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REASONS ✓
FOR ALTERING THE
METHOD
USED AT PRESENT IN LETTING
CHURCH and COLLEGE
LEASES,

ADDRESS'D TO A
MEMBER OF PARLIAMENT.

By the SENIOR FELLOW of a College in
CAMBRIDGE.

J. Colebatch

Mibi isthic nec seritur nec metitur. 6

CAMBRIDGE.

Printed for W. THURLBOURN.

And Sold by Mess. KNAPTONS, INNYS and MANBY,
and C. HITCH, C. RIVINGTON, and S. BIRT,
Booksellers in LONDON.
MDCCXXXIX.





R E A S O N S

F O R

Altering the Method, &c.

S I R,

IN compliance with your Request, I send you what information I have been able to get, in the Case of Church and College Leases; a Case, which, as you were pleas'd to tell me, will probably, in a short Time, come under consideration in your House; the Method, which is now used in Letting those Leases, being generally condemn'd on all hands, by the Lessors as well as the Lessees, and most of all by those who think that the common Good does in a great Measure depend upon a right Management and due Application of what the Piety of former Ages hath devoted to the Advancement of Religion and Learning; all complaining of Grievances, either public or private, for which, as they

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pretend, there is no Remedy to be had at Law, no Redress to be hop'd for, but from the High Court of Parliament.

For your part, as you take this to be a Matter of the highest Importance to your Country, and of no small Concern to many of your Countrymen in particular, You look upon it as an indispensable Duty to inform yourself, as fully as you can of the Case; that you may not be surpris'd into a hasty Sentence, whensoever it shall come judicially before you; and therefore, not content with your own, tho' uncommon, Diligence, have engag'd such of your Friends, whom you suppose to be conversant in Affairs of this Sort, or acquainted with those that are, to send you what Answers they can give, or procure to the following *Queries*.

First, What is the present Method of Leasing out, or letting to Farm, the Revenues belonging to Episcopal Sees, Cathedral Churches, and Colleges?

Secondly, What are the real Grievances occasion'd by that Method, to the Persons particularly concern'd on either side, or to the Public?

Thirdly, What Laws have there at any time, or any where, been made, to prevent or redress the like Grievances?

Which last Enquiry is not, it seems, confin'd to the Laws of this Realm, that are now in Being, tho' you doubtless design to consider them in the first Place, but leaves us at large, to search after those made for a like purpose in former
Ages

of Church and College Leases. 5

Ages, and in other Countries, without Distinction whether they be Ecclesiastical or Civil: probably you expect to find among them such as may point to a proper Remedy for the Mischiefs complain'd of, in case our present Laws shall prove so defective as the Complainants suppose.

First, What is the present Method &c? I wish I could satisfy you, or myself either, by answering that Query with an Account of the Method prescribed by those Acts of Parliament, which have been made on purpose to regulate this Matter, and are acknowledg'd in all the Courts of Justice to be in full force at this Day; being persuaded, that, had those Acts been heretofore duly observed, or executed according to their plain Meaning and the declar'd Intention of their Makers, there would be little Occasion for your two following Queries: The Grievances, of which you desire an Account, had, in all likelihood, been either wholly prevented, or long since redress'd, in the ordinary Course of Law; certainly the Legislature wou'd not be now to seek for a Remedy against them. But to your Question.

According to the Method which now is, and has been long in Use, the Revenues, you enquire about, are in effect Leas'd out, I know not whether I may say let to Farm, for an indefinite number of Years, or Lives; every Lease, its true, is so drawn up, as if it were never to last above twenty-one Years, or three Lives,

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which are the Terms limited by the foresaid Acts of Parliament. But then the common Practice is to prolong those Terms from time to time; so that it is by a very rare Chance, if they ever come to expire: This is usually done at the end of every seven Years, or upon the Fall of a single Life; when the Lease is renew'd, as it were of Course, with the Addition of other seven Years, or so many more as have laps'd of the 21; or by putting another Life into the Lease, to fill up the first Number: So that by means of these Renewals, the same Leases may be continued to the same Tenants, and to those that shall successively claim under them, for some Hundreds of Years, or many Generations.

These Leases are granted for, and in Consideration of, a certain yearly Rent, which is specify'd in every Lease; but this Rent, generally speaking, bears no manner of Proportion to the real Value or the yearly Profits of the demis'd Lands and Tenements. According to the 32. H. 8. c. 28. call'd the Enabling Act, and said to be the Rule which ought always to be follow'd upon these Occasions, it must never be less, it may be more, than was usually paid for twenty Years before the making of every Lease: The Words of the Statute are. — “ And that upon
“ every such Lease there be reserv'd yearly, dur-
“ ing the same Lease, due and payable to the
“ Lessors, and their Successors, so much yearly
“ Ferm or Rent, *or more*, as hath been most
“ accustomably yielden or paid for the Manors,
“ Lands,

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“ Lands, Tenements and Hereditaments, so to
“ be letten within twenty Years next before such
“ Lease thereof made.” By which Words one
wou’d think that the Lessors and their Successors
are entitled to so much yearly Rent, at the least,
as was actually paid by the Persons just before
nam’d in the same Statute, *viz.* the *Fermors*
who occupied the Lands within the next pre-
ceding twenty Years, it being apparently the In-
tent of this and those other Statutes hereafter to
be considered, to hinder the Estates in Question
from being let at an under Value. But in Fact,
the Case is quite otherwise: The yearly Rent of
those Estates, reckoned one with another, ex-
cepting such as belong to Colleges, scarce a-
mounting to a 10th, some not to a 15th or 20th
of what the Lessees receive from the under Te-
nants who occupy the Lands and Houses;
some, its true, come to about a 5th of the real
Value, which are those arising from impropria-
te Rectories settled upon certain Bishopricks at
the end of Queen *Elizabeth’s* Reign, in exchange
for the Manors and other Estates which that
Princess took from them. The Case indeed is
not quite so bad with Colleges in the Universi-
ties, and those of *Winchester* and *Eaton*, the re-
spective Governors whereof, are restrain’d by the
18th *Eliz.* c. 6. from granting Leases of Tythes
or of Lands, whether Arable, Meadow or Pasture,
without reserving a 3d Part *at least* of the old
Rent to be paid in Corn; that is to say, in good
Wheat for six Shillings and eightpence the Quar-

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ter or under, and good Malt for five Shillings the Quarter or under; and, for Default thereof, the Tenants are to pay in ready Money after the Rate that the best Wheat and Malt is sold for in the Market immediately before the Rent Days: by virtue of which Statute, a considerable part of their Revenues is preserv'd to those Societies; and for that reason, Sir *Thomas Smith*, at whose Instance it was made, is yearly commemorated by the Universities among their Benefactors.

Here I beg leave to digress so far as to vindicate the Memory of that Honourable Person from a Hearsay Story, reported by Mr. *Fuller* in his History of *Cambridge*, p. 144. and repeated after him, without a Censure, by Writers of a different Character: "Sir *Thomas Smith*, the principal Secretary of State, and chief Procurer of this Act, was said by some, saith *Fuller*, to have surpris'd the House herein, where many could not perceive how this (receiving their Rent in Corn) would be at all profitable to Colleges, but still the same upon the Point, whether they had it in Money or Wares. But the Politick Knight took the Advantage of the present Cheap Year, knowing that hereafter Grain wou'd grow dearer, Mankind daily multiplying, and License being *legally* [perhaps it shou'd be *lately*] given for Transportation."

But with Mr. *Fuller's* leave, a free *English* Parliament, (Queen *Elizabeth* had no occasion for any other) needs not to be surpris'd into an Act so beneficial, as they cou'd not but perceive this would prove to the Universities, and consequently

quently to the whole Nation, whose welfare depends so much upon the Encouragement there given to Virtue and Learning; which must fail in proportion to the Decrease of their Endowments. Nor is it credible that an Assembly of Landed Gentlemen could be impos'd upon by a Courtier in any thing relating to the Price of Corn. They well knew what they did in giving their consent to this Act, being sufficiently sensible of the growing Value of their *Wares*, as Mr. *Fuller* expresses it, having a few Years before made an Act, not to encourage, but to give a check to Transportation; for whereas before, by virtue of the 15 *H. 6.* which had been revived in the last Reign, Wheat might be exported when at six Shillings and eight Pence the Quarter, and Malt at three Shillings and four Pence, by the 5. *Eliz.* The Rate of Wheat was rais'd to ten shillings, and that of Malt doubled. But that which quite spoils Mr. *Fuller's* story, is the excessive Price which Corn bore the Year before this Act was made, and for the greater part of that very Year. The Session of Parliament in which this Act pass'd, began on the eighth of *February*, and ended the fifteenth of *March*, 1575. In 1574 there was, as we are told by Bishop *Fleetwood* in his *Chronicon pretiosum*, p. 123, from *Stow's Annals*, "Such a Dearth at *London*, that Wheat was the Quarter at two Pound sixteen Shillings, and after Harvest at one Pound four Shillings, and so continued about a Year." His Author says, that it staid,
little

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little or nothing rising or falling all the Year after. Now this latter Price of one Pound four Shillings, was thrice so much as Wheat usually bore for many Years before, and for some time after those two Years, which was no more than eight Shillings the Quarter; so that if one Shilling at that time was equivalent to five Shillings at this, and forty Shillings be now the ordinary Market Price of Wheat, Wheat was then as dear to the full, as it would be at this Day, if sold for six Pound the Quarter, or fifteen Shillings the Bushel: So far was the 18 *Eliz.* from being a cheap Year. If the Price of things, as it then was, had any Influence upon the Parliament, it was the Dearth and not the Cheapness of that Year, which mov'd them to pass this Act in favour of the Universities.

That which apparently led Mr. *Fuller*, and his Informers into so great a Mistake, is the low Price set upon Wheat in the Act itself, which is no more than a Noble the Quarter, and is certainly lower than that sort of Grain had yielded, not only in the late time of Dearth, but for twenty Years before, reckoning one Year with another; Eight Shillings the Quarter, as we are told by the now mentioned Prelate, being then generally agreed upon as a reasonable Price between Landlord and Tenant: for it was then no new thing, nor uncommon for Rents to be paid in Corn or in Money according to the usual Rate at which it was sold. But they who judg'd this to have been a cheap Year from the Price set upon

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upon Wheat, would have been of another mind, had they grounded their Judgment on that which is set upon Malt in the same Act, being no less than five Shillings the Quarter, which was then the highest Market Price, in Years not remarkable for Scarcity or Plenty. If you ask why in the same Act the one sort of Grain should be valu'd below the ordinary Price, and the other set so high? I can only offer my Conjecture, which you will admit or reject as you shall see Cause.

Colleges that were of a more ancient Foundation, such as *Queens* in *Cambridge*, where *Sir Thomas Smith* had been educated, and *Eaton*, of which he had been Provost, having their Rents settled when Corn, and consequently the other Necessaries of Life might be bought at a Rate proportionable to that here set for Wheat, instead of raising them, as Provisions grew dearer, and the Incomes of private Persons increas'd, may possibly have gone into that ruinous Method of compounding for the Increase, and taking what we now call *Fines*; such Colleges had by this Act a fair opportunity given them to rectify that great Abuse, by making so much of their old Rent payable in Wheat as they should find to be necessary in order to reduce and keep up their Estates to the true primitive Value; for tho' they were oblig'd to turn no less than a third Part of their old Rent into Corn, they were not restrain'd from doing the same by as much more as they thought convenient, the Words of the
Statute

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Statute being *one third Part at the least*; nor could any thing then, or at any time since hinder them from converting the whole into Corn Rent, (provided they took no *Fines*,) which had formerly been the Practice of some Religious Houses and great Families. I have now an Extract before me of a Lease for five Years, made by the Abbess, and Convent of *Elmestow* in *Bedfordshire* of an Estate belonging at this time to a certain College in *Cambridge*, wherein it is covenanted that the Tenant shall pay yearly eighty Quarters of Wheat, sixty of Barley, twenty of Pease, and twenty of Oates. The same Quantity of Grain, if sold in the Market at the Price current at this Day, would near double the Rent which is now paid for that Estate.

Colleges which were founded or endowed towards the End of K. *Hen.* the VIIIth's, or in Q. *Mary's* Reign, whose Rents, as then settled, were at or near upon a Par with the yearly Produce of their Estates, which for that Reason could yield no *Fines*, or such as were very inconsiderable, these could have but a very small, if any part of their Corn Rent payable in Wheat, since they were to allow for it but a Noble the Quarter *or under*; which no Tenants would agree to, there being no valuable Consideration to be had for what they must lose by the Bargain: These Colleges were of necessity to take their whole Corn Rent, or much the greatest part of it, in Malt, which being then set at so high a Price as five Shillings the Quarter, and that being to grow higher

higher as the Market should rise in after times, was then thought sufficient to secure a third Part of the Revenues from Diminution. The Revenues of Colleges, founded or endowed in the fore-said Reigns, arose chiefly from Lands and impropriate Tithes, that had been taken from Religious Houses, which tho' rated at an under Value immediately before the Dissolution, were afterwards, when the Crown became possess'd of them, exactly survey'd and estimated according to what they were truly worth in 1535. Hence I suppose it is that a Rectory of this sort given by Q. Mary to a certain College, yields for Corn Rent but four Bushels of Wheat, and no less than sixty six Quarters of Malt; another, one Quarter of Wheat, and sixty six Quarters seven Bushels of Malt; a third, one Quarter of Wheat, and two hundred and twelve of Malt.

But tho' it be a considerable part of the Revenues belonging to Colleges, which is preserv'd by virtue of the said Act, there is cause to question, whether it amounts to a full third of the Profits arising from their Estates in Land and Tithes; it is questionable whether the Act hath been put in execution in regard to such Estates of that kind, as have been settled upon Colleges since the 18. *Eliz.* tho' that Act extends to all alike, so far as to require that a third Part of the reserv'd Rent should be made payable in Corn “ of any
“ Farm or any their Lands, Tenements, or
“ other their Hereditaments, to which any
“ Tithes, arable Land, Meadow or Pasture doth
“ or

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“ or *shall* appertain.” Besides many waste and barren Grounds have since that time been cultivated, and become exceeding fruitful. Agriculture itself hath been much improved, and the same Lands have by that means produc'd much larger Crops, with less Expence than formerly; but it does not appear that the Corn Rents of Colleges have been augmented accordingly; possibly such Colleges have the least Cause to complain, whose Corn Rent shall prove to be one fourth of what those Estates produce Yearly.

But be that as it will, two parts in three at the least, of their Rents due for Lands and Tithes, the whole of their House Rents, Annuities and Exhibitions, in a Word all their Incomes payable in Money, have undergone the same Fate with the Revenues of Episcopal Sees, Cathedral, and Collegiate Churches, which have lessen'd by Degrees as the value of Money decreas'd, till they dwindled away to about one Fifth of what they were really worth and yielded in the Beginning of *Q. Elizabeth's* Reign.

This was chiefly occasioned by the prodigious Increase of Silver and Gold, as it came yearly into Commerce from the *West Indies*, after that the *Spaniards* were well settled there, and had brought the Art of working Mines to some degree of Perfection; those Metals being from that time yearly brought from thence in such large Quantities, that towards the Middle of the 17th Century, there was five times more Coin circling in Trade, than there had been in that of the 16th, as appears

appears from the different Prices which the Necessaries of Life bore at the Beginning and End of that Period. From 1550 to 1570, eight Shillings the Quarter was, as hath been shewn, the current Price of Wheat ; and a Crown of Malt. From 1650 to 1670 Wheat sold for somewhat more than fifty Shillings, and Malt for about as much less than thirty. It does not indeed appear that Grain of either sort hath born so great a Price since 1670, as it did for above twenty Years before, on the contrary there is cause to believe that the Markets have fallen rather, probably by reason of the now mention'd Improvements of Land and Agriculture: But should we suppose, that but five times more Silver was now paid for Grain and other Necessaries than they would cost one hundred and sixty or seventy Years ago, it must follow that the real Value of a Shilling at that time was the same as that of a Crown is at this; so that a Farm which was then let for twenty pound by the Year, if it yields no more now, must be less worth than it was by four parts in five, or it must come short of its real Value by so much as it brings in less than one hundred Pounds.

Money Rents, Pensions and Compositions for Tythes due to Religious Foundations in more ancient Times, fell by Degrees from their former Value upon a different Account. From the Conquest to the 20 E. 3. or 1346, a Pound sterling was no less than a Pound weight in Silver, which was coin'd into twenty Shillings and no more,
but

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but from that time to the last Year of *Ed. 6.* the quantity of Silver was gradually lessen'd in the Coin, till a Pound of Silver came to make sixty Shillings, or three nominal Pounds; by which means, the aforesaid annual Payments became less in real Value by two thirds than they had been two hundred Years before.

But this cannot be generally affirm'd of Rents that accrued from Estates in Land; such Land at least as was called the *Demeans* of any Manor, which as the Lawyers express it, appertain'd *ad Mensam Domini*; Lands of this sort, were commonly held by the Lord in his own Hands, at what Distance soever the Manors lay from the place of his Residence, being stock'd with his own Cattle and Instruments of Husbandry, and manag'd by his proper Officers and those who held of him in *Villinage*, and were bound by their Tenure to do all the Rustic Work, that there was occasion for, upon the Demeans.

If these took any part of the Demeans to Farm, which they sometimes did together with the Stock that was upon it, they were properly speaking Tenants at Will, and might be turn'd out whensoever the Lord pleas'd. *Est autem Dominicum quod quis habet ad mensam suam et proprie, sicut sunt Bordlands Anglice. Item dicitur Dominicum Villenagium quod traditur Villanis, quod quis tempestive et intempestive resumere possit pro voluntate sua et revocare.* Bract. L. 4. Tr. 3. c. 9. To the same purpose Fleta. L. 5. c. 5. Thus were the Manors belonging to the Crown manag'd

nag'd for a long time after the Conquest, and those possess'd by temporal Lords for a much longer: Bishops and Abbots continued the Practice till within the Reign of *H. 8. ad nostra usque tempora* saith *Harpsfield*, by which means they receiv'd the Produce of their Estates either in kind or in Money according to a reasonable Price.

But since the Custom hath generally prevail'd of letting out Estates by Leases, Churchmen, instead of apportioning the yearly Rents to the real Produce of their Lands, which they are allowed, and, if I mistake not, are oblig'd to do by the Laws that are now in force, and which the Nobility and Gentry have actually done in regard, not only to their Estates of Inheritance, but to those likewise which they by any means gain'd from the Church, tho' they could have no other Right or Title thereto than had been vested in the former Owners: Churchmen, I say, betook themselves to a Practice, which was as far from answering their Purpose, as it was from being agreeable to Law, and that is by taking Fines, for the renewal of Leases, or rather for continuing the same from time to time, beyond the Term limited by the Statutes of this Realm.

A Fine, as the Word is us'd on this occasion, is a certain Sum of Money paid by way of Compensation for what the real Profits of an Estate exceeds the reserv'd Rent. When a Lease of 21 Years comes to be renew'd, which, as was before said, is commonly done at the end of every seven Years,

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an Inquiry is made into the true Value of the Estate, or how much Rent it would yield, if let in a legal and regular Way. It is then computed how much Money paid in hand, the Rent of seven Years then to be added is worth, after a deduction of the reserv'd Rent, and an abatement of Interest upon Interest at the Rate of neartwelve *per Cent* for the fourteen intermediate Years, that remain good to the Tenant, which is just one Years Purchase; and this is given and taken for a Fine. According to this way of reckoning a single hundred Pounds is counted equivalent to seven, which the Estate would yield in due time, were it let in the ordinary way, as those of Laymen commonly are, and those of Churchmen and Colleges, as I conceive with submission, ought to be. But when it is said that a full Years Rent, according to the real Value, is paid for a Fine in this Case, it must be understood that the Lessors are duly appris'd of what that real Value amounts to, which is not always the Case, at least in Colleges, where, as I have been credibly inform'd, Leases are often renewed by the Addition of seven Years for one half, sometimes less than a third of what the Lessee receives yearly from his under Tenants, over and above the reserv'd Rent. The Rent of a Year and a Quarter is now requir'd for renewing a Lease for Lives by the addition of a single Life, and no less as I am inform'd, hath of late been demanded in some Places for the renewal of a Lease for Years. Here you'll please to take notice that no Statute of the Realm gives any Direction as to this Matter, nor do I hear that
the

the Fine is ever specify'd in any Lease. I have indeed seen one granted by a certain Prebendary, wherein it is said that the Grant was made in *consideration of a certain Sum of Money*, but the particular Sum is not nam'd. Whether a like Form be us'd by those belonging to any other Cathedral Churches, is more than I know.

