectory of _____ amounts to _____ (or as the case may be does not amount to) (or exceeds, or does not exceed) 300l.

Dated this _____ day of _____ . A. B. rector of _____ .

No. XXV.

Form of a Conveyance under Stat. 58 G. 3. c. 45.

I (or we) _____ of _____, in consideration of the sum of _____ to me (or us) paid, do hereby grant and release to _____ all (describing the premises to be conveyed), and all my right, title, and interest to and in the same, and every part thereof,

* If residence in any particular place, and performance of any particular duties, be necessary to give effect to the exemption, it must be stated that A. B. resided at such place, and performed such duties during all the period for which the exemption is claimed.

to hold to the said , and their successors, and to be devoted when consecrated to ecclesiastical purposes for ever, by virtue and according to the true intent and meaning of an act passed in the fifty-eighth year of the reign of his majesty king George the third, intituled (here set forth the title of this act). In witness whereof I have hereunto set my hand and seal this day of in the year of our Lord .

No. XXVI.

Form of a Lease of Tithes.

This indenture, made the day of , in the year , between A. B., rector of the parish of , in the county of , of the one part, and C. D. of , in the parish of , and county of , yeoman, of the other part, witnesseth, that the said A. B. for and in consideration of the rent hereinafter reserved and contained, hath demised, granted, and to farm let, and by these presents doth demise, grant, and to farm let, unto the said C. D., his executors, administrators, and assigns, all and all manner of tithes of corn, grain, hay, and herbage, yearly growing, increasing, or happening within the said parish of , and all profits of what kind soever belonging to the parsonage or rectory there, to have, hold, receive, and take all and every the said tithes and profits unto the said C. D., his executors, administrators, and assigns, from the day of the date of these presents, for, and during, and unto the full end and term of twenty-one years from thence next ensuing, and fully to be completed, if he, the said A. B. shall so long continue rector of the said parish of , yielding and paying therefore yearly, and every year during the said term, unto the said A. B. and his assigns, the rent or sum of , at and upon the days by even and equal portions. Provided always, that if the said rent, or any part thereof, shall be behind and unpaid by the space of days after the days and times appointed and limited for the payment thereof, then this present demise, and every thing herein contained, shall cease, determine, and be void ; and the said C. D. doth for himself,

his executors, administrators, and assigns, and for every of them, covenant, promise, and grant to, and with the said A. B., his executors and administrators, and to and with every of them by these presents, that he, the said C. D., his executors, administrators, or assigns, shall and will, from time to time, and at all times during the continuance of this demise, well and truly pay and satisfy the rent aforesaid, at the days and times aforesaid appointed for the payment thereof; and also shall and will pay and discharge all taxes which shall be imposed upon the said demised premises, or in respect thereof, by act of parliament or otherwise: and the said A. B. for himself, his executors, and administrators, and every of them, doth covenant, promise, and grant to, and with the said C. D. his executors, administrators, and assigns, and to and with every of them by these presents, that for and under the rents and covenants hereinbefore reserved and contained on the part of the said C. D., his executors, administrators, or assigns, to be paid and performed, he the said C. D., his executors, administrators, and assigns, shall and may have, hold, and enjoy the tithes and premises aforesaid, and every part and parcel thereof, during the said term hereby granted, without any let, trouble, molestation, interruption, or denial of him, the said A. B. or his assigns, or any other person or persons claiming, or to claim by, from, or under him. In witness whereof the parties to these presents have interchangeably set their hands and seals, the day and year first above written.

Signed, sealed, and delivered (having
been first duly stamped), in the presence
of E. F.

A. B.
C. D.

G. H.

3 *Burn's E. L.* 566.

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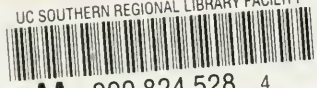
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