Hereby two things are to be observed: first, that hee shall not be delivered to the ordinary before hee be convicted; secondly, that the priviledge of the church extended not to high treason touching the king, crimen lese majestatis, but to petit treasons and felonies touching other persons.

About six years after this act, the abbot of Mistenden in the county of Buckingham, was adjudged to be drawne and hanged for high treason, viz. for contrafactio, et refuctione legale monetae.

At the parliament holden in the first years of H. 4. on the first Thursday after the bishop of Canterbury had will'd the lords, that in no wise they should disclose any thing that should be there spoken, the earle of Northumberland demanded of the lords what was to be done for the life of king Richard the second; thus farre are the words of the roll of the parliament: at this time spake that worthy prelate John Merkes bishop of Carlisle, and said, that they ought not to proceed to any judgement against king Richard for suche causas: first, that the lords had no power to give judgement upon him that was their superior, and the lords appointed: secondly, that they obeyed him for their soveraigne lord and king 22 years or more; thirdly, if they had power to give judgement against him, they ought in justice to call him to his answer; for that (said he) is granted to the cruellest murderer, or arraenst thieves in ordinary courts of justice: fourthly, that the duke of Lancaster had done more treipasfe to king Richard and his realme, then king Richard had done to him or them, &c. and desired, that if they would proceed against him; that the names of them that so would proceed might be entred into the parliament roll. It is true, that the parliament roll omiteth this speech of the bishop, but it appeareth by the parliament roll, that the lords proceeded against king Richard, and adjudged him to perpetuall prifon, whole life: they would by all meanes to be saved, as the roll reporteth.

The names of the bishops, and lords, and knights that assented, are set downe, as the roll of the parliament reports; so as it seemeth, that the stout and resolute speech of the worthy bishop wrought some effect: for this speech he was arrested by the earle marshall, and being for a small time committed to the custody of the abbot of Saint Albons was soon delivered; against him never any judicall proceeding was had for this speech in parliament: but this bishop, transported with excess of zealze, and affectionate desire of the enlargement and reititution of king Richard, was party and privie to the conspiracie of Thomas Holland earle of Kent, John Holland earle of Huntingdon, John Montacute earle of Salisbury, Edward earle of Rutland, Thomas lord Spencer, and others, to kill the king, under colour of joufting and pastimes in the Christmaffte time, at the castle of Windesfor, where the king lay in the first yeares of his reigne: for this he was indited of highe treason, arraign'd, trayed, and had judgement in case of high treason. But cor regis in manu domini, the king pardon'd him, and set him at liberty. Many more preidents might to this end be produced, but we will conclude this point with a resolution of all the judges in 24 H. 8. A priest was attained by verdict at the gale-delivery at Newgate, for clipping of the kings coine, viz. George Nobles, and by advice of all the judges judgement was given against him to be drawne and hanged, as another lay person, because...
because it was high treafon, and without degradation he was ex-ecuted at Tibo-roe.

Now for murder, burglary, robbery, sodomy, rape, burning of houses, and many other felonies, the benefit and privilege of clergy is taken away by divers acts of parliament, whereunto the bishops were party, whereof you may reade, lib. 11. Alexander Poulters cafe, and where the benefit and privilege of clergy remaineth, the party that takes the benefit of it shall not be delivered to the ordinary, nor make any purgation (which had been much abused) but forthwith be enlarged and delivered out of prison by the juftices, by whom such clergy is allowed, as by another act of parliament, whereunto the bishops were party appeareth.

* Amongst the ancient customes and liberties of England recognized and declared in the parliament before mentioned, holden in the eleventh yeare of Henry the fecond, this was one, Cleri acceafus de quaecunque re, femonitis a jufticiario regis, variant in curiam iri re-apontri ibdem de loco, unde videtur curiae regis quod ibi fit respon-dam, et in curia ecclesiastica, unde videtur quod ibi fit responendum, in qua regis jufticiarius mitit in curiam facrae ecclesie, ad videndum quonimo res ibi tranfciatur, et si clerici conuifions, vel confifto fuerit, non debet cas de cetero ecclesiis mori. So as in effect the ancient law and custome of England in that cafe is restored.

Lastly, out of what root this privilege sprang? It took its root from a constitution of the pope, that no man should accuse the priests of holy church before a secular judge, which being contrary to the crowne and dignity of the king, and the common law bound not here, till it was confirmed by parliament, and the rather, for that the church had no power to punifh the offence; but where their claim was general, the parliament of Edw. 1. and custome of the reame restrained it onely to felony, fo as they were to answer to high treafon, and all offences under felony.

(1) Clericus ad ecelesiam confugiens, &c.] By this law, if any that was infora fueras ordinis committed felony, and for his tuition fled to a church, if he claimed the privilege of his clergy, he should not be compelled to abyre, but submitting himselfe to the law of the king- dome, he should enjoy the privilege of his clergy. See more of this matter in the next § facultatem landab'.

(2) Scandium landabilem confuetudinem regni.] So as this privilege of the clergy took not his vigour or strength by force of any foraine counsell or canon, but by authority of parliament, and by the laudable law and custome of the kingdom, a point worthy of observation, the anfwre being fo caufully penned in those dayes, left any thing in the petition should countenance any foraigne jurif- dictio; but fo farre as lex et confuetudo regni have allowed of the privilege of the clergy, fo farre, and no further it is to be al- lowed; and yet with this limitation, so as the alcire would submit himselfe (as hath been said) to take it by the law of the kingdom expressed in these words, sed legi regni fi reddens, &c.

He that is within orders hath a privilege, that albeit hee have had the privilege of his clergy for a felony, he may have his clergy afterwards againe, and fo cannot a lay-man; and he that is within orders, and hath his clergy allowed, shall not be branded in the hand. But these privileges are given by act of parliament.
ITEM, quanquam confessionem coram illo qui non est judex confitentis, hanc non tenet, nec sufficiat ad faciendum processum, vel tentationem professum: quidam tamen seculares judices clericos, qui de foro suo in hac parte non existint, reatus proprios, et mormess, ut puta furta, roberias, homicidia, coram eis confitentes, admittunt accusationem illorum, quam ipsi communiter vocant appellum, ipsos sic confitentes, et accusantes, seu appellum facientes, non liberant praetatis eorum ipsil praemissa, quanquam situs his fuerint sufficientes requisitum, licet coram eis etiam per confessionem propriam judicari vel condemnavi nequeant, absque violacione ecclesiasticæ libertatis.


ALSO notwithstanding that a confession made before him that is not lawful judge thereof, is not sufficient whereon process may be awarded, or sentence given; yet some temporal judges (though they have been infantly desired thereto) do not deliver to their ordinaries, according to the premises, such clerks as confes before them their heinous offences, as theft, robbery, and murther, but admit their accusation, which commonly they call an appeal, albeit to this respect they be not of their court, nor can be judged or condemned before them upon their own confession, without breaking of the churches privilege. The answer. The privilege of the church, being demanded in due form by the ordinary, shall not be denied unto the appealour, as to a clerk. We desiring to provide for the state of holy church of England, and for the tranquillity and quiet of the prelates and clergy aforesaid, as far forth as we may lawfully do, to the honour of God, and emendation of the church, prelates, and clergy of the same; ratifying, confirming, and approving all and every of the articles aforesaid, with all and every of the answers made and contained in the same, do grant and command them to be kept firmly, and observed for ever; willing and granting for us and our heirs, that the foreaid prelates and clergy, and their succellers, shall use, execute, and practise for ever the jurisdiction of the church in the premises, after the tenour of the anfwers aforesaid, without quarrel, inquieting, or vexation of us or of our heirs, or any of our officers whatsoever they be. T. R.
Articuli Cleri.

Cap. 16.

T. R. at York, the xxiv. day of November, in the tenth year of the reign of king Edward, the son of king Edward.

Wee have been the longer in exposition of the former chapter, because wee should be the shorter in this which somewhat concerneth the same matter.

(1) Appellatoris, i. Probatorii.] Albeit the clergy here pretended, that the confession of a clerke (when he was indited of felony, and confessed the felony, and became an approver) was coram non judice; yet the continual opinion and resolution of the judges were against this: for they resolved, that such a clerke as confessed the felony before a secular judge, could not make his petition, and consequently, the confession did bind him: and therefore Shard in 25 E. 3. spake in the person of a prelate. And when the clerke was delivered to the ordinary, without any petition to be made, he ought to have degraded him; but commonly, if the offender were a monke, he delivered him to his abbot to remaine in the abbey perpetually: and if he were secular, he remained in the bishops prison, &c. in a very favourable manner; which abuses grew so odious and insufferable in encouragement of malefactors in their wickedness, as they were justly taken away, as is aforesaid.

An appeale of robbery was brought against J. de B. monke of L, who pleaded not guilty, and put himselfe upon the tryall of the country, who found him not guilty, whereupon the abbot of L and the said Monke, brought a writ of conspiracie against divers, which procured and abetted the said appeale, and recovered 1000 markes in damages, which could not have been recovered, unlese the monke had been legitimo modo acquietatus, before a competent judge: and hereby it appeareth, that a clerke might waive the priviledge of his clergy, if he would, and be tried by the course of the common law. And note, when hee knew himselfe free and innocent, then hee would be tried by the common law; but when he found himselfe fowle and guilty, then would he shew himselfe under the priviledge of his clergy: and though they committed temporall crimes, yet would they not be tried by the temporall lawes, which was the more against reason, because no other law within this realme could punish them for the same, but the temporall lawes onely.
The Exposition of 18 Edw. 3. Cap. 7. of Tithes.

ITEM, whereas writs of faire facias have been granted to warn prelates, religious and other clerks, to answer dismes in our chancery, and to shew if they have any thing, or can any thing say, wherefore such dismes ought not to be restored to the said demandants, and of answer as well to us, as to the party of such dismes; that such writs from henceforth be not granted, and that the process hanging upon such writs be adnulled and repealed, and that the parties be dismissed from the secular judges of such manner of pleas; saving to us our right, such as we and our ancestors have had, and were wont to have of reason. In witness whereof, at the request of the said prelates, to these present letters we have set our seal. Dated at London the eighth day of July, the year of our reign of England the eighteenth, and of France the fifth.

* Le preamble.

Before we enter into the exposition of this act, we will declare it of an objection against the life of it, viz. That it should be no act of parliament, but an ordinance made by the king only at the request of the prelates: and that the king to these letters had put his seal, and the seale and date as done by the king only; all which, say they, appear in the parliament roll, and that the clause of En testimoynance de quel chose, &c. is left out of the print.

But hereunto we answer, that by the said clause En testimoynance de quel &c. is to be understood, that this act was so plauisible to the prelates, that they requelled the king, that it might be exemplified under the great seale for the better preservation thereof, which the king granted. This parliament began the Munday after the Otab. Trinitatis, which was 16 Junii; and this exemplification was 8 Julii after this act was passed, there being but seven acts passed at this parliament. And en testimoynance de quel, and the whole clause following, are words of an exemplification.

Now that this ordinance before the clause of the exemplification in an act of parliament, first, is proved by divers reasons, viz. The title of the parliament is, Incipit statutum regis Edwardi anno regni sui.
18 Ed. 3. Cap. 7. Of Tithes.

fa ei decimo sexto. Secondly, it is entred in the parliament roll, Thirdly, it was by force of the kings writ (as the usage then was) proclaimed as an act of parliament, which writ in French we thinke good to transcribe in these words: Edward per le grace de Dieu reg Dangletur et de France, et seigneur Dirland a nostre veicount de Ntingham, salus. Scehes que a nostre parliament tenens a Weyiu le Lundye prochene apres les odoaves de la Trinity prochene passé entre autres choses mensyses, eaffetuns, et accordes en dit parliament, si furent mensyses, eaffetuns et accordes les choses sous effetres. And after a rehearsal of all the statutes, whereof this seventh chapter is one, the conclusion is, Et par ces voons mensus, que teus les statuts faces crier et publier, et firmement tener per mye nostre baiiite folonque la forme et tener dictile. Et ce no lesse en eusis manere, &c.

And F.N.B. 30 E. taketh it for a statute, and so it hath ever been by the general consent from time to time of learned men. And if it should not be a statute, it would worke great trouble and disquiet in the realm. Now that we have cleared this objection, let us peruse the words of the act.

(1) Ou briefes de faire facias eient oftre grantes, &c.] This rehearsal in this statute is true; for wee have found, that upon divers matters of record, that is to say, enrolled, returned, or removed into the chancery: first, upon tithes granted by the kings letters patents, which are enrolled in the chancery, writs of faire fac were brought in that court: as taking one example for many: in 17 E. 5, a faire fac was brought by the king, and the dean and canons of the kings free chappell of Saint Martins London, upon letters patents of Mawd, quondam reginae Anglie of tithes, &c. against the abbot of Saint Johns of Colchester, who took the same after severance, whereunto the abbot pleaded, &c. worthy to be seen.

(2) A garner prelates religatus et auter clerics, &c.] Note, this faire fac was not brought against the possielfors of the land for subfraction of tithes, but against the prelates, or other clerks, which took the tithes after they were severed. Sec 6 E. 1. in bundello petitionum in turri London, where the petition was for subfraction of tithes, to be put in posseffion: the answer was in parliament anno 6 E. 1. Rex non intrumitted fe de biis que taliter spechant ad forum ecclesioflicium, profequatur fus suum verius clericev carum ordinari. Herewith agreeeth Braetion, lib. 5. fol. 403. & 407.

Commisions out of the chancery were directed to certaine persons, giving them authority to enquire, whether such a spirituall person ought to have tithes of such lands, whereupon inquisitions were taken and returned; and if it were found for the spirituall person, upon this record he might have a * faire fac against any prelate religious, or other clerk that took them after severance.

a Compertum est per inquisitianum rectorum, et vicarium vicarum de Ever, quod vicarius ecclesiæ ibidem pericpere dehot minutar decimas omnium animalium ibidem, et molend. aquaticæ ibidem. But no faire fac was filed hereupon, for that the vicar was to sue for subfraction of these tithes against the owner of the land in the spirituall court.

b Also upon a fine executory of tithes before this act, the tenour whereof was removed into chancery, a faire fac did lye therefore against the spirituall person that perned the same after they were severed.
(3) Savant a neus nofrie droit, &c.] By force of this c saving not only the king himself, but the provost of C. being the kings patentee of tithes of the new affairs in the forest of Rockingham in the county of North-hampton, brought a seire facis in the chancery after this statute, against certaine personis of holy d church, who had taken the tithes granted to him, to have execution of the said tithes, according to the kings letters patents. The e defendants pleaded to the jurisdiccion of the court, that the conuance of this cause for tithes appertained to court christian, and not to the chancery, whereunto it was anwered by the court, that that was to be underflood, where the suit was taken against them that ought to pay the tithes (that is to say) for subfraction of tithes, and not when it was brought against them, that were wrongfull takers of the tithes. And all this is well warranted by the book, whereupon the judges and barons, that appropriation of tithes is no mortmain, f Quia decime sunt merce spiritualiis, quorum cognitio ad curiam chri[lianitatis pertinent, et non ad curiam] was.

And yet the inference that Fitzherbert maketh, that before this statute of 18 E. 3. the right of tithes was tried in the kings court was true: for upon a seire facias by a spiritual person against a spiritual person, and for tithes * which were spiritual, the right of tithes was tried in the seire facis before this statute, albeit the tithes were severed, which is now taken away in case of the seire facis by this statute.

And at this day, albeit in case of tithes, the parties by pleading admit the jurisdiccion of the court, yet if it be between spiritual persons, and the right of tithes come to be tried, albeit it be after the tithes were severed, the court ex officio shall ouite the court of jurisdiccion, which we hold, where the right of patronage was not drawne in question, was wrought by the construction and consequent of the said statute of 18 E. 3. for before that statute right of tithes, after severance was tried in a seire facis by the common law in certaine cases. But when the right of tithes trence to the diffolution or diminution of the advowson, &c. in certaine cases, the right of tithes at this day (as hath beene said) shall be tried in brevi de velo advocate decimarium, and in the indicuvit: but neither of these writs give any jurisdiction to the kings court, to hold plea for subfraction of tithes, but that is sent to the ecclesiastical court to determine.

Nullus pro decimis que sunt spiritualiis de aliqua separatione pontis pro aliisibus eterniis temporalibus onerarii debet. But at this day if tithes be in the hands of temporall men, they are by reason of them contributary to temporall charges.
Where it is said in some of our books, that of ancient time before the council of Lateran, any man might have given his tithes to what spirituall person he would, and that at that council it was provided that tithes in one parish should be given to the rector or parson of the same parish, that hee that gave the spirituall food, should reap temporall, &c. The truth is, that I have perused the councils holden at Lateran, and specially that holden under pope Alexander the third, anno Dominii 1179, anno 25 H. 2. and cannot finde any such decree: but pope Innocent the third, in a decreetall epistle, in or about the yeare of our lord + 1200, and the first yeare of king John dated at Lateran, directed to the archbishop of Canterbury, ut ecclesiis paroecialibus jussit decimas percolvantur, hath these words, Perveniunt ad auditentiam nostram, quod multi in diecisc tuae decimas suas integras vel duas partes ipsarum non illis ecclesiis in quorum parochiis habitant, vel ubi praeidia habitant, et a qualibus ecclesiasticsa percipient sacramenta, percolvissent, sed eas alio pro sua distribuunt voluntate. Cion igitur inconveniens esse videtur, et a ratione disjimile, ut ecclesiae, qua spirituallia sentiant, metere non debent a suis parochialibus tempestis, et habere, fraternitates tuae auctoritate profluentes indulgentias, ut illecat tibi super hoc, non obstante contradictione vel appellazione cujuslibet, esse confutatiune haecenus observante, quod amicitias suarum ordinis et facere quod fletur per consuetudinem ecastisticam nimirum observari, non ergo, &c. confirmantur, &c. Dat. Lateran, nonas Iuii. And (that I may speake once for all) this epistle decreetall bound not the subjects of this realme, but the same being just and reaonable they allowed the same, and so became lex terrae.