I have now given you the best Account I can of the Method us'd at present in Leasing out Estates belonging to Episcopal Sees, Cathedral Churches and Colleges.

Your next Enquiry is, What are the real Grievances, whether private or public, that are occasion'd by this Method?

For my part, I cannot but look upon it as a very great Inconvenience, I know not whether you'll call it a Grievance, that this Method affords matter of perpetual Complaint to such great numbers of People as are immediately concern'd on one side and t'other, as Lessors and Lessees; and therefore, how unreasonable soever the Complaints of either side may prove upon Examination, they ought surely to be hear'd, and the occasion of them remov'd, if that can be done without some greater Inconvenience, or fully as great.

The Lessees then, who seem to be the loudest Complainants, and the most importunate for Redress, charge their Landlords with Oppression and Extortion in imposing arbitrary Fines up-

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on them, as often as they come to renew their Leases, exacting upon every Renewal more than their Predecessors, and perhaps themselves had before thought sufficient; and the truth is, there may be many Leases now in being, for which, when they were first granted, nothing more was requir'd, than the yearly Rent, and, which could not afterwards be renew'd but for a large Fine, and this by Degrees hath amounted to the present Value. The Lessees apprehend, and not without some Ground, that the Lessors, who not content with a years Rent, have in some places refus'd to renew for less than a Quarter part more, may prove a leading example to others, and in time come to insist upon the extended Rent of a year and half, and should they carry their Pretensions still further, which, as some give out, they may, and, which is more, are bound to do, as they would acquit themselves of the Trust repos'd in them, they the Tenants must even in that Case lye at their Mercy, for any relief that can be had at Law. But what seems to be more vexatious still. According to the Rules, which the Lessors go by at present, and have gone for a long Time, a Tenant, who refuses to comply with their Demands at the End of seven Years, shall be forc'd to pay for every Year afterwards that he delays to renew, at the Rate of near twelve *per Cent* compound Interest, insomuch that at the End of eleven Years his Fine shall be doubled upon him, and trebled if he stands out three Years more. No less than three hundred

hundred Pound will be insisted upon when fourteen Years are run out where a third part of that Sum would have been taken at the Expiration of seven. Such then are the pretended Grievances, which the Lessees complain of ; and I have reason to believe, that there are among them who lye under great Hardships upon this Account, whose Case deserves Compassion, and may require relief from the Legislature, if it can be given, as it may perhaps, in a great Measure, without injury to others. I mean the real Farmers who live upon the Estates which they hold by Lease, having no other Maintenance for their Family. These often find themselves to be in a worse Condition than those who hold by the Year at a Rack Rent. This may seem a Paradox, considering how small a Matter comparatively speaking, they are oblig'd to pay their Landlords, putting Fines and Rent together. But experience proves it to be true, nor is it hard to assign the Reason: The rack Tenant, who holds at the Will of his Landlord, knowing what he must trust to, accustoms himself and Family to hard Labour, a coarse Diet, and rough Cloathing, the continual Apprehension he is under of seeing his Crop seiz'd, or himself and His turn'd out of Doors, putting him upon all the shifts he can make to get up his Rent against the End of the half Year, or within the next at furthest ; nor hath he sooner brought in what was due at *Michaelmas*, than he finds *Lady-day* coming on apace, so that he can never allow himself to slacken

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his Diligence, but is kept continually upon the stretch, till Time and Use have render'd his Condition of Life more easy to him. But it is not so with our Lease-holders, who having but a small matter to pay by the Year, commonly live upon what the Estates yield more than that, as if it were all their own, seldom troubling their Heads with the Thoughts of an after reckoning, or looking upon it as afar off, till the seventh Year insensibly steals upon them, and then they are at a Loss how to raise Money for their Fines, and whilst they are looking out for it, so many more Years shall sometimes elapse as will require a double or a treble Fine; for the Payment of which they are forc'd to Mortgage their Leases, and seldom get out of Debt till they have sold them outright. It may therefore, deserve consideration whether it would not be an Act both of Mercy to Men in such a Case, and of Justice to Posterity, instead of exacting Fines at the end of every seven Years, to raise their Rents by little and little, till they shall come near to what the Estates are yearly worth.

But so far as I can judge from the little knowledge I have of these Matters, there are few Tenants of this sort remaining at present upon either Church or College Estates, and those few are so gently us'd by their Landlords, that I scarce believe them to have any part in the present Dispute. The Lessees for the most part, are now such as have none of the Difficulties, I have been speaking of, to struggle with, they being either Gentle-

of Church and College Leases. 23

Gentlemen, who have large Estates of their own; and whose Ancestors, finding Lands belonging to Churches or Colleges adjoyning to theirs, took Leases of them on account of some particular Conveniencies, which have been renew'd from time to time to their Descendants; or wealthy Traders, who of late Years have found it a compendious Way of improving Money to Advantage, by purchasing these Leases of the former Occupants, without any Intention to live upon the Estates, which they leave to the Discretion and Management of under Tenants, concerning themselves no further, than to receive, as a kind of Rent-charge out of the yearly Profits, all that exceeds the small Pension reserv'd to the Proprietors.

In answer to these it is alleg'd in behalf of the Lessors, That tho' the Laws have entrusted them with a discretionary Power to dispose of their Estates for the Term of Lives or Years limited by Statute, and the Title they make over to the Lessees is unquestionable, which as times go, is no small advantage; yet so it is, that, should they receive the utmost of their Demands, it would scarce amount to one half of what is paid to other Landlords when they renew Leases of the same Value: When a Gentleman puts in a third Life, or adds seven Years to a Lease in being, he shall receive two or three years Purchase for a Fine, tho' the Lease should happen to be of Lands formerly belonging to the Church, to which the present Owner can have no other legal

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Right, than Churchmen still have to the Remainder of their ancient Possessions; yet these must think themselves well dealt with if the Lessees can be brought to allow them one whole years Purchase, or one and a Quarter at most. This you'll say does not look like Oppression on their side. In answer to the Charge of Extortion, they do not only own that at the renewal of Leases the Interest of Money is computed at the exorbitant Rate abovementioned, *viz.* near 12 *per Cent* compound Interest, but complain of it as an intolerable Grievance: It is true that when Leases run out beyond the usual time of renewing, they abate less in the Fine for every Year according to that Rate, which the Lessees call exacting more; but were both Parties confin'd on this Occasion to the legal Interest of five *per Cent*, the Lessor, who now receives but a single years Rent at the end of seven, might have little less than three, and when eleven Years are run out, instead of demanding, as he now does two years Purchase, he might insist upon somewhat more than five, and above seven instead of three when fourteen are elaps'd. All which will appear from the printed Tables, a Copy of which I send you.

The Lessors think it not unlikely that there may be Leases now in Being, which, as 'tis alleg'd on the other side, were at first granted in consideration only of the reserv'd Rent, for the Renewal whereof Fines were afterwards demanded, and those Fines from time to time augmented

mented at subsequent Renewals: But then they suppose that when those Grants were first made the reserv'd Rents came little short, if not fully up, to what the Estates were really worth by the Year. Those formerly belonging to Religious Houses, which *K. H. 8.* and *Queen Mary* restor'd to the Church, after they had been for sometime united to the Crown, and a due Estimate put upon them by the Court of Augmentation, were in all likelihood let to Farm at a just Rate; the like may said of the Impropropriations, which *Q. Elizabeth* settled upon Bishopricks, in lieu of the Mannors which she took from them. Now, when the Rents are equal to the yearly Profits of an Estate, there can be no Pretence for demanding a Fine; nor could there be any, where the reserv'd Rents were rais'd as Money decreas'd in Value, which seems to have been done for some time, where-ever we find the annual Incomes of any Cathedral or Collegiate Church or Prebend to exceed the Rate set upon them in the King's Books, of which as I believe many Instances may be given: But, since by a Practice more common than justifiable, the Rents came to be fixt, and continued the same notwithstanding any alteration found to be in the Price of Things, which was so very great in *Q. Elizabeth's* time, that it may probably be found upon Enquiry, that the same necessities of Life were commonly sold towards the End of that Reign for near four times so much as they cost at the Beginning: In this Case our Lessors it seems
thought

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thought to preserve some sort of an Equality between them and their Tenants by contenting themselves with such Fines as they could agree upon, when an Increase of Rent was due, and raising those Fines as the Prices of things grew higher. But then they much wonder, that the Lessees should look upon themselves as the Party griev'd by this Method, considering how much it hath turn'd to their advantage; since whatever they the Lessors have gain'd upon them by raising the Fines, they have lost with a great deal more in the Rents, which, as to their true Value, have fall'n in a far greater Proportion; so that, whilst this Method is follow'd, they are never like to be upon equal Terms, as you'll easily perceive from the Account, as it stood between them about ninety or a hundred years ago, and was offered to the Consideration of the then House of Commons upon the following Occasion.

When the Bill call'd *Root and Branch* was first brought into that House in 1641, two eminent Divines were admitted to argue against it in behalf of the Church, which they did so effectually, that it was thrown out for that time, and not resum'd till some time after the Sticklers for it had broke out into actual Rebellion. Dr. *Hacket* one of those Divines, then a Prebendary of *Westminster*, afterwards Bishop of *Lichfield* and *Coventry*, remonstrating among other things, that "*If all the Lands, of all Cathedral and Collegiate Churches were cast up into one total Sum*
" at

of Church and College Leases. 27

*“ at a reasonable and fair Pennyworth, allowing
“ to the Deans and Chapters what they receiv’d,
“ not only in Rents but in Fines, the Tenants in
“ clear gain, did enjoy six Parts in seven at the
“ least.”* Whether this was exactly the Case at
that Time, and how far it hath been alter’d since,
you’ll be better inform’d by those who have greater
knowledge and experience in Matters of this
sort than I can pretend to.

Hitherto Sir! I have been laying before you
their Complaints who are personally concerned
in this Cause. But there are Grievances both
great and many, and of a more extensive nature,
which, should those Gentlemen be wholly silent,
would call for a speedy Redress, as being the
most proper for our Representatives in Parlia-
ment to animadvert upon. I mean those which the
whole Nation suffers by so great a Diminution
of the public Patrimony, of which the Endow-
ments of Churches and Colleges may be justly
reckon’d a most valuable Part. For those En-
dowments were not design’d for their Use only,
or chiefly, whose Lot it should be to possess them,
but for the general Good of the Kingdom, or
rather of Mankind. However should they be
consider’d no otherwise than as beneficial to
those who are or shall be hereafter legally qua-
lify’d to enjoy them, the Appropriation, if I
may so speak, of so very large a share as is alrea-
dy got into their Hands, who pretend to no such
Qualification, must be look’d upon as a Natio-
nal Grievance, it being in effect an Inclosure of
that,

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that, to which all have a common Right. There are perhaps few, if any, Families in the Kingdom, that have not some temporal Interest in the preservation of those Endowments, scarce a Person of Distinction without a Son, a Brother, a Kinsman or Friend, who actually enjoys, or reasonably expects some special Benefit from them either in the Church, or in the University or both. But as they serve to the Advancement of Learning, and by that means to the Propagation of Religion, the Price of them is inestimable, in regard even to this Life, and the Benefit universal; and it may be truly said, that upon the Preservation of these depends that of every Mans Estate in particular; for wheresoever Irreligion prevails, a general Corruption necessarily ensues, Civil Government dissolves of Course, giving way either to Anarchy and Confusion, or to the most savage Tyranny, in which Cases who can be secure of any thing he now calls his own?

The Universities, as hath been observ'd already, have suffer'd the least in this common Calamity; yet they have in a great Measure been disabled from rendring that service to the Public, which, were their Revenues entire, might be expected from them. There are doubtless still, and 'tis hop'd ever will be found in those celebrated Bodies, Men consummate in all the most necessary and useful Parts of Learning. But it cannot be expected that the Number of those, who are thus qualify'd to serve their Country, should continue the same, when the necessary
Helps

Helps and Encouragements provided for them by the Founders and Benefactors shall fail, as fail'd they have to a very great Degree already, and will to a greater, untill order be taken for the better Management of their Revenues. I could name a College, than which perhaps, there is not one of the sort more richly endow'd in all Christendom, which at the Foundation was provided with a Maintenance for many Fellows, and more Scholars of several Denominations. For that of Chaplains, Clerks, Choristers, Almsmen &c. in very considerable Numbers; and with allowances for the Wages of Officers and Servants, for Repairs and other incident Charges. Which College instead of affording a competent Maintenance to all its Members, does not at this Day subsist above a third Part of them. It's true indeed, that generally speaking they all receive the nominal Sums assign'd them in the Statutes, which in effect is no more than a sixth, or a fifth at most, of what the Founders intended they should have, when they settled upon the College an Estate which would fully answer that Intent. The Scholars indeed, who are resident upon the Place, which few are but during the time requisite for the taking their Degrees, have, by virtue of the Corn Act, a small Encrease of Commons, but so very small, that it Costs their Friends more for their Diet there, than they could board for in other Places, insomuch that a Scholarship is a Charge rather than a Relief to the poorer sort of Students, and is seldom accepted

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cepted of by such, but as it renders them capable of being chosen Fellows.

The Fellowships of this are still reckon'd better than those of most Colleges in either University, however they are far from answering the general Design of such Foundations; whence you will gather that there are not many that come up to it. This design could be no other, than that Persons found capable of improving themselves in the learned Professions, might have the Necessaries and Conveniencies of Life provided for them, to the End that having nothing else to mind, they might give themselves up wholly to their Studies, and make the best use of those many Advantages which the Universities afford to such as are thus employ'd. But they who are chosen Fellows of the said College, commonly quit the place upon their Election, as unable to live there, the Profits of their Fellowships serving only as an additional supply to what they can make of such Employments as they happen to get in the World, which are often very different from those that Fellows of Colleges are bred to, as you'll easily believe, when told, that some have taken Service in the Army, holding their Commissions and their Fellowships at the same Time.

I deny not, that other Mismanagements, besides that of Letting Leases in the usual Method, may have concurr'd in reducing the College I've been speaking of into its present State; but those other Mismanagements, great as they are
said

said to be, could never have had that Effect upon a College so richly endow'd as that was, had not its Revenues been gradually diminish'd, like those of other Colleges by one and the same Method: For in this respect the Case of all such Foundations is much the same, the Lessees being by this time possess'd of what we may call the Bulk of their Estates, applying the Produce of them to their own Uses, which the Donors design'd for the Education of Youth, and their encouragement in Virtue and Learning: For the want of which many a noble Genius hath been, and is continually lost to the Public, which, if duly cultivated, might be capable of doing great Honour to our Country, and Service of the highest Importance to Mankind.

If things go thus ill with the Universities, it is far worse, you may be sure, with Cathedral and Collegiate Churches, which having no Benefit from the Corn Act, the whole of their Rents hath been liable to a continual Decrease for near two hundred Years. Here I beg leave to enlarge a little upon the Case of these Foundations, which some are apt to look upon as useless to the Public, considering what they are at present, and not what they have been or may be hereafter, whensoever the Legislature shall put a stop to the Abuse so generally complain'd of.

The chief End, for which Cathedral Churches were instituted, was that the Bishop of every Diocese might be constantly assisted, by a considerable part of his Clergy as his standing Council,

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cil, or Senate of the Diocese, without whose Advice and Concurrence he might do nothing of Moment in the Government of his Flock, the exercise of his Jurisdiction, or the management of Affairs relating to the Church, whether Spiritual or Temporal, that Bishops always have, or ought to have acted in Concert with such Councils. The most learned Bishop *Stillfleet*, among many others, proves from the most ancient Fathers of the Church, as he does from several eminent Canonists, that Deans and Chapters are in effect such Councils, and were appointed so to be; and not content with these Authorities, he thought it material to add, *That by our Common Law it is said, that the Dean and Chapter were appointed as a Council to the Bishop, with whom he is to Consult in Cases of Difficulty; to which purpose every Bishop habet Cathedram; and who are to consent to every Grant &c.* for which he quotes Co. 3. Rep. Dean and Ch. of Norwich. Antiq. of Lond. p. 568.

In these, and in Collegiate Churches, Provision is made for the daily Worship of God, to be perform'd there with so much greater solemnity than the ordinary Houses of Prayer will admit of, that according to the now mention'd Prelate, Parish Churches as well for that as for other Reason are to Cathedrals, but as Synagogues were to the Temple at *Jerusalem*, being built, as he says, for their Conveniency who could not attend the solemn Worship of God in the Temple. So it was, continues He, *in the Christian Church;*
every

every Cathedral in its first Institution was the Temple to the whole Diocese, where the Worship was to be perform'd in the most decent, constant and solemn Manner; for which End it was necessary to have such a Number of Ecclesiastical Persons there attending, as might still be ready to do all the Offices which did belong to the Christian Church, such as constant Prayers and Hymns and Preaching, and celebration of Sacraments which were to be kept up in such a Church, as the daily Sacrifice was in the Temple, &c. Concluding that upon this Ground, the institution of Cathedral Churches among Christians was a very pious and reasonable thing.

These Foundations have been highly useful upon another account, namely, that they were Places of Retirement for learned Men, who had there both means and Leasure to employ their Pens in the Service of Religion; and twas formerly observ'd, that our most celebrated Writers were such as resided either there or in the Universities.

Nor ought it to be forgotten, that those Religious Communities afforded great Relief to their neighbouring Poor: For besides what was daily given in Alms, or allow'd out of the common Stock for Hospitality, great Numbers of decay'd and impotent Persons had a sufficient Maintenance assign'd them by the local Statutes.

When King *Henry VIII.* had destroyed the Monasteries throughout *England*, it was much lamented both at the Time, and afterwards that

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Some of those pious Foundations were not reserv'd for the public Good of the Nation. Lord *Herbert* tells that Bishop *Latimer* was for having two or three left in every Shire for pious Uses: and, which is more remarkable, that divers of the Visitors themselves, those cruel Instruments of their Ruin, "Petition'd that some might be spar'd, " both for the Vertue of the Persons in them, " and the Benefit of the Country, the Poor receiving thence Relief and the richer sort good Education for their Children." p. 504. Afterwards, when he had given an Account of the general Suppression, that noble Historian adds; *All which being by some openly call'd Rapine and Sacriledge, I will no way excuse; tho' I may say truly, that notwithstanding so many Religious Houses destroy'd, there are yet in every kind (the suppress'd Abbies and Chantries only excepted) left standing so many, as give no little Increase to Learning, splendor to Religion and Testimony of Charity to the Poor; that although I cannot but pity the ruin of so many pious Foundations, as affording a singular Conveniency to those who desired to retire to a holy, private and contemplative Life, when abuses were taken away; yet I have thought fit to mention these particulars, that it may appear to foreign Nations we are not destitute of many Monuments of Devotion* 506.

His Lordship, when he wrote this, had doubtless his Eye upon those pious Foundations I've been speaking of, and had the said Monuments of Devotion continued but in the State wherein they

they were left even by K. *Hen. VIII.* they might in some measure have still answer'd the purposes mention'd by his Lordship. The State in which that Prince left them, may be gather'd from an Estimate of their Revenues made in the 26 of his Reign, Anno 1535, as it is enter'd into his Books, compar'd with that of Parochial Benefices made and enter'd at the same time. Of these latter Rectories may bereckon'd at a middle Rate to yield above six times more than they are there valued at, some its, true, come short of that Proportion, but there are many more, if I mistake not, that exceed it. Not that the same Quantity of Glebe or Tithes is really worth more now than it was at that time; but one Pound was then to all Intents and Purposes worth about as much as six are at present. So that had the several Members of Cathedral and Collegiate Churches, been under the same Restraints in Leasing out their Prebends, as the Parochial Clergy are in respect to their Livings (as why they should not, is not very clear from any Law or Statute now in Being.) they had been alike enabled to attend their respective Duties, according to the design of their Institution. But as the Case stands, they who should compose the Senate of each Diocese, and be assistant to the Bishop in his ordinary Functions, live many of them scatter'd up and down in divers remote Parts of the Diocese, or of the Kingdom, rather, being no where greater Strangers than in the Place appointed for the Residence of their Predecessors. The *Close* they liv'd in retir'd from

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the World, is now taken up by Inhabitants who, were those Foundations, what they have been, and were design'd to be, would seldom gain Admittance within the Gates. In one of our Metropolitan Churches, the Members whereof seem to be better provided for than those of most other Cathedrals, The Residentaries, so call'd, are, as we are told by a late Writer of great Credit, forc'd to hire Lodgings when they come to *reside*, the Prebendal Houses being all in the Hands of Lessees: The Owners as it seems, having little Occasion for them, since their Possessions, which should enable them to keep House and use Hospitality, have been long since dispos'd of in the same Manner. Mean while the Episcopal Jurisdiction and Discipline of the Church are committed to Persons of another sort, and manag'd by them in such a manner as the World is not now to learn. Divine Service is become, as it were the peculiar Business of Vicars Choral, and Lay Clerks; but many seem persuaded that it might be perform'd with greater Solemnity and Decency than it commonly is by such Persons. The poor Almsmen are paid their Stipends in the same Nominal Sums that were assign'd them in the time of K. *Hen. VIII.* or before; the very Fabrics of those venerable Domes, which were formerly so great an Ornament to the Nation, are now said to moulder away and threaten Ruin; the Portion set a part out of the common Stock to repair and beautify them, which is, or ought to be, a Fourth or a Fifth at least if occasion so requir'd
being

being now found insufficient to keep them standing.