See Linwood cap. de locato et conducio, fo. 117. vero parte, where he faith, Quod ante consilium Lateranense, anno Dominii 1179, bene potuerunt laici decimas in seculum retinere, et eas alteri ecclesiae dare, non tamen pac diei confici, &c. And thus began portions of tithes, what the parson of one parith hath in another. Vide concilium Lateranum, anno Dominii 1215. 17 Ioh. regis.

Albeit the parochiall right of tithes is now establised by divers acts of parliament as before it appeareth (a matter tending to the exceeding benefit and quiet of the clergy) yet he that is defirous to know what the auncient lawes of England were concerning the paient of tithes before the conquest, let him reade Fadus Edwarii et Gobrituni regum, cap. 6. et inter leges Ethelfastani cap. 1. Inter leges Edmundi regis, cap. 2. Leges Edgarii regis, cap. 2. & 3. Leges Canuti regis, cap. 8, 10, 11, 12. et leges Edwaridi regis, * cap. 8, 10, Qua Wilhelmus Conqiiitor rectivavit, et confirmavit. All which lawes M. Lambard hath well translated out of the Saxon into the Latine tongue, which was faithfully, but not so accurately, done before him, which wee have.

There hath been great, controversy heretofore concerning the tithes of wood, as appeareth by divers petitions in parliament, which petitions together with the answers we will recite, and incidently will shew, how that controversy is quieted, and ended.
That no man be imploabled for tithes of wood, or underwood, but in places accustomed. The answer was, as heretofore the same shall be. Item, prius le commen, que comme constitution furent fait per les prelates et prenus de chascun maner de boyes, quel chose ne fuit aues ystes, et que nies, les temes poux faire testaments, que est contre chose, que pleue sur lay, et tie tom baron concernant remedie, et que en personne demeroge en memise lofate quilx faloient eftre en temps de tous les previators, et que proibitions foyent grantes a tous ceux que font imploled de dimes de boies fons avoient constitution. Whereunto the an- ser was, the king wilthlet that law and reason be done.

Item monstre la commune comme nadgaires lecheresque de Casterbury, et les autres prelates ordenerent une constitution a donner dimes de jubois vendus tantfolement la ou avant es heures nuiselles dimes furent dones, ore la gente de Saint Eglise por force de la constitution pernoent et demandent les dimes auxibien de gros bois, comme de jubois vendus et neict vendus, et conte qui ont yues puer temps de memoria a la grand danse de la commune de quiis ils prioyt remedie, de luin point et del aultre.

Whereunto the answer is, the archbishop of Canterbury, and the other bishops have answered, that such tithes is not demanded by reason of the said constitution, but of underwood. But the subject being still molest for woods not tithable complained again in anno 25 E. 3. all which were preparatives to a good law made in anno 45 E. 3. cap. 3. De griffe boyes dage de vint ans, ou de grender sage si dimes ferent demande in toine de est paral sylva cadua, est ordine ef capable que proibition in cee caje, est grant, et fur cee attachment cas d'ef dix auant cee heures.

It appeareth before all the bishops claimed onely tithes of jubois, of underwood, under the name of sylva cadua, fo as of haut-boyes, of great wood no tithes were claimed; but herein rested two doubts: 1. what should be paid high or great wood. 2. Of what age the same should be, because it is parcell of the inheritance.

As to the first, this act, which is declaratory of the common law, as it appeareth by the book in 50 E. 3. cap. 10. b. 9 H. 6. fol. 56. Pl. Com. fol. 471. and this act it selfe proveth it, for it concludeth, Que adffire age devant cee heures; and this is confirmed by divers judgements hereafter cited.

And it is to be understand that this act useth these words griffe byes, and not haut byes, or garden byes, which word is also used in the books of 50 E. 3. and 9 H. 6. And in this act this word [griffe] signifieth specially such wood as hath been, or is either by the common law or custome of the country timber, for this act extends not to other woods, that have not beene, or will not serve for timber, though they be of the greatnesse or bignesse of timber. And it is to be observed, that the prohibition in 50 E. 3. for using for tithes in court Christian of griffe boys, was grounded upon the common law, without mentioning of this act.

Here it is to be demanded, to what kinde of wood grifle boys do extend? And the anwer is, that oake, af, and elm, are included within these words; and fo is beech, hornbeche, and hornbeam, because they serve for building, or reparation of houses, mills, cottages, &c. against the opinion in Plowd. Comment. fol. 470. in Molyns.

[643]
Henry Hall, and
Dorothy Fetti-
place. Kane.

Molyns cafe.
Tr. 26 El. coram
rege.
b Hil. 2 Jac. in
229, int. Brooke
et Rogers.
c Lib. 11 f. 49.
Lifeords cafe.
d Doct. & Stud.
fo. 174, 175.

Regift. fo. 49.
lib. 11 f. 49.

Molyns cafe, holden without argument, which opinion the whole
court upon deliberate advice held to be no law.
a It was resolved by the whole court, that asíp is also compre-
hended within grosse boys, because it may serve for building, or
reparation, ut supra. But otherwise it is of birch (as it was said)
it was adjudged in the case of Lennard cufus breveium, because that
kine of wood serveth not for building.
b If a timber tree be auida, fica, et non portans soli ne frutis in
estate, nec exisitens mauremrium, and the owner cut it down, and
convert it to fuel, &c. no tithe shall be paid thereof for the inheritance
which was once in it.
c So for the bark of oakes, being timber trees, no tithe
shall be paid, because it is parcel of the tree, and renueth not de
anno in annum. d But for acorns tithe shall be paid, because they
renew yearly.

As to the second doubt, of what age those grosse or timber trees,
whereof no tithe should be had, should be; the statute resolveth
this doubt in these words, Graffe boys del age de 20. ans, en greiner.
Which point was also declaratory of the common law, as by the
conclusion of this act, and the authorities aforesaid appeareth:
for this graffe boys thus described, it appeareth by the act, that
parsons and vicars sued for tithe of them, en nofine de cefi parch,
$yrva cratu.

Del age de 20 ans.] This is the age, as to bar all suits in court
christian for tithe. And these words are to be understand of grosse
trees, which may serve for timber, and grow out of the own hubs:
for if a man usually top or lop timber trees, tithes shall not be paid,
though they be under the age of 20 yeers. For as the law privi-
ledgeth the body of the tree, being parcel of the inheritance, so it
doth priviledge the branches also.

So if a man cut down timber trees, tithe shall not be paid
for the germyns or branches which grow out of the roots, of what
age soever; for that the root is parcel of the inheritance.

The bishops, and others of the clerge taking upon them to in-
terpret this statute, which belonged not unto them, gave out and
published that this ordinance did not restrain their ancient juris-
diction, and that this ordinance was never affirmed for a statute: and
thereupon the subject was still vexed in court christian, both con-
trary to the common law, and the said statute: and thereupon a
bill was exhibited in the next parliament following, holden in the
47 yeer of E. 3. reciting the statute of 45 E. 3. and then shewing
that the persons of holy church intending that this ordinance did
not restrain their ancient incroachments; and surmising, that this
was not affirmed for a statute, held plea in court christian to the
contrary of the ordinance aforesaid, to the great damage of the
people. Wherefore may it please our soveraign lord the king to
affirm the said ordinance for a statute to indulge for all times to

come; and that a speciall prohibition upon the same statute there-
upon be made in the chancery, prohibiting that they should not
hold plea in court christian of tithes of wood of the age aforesaid.
Whereunto the answer was, that such prohibition be granted, as
hath been used of ancient time. Which answer being compared
with the conclusion of the act of 45 E. 3. hath given such an end to
both these points, as no question hath been made thereof at any
time since. And to say the truth, that the surmise that this act of

45 E.
18 Ed. 3. Cap. 7. Of Tithes.

45. E. 3. was but an ordinance, and no statute, was but a meer
cavill, without any colour of probability: for it is entred in the
tilament roll amongst the other statutes made at that parliament.
2. It is under the title in that roll of statute. E. 3. de anno regni sui
45. 3. It was proclaimed by the sherifcs (as the usage in those
days was) amongst the rest of the statutes of that parliament. 4. It
hath the phrase of an act of parliament [Ordine est et stabile] aggreeing therein in effect with the other acts in that parliament.
5. It hath the consent of the lords and commons (who joyn in the
petition in the preamble) and of the king. 6. Infinite prohibitions
upon this statute, as taking some few precedents, whereof we have
the number roll, of such as be not in print.

Coram rege Tr. 27 E. I. Rot. 28. Linc. Magister Willielmus
fugitas ecclesiae de Ewposth attachatus fuit ad respondendum' Stephano de
Rubes de Gener' laco, et Willielmo Stel de Cottingham de placito quare
suint fuit placitum in curia Christianiatis, de catallis et debitis quae
uus fuit de teftamento, vel matrimonio contra prohibitionem regis, &c.
Et unde queruntur, quod cum prædictus magister Willielmus fecatus fuit
placitum suum eos in curia Christianiatis coram officio episcopi Lincoln
de catallis et debitis laicos, viz. de quercusbus et aliis arboribus per ipso
us quoque de quadam Rogerio Mubey. Et idem Stephano et Willielmus super
be praeditum prohibitationem domini regis coram prædicta officiariis in
ludugies omnium Sanctorum de Northb' die Martis prox' post featum Sancti
Nicolai, anno regni regis nunc 25. et et inibusitent ne placitum illud
contra prohibitionem prædictam ulterius sequeretur in praesentia Rogeri
de l'adibey, Genua de Cave, Willielmi de Cler, et Theomo de Redeshom
ince ibi dunt praesentiam, idem tamen magister Willielmus non obstante
prohibitione prædicta placitum præd' ulterius fecatus fuit quodque ipse
post seatum fuerat prædictum excommunicati fuerunt; unde dicunt quod
deteriorati sunt et dampnum habent ad Valentiam C. i. et in contempt
domini regis mille libr', &c.

Et prædictus magister Willielmus venit et defendit, &c. et dicit quod
william placitum de bonis et catallis laicos fecatus fuit in curia christianiatis
contra prohibitionem domini regis scit et impionat, et subdavit
sit inde legem fe 12. mani, &c. And had a day to make his law, at
which he came; and incipit (faith the record) jurare, et post quantum
pravum deposit de lege, ideo consideratum est, quod præd' Stepheano et
Willielmus recuperaverunt danna sua prædicta centum librarum, et ficit
etiam cum primo ad 401.

It is to be noted, that the parson stood not upon his right to have
tiles of oake and other trees; but the colour he had to wage his
law, was in respect of these words, De bonis et catallis laicos, and
tiles are not lay-chatellers: but he durst not in that case stand to
make his law, but upon failing therein, judgment was given
against him of the damages, as the plaintiffs had counted.

See lib. Intronat. Rall. fol. 448. b. nu. 2. 449. a prohibition fur
ligature de 45 E. 3. circa 14 H. 7. The old book of Entries,
fol. 34. b.

Hil. 33 H. 8. Rot. 78. Inter Stelling et Spooner.
Ibidem Rot. 103. Inter Peiers et Dixon.
Hil. 36 H. 8. Rot. 1. consimilis prohibito.

Regist. 34. the same prohibition, & 50 E. 3. 10.

De quercusbus &

arboribus.

Vide Pach.

15 E. 1. in banco

Rot. 52. Linc.

mills quercus,
&c.

The law at this
day, and long
after was helden,
that in this ca
he might wage
his law.

18 E. 3. 4. 24 E.
3. 39. So ad-
judged, 32 E. 3.
Ct. Ley. 64.

But in 44 E. 3.
fo. 32. it is
otherwise ruled,
that it is
not in a wa
of contempt;
and so
arrested
not
been taken
ever
finne.

Prohibitions co-
ram rege tem-
pore H. 8.
Trin. 1 E. 6. Rot. 94. consiliiiis prohibito. Inter Herne & Croft.

Paeon. 4 E. 6. Rot. 1. consiliiiis prohibito.
Hil. 5 E. 6. Rot. 2. consiliiiis prohibito.
Trin. 6 E. 6. Rot. 1. consiliiiis prohibito.
Paeon. 1 Mar. rot. 1. consiliiiis prohibito.
Hil. 1 et 2 Ph. et Mar. Rot. 1. consiliiiis prohibito.
Paeon. 1 et 2 Ph. et Mar. Rot. 3. consiliiiis prohibito.
Trin. 1 et 2 Ph. et Mar. Rot. 10. consiliiiis prohibito.
Mich. 2 et 3 Ph. et Mar. Rot. 4. consiliiiis prohibito.
3 et 4 Ph. et Mar. Rot. 2. consiliiiis prohibito.
Hil. 4 et 5 Ph. et Mar. Rot. 1. consiliiiis prohibito.
Mich. 4 et 5 Ph. et Mar. Rot. 1. consiliiiis prohibito.

We could cite a world of other examples of this kind, out of the kings bench, chancery, and common place, but in a case whereof never any learned man made any doubt, these shall suffice.

But this is against the provincial constitution of Simon Mepham, anno Domini 1332. anno 6 E. 3. and the exposition of Linwood thereupon.

There is a consultation de Silva Cædæ, where the prohibition was, De catallis et decemis quæ non sunt de tegmento et matrimoniis; and yet in the consultation there is a restraint (according to the common law, and the said act of 45 E. 3.) Dummodo tamen de græbis arboribus in bac parte non agatur. &c.

If any sue in court chirlfan for tithes de græbis arboribus utro- catim 20 annorum, he incurs the danger of a premonition, if so be contained in the libell.

In the Register it is said by Herlaflon, Concordatum fuit cum consilio regis in parlemento apud Sermon, quem consultationes jussi dabant de Silva Cædæ, eo non obstante, quod non renovaverat per annos et fe idem facere fuit quoddam consultation pro offende de Noiery, de Silva Cædæ.

Great question hath been made, when this parliament at Salisbury was holden, but we shall make it evident, that it was holden the Friday next after the feast of Saint Mark the Evangelist, in the seventh year of R. 2. which appeareth by William de Herlaflon here named, who was a clerk of the chancery, and as here it appeareth, inferred this into the Register.

This Herlaflon lived at the time of the holding of this parliament, at Salisbury; for afterward in the same Register, fol. 80. b. it is said, Nota que mil hene feria prific, ne imprison, pur vert us, ne venimus, si il ne soit trouvé ove le moyeuvre, ou si il ne soit indite, &c. Et sildil hath statutur R. 2. de anno 7. cap. 4. Et quam quis taliter fuerit indicatius et virtute indicatius illius est coniectus, ita quod non potest se injust patriam, et si sit de illis, qui indicati sunt de receptamento, actu sunt principales transgressiones per Herlaflon.

And in the Register, fol. 261 a. you shall finde this note, He breve concertum fuit, pro hominibus de Odibam, et concertum fuit pro hominibus aliis antiquis dominicis per cancellariam Escrege, et W. de Hor ley.
Now this Lefecrope lord of Bolton was chancellor in annis 2 & 5 R. 2. as we finde of record.

Thus have we discovered the clerk that entered into the Regifter the said concordatum in the parliament at Salisbury: but looking diligently into that parliament roll, no such concordatum as Herlafton entered into the Regifter can be found, and therefore you must take it upon the trust and credit of this clerk. But admitting that any such concordatum had been, as in the Regifter it is set down, it may well stand with law: for in the Regifier, fol. 44, there is a consultation (as before hath been said) de Silva vacua, and is consonant to law, having such a restraint in the same writ, as is as saif.

A country may prescribe to be quit of tithes of wood, or any other tithes, to there be sufficient maintenance and fulfillment of the incumbent besides; but a town cannot so prescribe.

Rex tali judici salutem. Monstravit nobis venerabilis pater H. Lincoin' episcopus (1), quod cum I. precentor ecclesiae beate Marie Lincoin' tenet de dono suo omnes decimas dominicarum terrarum suarum vel dominici sui de N. quas idem episcopus et praefectores sui episcopi loci praeclarii libere conferre conueniunt: Prior beate Catherine extra Lincoln. clamans decimas illas pertinentem ad ecclesiam suam de B. trahit cum inde in placitum, &c. (2). Et quia placitum praeclarium tangit coronam et dignitatem nostram, praefertim cum collatio earundem decimarum ad nos posset devolvatur ratione custodiae vel status, quia eam consimilis decimas conferimus in quibusdam dominicis, et simili rum quamvis magnates regni nostri in dominicis suis: nobis proibimus ut placitum illud teneatis in curia christiannitatis, nec aliquid quod in derogationem regiae dignitatis nostrae cedere valeat in hac parte attentatis, seu per alios attentari faciatis, quovismodo. T. &c.

Opus et interprete, therefore we will peruse the words of this writ in such order as they doe lye in the same.

(1) Venerabilis pater H. Lincoin' episcopus.] Is intended as I take it of Hugh bishop of Lincoln, who deceased soone after; and hereby it appeareth, that this writ was in use before the false confirmation of pope Innocent the third, as also is proved by litter words of this writ, which we shall observe when we come to it.

(2) Quod cum precentor ecclesiae beate Marie Lincoin' de dono suo tenet omnes decimas dominicarum de N. &c. Prior beate Katherine extra Lincoln. clamans decimas illas ad ecclesiam suam de B. trahit cum inde in placitum, &c.] Here it may be demanded that seeing the suit is between spirituall persons, and for tithes which are spirituall things, wherefore they should bee prohibited. Hereof three reasons arerended in this writ. First, quia placitum praeclarium tangit coronam et dignitatem nostram. For all advowsons are lay fee, and plea of them doe belong to the kings law, and seeing the whole benefit of the patron of this advowson consisted in conferring of those tithes to any of his chaplains, &c. And if the tithes be recovered, the advowson vanisfeth as a thing without fruit or benefit, and therefore the ecclesiastical court cannot hold plea of them. Quia

This was S. Hugh, bishop of Lincoln, as we conceive it.
Quiæ tangit, &c. See the writ of indicavit, et breve de rezzo de ad
vocationis: decimarum, before in this second part of the Institutes
W. 2. cap. 2. usus finem, & Articuli cleri cap. 2. And if the suit
in the ecclesiastical court were for subtraction of tithes, after the
right of the advowson be tried for the patron of the person that
sought, he shall proceed in the ecclesiastical court.

2. The second reason yielded in this writ is, Propter sum col-
lutto earundem: decimarum ad non petit devolvi ratione custodie, &c.
And if the tithes should be recovered, as hath been said, the ad-
vowson should vanish, &c.

3. Quiæ etiam confiniales decimas conferimas in quibusdam dominiciis,
et familiar quamplures maguates novi in dominiciis suis, &c.

By this it is probable, that the king speaking in this writ for him-
selves and the grandees of the realm in the present time, that this
writ was in the before the constitution that confined tithes to pa-
rishes, and hereby it is proved that at this time the king, and the
nobles of the realm might give their tithes to what spiritual
person they would. Laidly albeit the king and the nobles be for
honour sake named in the writ, yet the liberty of granting of tithes
extended at this time to all the kings subjects.

The marginall note in the Register is de decimis separatis, so called
because they had been granted to some spiritual person, and not
annexed to any parish church.

For the better understanding of the opinion of Sir William Herle
in the said book of 7 E. 3. which is, Ori ne post home fes digne qu
jort hors de paroisse; grant a que il woudra, car louvege del lieu les ans.
Hee grounded his opinion in this case upon the canon law, which is,
that the bishop is to have all tithes growing in lands not alligned to
any parish within his diocese. Yet this canon being against the law
of the land, never had allowance within this realm, for in such part
of forests as are out of any parishes, the king shall have them. See
Cumbria; adjudged for the king against the canon, and the opinion
of Herle. And this had been formerly resolved in parliament,
inter placita coram ipso domino rege et ejus consilio ad parlamentum fui
post festum Sandali Litarii, et etiam post festum Pasch, anno 18 E. 1.
fo. 8. int' episcopum Carlisle, et prmon ejusdem de decinis aforum
vocat Lintebwai et Kirtewai in foresla de Englewoood. The words
of which record are, Quod decima prædicta pertineat ad regem, et non
ad alium, quia sunt infra bandas foresla de Englewood, et quod vex in
fora la sale praedicta post villas adeficare, ecclesias confirvar, terras
aforear, et ecclesias illas cum decimis terrarum illarum pro voluntate sua
conuincuque voluerit conferre, &c. And E. 1. granted tithes comming
of land within the forest of Deane, as were not within any parish,
to the bishop of Landaff, and his successors.
An Exposition upon the Statute entituled, An Act for the true Paiment of Tithes.

Anno 2 E. VI. cap. 13.

The noise of the dissolution of monasteries in the parliament held in the 27 yeare of H. 8. (lay-men taking small occasions to withdraw their tithes) was the occasion of the making of the statute of 27 H. 8. c. 20. The principal cause of the making of the statute of 32 H. 8. cap. 7. was to inable lay-men, that had estates or interests in parifonages, or vicarages impropriate, or otherwise in tithes, to sue for subtraction of tithes in the ecclesiastical courts, and to provide that no parson should be sued, or compelled to pay any manner of tithes for any manners, lands, tenements, or hereditaments, which by the laws or statutes of this realm were discharged, or not chargeable for payment of any such tithes.

This act of 2 E. 6. is an act of addition, as by the words thereof hereafter following appeare.

Where in the parliament held at Westminster the fourth day of February, anno 27 H. 8. there was one act made concerning payment of tithes prediall, and personall: and also in another parliament held at Westminster, 24 July, 32 H. 8. another act was made concerning true payment of tithes, and offerings: in which severall acts, many and divers things be omitted and left out, which were convenient and very necessary to be added to the same. In consideration whereof, and to the intent the said tithes may be hereafter truly paid, according to the minde of the makers of the said act: bee it ordained and enacted, &c. that not onely the said acts made in the said 27 and 32 yeares of H. 8. concerning true payment of tithes, and every article, and branch therein contained, shall abide and stand in their full strength and vertue: but also be it further enacted by the authority of this present parliament, that every of the kings subjects shall from henceforth truly and justly, without fraud or guile, divide (2), let out, yeeld, and pay all manner of their predial tithes (1), in their proper kinde, as they arise and happen, in such manner and forme, as hath been of right yielded and payd within 40 yeares (3) next before the making of this act, or of right or custome ought to have been paid (4). And that no person shall from henceforth (5) take or carry away any such or like tithes, which have been yeelded or payd within the said 40 yeares or of right ought to have been payd in the place or places tithable of the same, before he hath justly divided or set forth for the tithe thereof, the tenth part

[ 649 ]
part of the same, or otherwise agreed for the same tithes with
the parson, vicar, or other owner, proprietary or farmer of the
same tithes, under the paine of forfeiture of treble value of the
tithes so taken or carried away.

(1) Prediall tithes. This branch extends only to prediall
tithes.

raie in debt upon this statute by the parson of the church pro
extraestimatione decimarum pro casa, vitulis, agnis, cæsar, valdem &c.
has to have the treble value, &c. The defendant pleaded quia
debit per patriam, and it was found against him. And it was moved
in arrest of judgement that the said tithes of cheefe, of calves, and
lambes were no prediall tithes, and therefore not within this
branch of the statute; and this act is penall, and shall not be taken
by equity, quod fuit concessum per totam curiam. And it was resolved,
quod decimarum tres sunt species, quadam persona, quæ debentur ex
opere personali, ut artificii, scientia, militia, negotiatio, &c. Quædam
prædialis, quæ proveniunt ex prædii, i. e. ex fructibus praediorum, ut
blada, virum, fenum, linum, canabium, &c. ex fructibus arborum, ut
poma, pyra, pruna, volema, cæsara, et fructibus hortorum. &c. Quædum
mixture, ut de casa, laēa, &c. aut ex fructibus animali, ut jux ens
præbendi, et gregatim pasturant, ut in agnis, vitulis, beædæ, caprælæ,
pullæ, &c. Ex prædialibus sunt quadam majoris, quædam minores.
Majores, ut frumentum, figilo, zizania, &c. fenum, &c. minores quo
minores, quædam sicum, sunt quæ proveniunt ex mento, ancho, ercibus,
et juxta juxta iibis diœum Domini, Luc. 11. ver. 42. Vex, si
decimati mentem et rumum et omne alium, et practeritis judicium et
contratan Dei, habe autem oportunem faciat, illa non omittere. Ali aut
quid in Anglia consunt decimæ minores in lino quæ sunt prædialis, et
lana, laēæ, cæsarea, et in decimis animali, agnis, pullæ, et ovibus, decimæ
etiam mellis et cære numerantur inter minores, quæ sunt mixtae. Vide
Linwood cap. de decimis cap. Quoniam, fol. 140. verb. talibus decimis.

And the Levite (to whom tithes were assigned) shall come, and
the stranger, the fatherless, and the widow which are within thy
gates shall eat and be filled.

(2) Henceforth truly and justly without fraud or guile divide,
&c.] Trin. 44. Eliz. coram rege. In a prohibition between Walter
Heale and John Sprat, the case was, Walter Heale set out his
prediall tithes, and divided them justly from the 9 parts, and after
came the fame away. Sprat sued for substitution of the fame
in the ecleisiall court, Heale pleaded that hee set them out ut supra, whereunto Sprat said, that presently after his
setting out, &c. he carried them away in frandum legum. Adjudged
that this was fraud and guile within this act, albeit he did
justly divide the same within the letter of this law. It was
further resolved, that if the owner of the corne before severance
grant the fame to another of intent that the grantee should take
away the fame to the end to defraud the parson, &c. of his tithes,
this is fraud and guile within this statute.

(3) Within forty yeares.] This time of 40 yeares is here
set downe because it is the usuall time for the probo de maio
decimandi.

(4) Or of right or custome ought to have been yeilded, &c.]
The sense of these words [as hath been of right yeilded] is of
tithes
tites to be yeelded *in specie* within 40 yeares, and the sense of the
words [or of right or custome] is, or by rightfull custome *de modo
debitandi* ought to have been paid.

(5) And that no person from henceforth, &c.] Albeit this branch
doht not give the forfeiture to any person in certaine, and
therefore it was pretended that the forfeiture should be given to
the king. And thereupon, upon this branch, the attourny generall,
Hil. 29 Eliz. did exhibit an information in the exchequer against
Wood of Cambridgeshire for this treble forfeiture for carrying
away his tithes before they were justly divided. The defendant
pleaded not guilty, and by a jury at the barre he was found guilty,
and in arrest of judgement it was moved that in this case the for-
siture was not given to the king, for that the words of the act be,
under the paine of the forfeiture of the treble value of the tithes so
taken away. And whatsoever a forfeiture is given against him
that doth dispose of, &c. the owner of his property, as here he doth
of his tithes, there the forfeiture is given to the party grieved or
dispossessed, and the rather for that this is an additional law, as hath
been said, and made for the benefit of the proprietor of the tithes.
And so it was adjudged by Sir Roger Mannood and the whole
court of the exchequer Pauch. 29 Eliz. And this was the first leading
case, that was adjudged upon this point, and ever since it hath been
received for law, and the party interest ed in the tithes doth in an
action of debt recover the treble value. And so it was also ad-
judged Hil. 40 Eliz. Rot. 699. where Rob. Bedell and Sarah his
wift in the right of his wife joined in an action of debt for the
treb le forfeiture. A record well examined and adjudged, and
worthy to be a precedent. In which case it was resolved that the
general allegation in the count, that the defendant anno 38 Eliz.
gave *omnivast* 20 acres terrae, &c. *et quod decime inde attest
ad valorem 150l.* without shewing what kind of graine, was
good.

And be it also enacted by the authority aforesaid, that at all
times whenever, and as often (6) as the said prediall tithes
shall be due at the tithing time of the same, it to be lawfull to
every party to whom any of the said tithes ought to be paid, or
his deputy or servant to view and see their said tithes to be
justly and truly set forth and severed from the nine parts, and
the same quietly to take and carry away. And if any person
carry away his corne, or hay, or his other prediall tithes before
the tithes thereof be set forth, or willingly withdraw his tithes
of the same, &c. that then upon due proofe thereof made be-
fore the spiritual judge, or any other judge, to whom hereto-
fore he might have made complaint, the party so carrying
away, withdrawing, letting, or floating shall pay the double
value (7) of the tenth, or tithes so taken, lost, withdrawn, or
carryed away, over and besides the costs, charges, and expences
(8) of the suit in the same, the same to be recovered before
the ecclesiasticall judge, according to the kings ecclesiasticall
laws.

3 T 4

(6) That
(6) That at all times, whenever, and as often, &c. The half part of this branch is declaratory of the common law, because for the flouting of his way, &c. an action of the case did lye at the common law.

(7) Shall pay the double value, &c. The reason why the double value, &c. is by this branch to be recovered in the ecclesiastical court, where by the former branch, the parson, &c. at the common law shall recover the treble, is, &c. for that in the ecclesiastical court he shall recover the tithes themselves, and therefore the value recovered in the ecclesiastical court is equivalent with the treble forfeiture at the common law.

(8) Besides the costs, charges, and expenses, &c. So as the suit in the ecclesiastical court is more advantageous then the suit for the treble forfeiture at the common law: for at the common law he shall recover no costs, but he shall recover in the ecclesiastical court costs and expenses. But then it is demanded, whether in an action of debt for the treble value at the common law, if the plaintiff be nonsuit, or if the verdict pass for the defendant, the defendant shall recover his costs by the statute of 23 H. 6. c. 15. And the answer is, that in that case he shall recover no costs, and so it was adjudged. Trin. 43 Eliz. in commum bono, in Dounton plaintiffe in debt upon this statute, and S. Mole Finch defendant; that this action of debt is no action of debt within the statute of 23 H. 8. because it is neither upon a specialty or by contract; neither is this action upon this statute any action for wrong personall immediately done to the plaintiffe, for it is a non-suits, viz. a not-setting out of the tithes, Trin. 42 Eliz. in commum bono adjudged in an action of debt for the treble value upon this statute, not guilty, or nihil debit are good uses, and so upon the statute of 5 Eliz. upon perjury.

And be it further enacted, &c. that all and every person which hath or shall have any beasts or other cattle tithable (9), going, feeding, or departing in any wattle or common ground, whereof the parish is not certainly knowne, shall pay their tithes for the increase of the said cattle fo going in the said wattle or common to the parson, vicar, proprietary, portionary, owner or other their farmours or deputys, of the said parish, hamlet, town, or other place, where the owner of the said cattle inhabitheth, or dwelleth.

(9) All and every person which hath or shall have any beasts or other cattle tithable, &c. Where the king ought to have the tithes within the wafts or commons in his forests, which are not within any parish, this branch giveth the tithes of the increase of cattle to the parson of the parih where the owner dwelleth.

Provided, &c. that no person shall be sued, or otherwise compelled to yield, give, or pay, any manner of tithes for any manours, lands, tenements, or hereditaments, which by the lawes (10), and statutes (11) of this realme or by any privilege or prescription (12) are not chargeable with the payment of any such tithes (13), or that be discharged by any composition reall (14).

(10) By

(10) By the lawes of the realme, &c.] (and so speaks the statute of 32 H. 8. cap. 7.) That is, by the common lawes and custome of the realme, terrae sunt indecimabiles: hereof you may read divers examples lib. 8. fol. 48, 49, 81.

Note, that tithes shall not be paid of any thing that is of the subsistence of the earth and are not annuall, as of quarries of stone, turf, flagges, tynne, lead, brick, tyle, lime, marble, coales, chalke, pots of earth, and the like, nor of beasts that be ferre naturae, as deere, &c. nor of agistment of such beasts, as the parson hath tithe of, nor of cattle that manure the ground; but of barren beasts he shall have tithe for agistment, or herbage of them, unless they be nourished for the pale or plough, and so imploved. Mich 41 & 42 Eliz. coram rege in prohibition int. Greene & Hull. & Mich. 37 & 38 Eliz. inter Giffinan & Lewes in communni banco. Nor of rakings left without covin, nor of after pasture. No tythes shall bee payd for ton cauda employed to hedging or for fellwe, for maintenance of the plough or pale. Nor for the herbage of meares, bawkes, nor farme, locks of wooll, or flubble, &c. but are freed thereof by the common law and custome of the realme. Vide Hil. 8 Jac. coram rege Tho. Baxters cafe. And in that case it was resolved and adjudged, that a parson shall not have two tithes of one land in one yeare, as of corne, and of the flubble or herbage, of hay, and of the after-pasture, et sic in similibus. But if the lode of an orchard be fowne with any kinde of graine, the parson shall have tithe of the fruit trees and of the graine, for they be of severall and different kinds. But if he pay tithe for the fruit of the trees, and after cut downe the trees, and sell them in billet, or faggot, he shall pay no tithe, for they bee not of severall kinds.

If a man pay tithe for his corne, and after grindeth the same corne at a mill within the same parish, no tithe meale shall be payd therefore. Vide Anct. Cleri. cap. 2.


Decimam partem separabis de cunctis fructibus quae ascentur in terra per annos singulos, &c. Decimam simul tu etsi vini, &c. Thou shalt tithe all the increafe of thy seed that the field bringeth forth yea re yeare, as of corne, wine, &c.

Regilter 54. b. F.N.B. 53. E. Brooke Dismes. 16.

All canons and constitutions made against the lawes &c. of the realme are made void.

(11) By the statutes, &c.] Viz. 27 H. 8. cap. 20. 31 H. 8. cap. 15. 32 H. 8. cap. 7.