According to the Proportion now mentioned the Revenues of Bishopricks ought to be six times at least as much as they are rated in the King's Books; so that wheresoever those Revenues are no more than doubled, two thirds of them are clear Gain to the Lessees, and lost to the Public. For we must suppose that so large a share of the Churches Patrimony, were it not thus interverted, would be duly expended in Works of Piety, Beneficence, Hospitality and Charity; it being for these, and no other Uses that the sacred Treasure, hath in all Ages been trusted to the Bishop's Administration in every Diocese. And that it hath in a great Measure been so expended even in the corrupt times of Popery, many lasting Monuments make evident at this Day, namely the Cathedrals and other Churches built and rebuilt by Bishops, with the Colleges, Schools and Hospitals, founded and endowed by them. Nor could even the great Depredations that have been made upon the Churches Patrimony, utterly disable our Protestant Bishops from imitating their Predecessors in this Respect. The great Sums that were employ'd in public Benefactions, and private Charity in K. *Charles* the 2d's Reign, by Archbishop *Sheldon*, Bishop *Cofens*, *Warner*, *Hacket*, *Wood*, &c. shew, that, had our Modern Prelates the same Means in their Hands, they would not have been outdone in Works of this kind by the *Wickhams*, *Chicheleys*

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and *Wainfletes* of former Ages. It has been long since observ'd, that the Poor have multiplied in all parts of the Realm, as the Revenues of the Church have diminished, and that before the Reign of K. *Hen. VIII.* there was no Occasion for those Poor Rates, which are now become a most grievous Burthen to almost every Parish in *England*. But possibly that Diminution may not be the only Cause why the lower sort of People should be so greatly impoverish'd, as they are at this Day, considering how vastly our foreign Trade hath encreas'd during the same Period of time. However if it be not the only, it is certainly one of the Principal Causes of so great a Calamity. For, if more of the Land had been still possess'd by Churchmen, more of its Produce had been kept at home, to feed and cloath the Hungry and the Naked of our own Country, to which the Returns made from foreign Parts contribute but little if any thing at all. So that whatsoever tends to lessen the Ecclesiastical Revenues, as the Method now under Consideration apparently does, may, for that among many other Reasons, be justly reputed a general Grievance of the Nation.

I come now to your third and last Enquiry, which you chiefly insist upon, namely, What Remedy have the Laws of this or of any other Nation provided against these and the like Inconveniencies?

In answer to which, I shall lay before you the Provision made for that Purpose, by

1, The Statutes of this Realm now in force.

2, The

of Church and College Leases. 39

2, The Civil and Canon Law.

3, Particular Constitutions made here in *England* and elsewhere for the same Purpose. and under this Head I shall offer to your Consideration certain Acts of Parliament and Judicial Proceedings, which, tho' they do not directly concern the matter in hand, may yet serve for Precedents, as being grounded upon Reasons which will hold good in this as well as in any other Case.

The Statutes of the Realm which relate to to this Matter, and are now in force, are the 32 *Hen. VIII.* ch. 28. with three of Queen *Elizabeth*, one made in the first Year of her Reign ch. 19. another in the 13th ch. 10. a Third in the 18th. ch. 11. I pass by ch. 6. of the same Year, commonly call'd the *Corn Act*, as spoken to already, and some others of which there will be no Occasion to take Notice.

The first of these is commonly call'd the Enabling Act; those that follow the Restraining.

It cannot be deny'd but the Enabling Act gives a Power to several of the Clergy, which, when that Act was made, might well be looked upon as exorbitant, as it would be still in any other Part of Christendom. Before it a Bishop or an Archbishop could not regularly Lease out any part or parcel of his Demesns for the Term of 10 Years but in Cases of Necessity, or for the Apparent Advantage (not of himself or Family but) of his Church; nor in those Cases neither without the express Consent of his Chapter, or if he had no Chapter,

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Chapter, that of his Clergy signify'd by their Subscription, after his having convinc'd them of that Necessity or Advantage; nor after all without Leave first had from the Pope: But he may now in pursuance of the said Act, make Leases not for ten Years only, but for twenty-one, nay for forty or fifty, in case three Lives shall last so long, as they often do and longer, and that without any Cause shewn, and without the Approbation, Consent or Privity of any third Person.

But then had all been restrain'd from using this Power but such as are within the Act; and had these been confin'd to the Limitations it contains, and which the subsequent Statutes were made to enforce; a great Part of the Mischief complain'd of might have been prevented, and it may perhaps by the same means be remedied at this Day.

This Act gives the Power aforesaid to no other Ecclesiastics than such as are seiz'd in Fee Simple of Manors, Lands or Tenements in the Right of their Churches. Now the Fee Simple or absolute Property of Revenues belonging to any Church, whether Episcopal, Collegiate or Parochial is in the Church itself, and they are seiz'd of the same in the Churches Right, whom the Laws Ecclesiastical and Temporal have entrusted with the free Administration of those Revenues: These are either single Persons, as Bishops, Deans and some Archdeacons, on account of such separate Portions of the Churches Possessions as are assign'd to each of them in particular; or they are

are whole Communities of Persons united in Bodies Politic and acting by common Consent.

To these some of the Learned in our common Law have made a very large Addition under the Title of *Sole Corporations*, a Title which must sound very oddly in the Ears of those who are not used to it, as importing Bodies that have each of them but one Member, Societies or Companies consisting of single Persons! It seems to be of a modern Invention; for I cannot find any mention made of it in any old Statute or Provincial Constitution of this Realm; nor can I learn upon Enquiry that it was known to the ancient Sages of the Common Law: As for the Civilians, they all hold that a Plurality of Members is essential to a Body Politic as well as to a Natural, and must therefore look upon a Sole-Corporation, as a Contradiction in Terms.

However we find in the Modern Law Books this Title promiscuously confer'd on all Clergymen possess'd of Benefices with or without Cure; and all of them, Parsons and Vicars excepted, brought within the Enabling Act in Quality of Corporations Sole; and tis now given out as the prevailing Doctrine in *Westminster-Hall*, that not only Bishops, Deans and Archdeacons but Prebendaries, Precentors, Chancellors and Treasurers of Cathedral and Collegiate Churches are enabled by this Act, each Man for himself, to grant Leases of one and twenty Years or three Lives, which his Successors must abide by, tho' made without Leave, had or ask'd of Bishop, Dean or Chapter.

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Chapter, and according to this Doctrine Judgment hath been given in many Cases. But the Reporters of those Cases leave us to seek for the Reasons on which such Judgments were grounded, those alleg'd by them being neither satisfactory in themselves nor consistent with each other.

It was long after the making of this Statute before any body could imagine that Prebendaries were concern'd in it: None surely thought so, whilst it was yet fresh in Memory, and the Intention of those that made it best known. *Dyer* f. 61. pt. 30. reports, that in *Easter Term* 38 *H. VIII.* it was doubted whether a Lease for Years made by a Prebendary, tho' confirm'd by the Dean and Chapter, could Bind the Successor without the Bishop's Consent; and many were of Opinion it could not, for which he gives this Reason; That the Bishop is both Patron and Ordinary of every Prebend; but he says not a Word of the Statute before us, apparently because neither He nor his Contemporaries thought that it made any thing to the Point in hand. Had they believ'd Prebendaries to be compris'd in it, the Doubt had soon vanish'd, or been never made; for it would then have been a clear Case that the Lease was good without the Consent or Confirmation of either Bishop or Chapter.

The first time I find this Matter brought into Question, was in *Trin.* 31 *Eliz.* when it was mov'd, saith the Reporter, 4. *Leonard* 51. *If a Lease made by a Prebendary were within the* 32 *Hen. VIII. ch. 28. Because that Statute speaks*
of

of Men seiz'd in the Right of their Churches, and a Prebendary is seiz'd in the Right of his Prebend and not in the Right of the Church. But it was the Opinion of the whole Court, that he is within the Equity of the Statute. So that the whole Court was, it seems, of Opinion that a Prebendary is not within the Words of the Statute, for by the Equity of a Statute our Common Lawyers understand, not the Mitigation of its Rigour, but the Extension of it to like Cases, which being out of the Letter, as Sir *Edward Coke* speaks 1st, *Inst.* 246, are within the same or a like Reason. And such Extension in *Materia Favorabili* is generally allow'd of and presum'd to agree with the Lawmaker's Intention; as when it is conducive to some good End without prejudice to particular Persons: But it is *Materia odiosa* when a Statute, like that before us, breaks in upon common Right, and puts a Hardship upon those that are affected by it; and a great Hardship it is, to say no worse, for Men to be kept out of their Freeholds by the force of Agreements made without their Knowledge, by those who had no Right in the same beyond their own Life time. Such Agreements tho' they might appear very reasonable when first made, must, considering the many Alterations that unavoidably happen in a long Course of Years, often prove grievous to those that come after. Of this the Makers of the Statute were not insensible, as appears by their excepting the Parochial Clergy out of it, which had they not done the Reading Desks and Pulpits
of

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of many Parish Churches might at this time have been as rarely fill'd as the Stalls are of some Cathedrals. It is not indeed to be imagin'd, that they intended or fore saw so great a Diminution of the Churches Patrimony as hath been occasion'd by this Statute. But that they were not without some Apprehensions of the Mischief that hath ensued, appears not only from the afore said Exception, but from the many Limitations which they have put upon it, which shew it to have been their Intention that this, like all other Statutes of the Sort, should be construed strictly and upon no Pretence of any parity of Reason be extended beyond what the Words express.

Five Years afterwards in *Mich. 36 Eliz.* the same Question was again mov'd upon a special Verdict in the Court of *King's-Bench*, namely, "Whether a Lease made by a Prebendary was good by the Statute 32 *Hen*" VIII.? and it was then urged as before, "That a Prebendary is not seiz'd in *jure Ecclesiæ sed Præbendæ*" and the same Judgment was given, but the Reason assign'd for it was not the same which shews that the Court itself was not satisfy'd with that before given. It was now said, *That the Lease was good because Prebendaries are not excepted out of the Act, as Parsons and Vicars are, and that therefore they are in the same Case with Bishops.*" 1 *Cro.* 350. This was to suppose the thing in Question, Namely that Prebendaries like Bishops are seiz'd of what they possess in Fee-simple; but till that shall appear, they are not in the same Case,

Case, nor like Bishops included within the Act, as Parsons and Vicars would be, were it not for the Exception, they as well as the Bishops being seiz'd of the Fee in right of their respective Churches, and till it shall be made appear that Prebendaries hold what they possess, as such, by the same Tenure, their not being excepted makes nothing to the Purpose, and does no more prove them. than it does the Judges themselves to be within the Act. However, "*Popham* as we are told by the Reporter, said *That it had been so adjudg'd for a House juxta Pauls; and had been twice so adjudg'd in his Experience; and Fenner said it had been so adjudg'd in the Case of a Treasurer of a Church.* And so it seems, the Sayings and the Experience of those Gentlemen serv'd for that Time instead of Law and Reason.

But nothing said or done in either of the Cases now mention'd, or in those alleg'd by *Popham* and *Fenner*, could in after times give satisfaction to either Bench or Barr. For the Question was again mov'd in the Case of *Eusden* and *Denny*, Jac. 18. viz. *Whether a Præcentor of St. Pauls being a Prebendary, was capable of making a Lease that should bind his Successors?*" The Court, we may be sure, could they think him capable, would not stick to declare their Opinion, confirm'd, as it was, by the many Precedents that were then before them, but *it was left unresolv'd whether capable or not*, 1 Keble 571. And unresolv'd it continu'd during the remainder of that and the whole following Reign; for it is said in
the

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the Case of *Bisco V. Dr. Holte*, 15 Car. II. that it was then but lately settled. *Keb, ib. 1 Levinz. 112.*

Upon what Occasion it came then to be settled, appears not from any thing I can find in the Reports; but we may learn from what was said in the last mention'd Case upon what Foundation the settlement was made. The Attorney General (Sir *Jeffrey Palmer*) in Evidence to a Jury propos'd it as a Doubt, *Whether a Lease made by the Chancellor of a Church, without Confirmation of Dean and Chapter was within the 32 Henry VIII. and the whole Court was unanimous that it should bind without Confirmation*"; for which the Chief, if not the only, Reason was the Lessors being a *Prebendary*, and as such in (pursuance as it seems to the late Settlement) *seiz'd of the Fee in right of his Church within the Words of the Statute.*

It was said indeed upon this Occasion, that the Chancellor was more than a *Prebendary*, being besides a *Dignitary*. But this, tho' it might perhaps have some Weight with the Jury, does not appear to have been much insisted upon by the Court, as making nothing to the Point in Question, and being in truth a great Mistake; for the Chancellor of a Church, hath, as such, neither Jurisdiction nor Preheminence, nor consequently any Dignity, being by his Office no better than Register or Secretary to the Chapter, *qui famulatur Ecclesiæ*, as was alledg'd by the Attorney. That which the Court laid the greatest stress upon,

on, was, the Chancellors having a Prebend for his Wages, and in quality of Prebendary they declar'd him to be seiz'd in Fee as is aforesaid and so to be within the very Words of the Statute. But they did not declare how it came to be discover'd at last, that Prebendaries have such an Estate in their respective Possessions; nor would they suffer that matter to be enquir'd into; for when the Attorney General mov'd for a special Verdict, in order, I suppose, to a full and free discussion of the Point, they flatly refus'd him, saying they would not have it made a Doubt. *Hyde* indeed seem'd to offer at some Reason for this Refusal, by representing the great Inconvenience like to ensue, should they give way to Mr. Attorney's Motion: *Hereby, saith he, all the Cathedral Possessions will be shaken, intimating, as I take it, that should this matter once come to be nicely canvass'd, they who hold Lands, Tenements, &c. of Bishops, Deans, or Chapters, would all of them run the hazard of being dispossest of their Estates.* But this was what neither he nor any other Lawyer could believe, if meant of such Estates as are held on such Terms, and with such Limitations as the Enabling Act requires; the Possession whereof is no less secure to the Tenants than of those that are held by the best and clearest Titles; if that were his meaning, it could be design'd only to amuse a Jury. If his meaning was, that should this matter come to be freely argued, it might occasion the discovery of many Cathedral Possessions,

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fions, as he call'd them, that were no more warranted by the said Statute, nor held by any better Title than that which was then in Question; the Thing might be very true: but it would be a very unfair way of arguing to infer from thence that the Plaintiff in this Case ought to be deny'd a further Hearing. It would in effect be much the same as to say, that should this Man be suffered to make good his Pretensions, many others, who are in the same or a like Case will be for putting in their Claims to the great trouble of the Court and of all those who had no better Right to what they possess than the Defendant. such a Procedure can never be approv'd of in *England*, where Justice is freely administer'd to all Persons alike without Prejudice and without Partiality; for it would be to give our Judges a Liberty like that which a certain Pope took to himself, when he resolved to determine a Cause of great Moment *per viam expedientiæ*. if it should not be for his purpose to do it *per viam Justitiæ*: In fine, if Judge *Hyde* and his Brethren really believed that any Cathedral Possessions would be shaken upon a further Discussion of the Point in question, they could not but think so of that which was in dispute before them; which if they did, they must themselves be in doubt, at least, and not so well assur'd as they would have others to be, that this Case comes within the Words of the Statute.

But let that be as it will, their Authority can never be thought so great nor their Judgment so
decisive,

decisive, but it may still be worth the While to consider, what might have been offer'd on the other side, had Mr. Attorneys Motion been admitted.

They whom the Laws have entrusted with the free Administration of the Church Revenues, are, as was before observ'd, either single Persons, or Bodys Politic: So that the Question before us is in effect, whether Prebendaries are to be rankt among those of the former Sort, or to be consider'd only as Members of their respective Corporations: For, if the first be admitted, there can be no doubt of their being seiz'd in Fee in right of their Churches, or as *Lyndwood* expresses it, *nomine proprio et ipsius Ecclesiæ*; if the latter be granted, it is, as I conceive, a clear Case on the other side, that not the Prebendary, but the Chapter to which he is subject, or whereof he is a Member, is seiz'd as aforesaid.

Now among those single Persons, whom the Laws Ecclesiastical or Temporal have entrusted with the said Administration, we no where find Prebendaries mention'd either before or since the Enabling Act. And there can be no Reason assign'd why they should be omitted on certain Occasions, in case they were allowed to be of that Number. They are no where named in our Provincial Constitutions, where these prescribe the Rules to be observ'd by such Persons in their Administration: Among the Decrees made in the Council of *Oxford* under Archbishop *Langton*, one is, *Ut nullus Abbas nec Prior; nullus om-*
D nino

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*nino Archidiaconus vel Decanus, nec alii habentes Personatum seu Dignitatem; sed nec Clericus inferior possessiones seu redditus dignitatis seu Ecclesiæ sibi commissæ—vendere, impignorare, infeudare de novo, aut quolibet modo alienare præsumat, nisi forma Canonis observata: At the End is added, idem Prælati majores observent. Here they are all reckoned up who could in any wise dispose of the Church Revenues by their own single Authority; but Prebendaries have no place among them, if any, it must be among the *Personatum seu Dignitatem habentes*, but they have neither the one nor the other, and are elsewhere distinguish'd from such as have either, as in *C. Esurientes de concess. Præb.* where we have *Dignitates, Personatus, Officia vel Præbendas*, the two former, as *Lyndwood* observes, upon the Place, imply perpetual Jurisdiction; but a Prebend is a simple Benefice, so call'd on account of its being without Jurisdiction, as well as without Cure. But tho' a Prebendary, as such, be no Dignitary, he is always rankt by the Canonists as next in order to those that are, and before Rectors and Vicars, who are named by *Lyndwood* as included in those Words, *Sed nec Clericus inferior.**

In another Decree of the same Council are the following Words; *Statuimus ut Ecclesiæ certis Personis deputatæ nulli dentur ad firmam nisi justa causa subfuerit, et a suo Episcopo approbata &c.* which I take notice of in this Place only on account of *Lyndwood's* Note upon *Certis Personis*,
which

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which he thus explains, *ut sunt Rectores et Vicarii qui certam administrationem in Ecclesiis habent, non in communi sed nomine proprio et ipsius Ecclesiæ: Incertas vero personas intelligere potes, quando administratio bonorum Ecclesiæ concernit Corpus aliquod vel Communitatem, ut puta Capitulum, Conventum vel Collegium.*

Here are all but Dignitaries, who in *Lyndwoods* time were seiz'd of in Fee of what they held in right of their respective Churches, both single Persons and Bodys Corporate; had Prebendaries been number'd among the former, they would have been particularly specify'd, and that in the first place by so accurate a Lawyer as *Lyndwood* was. Thus stood the Case before the Enabling Act.

Nor did that Act make any Alteration in this respect; for tho' it greatly enlarg'd the Power of those whom it found seiz'd of the Fee, yet did it not vest the same in any who had it not before.

After the Enabling Act comes the 13 *Eliz. c. 10.* which as to this matter may serve as an authentic Comment upon it, according to the Rule receiv'd among the Lawyers, which is that Statutes concerning Leases made by Ecclesiastics give Light to each other, and ought therefore to be construed together; This speaks of Leases made by the Master and Fellows of a College, by the Dean and Chapter of a Cathedral, or Collegiate Church, the Guardian of an Hospital, a Parson or a Vicar, but says not a Word of any that are seizable by Prebendaries, Chancellors, Precentors, &c. whence I suppose, it may fairly be presum'd

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that the Law knew of none they could make by their own Authority, or by any other than that of the Deans and Chapters. Had the Case been otherwise, there was the same Reason for mentioning them in particular as any of the rest.