This priviledge to thele three orders of religion was granted to them by the councell of Lateran, anno Domini 1215. & anno 17. Jeuanis regis, and was allowed by the generall content of the realme, but this priviledge extendeth only to the lands which they had before that generall councell.

Pope Innocent the third by his bul discharged those of the order of Premonstrateneses of the payment of tithes of such lands as were of their owne manurance, or other improvement. Note, about the yeare of our lord 1150. most of all religious orders were exempt from payment of tithes out of their poffessions kept in their owne hands. Which pope Adrian the fourth about that time restraine
652


2 H. 4. cap. 4.

2SH. 8. cap. 16.

Vid. 24 H. 8. cap. 21.

Vid. 11 H. 4. 76.

12 H. 8. 5. 6. 6.

P. Amuniri.

653

Vid. Dier 10.

Eliz. 277, 278.

Vid. 25 H. 8. cap. 10.

Vid. 11 Eliz.

Dier. to. 347.

Wottons. cait.

Ext. 110 de Ex-

cl. aliqua cap. 4.

Dr. ib. Lindow.

rol. 50. verb.

Ga-ri-

Ext. tit de of-

nic. judici. ordi-

n. cap. 4. cura-

v. ib. Lindow.

rol. 101. verb.

legitima. Rot.

Clau. 30 H. 3.

m. 4. in turri

Lond. Pet.

13 E. 1. m. 11.

ib. de monitura

episcop. Hil.

2 E. 2. in mem.

Scaracil. Tr.

56 E. 3. ib.

proce. verf.

episcopum.

Cefr. Hil. 5 E.

4. intro. com-

munica. Rot. 47.

Larchveque de

Yorkis. caele.

a Regist. 38.

F.N.B. 41. 8.

8 E. 4. 24.


b Doct. & Stud.

174.

to Cifercienfes, Templarii, et Hospitularii, and that all other
orders should pay tithes, &c.

By the statute of 2 H. 4, not only the Cifercienfes, but all other
religious and seculars which put any bulls in execution for discharge
of tithes of their lands in the hands of their farmours should be in
danger of a preminenture.

By the statute of 28 H. 8, it is enacted that all bulls, briefs,
faculties, dispensations, of what names, natures, or qualities what-
ssoever they be of, heretofore had or obtained of the bishop of Rome,
or of any of his predeceffours, or by authority of the sea of Rome,
by or to any subjéct, refiants, or bodies politico or corporate of
or in this realme, or of or in other the kings dominions, should from
thenceforth be clearly voyde, and of no value, force, strength, nor
virtue, and should never after that act be used, admitted, allowed,
pleaded, or allledged in any places or courts of this realme or any
other the kings dominions, upon paine contained in the statute of
preminenture, &c. This is a generall law, and plenarily and strictly
penned against all bulls, &c. True it is, that there are some ex-
ceptions or qualifications in the act, which you may read there; but
there is no exception or qualification therein for any dispensa-
tion or discharge of not payment of tithes by any bull of the pope.
And we are of opinion, that the pope by his bull could not dis-
charge any subjéct of this realme of payment of tithes, for it should
be against the liberty of the subjéct, when he had liberty to grant
his tithes to what spiritual person he would, and against the right
of the persons, &c. of parifhers, after parochiall rights were
establisshed.

This act of 28 H. 8, extendeth not to general counells, but leave
them as they were before, but all canons (as elsewhere hath been
said) which are against the prerogative of the king, the common
law or custome of the realme, are of no force. Let not therefore
only feriants, apprentices, and attournyes, but the parties themselves
be well advised how they plead or allledge any bull, brief, faculty,
or dispensation from Rome, &c. which is not warranted by this act,
the punishment being to penall as a preminenture, if they plead or
allledge any bull, &c. against that act.

And in some cases, this maketh for the clergy. By the canon
law parish churches are to be repaired by the parions of the parish,
but the custome of this realme being that the parish churches are to
be repaired by the parishioners or inhabitants of the parishes, this
canon bound not the clergy.

Also by another canon, neither arch-bishop nor any other of the
clergy could by their testament bequeath any thing wherein he had
property in the right of his church; but this being contrary to
the custome of this realme originally obtained by the bishops of
this realme for themselves and their whole clergy, for which at
this day a recompence is given to the king, as elsewhere we have
shewed.

(12) a Prefcription.] As modus decimandi, lands given in sat-
isfaction, &c. b And a country may prescribe to be quit of tithes,
or non decimandi. But for the better understanding both of this
statute, and of the books, it is good to be known what the time
of prescription for tithes is by the canon law, and by what autho-

rity. And the time of prescription in that case is forty years, by

which time of prescription a spiritual person may gain by the

canon

The law is a right of tithes in another parish, &c. * And this prescription hath this ground and warrant by a decretal epistle of pope Alexander the third, anno Domini 1180. But this canon being against the common law which allowed no prescription unless it be time out of mind of man, never had allowance in England. Of prescription according to the common law, you may read in the first part of the Institutes sect. 170. at large. And the epistle decretal of pope Alexander we have thought good to recite in boc operis, Alexander Mauricio episcopo; Ad aures nostras te significante personis, duas ecclesias fœdus sub examine tua litera super decimis, qua a ecclesiarum in alienis perturbatione 40 annis possebit, ac per hoc petit ejus actionem extemam, altera vero velum eos earem parochiali vicinorum prescriptionem non debebare sibi oboesse propositis; idem quid juris fit in hoc cajo tua nos duxit fraternitas confuseludens. Tunc itaque frustrati literis presentibus innotescat, quod jur<e vario et humano morf conditio possebit, quoniam quadragesimalis prescriptionem omnem personis actionem secludit.

*Mich. 43 & 44 Eliz. In a prohibition between Nowell and Hicks vicar of Edington in Midd. the plaintiff in the prohibition alleged a cuitume within the said parish of Edington time out of mind of man to pay for every lamb a penny, &c. And ifue was taken upon the cuitume, and the jury found, &c. before twenty years last past time out of mind, that there was within the said parish such a cuitume, and modius decimae; but for twenty yeares last past by reason of suits and troubles, the inhabitannts of the said parish had paid the tithes lambs in kinde. And in this case these two points were adjudged. First, when a cuitume doth create an inheritance, this cannot be waved or annulled by payment or other matter in pass. 2. Albeit that the modius decimae had not been yielded or paid by twenty yeares, yet the prescription may be general, for that the cuitume once established doth continue. As if a man hath a common of palture, &c. and taketh a leafe of the land, &c. for many yeares, yet after the yeares ended he may prece in general; for the inheritance of the common continued: and if the law should be otherwise, it were dangerous for the parties that doe prescribe for one yeare, and tenne or twenty yeares, &c. is all one in judgement of the same. And fo herewith doe agree the books in 15 E. 3. tit. judgement 13. in a writ of mine. 14 E. 3. bidem 155.

Edmundus de mortuo mari attactiatu fuit ad respondendum Johanni de beige et Christianae uxori ejus, quare impedit eos habere liberam dominionem in bosco suo de Kinkefield pertinens ad manerium suis de Stoatesden quod tenent de rege in capitae, et quod habenti ex feoffamento Hugonis le Plслиs quondam domini dicti maneri. Ed mundus dicit quod Rogerus pater socii oblit sejus indis tene ndo in suo siperale, et quod praedixi Hugo tempore quo effecavit prdaeitiis Johanne et Christianam de dicto manerio, non dicit sejus de dicta chacea. Et de bosco si super patriam, et praevd Christanne et Christianna similiter. Iuror dicit quod Johanne de Plслиs pater praedicti Hugonis de Plслиs fuit sejus de praeediis chacea dum fuit dominus dicti manerii, et dicit quod dixit Hugo voluit ibidem sugga, pslquam praeedi manerium pervenit ad manum suam, et Rogerus de mortuo mari ibi iisn impediuit et non permittit. Et dicit quod Hamo le Strange, et Hugis de Turebrevile parentes uxor is ipse Hugonis ex regatu ibis Hugonis numerunt ad manerium de Stoatesden, et praedictam chaceam simul

*Jure Canonico
* This is the ley de St. Eligio mentioned in 20 H. 6.
* Mich. 43 & 44 Eliz. coram rege.

[654]

finul cum prædicto Hugone intraverunt nomine ipsius Hugonis cum eis et armis, et in ea cum eis et armis per tres dies fugarerunt ab ipso impedimento prædicti Rogeri de mortuo mari aut bonumurium suorum. Et quiais jur<sup>1</sup> &c. dicunt quod illud fecerunt tempore pacis, et ab ipso impedimento prædicti Rogeri aut bonumurium suorum eo quod dixit Rogerus nescivit quod ibi fugarerunt, et quod ab eo tempore dixit Hugus nuncupavit ibi; quia quotiescumque fugarer ibidem voluit, dixit Rogerus ipsum impetravit. Peftera term<sup>2</sup> Trin<sup>3</sup> anno 20 cæsaret partu, a perierunt judicium suum per attornatos suos. Judicium reddidit, quod quia Johannes de Pleffys fuit de chaece sefius tenquam pertinente; &c. Et postr diebus Hugo per tres dies continuo tempore pacis sefiam suam obtinuit ab ipso impedimento Rogeri de mortuo mari, aut aliquis proinde suorum, per quod videtur cur<sup>4</sup> quod sefina illa est iustissima, bona, et jacta in hoc caelo: consideratum est, quod Edmundus injuste impetravit ibi Johannem et Chrifianam de prædicta chaece, et ipsi re<sup>5</sup> chaece illam dant<sup>6</sup> 100s.

The manour of Brimsgreen and Norton was ancient demesne, and in the kings hands, and William of Birmingham and his successors time out of minde and before the conquest had taken toll afwell of the tenants of the said manour as of others, whereupon judgment was given, as it appeareth in the record in these words: Et quia manifestè consatat, &c. quod manerium de Brammgerecre et Nortan est de antiquo dominico corone Anglese, & à tempore quod non est moriet, existit in sefina progenitorum reg<sup>7</sup> quandam regum Angliæ, ut adhuc in sefina domini regis nunc existit. Et homines de codem manour fuit et certi homines de antiquis dominici corone domini reg<sup>7</sup> quid eft déxcius à praifatione theolouini per totem regnum Anglese, ut præcitus est, &c. Et fuper hoc ujus et leto {recordo} piaciti prædicti manifestè patet quod prædicti Wilhelmus de Brimsgrecre recognovit quod ipse a anteceffores fuit habuerunt mercatum in prædicta villa de Birmingham, et theolouini de omnibus mercandiss in codem villa, de quibus theolouini praefari deberet, persevererent et habuerent, et etiam de hominibus de Brommgrecre et Norton, quod de aliis ibidem vendendum et vendebant ante Conquestum, et sua temporis interruptione, et quod ipse fletam eundem antecefforum continuavit diftingendo et percipectiendo ab eis hominibus theolouinis, tam pro minutis, ut pro visibilibus et aliis necessariis fuit, quod de aliis quibuscumque mercandiss fuit de aliis mercatoribus. Consideratum est quod prædicti Richarudus, Robertus, Johanne, et omnes aliis de manerio prædicto, quieti sunt impermeatus à praifatione theolouini in villa prædicta praefandi secundum legem et confuetudinem in regno ustrabs<sup>8</sup>, et quod recuperent domna, quod taxantur per diuocationem judiciariar<sup>9</sup> ad viginti marce. Et præciti Williamus pro injusta continuatione, usurpatione antecefforum fuiu in majorcordia. Et inibitum est eodem Willielmo ne homines de manerio prædicto de cetero disfiring ad theolouini in dicit<sup>10</sup> villa de Bringham praefandi contra legem et confuetudinem prædictis, &c.

Abbass de Sancto Eduno implicitat Rogerum de Bigod com<sup>11</sup> norre marese. Angl, et deus aliis pro captione duorum leporariorum fuiu in villa de mugna Thorpe. Comes dicit, quod dicit villa esta infra praefaci<sup>12</sup> domii<sup>13</sup> hundreda sui de Edam quod tenet ingaremmnum post Rustra annuatissimus ilius, cuius barres ipse est, illud tenet, et quia invent præciti<sup>14</sup> oblatem ibidem fugantem, ipse cepit, &c. Abbass dicit quod gutt<sup>15</sup> terrarum fuiuaru ibidem ad ipsum pertinet fugare, prout omnes præcede<sup>16</sup> foires fuit ibidem fecerunt, &c. Ideo uenit jur<sup>17</sup> qui per speciale uel<sup>18</sup> dicitum dicit, quod abbas et præcedifores fuit foluabant ante bellum a Lorn.
Provided, &c. that all such barren (15), heath (16), or waft (17) ground, other then such, as be discharged for the payment of tithes by act of parliament, which before this time have lynen barren and payd no tithes by reason of the fame barrenneffe, and now be or hereafter shall be improved and converted into arable ground or meadow, shall from henceforth, after the end and terme of seven yeares, next after such improvement fully ended and determined, pay tithe (18) for the corne and hay growing upon the same, any thing in this act to the contrary in any wise notwithstanding.


But it is not only so strictly taken in this act, but hath also a more restrained sense. For albeit it doth yeeld some fruit, yet if it be barren land, quoad agriculturam, as to tillage, which this branch meant to advance, for albeit barren ground (as to tillage) doth pay tithe wooll and lambe, yet is it within this act, and this appears by the next proviso in this act for the payment of such tithe as during the seven yeares before the improvement was payd. But yet if the ground be not apt for tillage, yet if it be not sapta natura barren, it is not within this act. As if a wood be felled and grubbed, and made fit for the plough, and employed thereunto, yet shall it pay tithes presently, for wood-ground is terra sterilit, et facunda.

Devenere locis latos, et amaeva virilla
Fortunatorum nemorum, fadsys beatas.

And so was it resolved Hil. 9 Jac. reg. upon the motion of Serjeant Houghton by the whole court of common pleas.

In a prohibition between Sharington and Fleetwood for tithes in Orwell in the county of Lancaster, it was resolved, that if marsh meadow, or other land for not cleansing of the trenches or fewers, or by suddaine accident or inundation of waters be surrounnde; or by ill husbandry or unprofitable negligence any land become over-
The manour of Brimsgreen and Norton was ancient demeane, and in the kings hands, and William of Birmingham and his antecessors time out of minde and before the conquest had taken toll aswell of the tenants of the said manour as of others, whereupon judgment was given, as it appeareth in the record in these words: Et quia manifeste consuet, &c. quod manerium de Brymmegegreen et Norton est de antiquo dominico coranæ Anglie, & à tempore quo non estat memoria, existit in sefina regantorum regnæ quodam regnum Anglie, & ab in sefina dominii regis non existit. Et homines de cadem manuevo sicut et cæteri homines de antiquis dominicis coronæ regni quisque officere lateant a prestatonie theologoni per totum regnum Anglie, ut predicto est, &c. Et super hoc in eo et leso recordo piacit predicti manifeste patet quod predicti Willielmus de Birmingham recognotit quod ipsi et antecessores suæ habuerunt mercatum in praedicta villa de Birmingham, et theologoniam de omnibus mercandis in cadem villa, de quibus theologoniam praefator debet, percepertur et habuerunt, et etiam de hominibus de Brymmegegreen et Norton, quam de aliis ibidem constuitibus et essentibus ante Conquestum, et sine tempore interrupcione, et quod ipsi etiam in eorum antecessorum continueretur dirigere et perceiving ab eis hominibus theologonis, tantum pro minutis, ut pro omnibus et aliis necessario sicut, quam de aliis quibus suae mercandis sicut de alii mercatoribus. Confessarum est quod predicti Richardus, Robertus, Johannes, et omnes aliis de manuevo predicti, quos consuetudo in praestatione theologonis in villa predicta praefati secundum legem et conjunctudinem in regno aestatis, et quod recuperent damna, que taxantur per dicti inusticiarior ad reginæ mare. Et praedictus Willielmus pro injusta continuatione, usurpatione antecessorum suorum in majestas cardia. Et inhibition est eadem Willielmo ne hominum de manuevo praedicto de eastero dirigendo ad theologoniam in dicta villa de Birmingham praefant contra legem et conjunctudinem praedictas, &c.

Abbàs de Sancto Edmundo implacator Rogerum de Bigod com Marris, Angli; et dux aliis pro capitaneo duorum leporisorum suorum in villa de magna Thorpe. Comes dicti, quod dicta villa est infra predictum demidum hundredi jussi de Erfam quod tenet ingenteendum prout Rogerus avunculus suus, cuius harres ipse eft, illud tenetur, ut qua invenit predictum ab hactenus ibidem fugans, ipse cepit, &c. Abbàs dicti quod ratione terrarum suarum ibidem ad ipsum pertinet figuris, prout omnes praedecfores suí ibidem fecerunt, &c. Ideo veni juris qui per speciale vincitationem dicam, quod abbàs et praedecfores suí folébant a bellum de Lecce

Provided, &c. that all such barren (15), heath (16), or waft (17) ground, other then such, as be discharged for the payment of tithes by act of parliament, which before this time have lyen barren and payd no tithes by reaфон of the fame barrenneffe, and now be or hereafter shall be improved and converted into arable ground or meadow, shall from henceforth, after the end and terme of seven yeares, next after such improvement fully ended and determined, pay tithe (18) for the corne and hay growing upon the same, any thing in this act to the contrary in any wife notwithstanding.


But it is not only fo strictly taken in this act, but hath also a more restrained signifie. For albeit it doth yeeld some fruit, yet if it be barren land, quoad agriculturam, as to tillage, which this branch meant to advance, it is within this act, for albeit barren ground (as to tillage) doth pay tithe wooll and lambe, yet is it within this act, and this appeares by the next proviso in this act for the payment of such tithe as during the seven yeares before the improvement was payd. But yet if the ground be not apt for tillage, yet if it be ftuante naturae barren, it is not within this act. As if a wood be flubb'd and grubbed, and made fit for the plough, and imployed thereunto, yet shall it pay tithes presenty, for wood-ground is terra sterilis, et facunda.

Devenere locos letos, et amena vireta
Fortunatorum nemorum, sedet beatas.

And so it was it resolved Hil. 9 Jac. reg. upon the motion of Serjeant Houghton by the whole court of common pleas.

In a prohibition between Sharington and Fleetwood for tithes in Orwell in the county of Lancaster, it was resolved, that if marith meadow, or other land for not cleaning of the trenches or sewers, or by suddaine accident or inundation of waters be surrounded; or by ill husbandry or unprofitable negligence any land become over-runne.
runne with bushes, furres, whinnes, and bryers, yet are not they of any of them said to bee barren land within this statute, because of their owne nature they are fruitfull, and the parson, &c. shall not by this act he barred of his tithes by the ill husbandry or negligence of the owner or poiffour.

(16) Heath.] In French it is called bruyeres; in legall Latin brusca, Regist. 2. In domesticy it is called bruarias; Latinè erica, ericia an unprofitable kind of ground, but wholly barren, for theron sheep and beasts will bruise, and some poor people the flags and turves thereof doe apply to fewell; and this heath cannot without great skill, charge and industry bee converted to tillage. It sendeth forth a flower in autumnne (when all others cease) which bees doe exceedingly covet, as it is said, this is within this act. Some say, est quodam genere myricæ, a kind of wild tamarisk, and in Lincolshire a little religious house was called Temple buer, because it was seet in the heath.

(17) Will.] It is called vestas fundus, wast ground, because it lycth as wail with little or no profit to the lord of the manour, and is so called to distinguish it from the residue of the demenses in the lords hands, and cannot without great charge and industry be improved or converted to tillage being simpse natura unprofitable, and being converted to tillage it shall pay no tithes by the space of seven yeares.

(18) Shall after the end and term of seven yeares next after such improvement pay tite.

Note, here are no expresse words of discharge of the tithes during the seven yeares, but by reasonable construction it doth implyly amount to a discharge during the seven yeares, and the seven yeares are to be accounted next after the improvement.

And be it enacted, &c. that every person exercising merchandizes, bargaining, and selling, clothing, handicraft, or other art or faculty, being such kind of persons as heretofore within these forty yeares have accustomedly used to pay such personall tithes, or of right ought to pay (other then such as bee common daylabourers) shall yearly, &c. pay for his personall tithes, the tenth part of his clear gains (19), his charges, &c. deducted; and where handicrafts men have used to pay their tithes within this forty yeares, the same custome of payment of tithes (20) to be observed. And if any person refuse to pay his personall tithes, &c. it shall be lawfull to the ordinary of the same dioceese, &c. to call the same party before him, and by his discretion to examine him by all lawfull and reasonable means other then by the parties owne corporall oath (21), concerning the true payment of the said personall tithes.

(19) Pay for his personall tithes the full tenth part of his clear gains, &c.] Of personall tithes we have spoken before. Vid. 37 H. 8. cap. 12. Vid. Linwood, tit. de Decimis, fol. 141.

(20) Custome of payment of tithes.] Nota, there may be modus decimandii for personall tithes.

(21) By all lawfull and reasonable means, other than by the parties owne corporall oath.] Here is just occasion offered to speake de juramento

Jumenta cumulus, wherein we will endeavour to find out three things: first, the beginning of the bringing in of this oath: secondly, how the law hath stood therein in former ages: and thirdly, what the right is at this day.

By a constitution domini Othonis diaconi cardinalis Sant' Nich. gaolice fidelis legati, at a provinciall councell, helden oab' Eneas Martini in ecclesia Sancti Pauli London, anno Dom. 1236, anno 21 H. 3, it was ordained in these words: Jus jurandum cumulus in causis ecclesiasticis et civilibus de veritate dicenda in spiritualibus, quae veritatis facilius appearatur, et causae celebri terminetur, placitum praebere de extero in regno Angliae, secundum canonicas et legitimas potestates obitent, confuetudine in contrarium non obstente. By this it appeareth, that by the custome of the realme of England, juramentum cumulus was not to be ministr'd: but to confesse the truth, the custome was not so generally, as in this canone is allledged; for lay-men were free by the custome of the realme for taking of that oath, unless it were in causis matrimonialiis et testamentariis: and in those two cases the ecclesiastical judge might examine the parties upon their oath, because contracts of matrimonium were often made in private, and legitimation of children depended thereupon. And in causis testamentary many things confin'd in terrecie, and the truth therein is to be drawn out by oath, et interj. jubebatur testamentum hominum rata baberi. And this appeareth by a * prohibition by authority of parliament directed to the shereffes, &c. Quod non permittant quod aliquid laici in bolivis fia in aliquid bo conveniant ad aligualis recognitiones p. sacramenta fia facere, nifi in causis matrimonialibus et testamentariis. But this custome extended not to the clergy, but to lay-people only, for that they of the clergy being presumed to be learned men, were better able to take juramentum cumulus: for concerning the testimony of witneses in the ecclesiastical court, that art, or the custome of the realme extends not unto.


But if in a penall law the jurisdiction of the ordinary be saved, as by 1 Eliz. b for hearing of masse, or by 13 Eliz. c for usury, or the like, neither clerke nor lay-man shall be compelled to take juramentum cumulus, because it may be an evidence against him at the common law upon the penall statute.

Legis cafe, Habemus corpus. c 18 Eliz. Dyer 175. in margin, Hinde's cafe, Habes b corpse.

But it is objected, that this oath hath long continued in the ecclesiastical court. To this it is answered: First, that it had the warrant of an act of parliament (as it was holden) in 2 Hen. 4. cap. 15, whereby it was enacted, Quod diocesanus per se, vel commisarios suos contra injusti conscribitur, &c. ad omnem juris effectum publicum, et judiciarium praebet et negotium injusti terminet justa canonica funtione. By this statute, and the said provincial constitucion, and other the canons of the church, the diocesans, &c. ministr'd the said oath, even in the cafe of heresie, &c. This statute of 2 H. 4. was repealed by the act of 25 H. 8. (which act is partly declaratory of the ancient law of the realme) in these words: "It standeth not 'with the right order of justice, nor good equity, that any person should..."

"should be convict, and put to losse of life, good name, or goods, unless it were by due accusation and witnesse, or by presentment, verdict, confession, or processe of outlawry, &c. And that it is not reaonable, that any ordinary, upon any suspicion conceived of his owne fantasie, without due accusation or presentment should put any subject of this realm in any infamy and slander of heresie, to the perill of life, or losse of name, or goods." And in a former clause of the said act it is said: "That the most expert and best learned man of this your realm, diligently lying in wait upon himselfe, can eschew and avoid the penalties and dangers, &c. if he should be examined upon such captious interrogatories, as is, and hath been accustomed to be ministrd by the ordinaries of this realme, in cafes where they will suspeect any man of heresie, &c.

Secondly, the words of the said act of parliament are contra voluntatem eorum, and of the Registar, ipsi invitiis; so as such as willingly have taken it, serueth for no possesion against the law.

But now lastly it is to be seen, how the right flandeth touching this oath at this day. It is confessed, as before it appeareth, as well the said provincial constiuition of Otho, as by the Registar, that the said constitution was contra conuentudinem regni, whereupon it followeth, that no cultume of the realme can be taken away by a canon of the church, but only by act of parliament, and specially in case of an oath, which is so sacred a thing, and which generally concerneth all the nobility, gentry, and comminity of the realme of both sexes. And by the statute of * 25 Hen. 8. cap. 19. no canon against the kings prerogative, the law, statutes, or cultume of the realme, is of force, which is but declaratory of the common law.

4 Wee have read over what Doctor Cofin hath in his book spoken for the maintenance of this oath, and certainly, he toucheth not the date of the question, as will appeare to the learned reader.

To conclude: This branch of 2 Ed. 6. giveth no life to any forcelesse canon, which is against any law or cultume of the realme, but, according to the law and cultume of this kingdom prohibiteth the ordinary in case of personall tithes to examine the party upon his corporall oath; for the parliament did take that to be lawfull and reasonable means (whereof it speaketh); for a parliament would never have prohibited any thing that was lawfull and reasonable; and yet the clearer gains of merchants, clothiers, or handickraft men do lyce in great fearece, and hardly to be proved by witnesse. And before, in the clauze concerning the second addition, for recovery of predial tithes, it is faid; upon due proces thereof, made before the spiritual judge, &c. for that they are open, visible, and easie to be proved by witnesse: and at this time the statute of 2 H. 4. flood repealed.

No person ecclesiastical or temporall ought in any ecclesiastical court to be examined upon the cogitation of his heart, or what he thinketh, &c. as it was holden by the judges in the parliament holden 4 Jac. and as it was after holden in the court of common pleas, Mich. 6 Jac. in Doctor Wolfdons case in a prohibition.

Provided, &c. that all and every person and persons, which by the lawes or customes of this realme ought to make or pay their offerings, shall yearly from henceforth well and truly content and pay his or their offerings (22) to the parson, &c. of the parish or parishes, where it shall fortune or happen him or them to dwell or abide, &c.

(22) Offerings.] Offerings or oblations, oblationes, these are of two sorts, viz. free or voluntary, and confuet; or by custome, as here it appeareth. Offerings and obvotions are in London the profits of the church, and not in corn, or other manner.

A writ of right of advowson brought of the fourth part of the tithes and offerings of the church of Saint Dunstan in the West in Fleetstreet London, and adjudged to be good.

See lib. 11. fol. 16. Doctor Grants case. Vid. there for obvotions, 38 E. 3. 13. and 16 E. 3. ubi sup. and see here the 10 addition. Vid. the next addition.

Provided, &c. That this act, or any thing therein contained, shall not extend to any parish, which stands upon and towards the sea coasts, the commodities, and occupying whereof confuet chiefly in fishing, and have by reason thereof used to satisfie their tithes by fith, but that all and every such parish and parishes shall hereafter pay their tithes, according to the hallowed customes, as they have heretofore of ancient time within these 40 yeares used and accustomed, and shall pay these offerings, as is aforesaid.

Provided that this act, &c. shall not extend in any wise to the inhabitants of the citie of London and Canterbury, and the suburbs of the same, ne to any other towne or place, that hath used to pay their tithes by their houses, otherwise then they ought or should have done before the making of this act, any thing in this act to the contrary in any wise notwithstanding.

Mich. 5. Jac. in communni banc, between John Skidmore and Robert Elire plaintiffes in a prohibition against John Bell parson of Saint Michael Queenhithe in London: the case upon the said statute of 37 H. 8. and the decree thereupon was this: the said parson libelled before the chancellor of London for the tithes of an house, called the Bores Head in Breadstreet in the said parish, by force of the said act and decree, the ancient farme rent whereof was five pounds, at the time of the said decree, and after, and that of late a new lease was made of the said house, rendering the rent of five pounds per annum, and over that a great in-come or fine, which was covenanted and agreed to be paid yearly at the same day; that the rent was paid as a summe in groffe, and that so much rent might have been referred for the said house, as the rent reserved, and the summe in groffe amounted unto; which referral and covenant, &c. were made to defraud the said parson of the tithes of the true rent of the said house, which to him did appertain by the purport and true intention of the said decree. And in this case four points were resolved by the whole court.

First,

First, if so much rent be referred as was accustomed to be paid at the making of the said decree in 37 H. 8. (whosoever fine or in- come be paid) that the parson can averne no covin; for the words of the decree be; Where any lease is or shall be made of any dwelling house, &c. by fraud or covin in referring lese rent then hath been accustomed, or is paid, &c. So as if the accustomed rent be referred, no fraud can be alleged; for the fraud by the decree is, when lesser rent then was then accustomed to be paid, is referred; or if no rent at all be referred, &c. for then tithes shall be paid according to the rent, that then was last before referred to be paid. The words of the decree are: Or that any lease shall be made without any rent referred upon the same for reason of any fine or income, then the farmer shall pay for his tithes after the rate aforesaid, according to the quantity of such rent, as the house was lastly letten for, without fraud or covin, before the making of such lease. So as the decree confiseth upon four points, viz. First, where the accustomed rent, &c. was referred. Secondly, where the rent was increased, there the tithes should be paid according to the whole rent. Thirdly, where lesser rent was referred. Fourthly, where no rent was referred, but had been formerly referred. And this act and decree were very beneficial for the clergy of London, in respect of that which they had before: and the defendant in his libel confesseth, that the accustomed rent, &c. was referred; and therefore no cause of suit.

Secondly, it was resolved, that such houses as were never letten to farne, but inhabited by the owner, this is casus omnis, and shall pay no tithes by force of the decree.

Thirdly, it was resolved, that where the decree fayth, Where so rent is referred by renton of any fine or in-come paid before-hand, albeit no fine or in-come be paid in that case, yet if no rent be referred, the parson shall have his tithes according to the decree, for that is pot but for an example or cause, why no rent is referred, and whether any fine or in-come were paid, or no, is not material, so to the parson.

Fourthly, it was resolved, that the parson could not sue for the said tithes in the ecclesiastical court, for that the act and decree that raised and gave these kind of tithes, did limit and appoint how, and before whom the same should be sued for, viz. That if a controversy were moved in the city for not payment of those tithes, or concerning the true rent or tithes, that then upon complaint made by the party grieved to the lord mayor of London, he by advice of his assistants should make a final end, with costs to be awarded by his discretion. And if the mayor doth not make an end of it within two moneths, or if any of the parties find themselves grieved, that then the lord chancellor within three moneths shall make an end thereof with costs, according to the true intention of the said decree: therefore as the decree gave a new and special kind of tithings, so it did appoint new and speciall judges to heare and determine the same. And in the end it was awarded, that the prohibition should stand. Vide for tithes in London, 27 H. 8. cap. 20. and 32 H. 8. cap. 7.

And be it further enacted, &c. that if any person do publish or withdraw any manner of tithes, obviations (23), profits, commodities,
commodities, or other duties before mentioned, or any part of them, contrary to the true meaning of this act, or of any other act heretofore made, that then the party so substracting or withdrawing the same, may or shall be convented and sued in the kings ecclesiastical court by the party from whom the same shall be substracted or withdrawn, to the intent the kings judge ecclesiastical shall and may then and there hear and determine the same, according to the kings ecclesiastical laws. And that it shall not be lawfull unto the parson, vicar, proprietor, owner, or other their fermors or deputies, contrary to this act to conven or sue such with-holder of tithes, obventions, or other duties aforesaid, before any other judge then ecclesiastical. And if any archbishop, bishop, chancellor, or other judge ecclesiastical give any sentence in the aforesaid caufes of tithes, &c. and (no appeale ne prohibition hanging) and the party condemned do not obey the said sentence; that then it shall be lawfull for every such judge ecclesiastical to excommunicate the said party so, as aforesaid, condemned and disobeying: In which sentence of excommunication, if the said party excommunicate, wilfully stand and endure still excommunicate by the space of 40 days next after, upon denunciation, and publication thereof in the parifh church, or the place or parifh, where the party so excommunicate is dwelling, or most abiding, the said judge ecclesiastical may then at his pleaure signifie unto the king into his court of chancery of the state and condition of the said party so excommunicate, and thereupon to require process de excommunicato copiendo (24), to be awarded against every such person as hath been so excommunicate.

(23) Obventions.] Obventions aforesaid are offerings.
That the jurifdiction of tithes belong to the ecclesiastical court,

the law of parliament, viz. of Circumjette agatis,
cap. 13. 27 H. 8. cap. 20. 32 H. 8. cap. 7. and this act.

Of ancient they were determined in the sheriffs turne, as it
appeared in lib. rubric inter leges H. 1. cap. 8. After by seire fac
at the common law before the statute of 18 E. 3. Vid. Rot.
chuf. 21 H. 3. m. 3. & Rot. Eliachet 8 E. 1. nu 67. Regis. fol.
165, a writ of covenant to leve a fine de decimis garbarum, &c.
35 H. 6. 20. F. N. B. 30. e. f. 4 E. 3. 27. 29. 7 E. 3. fol. 5.
per Parling. 8 E. 3. 49. Brafton, lib. 5. fol. 401. Britto.
cap. 4. fol. 11. omitted tithes, &c. Fleta, lib. 6. cap. 36. 28
E. 3. 97.

At this day a writ of right of advowson lyeth de advocatione
decimorum ecclesiis, &c. for the tithes is the profit of the church;
and if the tithes be taken away, the advowson is of none effect, and
the esgles in a writ of right of advowson (which is the fruit of the
advowson) are allledged in the parison, in taking of the great and
small tithes by the prefectment of the patron. See 16 Ed. 3.