In effect, I can find nothing in the Statutes or in the Ecclesiastical Constitutions of this Realm, that makes any difference in this respect between the Members of Cathedral Churches, and those of other Collegiate Bodies. Anciently they lived together in Communities as the Religious did, and as Fellows of Colleges do upon one common Stock, and at one and the same Table. The regular Canons, that were possess'd of Cathedral Churches, continu'd so to live till the time of their Dissolution, as did their Successors upon new Foundations at *Canterbury, Winchester, Worcester, Ely, &c.* long after the Enabling Act; so that there can be no Doubt as to these, but the whole Corporations, and not the Particular *Canons* or *Prebendaries* are seiz'd in the Right of their Churches. The secular Canons, its true, had for some Centuries of Years before divided among themselves the greatest Part of their Possessions, allotting to every Man his distinct share to be manag'd by himself as he should be directed by the Chapter; by which means each Prebendary became his own Receiver, who before had his Allowance out of the common Treasury, into which the Rents or the Annual Produce of the Lands had been paid. Yet could he not then be said to possess what was thus allotted him, *proprio nomine, et ipsius Ecclesiæ*, for the Chapters did not
divest

divest themselves of the Fee, or part with the Right they had to dispose of those separate shares or Prebends as should be most for the Churches Benefit. They encreas'd or lessen'd the Number, as the Revenues were improv'd or decay'd; they united or otherwise augmented such as came short of a Competency, and divided those that exceeded; they took them into their own Hands upon every Vacancy, and commonly applied a Years Income to public Uses. Nor would they suffer the Possessors to Lease them out without their License, or upon any other Terms than were agreed upon by general Consent. All which particulars might be prov'd at large from the *Jus commune*, the local Statutes, and Usages of Churches, and the peculiar Forms observ'd in the Confirmation of Leases made by Prebendaries. To which might be added the Authorities of many Modern Canonists, who represent the Case in this respect as being still much the same with that of Fellows of a College, who are entitled to the assignments made to each Man in particular in right of their Fellowships, and not in right of the College, for that can be affirmed only of the whole Society, *et quæ Universitatis sunt non sunt singulorum.*

But I need not insist on these Things, having that before me which if there is any thing certain in our Law, or if the most Authentic Expositors of it may be depended on in any Case, will put this matter out of Dispute: It is the Writ *De fine assensu Capituli*; one of those Original Writs which Sir *Edward Coke*, in his Prefaces to the third and eighth Books of his Reports

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and elsewhere, tells us from *Brañton, Fleta, Fitzherbert and others* “ are the very Body and “ Text of our Common Law, the Rules, the “ Principles and Foundations on which it depends. If you please to cast your Eye on this, as it lies first for a Bishop, and then for a Prebendary each of them claiming a Messuage that had been illegally demised by one of his Predecessors, you’ll see that, contrary to what is commonly asserted, the Case of both is not the same; that a Prebendary is not seiz’d, as Bishops are, in the Right of their Churches, which brings them within the Words of the Statute, but in that of his Prebend; for which Cause he cannot make a legal Demise, that shall be of force against his successor, untill he hath not only the Chapters Assent which was all that the common Law requir’d of a Bishop, but the Consent and Licence of the Bishop, Dean and Chapter.

Rex Vicecomiti Salutem, Præcipe A quod reddat B. Episcopo de S. unum, Messuagium cum pertinentiis in N. quod clamat esse Jus Ecclesiæ ipsius Episcopi S. Mariæ de S. in quod idem A. non habet ingressum nisi per H. cui R. quondam Episcopus de S. prædecessor prædicti nunc Episcopi, illud dimisit sine assensu et voluntate Capituli sui ut dicit &c.

Rex Vic. &c. Præcipe A. quod reddat B. Præbendario præbendæ de D. in Ecclesia beati Petri de Ebor unum Messuagium in A. quod clamat esse Jus Præbendæ Suæ, et in quod &c. nisi per dimissionem quod R. de B. nuper fecit Præbendarius præ-

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præbendæ prædictæ, Prædecessor Præbendarii prædictæ sine Licentia et voluntate Archiep. Ebor. Decani et Capituli Ecclesiæ Prædictæ inde fecit W. de R. ut dicit &c.

As their Numbers have been encreas'd, who are enabled to dispose of the Churches Patrimony by their own Authority; so hath their Power been enlarg'd far beyond the apparent Intent of those Statutes, which in any wise relate to this matter. For which purpose the Limitations contain'd in the Enabling Act, and enforc'd by those call'd the Restraining, have been overlook'd or eluded and render'd ineffectual. To make this appear, I shall lay before you those Limitations in the Words of the Act itself, to the End that by comparing them with the present Practice, you may see how little they are regarded as Leases are now made.

“ Provided always that this Act or any thing therein contain'd, shall not extend

1, “ To any Leases to be made of any Manors, Lands, Tenements, or Hereditaments being in the Hands of any Fermor or Fermors, by vertue of any old Lease, unless the same old Lease be expir'd, surrender'd or ended within one Year next after the making of the said new Lease.

2, “ Nor to any Lease of any Manors, Lands, &c. which have not most commonly been letten to Ferm, or *occupied by the Fermors* thereof by the space of twenty Years next before such Lease thereof made.

D 4

3, “ Nor

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3, “ Nor to any Lease to be made above the
“ Number of one and twenty Years or three
“ Lives *at the most*.

4, Lastly it is provided “ That upon every
“ such Lease there be reserv'd yearly, during the
“ same Lease, due and payable to the *Lessors*
“ *and their Successors* so much yearly Ferm or
“ Rent, *or more* as hath been most accustomably
“ yielden or paid for the Manors, Lands, &c.
“ so to be letten within twenty years next before
“ such Lease thereof made.

As the 32 *H. VIII.* is suppos'd to be the Pattern by which all subsequent Statutes relating to the same Matter were made, it is agreed among the Learned in the Law, that these Limitations must be observ'd in Leases of Lands belonging to Churches, Colleges and Hospitals, with this Variation only in regard to the first of them, that a new Lease of such Lands may be now made at any time within three Years before the old is to expire or be surrender'd; but if it be made before that time, the same Statute, which makes this Allowance of three Years, *viz.* 18 *Eliz. c. 11.* declares the new Lease to be void, frustrate and of none effect, any Law, Usage or Custom to the contrary notwithstanding.

But I believe it may be safely affirm'd, that there is not one Church or College Lease in 40, perhaps in 100 of any considerable Value now in Being, which was not made above three Years or twice that Number before that which was then

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then in force was to expire or to be surrender'd, or that would have been surrender'd otherwise than in order to a Renewal, whereby to defeat the manifest Intent of the Law, it having long since been the Practice for Tenants at the end of seven Years, or the fall of single Life to obtain new Leases, when those then in their Hands would otherwise have continued in force fourteen Years or two Lives longer, and this as it were in defiance of the said 18 *Eliz.* c. 11, which seems to have been made on purpose to remedy so great an Abuse; for therein after a Recital of the 13. c. 10. of the same Reign, which annuls Church and College Leases granted for more than twenty-one Years or three Lives, we have the following Words: *Sithence the making of which Estatute, divers Persons having Spiritual or Ecclesiastical Livings, have from time to time made Leases for the Term of twenty-one Years or three Lives long before the Expiration of former Years, contrary to the Intent of the said Estatute: Be it therefore enacted that all Leases hereafter to be made by any of the said Persons or others of any Ecclesiastical or Collegiate Lands, Tenements or Hereditaments whereof any former Lease is in being, not to be expired, surrender'd or ended within three Years after the making of any such new Lease, shall be void, frustrate, &c.*

And be it likewise enacted, that all and every Bond and Covenant whatsoever hereafter to be made, for Renewing or making of any Lease contrary to the true Intent of this Act, or of the said
Act

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Act made in the 13th Year shall be utterly void, any Law, Statute, Ordinance, or other thing whatsoever to the contrary in any wise notwithstanding.

Here we have the present Method of renewing Church and College Leases describ'd and condemn'd in Terms so direct and plain that one would think they could hardly be mistaken. However the common Opinion is, if we may judge of that from the common Practice, that this Statute is to be understood only of concurrent Leases, or such as are made to new Tenants, and not of such as are made to those who have the old in their hands. But the Law we see makes no such distinction, it annuls all such as are made before the time limited, to whomsoever they shall be made, *et ubi Lex non distinguit, neque nos distinguere debemus*. If there be any difference in this Case between an old Tenant and a new, it is the former whom the Legislators had their Eye upon in the first Place; for 'tis he only who hath the old Lease that can be properly said to *Renew*. Their *true Intent* who made this Statute and that of the 13th *Eliz.* as it is set forth in the Preamble, to the 3d. Section of the 13th. was to prevent the Mischiefs which *long* and *unreasonable* Leases are apt to occasion, which they found to be the *chiefest Causes of Dilapidations and Decay of Spiritual Livings and Hospitalities, and the utter impoverishment of succeeding Incumbents*. And what Leases could they think long, if those are not such, which by being renew'd from time, are continued to the same Lessees, and those who claim
under

under them, for several Ages, and that too for the same nominal Rent? Nominal I say, for in reality it is not the same, perhaps not a Fifth of what it was when the Lease was first granted; and could they account of any Leases as unreasonable if these be not of that Sort?

The only way that I can hear of, hitherto found out to frustrate the true Intent of these Statutes, is to pretend a surrender of the Lease in Being, every time it is to be renew'd or a new one made. In effect, as often as a Tenant comes to renew, he brings his Lease with him, in order to have it transcrib'd in the very same Words, and to have a new Date put to the Transcript, which is to be given him in Exchange for what he brings: This is call'd a Surrender, and many are persuaded that the new Grant at any time made thereupon is no less legal, than if it bore Date at the End of twenty-one Years, or after the Decease of all and every of the Persons named in the old Lease. Their Opinion seems to be favour'd by these Words in the Statutes; expired *surrender'd* or ended; Nor will it be deny'd that upon a real Surrender, such as the Statute can consistently with itself be suppos'd to intend, the Lessor may lawfully make a new Demise of the same Estate, which had been leas'd out but a few Years or not many Months or Days before. The Tenant may by some unforeseen Accident come to fail, or be otherwise disabled to manage the Farm; He may Dye and his Executors be unfit for such a Business: Surrenders on these and the like Occasions were doubtless very frequent

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frequent whilst the yearly Rent bore any Proportion to what an Estate was worth: It was therefore a necessary Provision that the Lessor in any such Case, should be at liberty to accept of the Surrender, and to make a new Demise to some other Tenant. But then, as Sir *Edward Coke* observes, the Surrender by 32 *Henry VIII.* (and for the same reason that by 18 *Eliz.*) *ought to be absolute and not conditional or illusory, such as may be avoided the next Day. 5. Rep. 2..* Now an absolute Surrender is such, and no other, as divests the Lessee of all the Right or Interest he had in the Lands, Tenements, &c. lately held by him, and by which he resigns up the same to the Lessor, leaving him free to keep them in his own hands, or to dispose of them to what other Tenant and upon what Conditions he shall judge convenient.

But nothing of all this is done in the Case before us; For a Church or College Tenant when he comes to *Renew*, as they call it, at the end of seven Years, or upon the fall of a Life, can have nothing less in his Thoughts than to resign up the Right he hath in the Premises, for the remaining Years or Lives; on the contrary it is his only Business to get the same continu'd for that and a longer Term; he makes it the Condition *sine qua non* of his fictitious Surrender, that his said Right shall be secur'd to him and to his Heirs with the Addition of seven Years, or another Life; in Effect, he Covenants with his Landlords, for
 “ a Lease of one and twenty Years or three Lives
 “ long before the Expiration of former Years,
 contrary

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“ contrary to the true meaning and Intent of
“ the said Statute”, (13 *Eliz.*) and contrary to
the very Words of the 18 *Eliz.* which expressly
declares such new Leases to be void, frustrate
and of none effect, and enacts “ that all and every
“ Bond and Covenant made for renewing, or
“ making any such Lease, shall be utterly void
“ any Law, Statute, Ordinance or other thing
“ to the contrary notwithstanding.”

The next Limitation or Proviso excepts out of
the Enabling Act, Leases of Lands and Tene-
ments which have not been most commonly let-
ten to Ferm, or (as these are explain'd by the
Words immediately following,) occupied by the
Fermors thereof, for the space of twenty Years
next before such Leases were made. Had this Li-
mitation been duly observ'd, the greatest Part of
those Manors and Lands which are at this Day
held of the Church, and for which so poor a
Pittance is yearly paid by way of Quit-rent, as
'tis now commonly call'd, might in all likelihood
have been in the Hands of the right Owners, and
managed by their Servants or Tenants at Will to
the best Advantage. For such of those Possessi-
ons as were in the Hands of their Predecessors at
the making of this Act or for the greatest Part of
the twenty preceding Years, which, as I shall
shew, 'tis probable that most of them were, and
such as have at any time afterwards been out of
Lease for eleven Years, as 'tis not unlikely but
many were whilst the yearly Rent bore a just pro-
portion to the real Value, such I say could ne-
ver

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ver from that time be demised by Lease or Grant that would bind the Successors of those who made it.

That most of the Manors and Lands which still belong to the Church were in the Hands, and at the free disposal of Churchmen at the time now mentioned appears very probable from what has been said above, Namely, that in former Ages it was usual for the greatest Men in the Nation to keep the Demean Lands of their respective Manors, were they ever so many, in their own Occupation and Manurance, that is Stockt with their own Herds and Flocks, and cultivated by their Servants; for such in effect, were all their Tenants; These indeed were of different Ranks, but every one from the highest to the lowest was bound by his Tenure to some sort of service, even in the Business of Husbandry. I find those entered upon Court Rolls as Freeholders *libere Tenentes* and even such as held by Knights Service, bound to send in their Men and Teams at the proper Seasons to the Lords Assistance in the Tillage of his Grounds, and carrying on his Harvest Work; whereas the Customary Tenants who held by base Tenure, and are now called *Copyholders*, were employed in the Service all the Year about by the Lords Reeve, or Bailiff (in Latin *Præpositus*) and for their Wages had a large Portion of the Demeans parcell'd out among them according to the Work which every Man was to perform.

Anti-

of Church and College Leases. 63

Antiquaries tell us that the *Terra Regis* or *Kingsland* wherever it is mentioned in *Doomsday Book*, was thus held in the King's Hands and manag'd for him by a *Præpositus* in every Town, and that the King's Rents were paid in Victual, not in Money till after the Reign of *Henry Ist.* It was part of the Instructions given to the Judges itinerant in the 5th Year of *Richard Ist.*, that they should cause the King's Ward-lands and Escheats to be well Stockt, and make strict Enquiry, "How many Oxen and Horses were
" sufficient for the Tillage of each Plowland,
" and what Stock every Manor would maintain. Dr. Brady, who copies this from *Hoveden*, observes, " that in those times and *two or three*
" *hundred Years afterwards* the King, but especially the Bishops and Abbots, the Temporal
" Nobility and Knights kept much and many of
" their Manors and Lands in their own Hands,
" managing them by a *Præpositus* and Servants
" and sometimes let them to farm stock't".

Agreeable to what that learned Writer affirms concerning the temporal Nobility, are the following Articles in the last Will of *Ralph de Neville* the 2d. Earl of *Westmoreland* made in 1424, which we have in *Maddox's History of the Exchequer*, wherein that Nobleman after having bequeath'd to his Lady many large Vessels of Plate, with other magnificent Furniture fit for a Princely Palace, adds *Item do et lego prædictæ Johannæ uxori meæ centum vaccas, 24 Jumenta et mille oves. Item volo quod Radulphus filius meus habeat*
Sibi

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Sibi et hæredibus suis Masculis Baroniam de Bewel et Stiford in Comitatu Northumbr. et unum gregem ovium, 24 vaccas, unum taurum, &c. That this Usage was continued by Churchmen till long afterwards, may be gather'd from what *Harpsfield* writes upon Occasion of a great Mortality of Men and Cattel, when Archbishop *Islip* came to the See of *Canterbury*, which was so great that the Lands in many Places lay wast, and uncultivated, insomuch, that the Owners were forced not only to abate of their usual Rent, but to let out their Farms ready Stockt and furnished, *omni rustica facultate instructas*; to which that Writer adds, *Quod etsi a laicis Possessoribus, ad rem attentioribus, observari fere desitum est, in prædiis tamen Cænobiorum, Episcoporum et Collegiorum mos ille frequens, ad nostra usque tempora, maximo colonorum emolumento perduravit.* *Harpsfield* wrote in the Reign of Queen *Elizabeth*, so that we may well reckon the 32d. of K. *Henry VIII.* to be within his Time. It was, I suppose, to repair the Loss occasioned by the said Mortality, and to fill up the usual Number, that Archbishop *Islip* (as *Goodwin* tells in his Life) gave a thousand Sheep to that See.

William Wickwane, when advanced to the Archbishoprick of *York*, found the same to be in a much worse Condition: It had at several times, and upon different Occasions been seiz'd into the Kings Hands, whose Officers had made so great a Devastation of the Lands belonging thereto, as to leave upon them neither Stock nor Imple-

Implements of Husbandry. In the Deed, I am going to mention, He complains that some of his Predecessors, as well as himself, came to that See, *Nudi post Fiscum dum Sola gleba pro cultura necessariis destituta relinquitur.* To repair this Damage, and prevent the like for the time to come, he gave for the Use of his Successors 582 Oxen, and 54 Horses with Carts and Plows in Proportion; as likewise 1000 Sheep to be kept for Stores on two of the Manors; and by an Ordinance made with the Consent of his Dean and Chapter, and confirm'd by a Royal Charter. 10 *Edw. I.* Provided that this Stock should be always kept entire, whether the See were full or void, by obliging every succeeding Archbishop, and the Kings Officers, who upon any Vacancy should seize upon the Temporalities, to leave the same Number of Oxen, Horses and Sheep, as they should find upon the Grounds, *Prynnes Hist. of K. J. H. 3. c. Ed. 1. pag. 310.*

Here no doubt a Person of your Curiosity will be willing to know what Right our Princes cou'd have to the Temporalities, *i. e.* to the Lands, Goods and Chattels belonging to Bishopricks and other Dignities, which from the Time of King *Hen. II.* it became customary for them to seize upon, and convert to their own Use during the Vacancy upon the Death of any Prelate. I shall therefore digress so far as to give some short account of that matter.

This Right, tho' utterly unknown to our *Saxon Kings*, and to the Conqueror himself, who
E was

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was like enough to make the most of any Pretensions he could have upon the Churches Patrimony, is, as we are told by the Lawyers, inherent in the Crown, because the Kings of this Realm are Patrons of all the Bishopricks in *England*; and that, as those Gentlemen tell us likewise, because their Royal Progenitors founded and endowed all the Episcopal Sees. But this last Assertion does not appear to be so well grounded as the other; and were it ever so true, I do not see how it could justify the taking back any part of what had long before been dedicated to Almighty God, and by such Dedication became applicable to none but pious Uses. Nor are plausible Arguments wanting for their Opinion who think that this Right of Patronage, understood in the Sense which some Lawyers put upon it, hath been acquired to the Kings of *England*, as it was to other Princes in their respective Dominions, by Grants from the Pope, *Concessione Pontificis*, as a foreign writer Speaks, who affirms that *Hoc modo plerumque Principes Seculares videntur consecuti Jus Patronatus in Ecclesiis Cathedralibus et Dignitatibus: Non enim ipsi aut eorum Majores, omnes illas Ecclesias vel Dignitates fundarunt aut dotarunt: Sed pleræque fundatæ et dotatæ sunt vel ex bonis Ecclesiasticis, ut ex decimis et fructibus bonorum jam ante Ecclesiæ donatorum, vel ex Symbolis et eleemosynis fidelium, vel ex opulentorum hominum Patrimoniis qui se suaque omnia Ecclesiæ vel Monasterio consecrabant, Lessius p. 422.* And to say the Truth, there

there is as much Evidence as the Case will admit of, that the Cathedral Churches in *England* were most if not all of them, built and rebuilt by the Bishops of each Diocese, and endowed too as those of other Countreys were, and not by the pure liberality of Princes.

It cannot indeed be deny'd that large Possessions were settled upon Churches and Monasteries by the *Saxon* Kings; but the Accounts that are extant of such Settlements, give us to understand that they were made upon valuable Considerations, for a just Price, or in Exchange for other Lands which had been bought by the Bishops, whilst they had the Disposal of the common Stock of their respective Churches, or were devoted by particular Persons to pious Uses. Mr. *Wanly* in his Catalogue of *Saxon* Manuscripts tells us where the very Deeds are still to be found, by which the Kings of *Kent*, *Mercia* and the *West Saxons* made over large Portions of Land, afterwards called Manors, for such Uses to the Bishops of *Canterbury*, *Rochester*, *Worcester* and *Kirton* (now *Exeter*;) for which the Value receiv'd is specify'd in each Deed. It deserves Notice, that in an antient Record publish'd by Mr. *Somners* in his *Antiquities of Canterbury*, p. 210. entitled *Donationes Maneriorum Ecclesiæ Cantuaren. et nomina Donatorum*, we find several Manors enter'd as given by the *Saxon* Kings with the same Names, Dates and Descriptions which are in divers Instruments to be found in *Wanly's* Catalogue, which Witness their having been bought

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and sold as is aforesaid. And this makes it probable that if more Instruments of a like Antiquity were now in Being, we should find more such Purchases recorded among the Royal Donations. There are indeed many Reasons to believe, that the Royal Bounty hath exerted itself in regard to the Archiepiscopal See of *Canterbury*, much more than to other Bishopricks; but it may well be a Question, whether its present Revenues come near to an Equality with those which were bought with the Churches Treasure by the Archbishops before and since the Conquest; or whether King *Henry VIII.* and two of his Successors did not take a great deal more from that See than all their Predecessors had given. For the rest I could name one See which is still reckon'd among the richest, of whose Foundation and Endowments a tolerable Account may be given at this Day, from which it will appear, that if other Sees be in the same, or a like Case with this, they are so far from being enriched by Royal Benefactions, that for one Manor given by the Crown. it hath taken from them Ten.

In the *Saxon* Times vacant Monasteries were committed to the Diocesan's Custody, and Bishopricks to the Metropolitans, whose Duty it was to preserve all that belong'd thereto entire for the Successor, or apply such things as could not be so preserv'd to their proper Uses in Acts of Piety and Hospitality, by which latter Term was chiefly meant Charity to the Poor. Those Princes, far from claiming any Right to them, condemn-
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ned the taking so much as an *Heriot* upon the Death of any Prelate, as bordering upon the sin of *Ananias* and *Sapphira*. The Churches Patrimony was then accounted no less free from such Exactions than that of the Crown, and so in effect it was adjudg'd and recorded to be at the famous Trial on *Pinnendine Heath*, where several principal *Normans* presided as Judges, between *Lanfranc* Archbishop of *Canterbury* and *Odo* Earl of *Kent*, Half Brother to the Conqueror. That Prince, hard as he was upon Churchmen in other respects, never pretended to make any other Advantage of vacant Benefices, than to bestow them on his Countrymen; as for the mean Profits, he is reported to have taken particular care that they should be reserv'd for the Successors without Diminution. He compell'd, its true, the Bishops and richer Abbots to enfeof part of their Possessions to be held by a Military Tenure, whereby they, like the Barons, became oblig'd to send a certain Number of Men into the King's Service, when he should be engag'd in War; from whence, as it seems, his Successors took a Handle to put the Bishops and greater Abbots upon the same foot with their Barons, whose Estates were so many Military Fees, which escheated to the Crown so often as any of them dy'd without Heirs; or, if the Heirs were under Age, were kept in the King's Hands till they became capable of serving in the War. But this was not till long afterwards; for the Seizures made by *William Rufus* of vacant Bishopricks

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and Monasteries, were looked upon as so many Acts of Power, for which there was no Pretence of Law or Custom. It was part of the Oath which *Henry I.* took at his Coronation, and of the Charter which he caus'd to be publish'd all over the Kingdom, and to be preserv'd as a Monument in the Abbies of every County. *Sanctam Dei Ecclesiam liberam facio—nec, mortuo Archiepiscopo, Episcopo vel Abbate, aliquid accipiam de Dominio Ecclesiæ nec de Hominibus ejus donec Successor in eam ingrediatur.* The first Article of King *Stephen's* Coronation Oath was, *Quod, defunctis Episcopis nunquam retineret Ecclesiam in manu sua;* and by his Charter he granted that *Dum sedes propriis fuerint Pastoribus vacuæ, et ipsæ et omnes earum possessiones in manu et custodia Clericorum, vel proborum hominum ejusdem Ecclesiæ committantur, donec Pastor canonice Substituatur.* King *Henry II.* oblig'd himself by a like solemn Promise to preserve the Rights and Liberties of the Church in as ample a manner as his Grandfather *Henry I.* had done. But this notwithstanding we find the two following Articles in the Assise or Statutes of *Clarendon* insisted on by that King in the tenth Year of his Reign as antient Customs of the Realm. 1, That Archbishops and Bishops hold their Possessions of the King as Barons, *Sicut Baroniam.* 2, That Bishopricks and Abbys, when void, ought to be in the King's Hands, who shall receive the Rents and Issues of the same, like those of his own Demains.

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From this time forward the Temporalities of vacant Churches were committed to the Custody of our Kings, and so became part of the Royal Revenues: For upon the Death of any Prelate, the King's Officers under the Title of Escheators and Guardians, immediately seiz'd upon the Houses, Lands, Grain, Cattle and Implements of Husbandry which the deceas'd dy'd possess'd of in Right of his Church. The Profits whereof were apply'd to Uses quite different from those to which they had been dedicated. We find the Guardian of the Archbishopric of *Canterbury* under King *John*, bringing to Account Money laid

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laid out by him *pro 67 Tuallis et 7 Peplis ad opus Reginae; et pro uno Purpuncto (Doublet) ad opus Regis*, Madox Hist Excheq. p. 254. King Hen. III. being in France with his Army, sent over Orders that *Omnia Blada Archiepiscopatus Cantuar, et aliorum Maneriorum et Episcopatum tunc vacantium, cum Baconibus et Sale, et aliis byematuris necessariis pannis quoque ad vestes faciendas adjectis, sibi sine moræ dispendio usque Burdigalam transmitterentur. Unde absque denariorum multitudine, missa sunt decem millia Summarum frumenti, et quinque milla avenæ, cum totidem Baconibus*. Matt Paris ad an. 1242.

When a vacant See came to be fill'd, it was usual for the Successor to compound with the King for the Grain then growing, sometimes for the Cattle and other Stock found upon the Ground. It will make much for the present Purpose, to observe what Sums of Money were paid into the Exchequer on such Occasions.

John Peckham being advanc'd to the See of Canterbury in March 1278, the Temporalities were restor'd to his Church on the 30th of May following, and by a Grant dated the 24th of July, *Rex concessit eidem Archiepiscopo Blada Archiepiscopatus prædicti de Autumno instanti, quæ ad Regem pertinent, ratione Archiepiscopatus illius nuper vacantis, et in manu Regis existentis*; for which he was to give at four Payments 2000 Marks, *i. e.* to the Value of 20,000 *l.* of our present Money, the Coin then having three times as much Silver in it as it hath at present, and

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and Silver, Quantity for Quantity, worth at least, 5 times so much as it is now. Roll, 7. E. 1. M. 11.

Ralph de Walpole, being translated from *Norwich* to *Ely* the 15th of July, 1299. *John Salmon* his Successor at *Norwich*, paid K. *Edward* I. 1000. Marks, which according to the now mention'd Rate, was worth 10,000 *l.* of our present Money, *pro omnibus Bladis in terris Episcopatus Norwycensis tempore vacationis per translationem ven. Patris Rad. nuper, Episcopi ejusdem loci, ad Episcopatum Eliens, Seminatis*; and was likewise to satisfy his Predecessor *de Misis et Expensis per ipsum appositis in terris et tenementis illis post translationem prædictam.* Claus. 27 Ed. I. M. 7.

When *John de Exon* was made Bishop of *Winchester* in 1261, no less a Sum was found due to the King (*Hen. III.*) than 2229 *l.* 13 *s.* 1 *d.* *pro exemptione Bladi dicti Episcopatus et Instauri ejusdem* Pat. 47. H. 3. which at the aforesaid Rate would be now worth about 30,000 *l.* without reckoning the two hundred and odd Pounds, &c. which that Prince was graciously pleas'd to remit. This large Sum, its true, is reckoned for the Stock as well as for the Corn found upon the Grounds, which is somewhat suprising, considering how the Case then stood, which was thus: *Atbelmar* or *Adomar*, the King's half Brother, being elected Bishop of *Winchester*, and confirm'd by the Pope, but not consecrated, was forc'd by the Barons to quit the Kingdom, who notwithstanding that the Pope interceded for him, would
not

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not consent to his Return, or to his enjoying the Temporalities which were seiz'd in the King's Hands. The Monks, thereupon chose *Henry de Wengham* the King's Chancellor, but he refused to accept of the Bishoprick, as being litigious; but being afterwards chosen Bishop of *London*, and finding the Stock of that Bishoprick (which a little before had been for about three Years in the King's Hands) to be greatly wasted, he prevail'd on his Royal Master to replenish the same, by a very large supply from that of *Winchester*, as will appear from the Grant mention'd in the following Writ dated *August 4. Pat. 43 H. III. M. 4.*

Rex Nicolao de Handlou, *Custodi Episcopatus Wintoniensis salutem. Sciatis quod pro laudabili Servitio, quod dilectus Clericus noster Henricus de Wengham, London. Electus, diu nobis impendit, concessimus ei de Instauratio Episcopatus Wintoniensis quinque millia ovium, ducentas vaccas et decem tauros de dono nostro ad instaurandum inde Episcopatum Suum London. Quod quidem instaurum eidem London Electo versus quem cunque Episcopum vel Electum Winton, seu alium warrantizabimus, et ipsum inde indemnem conservabimus, Hoc tamen excepto, quod si contingat Adomarum fratrem nostrum possessionem Episcopatus Winton recuperare, et obtinere, nos necessario eidem fratri nostro instaurum prædictum restituere tunc volumus, quod idem Electus London de tanto instaurum vel de rationabili pretio ejusdem nobis respondeat et ideo vobis mandamus, quod eidem*
London

London *Electo*, vel ejus certo *Attornato prædicta* quinque millia ovium, ducentas vaccas et decem Tauros liberari faciatis. Et nos liberationem illam vobis in *Compoto vestro* allocari faciemus. In cujus &c. Teste Rege, apud Westmonasterium Quarto die Augusti. Per ipsum Regem et Consilium Suum.

It was little more than three Years after the Date of this Writ, viz. 18 Jan. 47. H. 3. That we find the See of *Winchester* brought in Debt to the King, *pro Exemptione Instauri*, notwithstanding his having alienated so great a Part of the same, which he was bound by Law as well as in Justice to make good to the succeeding Bishops; since vacant Sees were by *Magna Charta* put upon the same foot with other Ward-Lands, which the King was oblig'd to restore, when the Heirs came of Age, in as good a Condition and as well Stockt as he found them; as in effect, we find King *Edward I.* making an Allowance to *John de Pontiffara* next Successor but one to this *John de Exon* in the See of *Winchester* of 64 l. 9 s. 4 d. *pro defectu trium Boum et 824 agnorum*, notwithstanding that the said Deficiency had been partly occasioned per *Morinam tempore vacationis contingentem*. Claus. 12. E. 1. M. 5. in *Cedula*. Possibly K. *Hen. III.* might make the Abatement aforesaid of 229 l. 13 s. 9 d. in consideration of the 5000 Sheep, 200 Cows and 10 Bulls, which he had borrow'd from the See of *Winchester*. But it is not my present Business

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to account for this Procedure. What makes directly to the present Purpose, is, that they who had Lands in their own Manurance sufficient to produce such vast Quantities of Corn, and such numerous Flocks and Herds, could lease out but a very small part of their Possessions. In effect, I have seen a large MS. Survey of the Manors belonging to the See of *Ely*, taken in the Year 1277. 5 *Ed. I.* containing among other things, an Account of the *Demean* Lands, arable Pasture, &c. of each Manor, with the Stock that was then upon them, and remember but two, of about threescore, that were then let out to Farm. There is a Writ extant in *Prynne*, p. 215. of K. *Ed. I.* directed to the Guardians of the Archbishoprick of *Canterbury*, then vacant by the Resignation of *Robert Kilwarby*, upon his being made a Cardinal, ordering them to allow him so much of the Rent as came to his share *pro rata temporis Sui* of two Farms, which he had let to his *Reeves*; one of which call'd *Oxenbal*, within the Manor of *Aldington*, had been let for 50 *l.* a Year. Had more such *Demises* been then made, they could doubtless have been mention'd in the same Writ. And so large a Rent for a single Farm, as would now amount to 750 *l.* or more, was we may be sure, what we call a Rack-rent, and that for the Stock and Rustic Furniture, as well as for the Land: It seems, in effect, to have been a Composition made by the Lord with his Bailiff, for the yearly Profits accruing from the Farm, and all its Appertinences, and much the same thing as if
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the Lord held it in his own Hands; so that if there were many such Bargains in force when the Enabling Act was made, as *Harpsfield* above quoted, gives us to understand there were, it cannot be said that Farms, thus let, were out in Lease at that Time, and such as were not in Lease before the 32 *Hen. VIII.* could never thereafter, by virtue of any thing contain'd in that Statute, be demis'd for any longer Term than the Life of each Lessor. I say by *virtue of any thing contain'd in that Statute.* I do not deny but other Methods were afterwards used for granting away Estates from the Church for an indefinite Number of Years which I do not pretend to account for, what I insist upon is, that this Statute of *Henry VIII.* never enabled any Bishop, Dean, or Archdeacon to make Leases, that could bind his Successor, of any Manors, Lands, &c. which were in the Hands or Manurance of himself or his Predecessors for the greater part of twenty Years before the 32 *Hen. VIII.* as tis more than probable most of those were, which now belong to our present Dignitaries. It was adjudged in Lord *Monjoy's* Case *Mich. 31 Eliz. B. R.* "That when these
" Words are in a Statute, *Yielding the true and*
" *ancient Rent of the Lands and Tenements so to*
" *them demised,* it is necessary that the thing in
" Question should be demised before the making
" of that Statute." *Moor* 198. There are in the Statute before us not only Words of the same Import, but likewise such as make more directly to the Point in Hand, viz. *Provided always that*
this

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this Act or any thing therein contain'd shall not extend to any Lease of any Manors, Lands, &c. which have not most commonly been letten to Ferm. or occupied by the Fermors thereof by the Space of twenty Years next before such Lease thereof made.

How far this second Limitation of the Statute hath been observ'd or overlook'd, I leave to their Enquiry whose particular and immediate Concern it is, who, if they'll please to consult their Registries and other Evidences still to be found in the Archives of their respective Sees and Churches, may, I believe, come to know, in some measure, which of those Manors, Lands, &c. that belong to them at this Day, were out in Lease at the time above mentioned, and which in the Hands of their Predecessors, either then, or at any time afterwards for the space of eleven Years in twenty. But without giving themselves that trouble, they may rest assured, that no Regard at all hath been had to the Law, as to this Point, in Cases like that of *Williams* Bishop of *Lincoln*, who in 1625 coming to live at *Bugden*, where the Bishops of that See usually reside, was forced to buy in the Leases of his own *Demeans*, which he found to be let out to the very Gates, as we are told in the Life of that Prelate. Part 2. pag. 29.

A third Limitation is, " That the said Statute
" of 32 *Hen. VIII.* shall not extend to any Lease
" made for more than twenty-one Years, or three
" Lives.

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By a Fourth it is provided, " That upon every Lease, made in pursuance of the said Statute, there be reserv'd so much yearly Ferm or Rent *or more*, as hath been most accustomably yielden or paid for the Premisses within twenty Years next before the making of such Lease."

Both these Provisions are confirm'd, and enforc'd by the Restraining Acts, Namely, the 1st. and the 13th *Eliz.* which declare, that all manner of Grants made by Ecclesiastics unless for the said term of Years and Lives, and with the said Reservation of Rent, shall be utterly void and of none effect, any Law, Custom or Usage to the contrary in any wise notwithstanding.

That little or no Regard hath been paid to the former of these Provisions, sufficiently appears from what hath been said already concerning the Continuation of Leases to an indefinite Number of Years and Lives.

Nor hath the latter been much better observ'd, since there are very few Church or College Leases now in Being wherein there is that Reservation of Rent, which the Statutes require. The accustomed Rent according to the 32 *Hen. VIII.* is that which hath been most usually paid within twenty Years next before any Lease is made. But tis the common Practice at this Day, to reserve no more than a 5th. or 10th. sometimes scarce a 15th. of what hath been actually and constantly paid, by the Fermors of the same Lands or Tenements for a number of Years far exceeding that which is specify'd in the Statutes. By
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the Fermors, I say, or those who occupied the Lands, for it is of them, and no others that the Enabling Act takes notice, as capable of taking or holding Leases; and it is what they pay by the Year, which every Body understands by the Rent of an Estate. But this Rent, you'll say, was paid by the Fermor to the intermediate Tenant, whom we now commonly call the Lessee. True; but the Law knows of no other Person to whom it ought to be paid, than the Lessor, and those who shall succeed him, the Words of the Act are, *That so much yearly Rent, or more, shall become due and Payable to the Lessors and their Successors, i. e.* to those who now are, and shall be hereafter vested in the Fee-Simple. If the Lessee, as he is call'd, shall intervert the main Profits of an Estate belonging to any Church, College or Hospital, which the Donor had devoted to Pious and Charitable Uses: there is not a Word, that I can find in the Statutes before us, capable of being wrested to favour so great an Abuse; or to give the least colour of an Excuse to those who shall in any wise consent thereto.

But should we suppose, that any thing contain'd in those Statutes might be construed to favour so unreasonable a Practice, such construction is so directly contrary to the declared Intent of the same that it can never be admitted in the Courts of Justice, whilst these shall act consistently with themselves. The Intent of the restraining Act at least, is, as appears from the express Words of the 13 *Elix.* to hinder those
who

who are possess'd of Estates belonging to any Church, College or Hospital, from making any such Grants of the same, as may tend to impoverish their Successors, and occasion Dilapidations or the Decay of Hospitality, or, in a Word to diminish the yearly Value of such Estates, That being the necessary Cause of those Evils: For which Purpose they, who are entrusted to interpret the Statutes, have construed these beneficially, as Sir. *Edward Coke* speaks, *i. e.* largely by extending the force of them far beyond the proper Import of the Words. But then on the other side they have, for the same Purpose, come as far short of what the Words plainly express, and, which is more, given Judgment in direct Contradiction to the same, as having nothing else to mind but how they might best prevent the Mischiefs, which those Statutes were design'd to remedy: For Instance; the Statutes declare that Leases not made for twenty-one Years, or three Lives, shall be utterly void, and of none effect to all Intents, Constructions and Purposes of Law; the which notwithstanding, Judgment hath been often given in favour of Leases that were otherwise made, some for a shorter, others for a longer Term, so far as they appeared to be not repugnant to the supposed Intent of the Statutes: For those of the former sort the Reason is plain, since the shorter the Leases are, the less apt are they to occasion those Mischiefs which the Statutes were made to prevent. And then for those granted for a longer Term,

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it hath in many Cases been adjudg'd, that they likewise shall hold good during the whole Time of the Persons by whom they were made and granted: If these are a Dean and Chapter, or the Master and Fellows of a College, the Lease shall be in full force to all intents and Purposes of Law, whilst the Dean or the Master Lives, and continues in Place, nor will the Death or Removal of those who concurred with him alter the Case, tho' it may happen that many Innocent Persons shall suffer for the Fault of one Man, who by Law can have no negative Voice. 33. H. VIII. c. 17. For which the learned in the Law give us this and no other Reason, that I can find, namely, *Because the Intent of the Statutes of the 1st, and 13th Eliz. was only to provide for the Successor, and not to relieve the very Persons themselves who make such Leases or Grants as are not warranted by the Statutes*" Hetly 24. How satisfactory this Reason may be in any respect, I will not undertake to shew; all that I pretend to prove by it, is That the aforesaid Gentlemen think themselves obliged to Judge according to what they take to be the Intent of those Statutes, and not according to the Letter, or any thing inferr'd from it, further than it agrees with that Intent.

Again there is nothing more plain than that the said Statutes, as well as that of 32 H VIII. allow of Leases for three Lives without Exception, or making any Difference whether a Lease be granted to one Man for three Lives, or to three

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three Men each for his own Life, it being all a Case to the Lessor and his Successors, provided they be all three named in the Instrument at the same Time; Yet when a Lease hath been made to one for his Life, the Remainder to another, the Remainder to a third; the Sages of the Law have declared the same to be void and of no effect, 1 Cro. 95. *Hetley* 22. For which Sir *Edward Coke* 2 *Inst.* 44. gives a Reason, which tis not likely that they, who made the Statutes, ever thought on, *viz. Because such Lease is dispunishable of Wast*, meaning, I suppose, that the Law cannot lay hold on the Tenant for any spoil that he shall make, or suffer to be made upon the Estate; for he adds, *But if a Lease is made to one for three Lives, the Occupant shall be punished for Wast, if any happens.* Now, tho' none but the Learned in the Law, can give a Reason why Justice should not be done in the one Case, as well as in the other, yet since the Common Law is so defective, that the Estate, which ought to be transmitted entire to Posterity, may in the former Case be expos'd to Wast without a Remedy, it must be own'd that those Gentlemen act consistently with themselves in laying this Restriction on the Statutes, in a Case wherein the Design of them might otherwise be defeated.