At Scire Imped. 147. 30 E. 3. fol. 1. 38 E. 3. 13. 45 E.
3. 12. Brit. cap. 4. and the writ of indicavitis, whereof you
may

Vid. Mich. 7 E. 1. coram
Reg. rot. 21.

Shard & p.r
Stoner, &c.
26 H. 8. 3
F. N. B. 30. c.
F. N. B. 30. e.
Ver. N. B. 31.
3 E. 3. 27.
8 E. 3. 49.
31 H. 6. 16.
may be read at large before in the exposition of the statute of W. 2, cap. 5.

This 10. addition for the establishment of ecclesiastical jurisdiction for tithes was made, but by the generality thereof (which observe well) it should have been doubted, whether the writ of right of advowson of tithes, and of indicavit had been taken away; but to clear the doubt, there is hereafter a special provision therefore, as hereafter shall be shewed. See the 12. addition.

(24) Procede de excommunicato empiendo.] See the statute of 5 Eliz. cap. 23, for divers notable things concerning this matter; but none of the penalties of that statute doe extend to the proceeding upon cause of tithes, but onely upon cause belonging to ecclesiastical jurisdiction particularly expressed in that act.

Be it further enacted, &c. that if any party at any time hereafter, for any matter or cause before reheard (25), limited, or appointed by this act to be sued or determined in the kings ecclesiastical court, or before the ecclesiastical judge, doe sue for any prohibition in any of the kings courts, where prohibitions before this time have been used to be granted: that then in every such case the same party, before any prohibition shall be granted to him or them, shall bring and deliver to the hands of some of the justices or judges of the same court where such party demanded prohibition, the very true copy of the libell depending in the ecclesiastical court concerning the matter, wherefore the parte demandeth prohibition, sub subscribed or marked with the hand of the same party; and under the copy of the said libell shall be written the suggestion, wherefore the party so demandeth the said prohibition. And in case the said suggestion by two honest and sufficient witnesses at the least, be not proved true in the court (26) where the said prohibition shall be so granted within 6 moneths next following after the said prohibition shall be so granted and awarded, then the party that is lettered or hindered of his or their suit in the ecclesiastical court by such prohibition, shall upon his or their request and suit, without delay, have a conflatment granted in the same case in the court, where the said prohibition was granted, and shall also recover double costs and damages against the party that so pur sued the said prohibition, the said costs and damages to be affixed or assailed by the court, where the said conflatment shall be so granted; for which costs and damages the party to whom they shall be awarded may have an action of debt by bill, plaint, or information in any of the kings courts of record, wherein the defendant shall not waste his or their law, nor have any effuine or protection allowed or admitted.

(25) Rehearsed.] This word is very materiall, for this additional act of 2 E. 6. extendeth only to prediall and parcinal tithes; but in as much as this act doth rehearse the statues of 27 H. 8, cap. 20, and 32 H. 8, cap. 7, both which statues extend unto
unto all kind of tithes, viz. prediall, personall, and mixt, and to offerings also; therefore this branch extendeth to them all. And it is to be observed, that this branch respecteth the cause of fut, viz. for tithes or offerings, and not the cause of the prohibition. Vid. Dyer, 2 Eliz. fol. 170.

(26) And in case the said suggestion, &c. be not proved true in the court, &c.] This clause was made in favour of the clergy for proof by witnesses, which they had not at the common law.

If the suggestion be in the negative, as if the proprietary of a parsonage improper were for tithes, and the cause of the suggestion be, that the parsonage is not improper; or if the parson of Dale were for tithes of lands in that parish, and the party were a prohibition, for that the land lieth not in that parish, or that the parson that sueth for tithes was not instituted, &c. or any the like cause in the negative of any matter of fact, he shall not produce any witness by force of this branch, because a negative cannot be proved; and therefore a prohibition upon causes in the negative remains at the common law.

If a man plead a deed in barre, wherein witnesses be, and issue is joined, non est factum, and process is awarded against the witnesses, who are joined to the jury, and it is found non est factum, notwithstanding this joyneder, the party grieved shall have an attainder: for it is a maxime in law, That witnesses cannot testify in the negative, but in the affirmative: otherwise it is, if they found it to be the deed of the party in the affirmative, there no attainder doth lie. Vid. 11. aff. p. 19. 22 aff. p. 15. 23. aff. p. 11. 40 aff. p. 23. 12 H. 6. 6. F. N. B. 106. h. So it is, if the suggestion be grounded upon any matter in law, for that the fut for tithes in that kind are not due by law. As if the libell be in the ecclesiastical court, for the tithes of tiles, turves, or the like, there need no witnesses to be produced; for that matters in law are to be decided by the judges, and not to be proved by witnesses: and quod conflat curiae, opere testium non indiget, and the cause of this prohibition, or the like, appeareth in the libell if selfe. See before Just. Cleri 3. regis Jacobi, Articul 18.

Provided alwaies, and be it enacted by the authority aforesaid, that this act, or any thing therein contained, shall not extend to give any minister or judge ecclesiasticall any jurisdiction to hold plea of any matter, cause, or thing, being contrary or repugnant to, or against the effect, intent, or meaning of the statute of W. 2. (27) the fifth chapter, the statutes of Articulis Cleri (28), Circumspeteste agatis (29), Sylvia caeduca (30), the treatise de regia prohibitione (31), ne against the statute of anno primo Edwardi tertii the tenth chapter (32), or any of them, or yet hold plea in any matter, whereof the kings court of right ought to have jurisdiction (33): any thing therein contained to the contrary in any wise notwithstanding.

[662]

(27) Statute of W. 2. cap. 5.] Hereby, if need were, the writ of indiciavit, and the writ of right of the fourth part of tithes, and all dependences thereupon are laved. See before in the exposition of this act of W. 2. cap. 5. anno 13 E. 1.
(28) Articuli cleri.] These articles were established by act of parliament anno 9 E. 2. See before in the exposition upon these articles. By this act also cap. 2. the writs of indicavit, and of right of advowson of tithes are stayed.

(29) Circumfectis aquis.] This act is (as here it appears) a statute, and enacted anno 13 E. 1. See before the exposition hereof.

(30) Silva caedua.] Here is intended the statute of 45 E. 3. cap. 3. concerning tithes de Silva caedua, and not of great wood above 20 ycares growth.

(31) The treatise de regia prohibitione.] Herein some difference is in our books; for in Hill, 7 H. 4. it is said, that the statute de regia prohibitione doth rehearse how per conditiones spiritualis sunt temporales which clausfe is in Artic. Cleri, cap. 1. in fine. Also in 31 H. 6. it is said, that the statute de regia prohibitione, and recite the effect of the second chapter of Artic. Cleri. So as by these books the statute de regia prohibitione is the statute of Artic. Cleri: but it cannot be so conceived in this act, because herein they are distinguished as two several statutes, and so in truth in the intention of this act they are: and the treatise de regia prohibitione intended by this act is that treatise de regia prohibitione, intitled Prohibito formata aper artic. Vide Yet. Mag. Chart. part 2. fol. 7. Railiff abridg. stat. tit. prohib. pl. 6.

(32) Statute of 1 E. 3. cap. 10.] This is miswritten; for the act is 1 E. 3. stat. 2. cap. 11. that if any suit be in the spiritual court against inditters, a prohibition doth lye. This act is in affirmed of the common law. Vide Regist. fol. 39. lib. intr. R. 447. b. tit. Defamation.

(33) No yet bold plea in any matter where the kings court of right ought to have jurisdiction.] So provident the makers of this statute were to keep both jurisdictions within their proper bounds, a great means to make both church and common-wealth flourish. And this is a large and a general laying of the jurisdiction of the kings courts of the common law.

Provided nevertheless, where heretofore such a custome hath been in many parts of Wales, that of such cattell and other goods as have been given with marriage of any person, there tithes have been exacted and levied by the parfous and curats in those parts; which custome being disfavour of any part of this realm, as it seemeth, when the country of Wales was through civil diffention unculted for want of other sufficient profits, that might otherwise grow to the curats and minipaters there, to have been for that time tolerable (34), so now the country being now well manured and husbanded, and the tithe is duly paid there of corne, hay, wool, and cheese, and of other icreat of all manner of cattell, as it is commonly in all other parts of this realm, the same custome seemeth to be grievous and unreasonable, especially where the benifices are else sufficient for the finding of the said minipaters and curats: that it be therefore enacted by the authority aforseid, that from and after the first day of May next coming no such tithes of marriage goods be exacted or required of any person within the said dominion of Wales, or marches of the same:
any thing in this act contained, or any other act, custome, prescription had or made to the contrary hereof notwithstanding.

(34) To have been for that time tolerable.] Here is first to be noted, that a custome once reasonable and tolerable, if after it become grievous, and not answerable to the region, whereupon it was grounded, yet is to be (as here it appeareth) taken away by act of parliament; for an inheritance once fixed cannot be taken away, but by parliament. Secondly, here is to be noted, that by custome a parfon, &c. may have tithes of such things, as are not titheable of common right.

An Exposition upon the Statute of 1 H. 5. Cap. 5. of Additions.

ORDEINES est et estable, que en checun briefe originali (1) des actions personals, appeals, et indictments, et en queus exigends servy agard (2), que aux nofmes des defendants en tiets briefes originals, appeals, et indictments foyent faits addition de leur eflate, ou degré (3), ou de meffier (4), et les velles (5) ou hamlets (6), lieux (7), et les counties (8) de queus ils furent ou foyent, ou en queus ils foyent ou furent converfantes. Et fi per procès sur les dits briefes originals, appeals, ou indictments, en queus les dits additions foyent enterelles, aujour utulagaries foyent pronounces, que ils foyent voides (9), irrites, et tenus pur nul. Et que avants les utulagaries pronounces les dits briefes et indictments foyent abatus per exception du partie (10), per la ou en icell les dits additions foyent enterelles. Parvieu touts foits, que mesq les dits briefes actions personels ne foyent accordants au records, et faits (11) per le furplusage de additions suidents, que par cel caufe ils ne foient abatus. Et que les clerkes del chancellerie (12), soth que nufines tiets briefes isseront escriptes

ITEM it is ordained and established, that in every original writ of actions personals, appeals, and indictments, and in which the exigent shall be awarded, in the names of the defendants in such writings original, appeals and indictments, additions shall be made of their estate or degree, or mystery, and of the towns, or hamlets, or places, and counties, of the which they were, or be, or in which they be or were conversant; and if by process upon the said original writs, appeals, or indictments, in the which the said additions be omitted, any utulagaries be pronounced, that they be void, frustrate, and holden for none; and that before the utulagaries pronounced, the said writs and indictments shall be abated by the exception of the party, where in the same the said additions be omitted. Provided always, that though the said writs of additions personals be not according to the records and deeds, by the furplusage of the additions aforesaid, that for that cause they be not abated; and that the clerks of the chancery, under whose names
We shall, in expounding the words of this act, shew what was the meaning of the common law before the making hereof.

(1) *Eu brieve original.* Though it be in writ original, yet if the plea be not holden upon the original, this act extendeth not to it; as in a recordare to remove a plaint of repelinves into the common place, because the plea is holden upon the plaint, this act extends not to it. *So in a returne of refecous, though there beth processe of outlawry, yet this statute extends not to it, because this act spenketh only of writs original.*

(2) *Des personel actions, &c. en quelques exigens ferre agard.* In an affor of novelty difficil, if the difficil be found with force and armes, a capias pro finis and exigent doe lye for the king; yet the defendant shall have no addition within this statute, for that the original writ is in the realty, and this act extendeth onely to personal actions.

*Aux noms des defendans.* Regularly by the common law every natural man, having no name of dignity, ought to be named in all originals, and other futys by his christian name and surname, and that before this act sufficed; but if he had a name of inferior dignity (as knight, or bannerer) he ought to be named by his christian name and surname, and by the addition of his name of dignity by the common law, which is implied in these words: *aux noms des defendants.*

If there be a corporation of one sole person that hath a fee-simpl, and may have a writ of right, he may be named in original, &c. by the common law by his christian name, without any surname; for the name of his corporation is in lieu of his surname (some say both christian name and surname) as John abbot of D. &c. John bishop of N., but otherwise it is of a parson: for he must be named by his christian name and surname.

*If it be a corporation aggregate of many able persons; as mayor and commissary, dean and chapter, master of an hospital and confrecs, &c. the mayor, deane, or master need not be named by his christian name, because that such a corporation standeth in lieu both of the christian name and surname.*

If a man be created by letters patents duke, marquess, earle, viscount, or baron, the dignity is so incorporated to him, according to the flap given unto him by those letters patents, as the duke, &c.
by the common law might be named by his christian name, and by
the name of his dignity, which standeth in lieu of his surname: as
precipite Johanni duci Lancastriae. And the reason thereof is, for
that the king by those letters patents creates him to the state, ho-
nour, and degree of duke, et imponit ei stipul et titulum ducis Lan-
c&c. habend' &c. et sic in semilibus. And albeit a creation by writ
hath not the same words, yet it hath the same effect.

And it is to be observed, that farnomine is derived of far (id est
super, and nonfie (that is) nomen, quavit super nomen, because it is super-
added to the christian name, which legally is pronomine, in Latine
omen, qua conjunction nomen.

(3) Soient faits addition de leur estat, ou degree, ou de mestier.
Estat, statu et bando, the condition wherein any subject standeth.
Degree, gradus a gradiendo, the degree wherein any subject
standeth. So as in legall understanding these two words are of
one signification, and doe extend to persons of nobility, of dignity,
and under the degree of nobility and dignity; as yeoman, &c. and doe extend as well to the clergy as to the temporalty, and to graduates and degrees in universities in any kind of pro-
fection.

State of a lord, 3 E. 4. cap. 5. &c.
Under the estate of a knight, &c. & cap. 14. of the estate of carriers,
plowmen, &c. and the estate of a groome attending to husbandry,
cap. 13. degree and estate of clerkes.

Degrees applied to all, as well women as men.
No yeoman, nor lover estate then an esquire.
Under the degree of a knight or lords fon.
Under the degree of a barons fon, or knight.
So as in legall understanding, statu and gradus sunt synonyma.
And so in the ancient writ of the call of a serjeant, * ad statum et
gradum servantis ad legem.

The estates and degrees against whom originall writs may be
brought, are the queen, conforth of the king, the prince of Wales,
dukes, * marqueses, carles, viscounts, and barons. These are of
the greater nobility.

Knights of Saint George, knights bannerets, knights of the
bathe, knights of the chamber, b misites camere, knights batchelors,
baronets, esquiers, gentlemen. These are of the lesser nobility.

Grose, baronets, and yeomen, which are of the lowest estates or
degrees.

There is another division made in our * books of lesser nobility,
viz. some be names of dignities, as all the knights abovefo-

and baronets; and some of worship, as esquires and gentlemen.

Baronets were first raised and created by king James, of an
eeate to them and the heires males of their bodies: and where in
some * statutes and records baronets are named, it is vimum im-
pressoris, sen scriptoris, and should be bannerets, who were not of
inheritance, for that they were knights, which dignity was not de-
Pat. anno 13 E. 3. m. 13. Will. de la Pool statum et honoreum
baneretti, part 2. 15 E. 3. m. 22. & Rot. Pat. anno 7 R. 2.
octb' Thomas Camoys banerettus, &c. 22 E. 3. fol. 18. a ban-
ner, quae nominat auetile de vexillo, of the banner, &c. Corruptly ba-

Vid. Camb. ubi

5 E. 3. 28. 99.
22 aff. 24.
Nob, nobility
in a manner in-
corporated.

* 37 E. 3. ca. 8.
22 E. 4. cap. 1.
8 E. 4. cap. 2.
13 R. 2. stat. 2.
cap. 1.

22 E. 4. cap. 1.
37 E. 3. ca. 10.

3 E. 4. cap. 5.
26 R. 2. cap. 4.
20 R. 2. cap. 2.
S. Eliz. cap. 11.

* Fortesc. ca. 50.
14 H. 6. 15. Bri-
tit. Addition 44.

* Munchiones.
25 H. 6. bre.
100.

b Rot. pat.
29 E. 3. part. 1.
m. 29.
Armigeri, scuti-
feri, unde scuta-
gium, genero.


P. 24.

[ 667 ]

* Rot. Parl.
2 R. 2. nu. 13.
14 R. 2. 2.
21 R. 2. cap. 1.
16 R. 2. cap. 6.

Vid. Camb. ubi

ronet, in 35 H. 6. 46. for baron. But let us proceed to some more profitable matter.

There have been within this realme since the conquest divers names of dignities, which are growne to dis-use, and in a manner lost: as, vicedominii, vidams. Vavasores, viri (as Bradon faith) magnae dignitatis. Vavasor enim nihil melius diti potest, quam si fortitum ad valeradinem unde vavasoria in divers ancient records. Cambden Brit. 123. vavasores fuit vavasores proximse posse barones locum olim tenerunt. See Chaucer our English poet in the Franklyns prologue.

Some doe hold, that it had been more fit to have revived some of the ancient dignities, then to have created any of a new invention.

We have spoken of all the names of dignity, let us now speake of the names of worship.

Esquier, armiger, scutifer, &c.] In legall understanding he is derived ab armis, que in epyteis gentilicis honoris insignia gosiant. In Spanish eficdero, ab escudo, id est, scuto.

In this sense, as a name of estate and the making and degree, it was used in divers acts of parliament before the making of this act, and after this act also. Et Rot. Parl. an. 1 E. 4. John lord Audley, an ancient and a noble baron, was named Johnnes Audelye armiger, for that all the rest of the barons that appeared at that parliament were knights: and all dukes, marquesses, earles, viscounts, and barons of other nations, or which are not lords of the parliaments of England, are named armigeri, if they be no knights; and if knights, then are they named milites.

The sones of all the peers and lords of parliament in the life of their fathers, are in law esquires, and so to be named. By this statute the eldest son of a knight is an esquire.

Gentleman, generofus, Gentil home.] This is also a good addition. And every gentleman must be arma gerens, and the best tryall of a gentleman in blood (which is the lowest degree of nobility) is by bearing of armes. For as in ancient time the statues or images of their ancestors were proofs of their nobility, which was a lemenne and honourable, but yet a cumbersome tryall, whereof, and how in time they decayed, the poet speaketh,

[ 668 ]

Stemmata quid facinunt? quid prodeat pontice longo
Sanguine cunei, pictoque foedere cultus
Majorum, et flantes in curribus Aemilianos,
Et curies jam dimidios, nesumque minorem
Corvini, et Galbam auriculis nesique carentem? Et
Tota licet veteres exornent undique cerae
Attia: nobilitas sola eft atque unica viribus.

Cicero.
Cicero.

Floria gens obscura quidem, et sine imaginibus.
Nobiles sunt qui imaginis generis sui proferre paffant.

So of later times coat-arnes came in lieu of those statues or images, and are the most certaine proofs and evidence of nobility and gentry. So as in these daies the rule is, nobiles sunt qui insignia gentilicia generis sui proferre paffant.

There is small difference between an esquire and a gentleman: for every esquire is a gentleman, and every gentleman is arma gerens.
And *generosus* and *generosa* are good additions: and if a gentleman be named *spinter in any original writ, &c. appeale, or indument, he may abate and quash the fame; for the hath as good right to that addition, as *baronissus, viscounesse, marchioness or dutchess* have to theirs.

A man may have an addition of gentleman within this statute, if he be a gentleman by office (though he be not by birth) as many of the kings household, and of other lords, be; and *clerks*, being officers in the kings courts of record: and if they be out of their office, they are but yeomen: and yet as long as they continue in their office, they ought to be named gentlemen, as their due addition.

A gentleman by *reputation*, that is, neither born by birth, nor by office, nor by creation, but commonly called gentleman, and known by that name, is a sufficient addition within this act.

And so was it adjudged in *Caters cafe, Hill. 25 Eliz. in communi banco, but if he be named yeoman, hee cannot abate the writ."

A French knight challenged *John Kingston yeoman, the kings subject, at certain points and deeds of arms, &c. unde rex (faith the record) ut dixit *Johannes honores ambitus in praemissis accipiat, ipsum Johannes in ordinem *generorum adoptavit, et armigerum constituit, et caetera honoris insignia concessit. And such a gentleman or esquire so created, is an addition within this statute.

*Yeoman or yeoman.* This is a Saxon word *geuen gemen,* the G being turned in common speech (as is usual in like cases) into a Y. In *legall under standing* a yeoman is a free-holder, that may dispense 40 shillings, anciently 5 noble *per annum:* and he is called *probus et legalis homo.*

And as of ancient time the *gentleman held per forciuim satis,* by knights service, fo the yeoman held *per forciuim foci,* by fo-tage. Of this degree see Fortescue, cap. 25. & 29.

This degree is a good addition within this statute, and is applied only to the man, and not to the woman.

We have omitted *citizens and burgesses* (albeit they are such as are called to parliament) yet because they are not sufficient additions (being too general) within this act, we have omitted them.

(4) *Mistar.* 1. *ars, feu artificium, Latinâ dicitur, mysterium, Angliç mysterie.* Mistar *derivatur à mastre, Latinâ magisterium,* because no man ought to exercice it, but he that is a master of it.

Mistar is a large word, and includeth all lawfull arts, trades, and occupations, as tailor, merchant, mercer, husbandman, labourer, and the like. But *servant, groome, or fermor are no additions* within this act, because they are not of any mysterie. And *chamberer, butler, pandier, or the like,* are additions of offices, and not of any mysterie or occupation.

Neither doth this act extend to unlawfull practices, as extortioner, maintainer, abetter, heretick, &c.

Trade

Trade dicitur à tradendo, quia tradit nobis necessaria: the Saxon word is Cnecie, Craft, bodie craft, id eft, trade.

If a man have divers arts, trades, or occupations, he may be named by any of them: but if a gentleman by birth be a mercer (as many younger fonnes of gentlemen be bound prentices to arts and trades in London, and elsewhere) if he in an original, &c. be named mercer, or of any other trade, whereof he is in truth, he may abate the writ, &c. for he ought to be named by the degree of a gentleman, because it is worthier then the addition of any myysterie.

And so it is, if one man be a duke, a marquesse, earle, viscount, and baron, all these dignitiees stand distinctly in him, and the greater drowneth not the leffer, yet shall hee be named in original writs, &c. by the worthier dignity, viz. by the name of a duke onely within this act.

Having diligently observed the order of this act, we find, that in some cases the order thereof is observed, and in others not. In appeales and inditements of treason or felony, &c. against the greater nobility, as dukes, marquesse, the order of the statute is pursued, viz. For, 1. the estate and degree (for example) of a duke, &c. is named, and after the town and county. Edwardus dux Buckingham nuper de N. in com' Glouc'. And so it is when one is named of a cite, which is a countie of it selfe, the like order is observed: as J. S. panarius de London in com' civitatis London.

But in case of the leffer nobility, and all other under them, the town and county are named before the addition: as, Th. C. nuper de D. in com' M. miles. Jo. C. nuper de D. in com' M. armiger. N. C. nuper de D. in com' M. mercenare, &c.

(5) Et les villes, ou bannets, ou liues, et les countiez.] Villas. For the se the first part of the Institutes, sect. 171. And if there be D. major, and D. minor, and not D. tagnetum, he cannot be named of D. for there is no such town.

(6) Bannets.] See the first part of the Institutes, ubi sap. And it is at the election of the party to name him of the hamlet or town.


By the ancient common law of England, secundum antiquam consuetudinem dixi potest de familia aliena, qui hospitatus fuerit cum alis per tres mores, et vocatur Hugbencymbus.

(8) Counties.] See the first part of the Institutes, sect. 61. & 248.

But seing that ancient boroughes were first townes, and cities were formerly boroughes, if a cite be a countie of it selfe, wherein are divers parishes, yet the addition de London, or nuper de London, is sufficient within this statute.

* The addition of a parish, if there be two or more towns within it, is not good, but if there be one town, the addition of parish is good within this statute: and it shall not be intended (if it be not pleaded) that there be more towns then one in the parish; for non profumatur pluralitas.

This statute extends not to some cases, though the defendant be...
not named of any towne, hamlet, or place. As in an action of
debt, the writ is, procede R. G. rectori ecclesie de T. without al-
ledging in what towne, hamlet, or place he is dwelling. So if the
procede in an action of debt be, Praeca Tho. Chief cancellior universi-
tatis Oxoni, without saying de Oxonia. So in a writ brought against
the husband and his wife, or the abbot and his commone, the
plaintiff need not shew in what towne, &c. the wife or commone
dwell; for the law shall intend (which ever intendeth the height)
that the parson is resident upon his rectory, the chancellor upon
his office, the wife with her husband, and the monk with his
foreireigne.

The addition as well of the estate, degree, or mysterie, as the
towne, hamlet, or place, ought by force of this act to be alluded
in primo nomine; for the proper use of an alias dicit is, to agree
with the record, or specialty whereupon the writ is grounded, and
is not traversable.

The addition of the estate, degree, or mystery ought to be by
force of this act, as the defendant was of at the day of the writ
purchased, and not with a nuper, as nuper armigere, nuper munachus,
but nuper comen de D. &c. but a nuper may be of the towne, &c. be-
cause men doe often remove their habitation. And this distinction
appeareth by the act it selfe, by reason of these words in the act,
relating to the townes, hamlets, &c. On ils fuerunt, ou font.

The end of the purview of this act was, that the person of the
defendant in originalis, &c. where proceffe of outlawry did lie,
should be so described by certaine additions, as one man might not
be troubled for another. See other statutes made to the same
end. 8 H. 6. cap. 10. * 6 H. 8. cap. 4. 5 E. 6. cap. 20. 31 El.
cap. 3. & 9.

(9) Alias uelagaries sunt pronunt, quia illos vobides, &c.] This
being a judgement in law is interpreted to be made void by a writ
of error, or by the plea of the party coming in upon a cap. uelagast,
according to the course of the common law: for though the words
of the statute be vobides, yet it is but voidable by a writ of error,
or plea; which is worthy of observation. 19 H. 6. fol. 1. 8 H. 6.
4. 10. 10 E. 4. 41. 42. 22 E. 4. 37. 10 E. 4.
13. 5 H. 7. 16. 11 H. 7. 5. 21 H. 7. 13. 3 El. 192. b. 4 El.
Dyer. 213, 214.

(10) Per exception du partie.] But if the defendant, albeit hee
hath not such addition as this act requireth, yet if he appeareth
upon proceffe, and plead, taking no advantage therof by exception,
he hath lost the benefit of this act.

(11) Ne ujacent accordant al record et faits, &c.] Abundans cou-
tinuum nocet; but if the addition prescribed by this act had varied
from the record or deed, yet being injoyed by act of parliament
to be contained in the writ, &c. such variance should not have
abated the writ, albeit this clause had been omitted; but yet an
act of parliament cannot be made too plaine.

(12) Et que les clerkes del chancerie.] i.e. les courteurs. Clerici
de curiae, that make out original writs. Of these there be in the
chancery twenty in number. To every of these are appointed cer-
taine counties, and are a corporation of themselves.

(12) Dytre
An Exposition upon the Statute of 27 H. 8. 
ca. 16. intitled, An Act concerning Inrolments of Bargaines, and Contracts of Lands and Tenements.

Be it enacted by the authority of this present parliament, that from the last day of July, which shall be in the year of our Lord God 1536, no mannors, lands, tenements, or other hereditaments shall passe, alter, or change from one to another, whereby any state of inheritance or freehold shall be made (1), or take effect in any person or persons, or any use thereof to be made, by reason onely of any bargain (2) and sale thereof (3); except the same bargain and sale be made by writing (4) indented (5), sealed and inrolled (6) in one of the kings courts of record at Westminster (7), or else within the same countie or counties where the same manors, lands, or tenements so bargained and sold, ly or be, before the custos rotulorum (9), and two justices of the peace (8), and the clereke of the peace of the same countie or counties, or two of them at the least, whereby the clereke of the peace to be one: and the same inrolment to be had and made within six moneths next after the date of the same writings indented (10), the same custos rotulorum, or justices of the peace, and clereke, taking for the inrolment of every such writing indented before them, where the land comprised in the same writing exceed not the yearly value of 40 shillings, 2s. (11) that is to say, 12d. to the justices, and 12d. to the clereke, and for the inrolment of every such writing indented before them, wherein the land comprised exceed the summe of 40 shillings yearly value, 5s. that is to say, 2s. 6d. to the said justices, and 2s. 6d. to the said clereke for the inrolment of the same. And that the clereke of the peace for
Of Inrolments of Bargains, &c.

for the time being, within every such county, shall sufficiently enrol and ingrosse in parchment (12) the same deeds or writings indented, as is aforesaid, and the rolls thereof, at the end of every yeare shall deliver unto the custodia rotulorum (13) of the same county for the time being, there to remaine in the custody of the said custodia rotulorum for the time being, amongst other records of every of the same counties, where any such enrolments shall be so made, to the intent that every party that hath to doe therewith may resort and see the effect and tenour of every such writing so enrolled.

(1) Of inheritance, or freehold shall be made, &c.] After the statute of 27 H. 8. cap. 10. of transferring uses into possession. If a man by his deed had bargained, and sold for valuable consideration, any lands, &c. of any estate of inheritance, free-hold, or for years, the same had been executed by the said act of 27 H. 8. cap. 10. Now this act of enrolments restrains only estates of inheritance and free-hold; and therefore bargains and sales for years, for what number ever, are not restrained by this act, though it be not by deed indented nor enrolled.

(2) By reason only of any bargains, &c.] If a man for valuable consideration by deed indented doe bargain and sell lands to another and his heires, and before the deed be enrolled he leveth a fine, or maketh a feoffment to the bargainer and his heires of the same lands, and after, and within the six moneths the deed is enrolled, the bargainer shall be in by the fine or feoffment, and not by the bargain and sale, both by reason of this word only, &c. and that the estate by the common law valued shall be preferred.

(3) Of any bargain and sale thereof.] First, what is a bargain and sale? &c. A bargain and sale is a reall contract upon valuable consideration for passing of manors, lands, tenements, or hereditaments by deed indented and enrolled within six moneths after the date of it, without livery of seisin, or attornement of tenants.

If the bargainer be in possession, this is a facile and speedy assurance, but the feoffment reduceth and restorath the possession to the seoffor, and passeth the land to the seoffice, though the seoffor had been defeited, &c. and the enrolment is not pleadable as the feoffment is.

Secondly, whether these words of [bargain and sale] only, or equivalent words may be used, &c. to take effect by force of this statute? Though it be good to use those words mentioned in this act, yet are they not of necessity to be used; for whatsoever word upon valuable consideration would have raised an use of any lands, tenements, or hereditaments at the common law, the same doe amount to a bargain and sale within this statute: as if a man by deed indented and enrolled according to this act doth covenant for valuable consideration to stand seised of lands to the use of another, &c. this is in nature of a bargain and sale within this act.

A seised of certaine lands in fee, demised the same to C. for life, the remainder for life rezerving a rent at the feast of Saint Michael, and of the annuntiation; A. by indurence, in consideration of 50 pounds, doth demife, grant, fee, and to farme let the same lands to B. for 97 years, reserving a rent at the same feasts presently, and C. the lizise for life did not attorne; and it was adjudged, that the
said demise and grant upon the consideration of 50 pounds amount-
ed to a bargain and sale for the saide terme. So if a man
for valuable consideration doth by deed indented and inrolled alien
or grant the land to a man and his heires, &c. this is a bargain
within this statute, et sic de similibus. But inasmuch as the inten-
tion of the parties is the principall foundation of the creation of
uses, if by any clause in the deed it appeareth, that the intention of
the parties was to passe it in poesession by the common law, there
no use shall be raifed: and therefore if any letter of attorney be
in the deed, or a covenant to make livery, or the like, there
nothing shall passe by way of use, but according to the intention of
the parties poesession by the common law. And albeit no valuable
consideration be expressed in the indenture, yet if any were given,
the same may be averred, and the land doth sufficiently passe.

A. by deed indented and inrolled in consideration of 100 pounds
paid by B. bargaineth and sells the land to B. C. and D. parties
to the indentures: in this case the land paseth to them all; for
although the valuable consideration be expressed to be paid by one,
yet it must be intended, that it was paid for them all, to the end,
that the land may passe to them all, according to the meaning of
all the parties, and a consideration given by one of the parties,
is sufficient to convey the land to them all.

(4) Except the same bargain and sale be made by writing.] Firft,
it must be by writing, and not by print or stamp.

Secondly, it must be written in parchment or paper, and not
upon wood, stone, lead, or other material.

(5) Indented.] If the deed begin, Hare indentura, or, This in-
denture, yet if the deed be not indented, it is no indenture; but
if the deed be indented, though the deed doth begin, This deed
made, without mentioning the word of indenture, yet is it a writ-
ing indented within this statute.

In an action of debt between Scudamore and others plaintiffs,
and Vandensfene defendant, upon an indenture of charter party the
case was this: the indenture of charter party was made between
Scudamore and others owners of the good ship, called B. whereof
Robert Pitman was master, on the one partie, and Vandensfene on
the other partie. In which indenture the plaintiff did covenant
with the said Vandensfene and Robert Pitman, and also Vandens-
fene covanned with the plaintiff and Robert Pitman, and bound
themselves to the plaintiff and Robert Pitman for performance of
covenants in 600 pounds. And the conclusion of the said indenture
was, "In witnesse whereof the parties aforesaid to these prefet
"indentures have put to their seals." And the said Robert Pitman
to the said indenture put his hand and seal, and delivered the same.
The defendant in barre of the said action pleaded the releafe of
Pitman, &c. whereupon the plaintiff demurred. And it was ad-
judged, that the releafe of Pitman did not barre the plaintiff, be-
cause he was no partie to the indenture. And the diversity was
taken and agreed betweene an indenture recipcall betweene
parties on the one side, and parties on the other side, as this was;
for there no bond, covenant, or grant can be made to or with any
that is not party to the deed. But where the deed indented is not
recipcall, but is without a between, &c. as, omnibus Chriftif fide-
libus, &c. there a bond, covenant, or grant may be made to divers
severall persons.