Other Cases there are wherein the force of these Statutes is extended beyond whatever the Words express or imply, and all in pursuance of the same Design; There is nothing contain'd in the Restraining Acts that should hinder those con-

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cern'd therein, to make Grants of Offices belonging to a Bishoprick or a Collegiate Body for more than one Life; or to create any new Office, or augment the Fee of an old; or to settle an Annuity upon one *pro Consilio impenso et impendendo* and yet such Grants have, upon many Trials been annull'd, as contrary to the Intent of these Statutes, tho' acknowledg'd at the same time to be not within the Letter. It would indeed be a very great Hardship upon the Successors, that they should be forc'd to employ Persons in their Service not chosen or approv'd of by themselves, such as have been put upon them without their Consent or knowledge; But tis a Hardship likewise, tho' not so great, if the Grants be made but for one Life; yet these shall bind the Successors, if the Offices and Fees be ancient. However the Things in Grant are no Part of the Possessions, nor do these let for a less yearly Rent upon that Account, and tis the Diminution of the Rents, which seems to be the only thing that the 1st. and 13 *Eliz.* provide against; notwithstanding which, the Courts of Justice have, upon many Occasions, made use of these Statutes in order to lay a Restraint upon such Grants; for tho' they make no alteration in the Rents, yet since they may bring an additional Charge upon a Bishoprick, or a College. they may in consequence be said to lessen the Revenues.

What I would observe upon these and the foregoing Instances, is, that tis not credible the present Method of letting Church and College Estates

states to Farm, should ever be approv'd of in any Court of Justice: For who can believe that they who have hitherto proceeded by no other Rule, than the apparent Intent of our Statutes, and in pursuance of that Intent, have in many Cases gone besides and against the express Words, in order to obviate any remote Danger of Wast or Diminution, which might happen to the said Estates, that they should justify a Practice so ruinous, that every one who reads the Statutes cannot but see that they are made on purpose to prevent it: That they who have often seem'd to go out of their way, to vacate Grants of five Marks, or twenty Nobles, tho' made in consideration of Services, that might well be thought Equivalent to such Fees, should allow of those Grants which are now commonly made of Manors, Lands, and Tenements to the yearly Value of five, ten, or twenty times more than the reserv'd Rent: What would this be but to strain at Gnats and swallow Camels?

In answer to all this it will probably be alledg'd,

1st. That according to the present Practice, so much yearly Rent is reserv'd upon every Lease, as hath been paid by any former Lessee, which is as much as the Statutes require, and it is a Question whether they will allow the Exaction of more.

2dly. That what is wanting to the yearly Value of the Lands, is made up by Fines from Time to Time, when Leases come to be renew'd.

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3dly. That the present Practice hath been legitimated by long Custom, and if the Continuance of it is like to prove a Hardship upon those who shall succeed to the Estates in Question, it is no more than the present Possessors suffered from those who went before them.

To the first of these Allegations we reply, That the same nominal Rent may still be reserv'd, which was paid 150 or 200 Years ago, which comes very far short of what the Statutes require. I say the same nominal Rent, or the same number of Pounds and Shillings as were paid when they were really worth to all Intents and Purposes five or six times so much as they are at present, so that in effect the Rent reserv'd now, is but a fifth or a sixth Part of what was paid then. They who make it a Question whether a greater Rent may be reserv'd, than had been formerly paid for the same Lands, may satisfy themselves by casting their Eye upon any of the Statutes before us, in which they will find those Words, so much yearly Rent *or more*; and tis surprising that any should imagine that the Nobility and Gentry assembled in Parliament, wou'd tie up the Hands of Ecclesiastic Lessors, from what many of their own Number were doing, when the Restraining Acts were made, I mean so many of them as were possess'd of Lands, which not long before had been taken from Episcopal Sees and Religious Houses, to which they could have no other Right than the Bishops and Abbots lately had. They, as the Value of Money

ney decreas'd, enhanc'd the yearly Rents in Proportion, as well of their Church Lands as of those which came to them by Inheritance, which their Descendants, and such as claim'd under them, have continued to do, insomuch that many of the same Estates do now yield more thousands by the Year, than they formerly did Hundreds.

The Statutes before us do not only allow, but require, that more than the accustomed Rent shall be reserv'd upon every Lease, in case the yearly Produce of the Land shall, one Year with another, prove to be worth *more*, than had been usually paid, by the *Fermors who occupied the same*, not at that Distance of Time which hath been now mention'd, but within twenty Years next preceding the Date of each Lease.

2. That the Fines paid at the Renewal of Leases, make up for what is wanting in the yearly Rents, are Words of Course, which we often hear from those who can hardly be supposed to consider what they say, since they tell us in effect that the same Sum paid but once in seven Years, or upon the Fall of a Life, is equal to so much coming in every Year, or that a Part, and a small one too, is as much as the Whole.

But, were this the Case, such Payments wou'd not satisfy our Statutes, any more than they would answer the Ends for which the Lands in Question were given; That, as Sir E. Coke observes 5 Rep. 2. can be done only *by a continual Revenue paid annually, and not by such as is in*

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Expectancy or in futuro: for Possibilities, as he adds, *will not maintain Hospitality, or prevent Dilapidations*. Fines that are not to come in till after a long Term of Years, or the Fall of Lives, nor then neither, till the Lessor shall accept the Conditions, which the Lessee thinks fit to offer, are so uncertain a Revenue to a Prelate of sixty or seventy Years Old, that it can scarce be call'd an Expectancy, or any thing else than a mere Possibility, a very improper Fund for supplying the Poor with daily Food, and keeping ancient Edifices in Repair.

3. The Plea of Custom loseth all the force, it might otherwise have, when it is set against either Law or Reason: In the present Case it is contrary to both; To Law, as there are Statutes of the Realm made on Purpose to abolish it, against which no Prescription of Time can prevail 1 Inst. 113. It is contrary to Reason on many Accounts, particularly as it is injurious to the Successors of those who use it, the Successors I say, who will have the very same Right to the Lands with which their Churches or Colleges are endow'd, as any of their Predecessors ever had; and consequently to the Issues and Profits of those Lands, be they more or less. The extended or improv'd Rent will be as much their Due, as the old Rent was theirs who at any time went before them, even supposing the one to exceed the other no less in Value than it does in Tale or Number of Pounds; whereas in Truth they are much the same in that respect, one Pound

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Pound as it made part of the old Rent, when that was settled, being really worth five or six of those that are now paid. Let us suppose that one who used formerly to have his Rent paid him in Gold, should now receive the same in Silver, the Equivalent might as properly be called the extended Rent, as that which does now pass for such in the Case before us, and this for a Reason which will hold in both Cases alike, *viz.* Because the Number of Pieces and Quantity of Money are more and greater, tho' the Worth be but the same. A very small Part of that which hath been thus extended, now goes for the old Rent of Church and College Estates, and is reserved upon Leases, for those who hereafter shall succeed to such Estates; all that exceeds it, which is commonly five Parts of six, oftener more than less, is made over to the Lessees and their Heirs, for an inconsiderable Sum, paid in hand to the present Possessors, tho' but Tenants for Life. I need not go about to prove that this is against all Reason, nor indeed can I shew it more plainly than the Thing speaks itself.

They who are for continuing this Custom, because they have suffered by it, and design no worse to their Successors, than hath been done to themselves by those who went before them, would do well to consider, what better Right they can have in this than in any other Case, when they have been wrong'd by one Man, to make Reprisals upon another who never did or could do them any Harm.

But

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But after all, the Custom illegal and unreasonable as it appears to be, hath long been kept up without Interruption or Disturbance, at least hath never, that I can find, been call'd in Question before any Court in *Westminster-Hall*; and, should it ever come to a Trial there, yet since the Goodness of a Cause does not always insure the Success, (if it did there would be little to do for the Lawyers,) no Man can tell what would be the Event. Causes, its true, that had some Affinity with this before us, have been determined in those Courts, but after such a Manner as makes it still more uncertain, what would be the Issue of this; of which I shall give some Instances.

Differences arising between the Clergy of *London* and their Parishioners, about the Payment of Tythes, the Matter was referr'd to the Archbishop of *Canterbury*, the Lord Chancellor, the three Chief Justices and others, whose Award was confirm'd by Act of Parliament, 37 *Henry VIII.* c. 12. by which it was decreed among other Things, That the Inhabitants of *London* should yearly, without Fraud or Covin, pay their Tythes after the following Rate.

Of every Ten Shillings Rent by the Year of Houses, Shops, Ware-Houses, Cellars and Stables Sixteen Pence Halfpenny, or Two Shillings Nine Pence the Pound; and that when any Lease was made of a House, Shop, &c. by Fraud or Covin, reserving less Rent than had been, or then was, accustomed; or without any Rent reserv'd, by reason of any Fine, or Income paid before hand,

hand, or by any other Fraud or Covin, the Tenant in such Case should Pay after the Rate aforesaid, according to the Rent which the House, Shop, &c. was last letten for, without Fraud or Covin before the making of such Lease.

If any Doubt should arise concerning this Matter, the Lord Mayor, with the Assistance of Council, was to determine the same, which should he fail to do within two Months after Complaint made, or if either of the Partys found themselves aggriev'd by his Sentence, they might, within three Months complain to the Lord Chancellor, who should put an End to the Dispute, according to the Intent and Purport of this Decree.

The Livings of the *London* Clergy were, when this Decree was made, reckon'd at about 40 *l.* a Year, some 10 *l.* more, others by so much less. This, as things went at that time, might be thought a competent Maintenance; but it ceas'd to be such, as it grew less in Value, which it soon afterwards began to do for the Reasons above mentioned; to which may be added that, as the City became more populous every Year than before, by reason of a greater Encrease of Trade there than in other Parts of the Kingdom, the Price of all things necessary for Life was raised there in a greater Proportion than elsewhere. The Rent of Houses, its true, arose in the same Proportion, and the Law had provided that the Clergy's Maintainance should be augmented accordingly; But ways were found out to hinder their

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their having any Relief from thence : It became a common Practice among the Citizens, (of the inferior sort I suppose,) in renewing their Leases, to agree with their Landlords, that whatsoever they were to pay more for the Hire of their Shops or Houses, than they had done formerly, should not be call'd Rent, but go by some other Name ; That which they commonly gave to this additional Payment was a *Fine*, using that Term, not as tis understood in the Case before us, for a certain Sum paid all at once for many Years to come ; for it seems, that neither Landlord nor Tenant could find his Account in such Fines ; but for a Sum payable at the end of every Year or Quarter, at the same time with that which still retain'd the name of Rent, and qualify'd as yearly and quarterly Fines. Some would have these advanc'd Payments to pass for *New Years Gifts*, others call'd them *Annuitys*, other more ingenious pretended that they were due to the Landlord, as Interest for Money, supposed to be laid out in improvements and Furniture of the House ; some, it seems, thought they might as honestly make two Leases of the same House, one for the Landlord wherein his full Rent was reserv'd to him, another to shew the Minister, when he was to receive his Tythes.

It does not appear, how the Lord Mayors behaved on these Occasions, and we are not, without Proof, to imagine, that Persons in that Honourable Station would give Countenance to so notorious a Cheat, If they did not put the afore-said

said Decree in Execution. it was, probably, on account of some Defect which the more learned in the Law pretended to find in it, or in the Statute made to confirm it. It is plain, that some further Regulation of this Matter was thought to be wanting, since a Bill for that purpose was brought into Parliament in the Beginning of K. *James I.* Reign, and promoted by two of the Members that serv'd for *London*; and, when it miscarried, I know not how, for the House, as tis said, seem'd to favour it, Sir *Hen. Billingsly*, one of those Gentlemen shew'd, that the Governing part of the City were in good earnest, for putting an End to those scandalous Practices, by undertaking for the Court of Aldermen, of which he was likewise a Member, that it should be brought in again at their Charge. But the Session drawing then to an End, and Parliaments not meeting so often in those Times, as they have done since, the *London* Clergy were left to seek for Justice elsewhere.

Mr. *Bell* Rector of *St. Michaels Queen-Hith*, believing, as it seems, that the Ecclesiastical Judge, who by common Right hath the sole Cognisance of such Cases, might still have a concurrent Jurisdiction, since there are no negative Words in the Statute to disable him, brought his Action in the Bishop of *London's* Court, for Tythes of a House, call'd the *Boreshead* in *Breadstreet*; the Case was thus: A Lease had lately been made of that House, reserving the accustomed Rent, as it was call'd, of five Pounds,
which

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which had, as it seems, been all along paid ever since the Decree was made; and at the same time it was agreed, that the Landlord should receive yearly a large Fine, or Income to be paid on the same Day, with his Rent as a Sum in Gross, *Which Reservation and Covenant*, as Mr. Place a Gentleman of the Temple, who wrote the *Complete Incumbent*, (and not Dr. Watson, Dean of Battel, as tis pretended in the Title Page) fairly owns, *Were made to defraud the Parson of the true Rent, of the said House, which he ought to have had, according to the true Intent of the said Decree, since so much Rent might have been reserv'd for the said House, as both the five Pounds reserv'd, and the Sum in Gross amounted to.*

This being a Case that would admit of no Dispute in any Court of Equity, that is wherefoever Justice is like to take Place of Law, a Prohibition was awarded by the Court of *Common-Pleas* to the Bishop of *London's* Chancellor, requiring him to stay the Plaintiffs Suit; the Reason was, because the Statute had appointed special Judges in such Cases, *viz.* the Lord Mayor and his Assistants; and yet the Court of *Common-Pleas*, who were not such Judges, took upon them to determine the Matter; and determine it they did, by declaring that the Plaintiff could alledge no Fraud in this Case; and therefore could have no Cause of Suit. This *per totam Curiam*, after they had previously resolv'd, among other Things; *That where the Rent of a House is increas'd, there the Tythes ought to be paid*

paid according to the whole Rent. What the Court insisted upon, as the Ground of their Judgment, was, *the Parsons confessing in his Libel, that the accustomed Rent was reserv'd; and from thence it was inferr'd, that he could averr no Fraud in such Reservation; for the Fraud in the Decree is, when less Rent than usual, or when no Rent at all is reserv'd.* The Parson might well acknowledge that five Pounds was as much as the House had been anciently let for, and that five Pounds was still reserv'd under the name of Rent. But could he, or the Court, or any By-Stander imagine, that there was no Fraud or Convin in the Reservation of that Sum, and no more; or that the House really was then, or had been for a considerable Time before, letten and hired for no greater Sum, when every Body knew, that five Pounds at the time of this Trial, (5 Jac.) could not be worth a third or fourth Part of what it went for when the Decree was made? (37 H. VIII.) They who sate upon this Trial must, in all likelihood, have been grown Men long before the Death of Queen *Elizabeth*, during whose Reign the Alteration so often mentioned, in regard to the Value of Money, was more remarkable than at any other time. It was obvious for them to observe that the Price of things had doubled or trebled within their own Memory; and was it possible for them, not to suspect a Fraud, when told that a House, situate in the Heart of the City, had lately been hired at the Rate it was let for in *Henry VIIIth's* Time?

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Time? But, to say the Truth, here was no room for Suspicion, for that implies some Degree of Doubt; but there could be none in this Case, as it lay before the Court, it being taken for granted, that the House had been *hired* by the Tenant, and let by the Landlord, for a large yearly Sum, over and above the five Pounds usually paid, when the Decree and the Statute were made, which all the World must understand to be an Encrease of Rent. Why then did not the Court adjudge, that the Tythes should be paid accordingly, pursuant to the plain Intent of the Statute, as set forth by themselves? Why this Encrease of Rent was called by another Name, and that, as it seems did, in the Opinion of these Reverend Judges, make it become another Thing.

Now if this Decision be according to Law, it may serve for a Precedent in the Case before us, if that shall ever be brought to a Trial, so far as to make the small part of the Rent, which is commonly reserv'd in Church and College Leases, to pass for the Whole; and to indemnify the Lessors, who shall convert the Remainder to their own private Use, under the Notion of Fines; for, as to the Legality of the Thing, it matters not whether the Fines be paid all at once, in gross Sums, or in Parcels by the Year together with the Rent.

But then we find in the Proceedings upon another Statute such Management condemned as fraudulent, injurious, and consequently illegal; and the Persons found guilty of the same, compelled

pelled to make good the Damage done to the Party griev'd, or to the Public: Which Proceedings, if well grounded, may be apt to occasion very severe Reflections upon any Court of Justice, that shall pretend to authorise what is so condemn'd or do any thing that may seem to encourage it.

The Statute I mean, is the 43 *Eliz.* c. 4. commonly call'd the *Statute of Charitable Uses*, which may be taken for a Supplement to the Restraining Acts; as providing a Remedy against the Abuse of such Pious and Charitable Donations, as do not come within those Acts. In the Execution of this Statute, I find it observ'd as a Rule; never to be dispens'd with, that where any Lands, Tenements, &c. have been given for the Relief of poor People, the Maintenance of Schools, or of Scholars in the *Universities*, or any other pious or charitable Use specify'd therein, the Rents arising from such Donations, how much soever improv'd, or encreas'd should be wholly, and solely apply'd to that Use. So that whenever any such Lands were found to have been Leas'd out at an Undervalue, that is when the reserv'd Rents came short of what the Lands were worth by the Year, when the Demise was made, the Leases were annulled, and the Parties concern'd forc'd to refund their unjust Gains. It deserves your Notice, that this was not done by virtue of any Special Directions contain'd in the Statute, but out of a pure Principle of natural Justice, which is known to all Men alike, that

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can think and reason, and is, as we are often told the Ground of our Common Law, if not the very Law itself. For the Commission given to those, who are to be Judges in the Case, goes no further than to "Authorise them, after Enquiry made by the Oaths of twelve Men, and all other Lawful means, of all Abuses, Breaches of Trusts, Negligences, concealing, defrauding, misconverting or misgovernment of any Lands, Tenements, &c. given to or for any Charitable and Godly Uses before rehearsed; and hearing the Parties interested, to set down such Orders, Judgments and Decrees as the said Lands, Tenements, Rents, &c. may be duly and faithfully imploy'd to and for such of the Charitable Uses, for which they were given by the Donors and Founders thereof;" So that one would think the Judgments and Decrees in the following Cases, must be founded on the Rules of Common Law.

Mich. 10. Car. Land to the Value of 3 *l. per Annum* was given, in the Reign of K. *Hen. VIII.* to the Parish of *Eltbam* in *Kent*, for repairing the High Ways; which, in time, came to be worth 11 *l. per An.* The Vestry-men demis'd it to one *Warreyn* for 50 Years, reserving the old Rent of 3 *l.* The Commissioners vacate the Lease, ordering it to be surrender'd and cancell'd; and not satisfy'd with That, Decree that *Warreyn*, for the Time that he enjoy'd the Land, should pay the Surplusage of Rent, according to what the Land was worth, when the Lease was made. He brings

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brings an Appeal into the Court of *Chancery*, where the Decree is affirm'd by the Lord Keeper *Coventry*: and it is resolv'd, among other Things, that the making this Lease, at an Undervalue, was a Breach of Trust and a Fraud, to deprive the charitable Use of the true Value of the Land.

Again, *Hil. 11. Car.* in the Case of *Sutton Colefield in Com. War.* Resolv'd if Land to the Value of 3*l. per Annum* be given to a charitable Use, which is paid accordingly, and afterwards the Land encreaseth to a better yearly Value, if the encreas'd Value be not also paid to the charitable Use, That is a Breach of Trust, which the Commissioners may reform.

King *Edward VI.* gave Land to the Mayor and Communalty of *Morpeth* in *Northumb.* then valued at 20*l.* a Year, to maintain a Schoolmaster there, and appointed them Visitors of the Schoolmaster and Scholars, to see that they behaved themselves according to his Orders. This Land comes to be worth 100*l. per Annum.* The Corporation, notwithstanding, allows the Schoolmaster but 20*l.* A Commission is granted 5. *Car.* to reform this Breach of Trust, as it then appear'd, and was afterwards found to be. The Corporation, when summon'd, refus'd to appear before the Commissioners, because they were appointed Visitors, there being a *Proviso* in the Act, *That not any thing contain'd therein should extend to any City, or Town Corporate. nor to any Lands or Tenements given to charitable Uses within any such City or Town, where a special Governor or*

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Governors are appointed, to govern or direct such Lands, Tenements, &c. neither to any College, Hospital or Free-school, which have special Governors or Overseers appointed them by the Founder."