(6) And
Of Inrolments of Bargaines, &c.

(6) And enrolled.] Albeit the indenture (as hath been said) may be either of parchment or paper, yet the inrolment must be in parchment only; and so it is expressed in the claufe of inrolment by the clereke of the peace; viz. That hee shall sufficiently inrol and ingrosse * in parchment the same. And so much is implied, when the inrolment is in any of the kings courts of record at Westminster; and so was it adjudged, as M. Plowden cited it before the lords in parliament, anno 23 Eliz. in the great cafe between Herbert and Vernon, which I heard, and observed.

A deed knowledged by the husband and wife shall by the common law be inrolled onely for the husband, and not for the wife, by reason of the coverture, and though it be inrolled for both, it bindeth her not. Otherwise it is by custome, and none hath power to examine a feme covert without writ. 29 H. 8. tit. Faits inrol'l Br. 14. 7 E. 4. 5. Vid. 34 H. 8. ca. 22. 18 E. 3. 29. 45 aff. 8. 14 E. 3. execution 73. 19 R. 2. cefloppel 281. 21 E. 3. 43. 24 E. 3. 64. 21 Eliz. Dyer, fol. 363. Kelvey 12 H. 7. fol. 4. &c. 12 H. 14. 12. 29 H. 8. faits inrol Br. 15. lib. 10. Mary Portingtons cafe. fol. 42.

If an infant acknowledgeth a recognizance, statute merchant, statute staple, or obligation in the nature of a statute staple, or inroll an obligation, in all these cafes he must avoid it in an *audita querela, during his minority; for it must be tried by injunction, and they concern not perfonnal duties. But if an infant bargain and sell lands which are in the reality by deed indented and inrolled, he may avoid it when he will; for the deed was of no effect to raise an use; and this statute is to be intended of lawfull and effectual bargaines and sales, and such as would have raised uses at the common law, and doth only restrain the execution of them that be of effect, except the deed be inrolled. And this standeth with the reason of the common law, that none but effectual deeds ought to be inrolled; and therefore a deed of feuemento ought not to be inrolled before livery. But in case of a fine the infant must reverse it during his minority: for the consuance is taken by force of the kings writ before a judge, and is voidable by the common law.

That upon a bargain and sale by deed indented and inrolled, a rent may be reserved, for the use and possession paffeth *tanguum uno flan. See lib. 2. fol. 54. in Sir Hugh Cholmeleys cafe.

(7) In any of the kings courts of record at Westminster.] That is, in the kings bench, the chancery, the common pleas, and the exchequer. And though the words be, at Westminster, for that at the time of the making of this act, these courts were there; yet if there be adjourned into another place, the inrolment may be in any of these courts; for the inrolment is confined to the courts, whereasver they be holden.

(8) Or else in the same county, &c. before the custos rotulorum, and two justices of peace, and the clereke of the peace, &c.

(9) Custos rot.] This officer is a justice of peace, and is of the gift of the lord chancellor, or lord keeper, and he may exercise his office by deputy. He hath the keeping of all bargaines and sales by deed indented and inrolled, and of all the records and rolls of the actions of peace, * and of the commiision of peace itself, and thereof he taketh the name of his office to put him in mind of his duty. He hath the gift of the clerkship of the peace, to exercise H. 1st.

Nota.

Vid. Regist. fol. 150. F.N.B.
104. k. Dyer,
7 E. 3. 193. b.
Harringtons cafe.
7 E. 4. 13 E.
3. audita querela
26. 17 E. 3. 76.
10 E. 3. enfeoff
61. 28 E. 3.
audita quer. 27.
8 H. 6. 30.
15 E. 4. 51.
1 H. 7. 15.
11 H. 7. 5.
48 E. 7. 31.
16 H. 7. 5.
44 E. 3. 7. b.

[674]
by himselfe or his deputy, but he continueth no longer in his place, then the custos rotulorum doth. 

(10) The same inrolment to be had within six moneths next after the date of the same writing indented.] The six moneths shall be accounted after the computation of 28 dayes to the moneth. After the date, and after the day of the date upon this act is all one; so as the date it selfe is taken exclusive. And yet in the report of justice Dalifon it is said, that it was holden anno 4 Eliz. that if it be inrolled the same day it beares date, it is sufficient; but the fater way is to inrol it after the day of the date. And yet where it hath a date, and is delivered after, it shall take effect to passe from the bargainor from the delivery; for then it became his deed, and not from the date: but the deed must be inrolled within six moneths after the date.

Every deed shall be intended to be delivered on the same day that it beares date, unless the contrary be proved. And it is the bett course according to the intendement of law to deliver it the same day that it beares date. But if the deed indented hath no date, then the day of the delivery is the day of the date of that deed, and may be inrolled within six moneths after the delivery. And when the deed is inrolld within the six moneths, then it passeth from the delivery of the deed. And albeit after the delivery and acknowledgement, either the bargainor or the bargainee dye before inrolment, yet the land passeth by this act; for the words thereof be: No manors, lands, tenements, or hereditaments shall passe of any estate of inheritance or freehold, * except the deed be inrolld. So as by the common law and the statute of 27 Hen. 8. of ues, it should have pass'd. And by the words of this statute, when the deed is inrolld, it passeth ab initio.

Between Andrew Mallery plaintiff, and Jennings and others defendants, the cause was this: one Sewler was feided of certaine lands in fee, and knowledged a recognizance to Turner, whose executrix brought a feire fae upon the recognizance bearing date the 9 day of November, anno 41 Eliz. against Sewler, and allledged him to be feided of the said lands in dominico suo, ut de foedis, the day of the feire fae' brought, which was traversed by the other party. And the truth of the cause, being by long pleading disclosed to the court, was this: Sewler 7. die November, before the recognizance knowledged, by deed indented for money, had bargain'd and sold the said land to another, and the deed was inrolld 20 Nov. following. The question was, whether Sewler was upon the whole matter feided in fee the 9 day of November, the deed being not inrolld until the twentieth of the same November. And it was adjudged una voce, that Sewler was not feided in fee of the land the 9 day of November, for that when the deed was inrolld, the bargainee was in judgement of law feided of that land, from the delivery of the deed. And it was resolved, that neither the death of the bargainor, nor of the bargainee before inrolment, shall hinder the passing of the estate. And that a releafe of a stranger to the bargainee before inrolment is good. So as it hold not by relation between the parties by fiction of law; but in point of fact as well to them as to strangers also. And that a recovery sufferd against the bargainee before inrolment. (the deed indented being after within the six moneths inrolld) is good, for that the bargainee was tenant of the freehold in judgement of law at the time of
Of Inrolments of Bargaines, &c.

of the recovery. And non referunt, when the deed indented is knowl-
edged, so it be inrolled within the six moneths. And all this was
afterwards affirmed for good law by the court of common pleas
Trin. 3. Jac. regis, upon a speciall verdict given in an ejection firmæ
betweene Lellingham plaintifie of the demife of Thomas Fitzher-
hert esquire, and Allop defendant: and further, it was there re-
solved, if the bargaine of land after the bargaine and
file, and before the inrolment doth bargaine and sell the
same by deed indented and inrolled to another; and after the
first deed is inrolled within the six moneths, the bargaine and
file by the bargaine is good: but there in the principall case,
in respect of the special manner of the penning of the meane
bargaine and file, the court being divided, viz. three judges
against two, judgement was given against it.

The day of the moneth, and the yeare of our Lord and Saviour
Christ, and the yeare of the kings raigne are the usuall dates of
deeds. And the day of the moneth by the none, ides, or kalends
is sufficient.

(11) The custos rotulorum, or justices of the peace, and clerke,
acting for the inrolment of every such writing, &c. two shillings,
&c.] A good president, when parliaments appoint new labours,
&c. that they would also limit and set downe in certaine what fees
shall be taken for the same, as here it is done.

(12) The clerke of the peace shall sufficiently inroll in parchement,
&c.] Of this somewhat hath been said before.

(13) Shall deliver them to the custos rotulorum.] For (as hath
been said) he is the keeper of the records and rolls of the seccion
of the peace of that county.

Provided alwaies that this act, nor any thing therein con-
tained, extend not to any mannor, lands, tenements, or heredi-
taments, lying or being within any citie, borough, or towne
within this realme, where-in the mayor, recorders, chamberlaines, bailiffes, or other officer or officers have au-
thority, or have lawfully used to inrol any evidences (14),
deeds, or other writings within their precinct or limits: any thing
in this act contained to the contrary notwithstanding.

(14) In any citie, borough, or townes corporate, wherein the
mayors, &c. have authority to inroll evidences, &c.] Resolved by
the opinion of the justices of both benches, that a bargaine and
file for valuable consideration of houses, or lands in London, &c.
by word only is sufficient to passe the same; for that houses and
lands in any city, &c. are exempted out of this act: and at
the common law such a bargaine and file by word only raised an
use. And the statute of 27 H. 8. cap. 10. doth transferre the use
into possession.

When the makers of this act had appropriated the inrolment of
all indentures of bargaine and file to the kings foure courts afore-
said, it was necessarie to make a provisio for cityes, &c. which had
authority to inroll, and that there such bargaines and fales should be
inrolled. Sed defunt verba: for by the words, the manors, lands,

6 El. Dyer, 229.
in Chiburns cafe.

[ 676 ]

3 X 2
tenements,
tenements, and hereditaments are exempted out of the said acts, without any provision for enrolment within those cities, &c.

If a deed be shewed in court, or in the custody of the court, and by mischance the seal is broken off; the court shall roll the deed in court for the avail of the party.

An Exposition upon the Statute of 32 H. 8.
Cap. 5. Of Executions.

WHEREAS before this time divers and sundry persons have sued executions, as well upon judgements for them given of their debts or damages, as upon such statutes merchants, statutes of the staple, or recognizances, as have been to them before made, recognized, and knowned; and thereupon such lands, tenements, and other hereditaments, as were liable to the same execution, have been by reasonable extent to them delivered in execution for the satisfaction of their said debts and damages, according to the laws of this realm. Nevertheless, it hath been oftentimes seen, that such lands, tenements, and hereditaments so delivered, and had in execution, have been recovered, or lawfully devested, taken away or evicted from the possession of the said recoverers, obligees or recognizors, their executors or assigns, before such time as they have been fully satisfied and paid of their debts and damages, without any manner fraud, deceit, covin, collusion, or other default in the said recoverers, obligees, or recognizors, their executors and assigns, by reason whereof the said recoverers, obligees and recognizors have been thereby set clear without remedy, by any manner suit of the law, to recover or come by any such part or parcel of their said debts and damages as was behind, and not by them levied or received, before such time as the said lands, tenements, and other hereditaments so by them had in execution, were recovered, lawfully devested, taken or evicted out of and from their possession, as is aforesaid, to their great hurt and losse, and much seeming to be against equal justice and good conscience.

For reformation whereof, be it enacted by authority of this present parliament, that if hereafter any such lands (2), tenements, or hereditaments, as be, or shall be had and delivered (3) to any person or persons in execution (1), as is aforesaid, upon any just and lawful title, matter, condition, or cause (4) whereby with all the said lands, tenements, and hereditaments were liable, tied, and bound, at such time as they were delivered and taken into execution, shall happen to be recovered, lawfully devested, taken, or evicted (5) out of, and from the possession of any such person.

per son and persons as now have and hold, or hereafter shall have
and hold the same in execution, as is aforesaid, without any fraud,
deceit, covin, collusio, or other default of the said tenant or ten-
ants by execution, before such time as the said tenants by execu-
tion their executors or assignes (6) shall have fully and wholly le-
viated or received the said whole debt (7) and damages, for which
the said lands, tenements, and other hereditaments were delivered
(8) and taken in execution, as is aforesaid: then every such re-
coverer, oblige, and recognizee shall and may have and pursue
a writ of fiere facias out of the same court (9), from whence the
said former writ of execution did proceed against such person
or persons, as the said writ of execution was first pursued,
their heirs, executors, or assigns of such lands, tenements,
or hereditaments, as were or been then liable or charged
to the said execution, returnable into the same court at a
certain day, being full forty days after the date of the same
writ.

At which day if the defendant, being lawfully warned,
made default, or appeare and do not shew and plead a suf-
cient matter or cause, other than the acceptance of the
said lands, tenements, and hereditaments, by the said former writ
of execution, to barre, avoid, or discharge the said suit for the re-
side of the said debt and damages remaining unlevied, or un-
received by the said former execution: then the lord chancellor,
or other such justice or justices, before whom such writ of
fiere facias shall be returnable, shall make citations a new writ
or writs out of the said former record of judgement, statute
merchant, statute staple, or recognize of like nature and ef-
fect, as the said former writ of execution was, for the levying of
the residue of all such debt and damage, as then shall appear
to be unlevied, unsatisfied, or unpaid of the whole summe or
summes in the said former writ of execution contained: any
law, custom, or other thing to the contrary hereof, heretofore
used, in any wise notwithstanding.

(1) That if hereafter any such lands, tenements, or heredita-
ments, as be or shall be had and delivered to any person in execu-
tion, &c.

(2) Such lands. This hath relation to the preamble, where
there are rehearsed foure kinds of executions of thofe lands, &c.
First, upon judgements: 2. upon statutes merchant: 3. statutes of
the staple: 4. recognizances. These recognizances bee of two
sorts; one, usuall recognizances taken in any of the kings courts
of record at Westminster: another, in nature of a statute staple, by
the statute of 23 H. 8. cap. 6. This conuic of the statute staple
hereafter in this statute is called oblige, because in them both the
feale of the party is put, and the tenant by eligis upon judgements
and recognizances shall hold the land, &c. untill he be anwiered his
debt without mifes, costs, &c. But a tenant by statute merchant,
tenant by statute staple, or by recognize in nature of a
statute staple shall hold the land, &c. untill his debt be paid together
with mifes; costs, &c. Vid. Regist. 151, 152. 289. F.N.B.
See before the
Statute of W. 2.
cap. 12. and the
expulsion upon
the same.
To what execu-
tions this act
extendeth unto.

a By the stat. of
W. 2. cap. 8. for
Judgements, and
cap. 45. for rec-
ognizances.
b By the stat. of
Axtin Burney,
E. 1. &c.
c By the stat. of
5 H. 4. cap. 12.
d By the stat. of
27 E. 3. cap. 9.
e By the stat. of
23 H. 3. cap. 6.
678


(3) So had and delivered.] Had, is by elegit upon judgements or recognizances, to have the moity in execution.

Delivered, is by liberate upon the other three of the whole land, &c. of the conuise ; but after the extent in those three cases (of the statutes, or recognizances in nature of a statute) returned, the conuise may enter without any delivery by the sherif by force of the liberate: and he that so entrieth without any delivery is within the aide and benefit of this act, which speakeith of delivery.

(4) Upon any just and lawfull title, matter, condition or cause.] That is, upon some former just and lawfull title, &c. before the judgements, statutes, or recognizances.

(5) Shall happen to be recovered, devised, taken or evicted.] By the context of this law, the whole land, &c. had in execution, and the whole interest of the land in execution must be recovered, devised, or evicted for the reasons and causes there expressed.

Execution of a recognizance by elegit of lands, &c. of Thomas Camoys was had by two merchants; and afterwards by a former statute the same lands were out of the hands of the said merchants delivered to the former conuise, whereupon the two merchants desired to have execution of other lands of the said Thomas Camoys, et conceditur.

A man maketh a lease for yeares, rendering a rent, the lesse oueth the lessee, and bindeth himselfe in a statute, the land is extended, and delivered to the conuise, the lessee re-enters, this is no eviction within this statute : for it appeareth by the preamble, that the conuise must be clearly without remedy, &c. but here the conuise shall have the rent reserved, and the reversion.

(6) Before such time, as the said tenants by execution their executors or assignees, &c.] Here are administrators, and so through the whole act understood, because they are in equalle mischife. And likewise and for the same reason, albeit assignees be named in this branch, yet are they impliedly through this act in branches necessary, where they are not named.

The assignee of parcell is not within this act, as appeareth by that which hath been said; but if there be severall assignees, and the land is evicted from them all, they are within the letter and remedy of this act, because the whole is evicted from them, and they may have a re-extent for the whole debt, according to the words and meaning of this act.

Which case in 46. lib. aff. because it hath been often mistaken, and mist-applied by many, we will truly put the same. A. filio of Blacke acre, and White acre in fee, acknowledge a statute merchant to J. and infeffrith B. of White acre. J. fuerth execution of Black acre out of the possession of A. the conuise, and White acre out of the possession of B. A. conveyeth Black acre to C. in fee, J. tenant by statute merchant assigneth his interest to D. C. the assignee of A. fuerth a seire fee against D. assignee of J. and tendereth the mony that is behind. D. the defendant pleadeth the writ for.

Notwithstanding by good construccion the conuise shall have a seire fee upon tender of the debt with mares and cattell ; for the land was delivered in nature of a gage, thogh 17 E. 3. 45. & 18 E. 3. 11. seeme to the contrary, but in 21 E. 3. tit. seire facias 109. & 47 E. 3. 11. tit. 694.

facias was granted. 32 E. 3. tit. seire facias 101. the assignee of the conuise shall have the seire facias, 53. 11.