The Mayor and Corporation of *Morpeth* claim an Exemption from the Power of the Commissioners, by virtue of this *Proviso*, which the Commissioners certify to the Lord Keeper: adding, that the Visitors were the Persons trusted, and had broken the Trust. The Lord Keeper, upon this Certificate, declares his Opinion to be, *That the Commissioners might proceed in the Execution of their Commission: For that the Visitors, being Trustees, and Parties, breaking the Trust, were not within the Intent of the Proviso: And, if it should be otherwise construed, this Breach of Trust would escape unpunish'd, unless in Chancery or in Parliament, which were a tedious and chargeable suit for poor Persons.* This I confess, shews that the Lord Keeper did not think they could have a Remedy in the Courts of Common Law; I suppose, because the Statute had prescrib'd a particular Method of Proceeding in such Cases. But he could never think, that the Thing in Question could be justify'd as lawful, by any Court that had Cognisance of it, for he declar'd at the same time, *That the not bestowing the increas'd Value upon the Use for which the Land was given, was a Breach of Trust in the Corporation, if no other Use be express'd in the Letters Pattent.*

The same Prince, (*Ed. VI.*) founded a Free-School at *Chelmsford* in *Essex*, and made it a Corporation

poration of Guardians, Master and Usher, and gave a Chantry to them and their Successors, to maintain the Master, Usher, and certain poor People in *Chelmsford*, and *Moulsham*; ordering that the Rents, Profits and Issues of the Lands should be employ'd to that, and no other Use, a Limitation always suppos'd in such Donations when no other Use is express'd. The Lord *Petre*, Sir *Thomas Mildmay*, Sir *John Tyrrel*, and Sir *Humphry Mildmay* were appointed Governors of the Free-School and Land; and were to be succeeded in that Trust by the Heirs Male of their Bodies. It was provided withal, that no Person should be a Governor, who was under the Degree of a Knight. The Lands, when this Matter came into Question, *viz.* in 1659, were worth 300*l.* by the Year, but yielded no more than they did at the time of the Foundation; which was imputed to the Heir of the last named Governor, who, whilst the Descendants of the rest were either within Age, or beyond the Seas, *leas'd out the Lands at the old Rent, taking Fines and defrauding the Trust.* For this Cause, a Commission of Charitable Uses being sued out, it was decreed, that the Government and ordering of the Estate should be committed to other Trustees. The aforesaid acting Governor, as they of *Morpeth* had done before, excepts against the Decree, pretending that the Corporation, having special Visitors appointed, was within the abovementioned *Proviso*; to which the same Answer was given, as in the Case of *Morpeth*, and that Case,

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among other Precedents, urged in behalf of the Decree. But the Lords Commissioners of the great Seal, as *Whitlock*, *Lisle*, and *Keeble* were then call'd, did not think fit to confirm it. However they agreed in condemning the Fraud, and order'd that a Bill should be exhibited in Chancery, against the Visitors and Governors, to the End, that their Breach of Trust being prov'd, a Course might be taken for the Relief of the Poor and the School, pursuant to the Founders Intention.

As these and other like Cases, to be met with in *Dukes Law of Charitable Uses*, come nearer to the Purpose in hand than that which was before recited: So the Decrees made upon them so often repeated and confirm'd, as they have been, must, one would think, be of greater Weight in the present Dispute than the single Judgment given by the Court of *Common-Pleas* in the *London Clergys Case*.

However, it can hardly be expected, that those Decrees should without some Contradiction, be admitted for Precedents in the Case before us. It will probably be objected.

1st. That they who have the Disposal of Church and College Estates, are not to be considered as simple Trustees, they having a Right of their own in those Estates.

2dly. The said Decrees had their Sanction in a Court of Equity, whereas this Cause, if it ever comes to a Hearing, must be try'd in a Court of Law. But the Rules and Methods by which those
Courts

Courts proceed, are so very different, that a Judgment given in the one can be of no Consequence in the other. In short, there are some who seem to be of Opinion, that Leases annul'd, as fraudulent by the Commissioners of Charitable Uses, would have been found good in Law, *i. e.* would have been approved of and confirm'd in Courts of Common Law.

To the first of these objections it may be answered. That whatever Right the present Possessors have in the said Estates, it can last only for their own Time; and must determine upon their Cession, Death or Removal, one of which may happen immediately after the Leases are sign'd. So that for the Time thence to come, they are no more than Trustees for those that shall succeed them; nor are they otherwise considered in the Statutes that concern them. The Limitations in the Enabling Act and the whole Purport of the Restraining, tie up their Hands from acting in any other Quality. If they differ in any Respect from other Trustees, it is because they lye under a stronger Obligation of Justice to a faithful Discharge of their Trust. It is part of the Duty, for the doing of which they receive a Maintenance out of the said Estates, to transmit the same entire to their Successors, and so it may be truly said, that they are paid for that, which in other Cases is commonly perform'd *gratis*.

The Opinion given by the Chief Justices, with the Concurrence of all their Brethren, in the

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Case of *Thetford* School, may serve for an Answer to the second Objection: unless we can imagine, that those Sages of the Law thought themselves at liberty to maintain both sides of a Contradiction, the one in their own Courts, the other when consulted by the Lords in Parliament.

A private Bill having been exhibited in Parliament 8 *Jac.* for the Erection of a Free-School, and other purposes; a Question was mov'd by the Lords, and referr'd to the Judges upon the following Case.

Sir *Thomas Fulmerston* in the 9th Year of Q. E. 1567. devis'd by will Land to the Value of 35*l.* *per Ann.* to certain Persons, and their Heirs, for the Maintenance of a Preacher four Days in the Year, the Master and Usher of a free Grammar-School, and of certain poor People; limiting the Sums which each Person was to receive, and which amounted in all to the whole annual Profit of the Land. The Rent of this arising in the same Proportion with that of other Lands, amounted in about forty Years time to 100*l.* It then became a Question, what was to be done with the Encrease? Should the Preacher, Schoolmasters and Poor be still put off with the same nominal Stipends that had been assign'd them by the Founder, whilst the Trustees made a yearly Dividend of 65*l.* among themselves, or leas'd out the Land for a large Fine to be put into their own Pockets, reserving the old Rent to be paid pursuant to the Letter of the Donors Will? The two Chief Justices, and Justice *Walmisley* were order'd
by

by the Lords to take this matter into consideration; who sate several Days upon it at *Serjeant's-Inn*, and after hearing of what could be said by Council learned on both sides, had a Conference with the other Judges; Not that they could think the Point in Question to be so exceeding difficult, as to need all this Consultation; But they considered, no doubt, of what Consequence their formal Determination of it would be, in more Cases, and those of greater Importance, than that which lay before them. In fine, it was resolv'd, that the said Increase should be employ'd in augmenting the Stipends of the Preacher, Schoolmaster, Usher and Poor; and if there were any Surplusage, it should go to maintain a greater Number of Poor; and that no part of it should be converted by the Devisees to their own private Use, since it appear'd from the Distribution made by the Devisor, that he design'd the whole Profits of the Land for Works of Piety and Charity.

This Resolution, saith Sir *Edward Coke*, is grounded upon apparent Reason, for if the Lands had decreas'd in Value, the Preacher, Schoolmaster, &c. would have lost: So *pari ratione*, if the Lands increase in Value, they ought to gain. But, with submission, there is no Cause to think that the real Value of this Land was increas'd, or that 100 *l.* was worth more in 1610, than 35 *l.* had been in 1567. Had the Estate indeed been improv'd, as to its intrinsic Worth by some extraordinary good Management, and the Price of things continued as it was when the Will was made,

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made, I do not See, to whom the Advantage ought rather to accrue, than to the Devisees. Surely they would have no Cause to complain, who were paid to the full what the Testator left them.

But those Reverend Sages had a much better Argument for their Opinion, and that too grounded upon a Parity of Reason; they found the Case to be much the same with that of Collegiate Bodys, and taking that for granted which we have hitherto been endeavouring to prove, they thought it would be alike injurious to the foresaid Persons, if they had not the true Value of what the Testator had assign'd them: as it would be to the Members of any College, if the real Issues of an Estate left them by their Founder, or any considerable Part of the same were interverted, or apply'd to any other Use than theirs.

And they said, that this Case concerns the Colleges in the Universities of Cambridge and Oxford, and other Colleges. For in antient Times, when Lands were of a small yearly Value, (Viſtuals then cheap) and were given for the Maintenance of poor Scholars; every Scholar was to have a Penny, or a Penny Half-penny a Day; that small Allowance, was then competent in respect of the Price of Viſtuals, and the annual Value of Land. But now, the Price of Viſtuals being increas'd and with them the annual Value, it would be injurious to allow a poor Scholar but a Penny or Penny-Halfpenny a Day, which cannot subsist him, and convert the residue to private Uses, where in Right
or

or in Law (En Droit) the Whole ought to be employ'd to the Maintenance or Increase (if it may be) of such Works of Piety and Charity which the Founder hath express'd, and no part to any private Use. For panis egentium vita pauperum est et qui defraudat eos homo Sanguinis est. 8 Co.

13.

“ And afterwards upon Conference with the
 “ other Judges, (continues the Reporter) they were
 “ of the same Opinion. And they agreeing in their
 “ Opinions, the said Bill pass'd both Houses, and
 “ was afterwards confirm'd by the King's Royal
 “ Assent. Observe Reader, saith Sir *Ed. Coke*,
 “ a good Rule in the Act of Parliament entitled
Statut. Templariorum. Ita quod Semper pia et celeberrima voluntas donatorum in omnibus teneatur, et expleatur, et perpetuo Sanctissime perseveret.

N. B. If there be any Acts of Parliament, made to declare the Law as it stood when those Acts were made, as we are occasionally told of many, may not this concerning *Thetford School* be reckoned one of that Number? But what we insist upon, is, is the Concurrent Opinion of all the Judges in a Point of Law, which comes fully up to the Case in Hand, so far as Collegiate Bodies are concern'd therein.

It is the common Opinion of our Modern Lawyers, that before the restraining Statutes made in Queen *Elizabeth's* Reign, Ecclesiastical Persons had as full Power and Authority to lease, grant, or alienate any, or all of their Possessions,

as

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as any Person seiz'd in Fee of a Temporal Estate then had, or as yet hath : Bishops indeed, they Say, and other Corporations Sole, as they call them, were to have the Assent of their Chapters, &c. in exercising this Power. But then, they tell us, that Deans and Chapters, Masters and Fellows of Colleges, Wardens and Brethren of Hospitals, and such like Corporations, aggregate of many, might of themselves make Leases for Years or Lives, Gifts in Tail, or Estates in Fee to whom they should think fit, without the Confirmation or Consent of others. So that if this be true, the Superior of any Religious House, the Master of a College, or the Warden of an Hospital, if he could but corrupt the major Part of his Brethren, by allowing them a share in the Spoil, might alienate the whole Estate of a Community, without being call'd to an Account for so doing. And it might seem a Wonder how it came to pass that those large Possessions, formerly belonging to Religious Foundations, with which so many Families are enrich'd at this Day, were not otherwise dispos'd of before K. *Henry VIII*th's Reign. But I suppose the meaning of the said Gentlemen is, that such Alienations might have been made, for any thing to the contrary contain'd in their Books ; and what we are to gather from hence, is, that the temporal Courts very seldom intermeddled in Cases of this sort, which were anciently determin'd by Laws and Rules whereof those Courts had little Knowledge.

It

It is certain that as the Law stood for many Reigns after the Conquest, the Ecclesiastical Courts had an exclusive Jurisdiction in Causes relating to Churchmen and their Possessions; of which among other Proofs that might doubtless be brought, please to take the following: It is one of the Laws ascrib'd to St. *Edward*, and said to have been confirm'd by the Conqueror, that *Quicumque de Ecclesia aliquid tenuerit, vel in fundo Ecclesiæ mansionem habuerit, extra Curiam Ecclesiasticam coactus non placitabit, nisi (quod absit) in Curia Ecclesiastica de recto defecerit.* In the Charter, given and Sworn to by K. *Stephen*, we find this among other particulars; *Ecclesiasticarum personarum, et omnium Clericorum et rerum eorum justitiam et potestatem; et distributionem bonorum Ecclesiasticorum in manu Episcoporum esse perhibeo, et confirmo.* By the ninth Article of *Clarendon* it was declar'd, that none but Ecclesiastical Courts could hold Pleas concerning Tenements that were found to be of *Franc Almoigne*, or belonging to the Church. Accordingly *Glanville*, who was constituted Justiciary of all *England* towards the End of *Henry II*'s Reign, gives it for Law, that Pleas of Freehold between *Clerc* and *Clerc*; or when a *Clerc* is Defendant, let who will be the Plaintiff, should be no where held but in the *Court Christian*, in Case the Fee were Ecclesiastical.

He adds, its true, pursuant to the aforesaid Article, that a Question concerning the nature of any Fee, as whether it was Ecclesiastical or
Laic,

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Laic, ought to be tried in the King's Court ; but then, if it appear'd to be of the former Sort, that Court had nothing more to do in the Case, though the Tenant should pretend to hold of the Church for a valuable Consideration ; which I take to be meant by *per debitum servitium*. Hence it is that the ancient Writ of Prohibition, went no further than to restrain the *Courts Christian* from intermeddling in Pleas of Lay Fees, as appears from a Copy of that Writ given by the said Justiciary of England. *Rex Judicibus Ecclesiasticis Salutem, Prohibeo vobis ne teneatis Placitum in Curia Christianitatis quod est inter N. et R. de laico Feod prædicti R. unde ipse queritur, quod N. eum trahit in placitum in Curia Christianitatis coram vobis ; quia illud spectat ad Coronam et dignitatem meam.* How, and when the Law came to be alter'd in this respect, I leave to the Enquirys of others, but that it continued the same since *Hen. II.* seems very probable from what pass'd under King *Richard I.* in a Convention of the *Norman Nobility and Clergy*, and assented to by that Prince, it being there agreed among other Things ; that, *Nulla fiet recognitio in foro seculari super possessione, quam viri Religiosi, vel quæcunque Ecclesiasticæ Personæ, 20 annis, vel amplius possiderint Similiter ; nulla fiet recognitio, si Carta, vel alio modo, Elemosynatam esse possessionem probare poterint, sed ad Ecclesiasticos Judices remittentur.*

But as little as the temporal Courts had to do with the Possessions of the Church, they did not suffer

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suffer them to be alienated at the Will and Pleasure of the Possessors; for besides the Writ *de fine Assensu Capituli*, by which, when a Bishop, Abbot, or Master of an Hospital had demis'd Lands, or Tenements without consent of the Chapter Convent or Fraternity, the Successor had his Remedy at Common Law: *Glanville* tells us, that the Prelates could not Enfeof or Lease out for a long Term any part of their Demeans, without the King's Consent or Confirmation.

Notandum, quod nec Episcopus, nec Abbas, quia eorum Baronie sunt de Eleomofyna Regis, et antecessorum ejus, non possunt de Dominicis suis aliquam partem dare ad Remanentiam. It has been a Question, whether these last Words, as used here by *Glanville*, signify for a long term, or forever: It seems most likely that he meant no more than the Civilians do, by *longi temporis Locatio*. The Reason is, because the King's License, or Charter of Confirmation, could not make good a perpetual Alienation, as will appear from the following Records, to be found in *Madox's History of the Exchequer*. p. 357.

Abbas de Whitebi debet 100 Marcas, ut Burgenfes de Whitebi non possint uti libertatibus sibi concessis ab Abbate, [Ric de Watervil,] et Conventu de Whitebi et Carta Domini Regis Confirmatis, donec judicatum sit in Curia Regis, si Abbas et Conventus eis dare potuerunt illas libertates: Willelmus Clericus, Radulphus filius Sudof, et Simon de Reseburn debent quater XX. [80.] Marcas, pro se et tota Villata de Whitebi pro habenda

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da confirmatione de libertatibus suis sicut Abbas et Monachi de Whitebi eis confirmaverunt et concesserunt. Mag. Rot. 1. J. Rot. 46. Everwich scira. Where we may Note, that it was usual in those Times for our Kings to take Money, sometimes from both Parties for the Trial of Causes in their Courts. The Issue of this Trial was as follows, *Johannes Rex. Sciatis nos concessisse P. Abbati de Whitebi, quod Carta Ricardi de Watervil quondam Abbatis de Whitebi, et Conventus ejusdem loci, quam Burgenfes de Whitebi habent, quæ est contra dignitatem Ecclesiæ de Whitebi, non confirmabitur a nobis.*

This, its confels'd, seems to be an extraordinary Case, and to have been tried in the Temporal Court, because the Validity of the King's Charter was call'd into Question. For Causes of a like Nature were commonly tried in the Spiritual Courts. When difficulties arose, the King, would at the Bishop's Request, either permit the Judges of those Courts to sit in his own, in order to have the Advice and Assistance of his Judges upon any Emergence; or command his Judges to sit in the Spiritual Courts for the same purpose: as will appear from the following Writs, which we have in *Prynnes History of K. John, &c.*

Chartæ 2 f. M. 27. Dorsò. Rex Justitiariis, Vice comitibus et omnibus Ballivis et Ministris suis Salutem. Sciatis nos concessisse Ven. Patri nostro, I. Norvicensi Episcopo, quid omnes terras, tenementa et possessiones tempore Prædecessorum injuste alienatas, juste posset revocare: et si in illis
revo-

revocandis consilio Curiaē nostrae indiguerit, volumus et concedimus quod idem Episcopus, si voluerit, Curiam suam in Curia nostra ponat, ut loquelae suae quas ibi posuerit, per Judicium Curiae nostrae et consuetudinem Regni terminentur.
Prynne L. 3. p. 30.

Pat. 3. J. M. 4. N. 20. Rex. Capitali Justitiaro suo, et aliis Justitiariis suis, Angliæ. Volumus quod Ven. Pater noster in Christo, Hubertus Cantuar, Archiep. revocet in Curia sua, Secundum consuetudinem et libertatem Curiaē suae, omnia Dominica sua injuste alienata, per Sacramentum liberorum et legalium hominum de Visneto—Volumus etiam quod, si requirerit, duo de Justitiariis nostris mittentur in Curiam suam, ad illud videndum et auxilium ei impendendum, si necesse fuerit, salva dignitate nostra, et ideo vobis mandamus et firmiter præcipimus, quod ita faciatis.

That Spiritual Persons were restrain'd from alienating their Possessions by the Statute Law, as well as the Common, we have a direct Proof in Cap. 41. Westm. 2. 13 E. I. whereby it is provided, that in case the Superior of any Religious House shall alienate Lands, given for Pious or Charitable Uses, the King, or He by whom, or whose Ancestor it was given, may recover the same, by virtue of the Writ *Contra formam Collationis*, and the Purchaser shall lose both the Lands and the Money he paid for them.

The next Year after the making this Statute, the said Writ issued to the Sheriff of *Staffordshire*, requiring him to seize upon a certain Messuage, which the Abbot of St. Peters in *Shrewsbury* had
H alienated,

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alienated, and which had been given to find a Monk, and a Mass Priest. *Fines 14 E. I. Pryne 357*. And long after that, as we learn from the same Writer, it was found by Inquisition. *Hil. 38 E. 3. Rot. 14*. That *Thomas de Pipe*, Abbot of *Stonely* in *Warwickshire* had demised divers Parts of the Manor of *Stonely* to - - *habendum et tenendum ad terminum vitæ eorundem*, and this was held to be an Alienation, within the Meaning of that Act.

So far is it from being true, that before the restraining Acts, Ecclesiastical Persons had as full Power to Lease, Grant, and Alien any or all of their Estates, as any Person seiz'd in Fee of a temporal Estate ever had. How far the Law was observ'd, or put in Execution in this respect under K. *Henry VIII.* and some of the following Reigns is another Question.

However, it must be acknowledged, that the Sacred Patrimony could never have afforded such ample Spoils, as it did to that Prince, and those who governed under his Son, had it not till then been preserv'd by the Ecclesiastical Laws. By these I understand, not only our Provincial Constitutions, but that which is stiled the *Jus commune* all over *Europe*, and prevails more or less in every part of the *Christian* World, as it hath done ever since Laws were made, to regulate the Temporal Concerns of the Church, continuing in substance the same, tho' not without some considerable Variations, in different Times and Countries. Of this, so far as it relates to the present

present Subject, I shall give some Account, which may serve for a further Answer to your last Enquiry.

It is commonly said, that before *Constantine's* Time, Christian Churches had no real Estates belonging to them; and that the Bishops, Clergy and Poor liv'd upon Weekly, and Monthly Collections, with such other Oblations as were occasionally made by the Faithful; and that, when any dedicated their Possessions to pious and charitable Uses, they, like the first Christians at *Jerusalem*, sold them and brought the Price into the Sacred Treasury: The Reason given for this Assertion, is, that by the *Roman* Laws, Communities, that had no legal Establishment, were incapable of inheriting or holding such Estates. But, in fact, it is certain that Churches, consider'd as Communities, were, in the third Century at least, actually possess'd of both Houses and Lands; and that this was not unknown to those, who had the Sovereign Power in their Hands. Witness the Judgment given by *Alexander Severus* in favour of the Christians, when their Right was contested to a Piece of Ground within the City of *Rome* itself; and the Decree of *Aurelian* for ejecting *Paulus Samosetenus* out of the Episcopal House at *Antioch*, and disposing of the same as the Bishops of *Italy* and *Rome* should direct. When the great and last Persecution was over, and Edicts publish'd by the Emperors, to reinstate the Christians in their respective Possessions, as well public as private,

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we find mention made in those Edicts not only of the Places where the Christians used to assemble, but of the Houses and Lands belonging to their Churches.

But whatever Goods these were then possessed of, whether standing Revenues or Moveables, effectual Care was taken, to prevent their Alienation, or, which is the same thing in effect, their being applied to any other than pious Uses. They were deposited with the Bishop of every Church, who was to dispense them by the Hands of his Presbyters and Deacons to the Relief of Orphans, Widows, Strangers in Distress, and in a Word to such as were in Want; particularly to those who served at the Altar. He was allow'd withal to supply his own Necessities out of the common Stock. and even those of his Relations, in case they were poor, in the same Measure as he dealt to other indigent Persons, but not otherwise. He was not indeed accountable for his Administration to any Mortal, it being look'd upon as a sort of Impiety to distrust him in temporal Matters, to whom the precious Souls of his Flock were committed. But then, as there was no such Cause to confide in those that were about him, Precautions were used to prevent their meddling with any thing that was not the Bishops Property; It was therefore order'd, that an Inventory should be taken of what belong'd to the Bishop, and what to the Church: That the Bishop at his Death, might dispose of his own to whom, and in what manner he should think

think convenient; For he might, as the Canon Speaks, have a Wife and Children and other Relations or Servants to provide for, and, as it was not just that the Church should suffer Damage on their Account; so neither was it fit, that they should be put to trouble in recovering any Part of the Bishops Estate.

Such was the Ecclesiastical Law concerning the Churches temporal Goods from the Time of her first Settlement, as appears from the 38. 40 and 41 of the Apostolical Canons, which, as to the Substance of them, and sometimes the very Words, are throughout all succeeding Ages, down to these latter Times, repeated and inculcated, as still binding, by Councils, Synods, Fathers, Schoolmen and Canonists without Number.

When the Empire became Christian, and the Churches Possessions greatly enlarg'd, Stewards were appointed to manage them under the Bishops, and severe Laws made by the Civil Powers to prevent their Alienation. The first of these now extant is call'd the *Leonine* Constitution, having been made by the Emperor *Leo* I. in the Year 470. By it both Bishop, and Steward are disabled from making any Grant, Sale, or Exchange of Houses, Lands or other Immoveables, such as Assignments upon the Public Revenue, [*Annona*] belonging or accruing to the Church, by any Right or Title whatsoever: All Agreements made to such Purposes are declared to be of no effect, tho' consented to by the whole Bo-

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dy of the Clergy : *Nec si omnes cum religioso Episcopo et Oeconomo Clerici in earum possessionum alienationem consentiant.*

The Steward who should do or Suffer any thing to be done in Breach of this Law, was to be turn'd out of his Office ; and forc'd to make good out of his own Estate whatsoever Damage the Church might sustain through his Fault. The Notaries, who drew the Instruments of any such Alienation, were condemn'd to perpetual Banishment. Judges and Actuaries concerned in entering any such unlawful Bargains upon Record, were to be displac'd, and to forfeit their Estates. The Houses or Lands that had been thus given away, sold or exchange'd, return'd to the Church, together with the mean Profits, without any recompence to the Purchaser, who had his Action against the Steward.

One Exception there was to this Law, and but one : If a Man had a Mind to a House, or parcel of Land belonging to any Church, that lay for his Conveniency, he might take a Lease of it for Years or for Life, on Condition, that he assign'd to the Church for the present, an Estate of equal Value ; and that at the expiration of his Term or at his Death, he should leave both the one and the other to the Church. *L. 14. C. de Sacros. Eccl.* This Law, made at first in favour only of the great Church at *Constantinople*, was afterwards extended to all other Churches throughout the *Roman Empire* ; as likewise to Hospitals, and other Religious and Charitable Foundations, and

and at length was incorporated in the Canon Law.

But it was not long made, when notwithstanding all those severe Penalties by which it is fenc'd about, divers ways were found out to break in upon it. Two sorts of Contracts are particularly taken notice of by the Emperor *Justinian*, as made use of to this Purpose, in the Preface to his seventh Novel, of these I shall give some Account, since they have each of them some Resemblance to the Method, by which our Restraining Acts have been defeated.

The one is stil'd by that Prince *Jus Colonarium*, in the Greek Text of the Code l. 24. de Sacr. Eccl. he terms it *παροικικὸν δίκαιον*, the Reason for either Name is no where given, that I can find, but we have the following Description of the Thing in the aforesaid Preface, crept into the Text, as I suppose, from some ancient Gloss. *Colonarium Jus est veluti si domum valentem centum Solidos, et præstantem pensionem decem solidorum accipiat quis ab Ecclesia, et det pro ea centum Solidos, sed amplius aut certe minus* [perhaps it should be read *vel amplius aut certe non minus*] *et quasi jam de proprio aggravet se dare singulis annis, quasi, Pensionis nomine, solidos tres. Iste appellatur Paræcus. Sed ipsam domum sub tam parva pensione in perpetuum et ipse, et hæredes ejus possidebunt.* By the Way, if there be no Mistake here in the Numbers, the Purchaser in this Case must have a hard Bargain, if having given the full Price for a House, he charges himself with the yearly Payment of a Sum amounting to near a third

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part of the Rent. *Gothofrede* from *Cujacius*, makes this to be the same with the *Contractus libellarius*, which, according to his Description, is, *Venditio quæ fit Scriptura interveniente, certo pretio, et hoc amplius certa pensione constituta in annos singulos, et hac plerumque lege, ut Stato dictoque tempore contractus renovetur numerato certo pretio vel arbitrario*. If so, it comes very near to, if it be not the same with our Church and College Leases, as they are now manag'd. However *Justinian* absolutely condemns such Bargains, as unknown to the Laws then in Being, (which they certainly are to the Law as it stands here in *England*) and contriv'd on purpose to elude them.

The other Contract which was abus'd to a like ill purpose in that Emperors time, was call'd the *Emphyteusis*, being the same thing in effect as a Lease for Years or Lives, which the Emperor chose rather to regulate than to abolish. And since it comes the nearest to that which our Laws allow of at present, and would in truth prove highly beneficial to Collegiate Bodies, and to those who occupy their Lands, if the Rules prescrib'd by *Justinian*, or by our own Laws, which seem to have been borrow'd from the other, were duly observ'd; I shall take the Liberty to enlarge upon it.

It had its Name from *ἔμφύτεψεν* to Graft or Plant, and was first used in letting out wild and barren Grounds, which the Tenant was oblig'd to clear and cultivate, and upon that Consideration,

tion, as well as for the Payment of a small Rent, had them secured to him and his Heirs for so long a Term, as they might expect to enjoy the Fruit of their Labour. This Contract, though the Name of it does not appear in any Laws extant before the Greek Emperor Zeno, was certainly very ancient, as the thing itself speaks. *Alciat* thinks he has found an Instance of it in the 2d. of *Aristotles Oeconomicks*, where it is said, that People of *Bisantium* wanting Money, dispos'd of the Lands belonging to the Public; those that were fruitful for a Time, the barren for ever. The Words of *Aristotle* are, Βυζαντιοὶ δὲ θέντες χρημάτων τὰ τεμένη τὰ δημόσια ἀπέδοντο, τὰ μὲν κάσπιμα χρόνόν τινα, τὰ δὲ ἀκαρπὰ ἀενάως. But it is not clear, whether the Bargain was made in either Case for a yearly Payment, or a Price to be paid at once. However, it was certainly a very ancient Custom for Cities and other Communities to let out their common Possessions at a yearly Rent, some for a short Term, others for an indefinite Time, but on condition that the Tenants duly paid their Rent. Hence that Distinction which we find in *L. 1. ff si ager vect. Agri Civitatum alii vectigales vocantur, alii non vectigales; qui in perpetuum locantur, id est hac lege ut quamdiu pro illis vectigal pendatur tamdiu neque ipsis qui conduxerint, neque his qui in locum eorum successerint auferri eos liceat: Non vectigales sunt qui ita colendi dantur, ut privatim agros nostros colendos dare solemus.* This in the City of Rome used to be done both by the Censors, and

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and by private Owners at every *Lustrum*, that is at the End of every fourth Year or Beginning of the Fifth. By the Way we may observe, that the *Agri Non vectigales*, if in good Condition, were let for no less than six in the Hundred of the Price they were valued at, as may be gather'd from what *Pliny* tells of his Case, in *Ep.* 18. *Lib.* 4.

In the lower Empire the *Agri vectigales* were more frequently call'd *Emphyteuticarii*, probably because the *Emphyteusis* came then to be more in Use, than it had been for many Ages before, by reason of the frequent Incursions of the Barbarous Nations, whereby the most fruitful Lands were often laid wast and desolate; in somuch that it required more than ordinary Cost and Pains to bring them again into their former State, sometimes, peahaps, no less than when they were first till'd and planted. It is certain that the *Emphyteutic* Contract grew then so common, as to become a Technical Word, and to signify much the same thing as a *long Lease* does with us, and that not only of Lands, in what Condition soever they were, but of Houses likewise, as well those that were in good Repair, as of those that were falling to Decay or in Ruins.

By a Law of the Emperor *Anastasi*, they who had the Disposal of Estates belonging to Churches and other pious Foundations within the Patriarchat of *Constantinople*, were enabled to make such Leases with the following *Provisos*, 1st. That a Lease should hold no longer than
for

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for the Life of him that took it, except in Cases wherein an Alienation was lawful, (for some such Cases there were as will be shewn in due Place.) *Justinian* afterwards allowed it to be made for three Lives. 2dly. That the yearly Rent should continue the same without Diminution or Abatement.

But the Effect of this Law was much the same with that of our Enabling Statute; for the liberty it gave was quickly laid hold on, and carried a great deal farther than the Law-maker intended; whilst the Limitations were overlooked, or so interpreted as to become altogether insignificant. For first a way was found out to perpetuate the *Emphyteusis*, by continuing it to the Successors of those who were named in the Lease, I suppose upon Pretence of the *Jus Colonarium*. 2dly. The Rents were greatly diminish'd, particularly those due to the great Church of *C. P.* the Stewards thereof in some Leases not reserving so much as a sixth part of the yearly Profits, all the rest being given up to the Lessees. *Imminuerunt plurimam quantitatem veri redditus --- hi qui rebus pridem Sanctissimæ majoris Ecclesiæ præfidebant --- ut neque Sexta relinquatur Sanctissimæ Ecclesiæ pars, reliquis omnibus Emphyteusim accipientibus donatis*, Novel 7. so that, had not the Emporor *Justinian* interpos'd his Authority, the Case of the said Church might in time have been like to that in which many Cathedrals and Episcopal Sees are found at this Day.

In

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In order to remedy these and the like Abuses, that Prince found it necessary to regulate the *Emphyteusis*, which, as hath been said, he chose rather to do, than utterly to abolish it, as he did the *Jus Colonarium*. His Regulations appear'd so agreeable to Justice and Reason, that, with some few amendments, they have been receiv'd for Law in most Parts of the *Christian* World, and will therefore highly deserve your Notice. They are to be found in *l. 24. C. de Sacros. Eccl.* and in the 7 and 120 of his Novels. In these that Prince declares. 1st. With what Persons, 2. Upon what Conditions, 3. For how long a Term the *Emphyteutick* Contract might be made.

1. He requires that the Persons should be neither Indigent nor Powerful, but Men of Substance *Εὐποροί*, who neither wanted wherewithal to improve the Estates, nor were yet too great to be dealt with upon equal Terms. If an Estate should suffer in the Hands of a Necessitous Tenant, the Steward was to make good the Damage; If any Person in Authority at *C. P.* shou'd take a Lease of the great Church there, (it was in favour of that Church only, as hath been observed that the Law was at first made,) the same was to be deem'd as Null, and of no other Effect than that both the Lessee and the Steward were, each of them, to forfeit to the Church the Value of the Estate. If any such Person should by indirect means get into his Hands either House or Land belonging to the said Church: Acts done for that purpose, were to be of no force in Law,
the

the Money given on that Occasion was to go to the Church, together with a Mulct of twenty Pounds of Gold, (7 or 8 hundred Pounds Sterling) payable by the said Person; He that convey'd the Premisses over to him, was made liable to the same Penalty. He that procured the Bargain to be made, was to forfeit the double of what he receiv'd on that Account.

When this was made a general Law, that part of it which concerns those who had a share in the Government at *C. P.* became applicable to Persons of Authority and Power in all Places alike, the Reason of the Law, in this respect, being every where the same; Namely the great Difficulty there is in bringing such Persons to account, or obliging them to give up what they are once possess'd of: This Difficulty seems to be so exceeding great, that the Letting out an Estate to a Man in Power is, according to the Civilians, much the same thing as to part with it for ever. *Locatio facta potentiori alienatio dicitur.* In *Spain* such Persons are prohibited by Law to Farm any Part of the Royal Revenues, in their own, or in other Mens Names *Leys del Reino. L. 9. Tit. 10.* In *France* all Gentlemen and public Officers are forbid, by the Royal Edicts and Ordinances, to take Leases of Tythes and Church-lands, the former on pain of being degraded from their *Noblesse* and becoming *Roturiers*, both they and their Posterity: The latter of being turn'd out of their Places, and made incapable

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capable of any publick Employment. *Les Edits et Ordon. des Roys* 2 Vol. p. 1227. & 1239.

I do not find that any such Law hath ever been received or made in *England*. Our Clergy, its true, struggled long to keep their Possessions out of Lay Hands, that they might have as little to do as twas possible with the Courts of Common Law; for which Purpose many Provincial and Diocesan Constitutions were made and are still to be seen in *Spelmans* Councils: but when these grew obsolete or were overruled by Papal Dispensations, the Clergy did not scruple to lease out their Estates to Persons of all Ranks without Distinction; insomuch that the greater Part of those Estates are now possess'd by the Nobility and Gentry, *i. e.* such as either have, or are capable of having a share in the Legislature; which gives them in some respects much greater Authority and Power, than is common to those of their Rank in other Countries. However their Landlords, far from apprehending any Inconvenience from thence, depend upon the Patronage of such Honourable Tenants, whensoever the Rights of the Church or the Universities shall be questioned in Parliament.

2. The Conditions of this Contract, as prescribed by *Justinian*, were various, according to the different Nature of the Things contracted for: The general Rule was, that, when an Estate was to be Leas'd out, an exact Account should be taken of what it yielded by the Year, when it first came to the Church, and if it continued
still

still to be of the same Value, a sixth Part of the Rent should be abated as an Allowance to the Tenant for Common Accidents: But if it should appear to have been impair'd by any great Misfortune since that Time, no Abatement was to be made of the Rent, which it continued still to yield. The Emperor requiring that it should be let by the Year, for so much as could be made of it, rather than be Leas'd out at an Undervalue.

There were many Country Seats at a small Distance from *Constantinople*, which serving for Pleasure rather than Profit, were seldom let to Farm; and, when they were, scarce ever afforded Rent answerable to the Cost, that had been bestowed upon them; when any of these had been given to the Church, and were to be Leas'd out, the Emperor ordered an Appraisement to be made of what they would be worth, if sold outright, and the Rent to be settled accordingly, at the Rate of five in the Hundred, which was one *per Cent* less than Country Farms did then usually let for.

Concerning Houses that had been destroy'd by Fire, Earthquakes or other Accidents, which the Governors of the Church or Hospital, to which they belonged, were not able to rebuild at their own Expence, we have two different Laws made by this Emperor. The first in *Nov.* the 7th, by which he ordains, that one who would undertake to rebuild such a House, making use of the Materials he should find upon the Place, might have a Lease of it, and of the Ground
whereon

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whereon it stood, for three Lives upon such Conditions as should be judg'd reasonable by the two principal Architects (if the Case happened to be in the City of *C. P.*) the Stewards of the Church, five Presbyters and two Deacons, all upon their Oaths; the Matter to be determin'd in the Bishop's Presence. If the Case happened in any other Place, one or two of the best Architects that could be had, were to be called in to give their Judgment.

By a subsequent Law to be found in *Nov.* 120, it was allow'd, that in this Case a Lease for an indefinite Term might be granted, upon the one or the other of the two following Conditions, which were left to the Tenants Choice, Namely, That he should pay, either one third of what the House whilst standing was formerly Let for, the Rent becoming due from the Date of the Grant: or one Half of what it should yield when he had built it a new.

3. The Term to which Leases of this Sort are limited in the *Code*, is of twenty Years, but in the *Novels* it is extended to thirty Years or three Lives; these were to be the Lives of the Person who took the Lease, and two of his or her Heirs of the first or second Descen: If the Lessee dy'd without Children, the Lease expir'd, and the Estate with all its Improvements return'd back of Course into their Hands who before had been trusted with the Disposal of it. For it could not go to any other Heir of the Lessee, nor could the Husband settle it upon his Wife, nor the
Wife

Wife upon her Husband, unless He or She had been expressly named as one of the Three in the first Contract. All Agreements made for the Addition of other Lives, or even the Preference of other Heirs in a new Lease, are declar'd to be utterly void, as so many fraudulent Contrivances to elude the Law, and perpetuate the *Emphyteusis*.

Thus stands the Civil Law with relation to the Endowments of Churches, Monasteries, and all other pious and charitable Foundations, particularly and by Name, Houses built and endowed for the Entertainment of Strangers, Relief of the Poor, Cure of the Diseas'd, Education of Children, providing for Orphans, and the Maintenance of Aged People, prohibiting the Alienation of such Endowments, or any part of the same, by Sale, Donation or Exchange, as likewise Leasing them out at an under Value, or beyond a certain Term.

But as a literal Observance of this, like that of other Laws, may, in some particular Cases, go beyond or beside the real Intent of the same, Special Provision is made for such Cases, so far as they were foreseen by the Lawmaker.

One Case hath been already mention'd wherein Leases of Houses might be granted for an illimited Time.

Lands belonging to two different Churches, or other of the now mention'd Foundations, might be so situated, that an Exchange would be for the Advantage of both, and, when That

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should be duely prov'd, they might be exchang'd accordingly, notwithstanding any thing contain'd in the Law to the Contrary.

If a Rent Charge, (*Annale legatum*) was left to any pious Foundation, issuing out of an Estate, that lay in a distant Province; an Exchange might be made of that likewise, for a Rent payable near at Hand; provided that the latter exceeded the other in Value by one fourth Part, *Liceat illis quibus hoc relictum est, si pars obligata consentit, commutare legatum, et pro eo percipere redditus idoneos, cum augmento non minus quartæ partis relictæ quantitatis.* Or it might be Sold, but for no less than 25 Years Purchase, and the Price applied to the Benefit of that Foundation, to which the Rent Charge had been bequeathed — *aut vendere (si voluerint) et non minus pro pretio percipere quam ex tali legato intra viginti quinque annos colligitur, ita tamen ut hujusmodi pretium ad utilitatem prædictæ venerabilis domus, ubi relictum est proficiat.*

About the Time when these Laws were made, great Numbers of helpless People were frequently carried into Captivity by the Barbarians, that infested the *Roman* Empire on every side: For the Redemption of these, the Governors of Churches were at liberty to sell their Possessions together with the Consecrated Plate; The same might be done to relieve the Neccessitous in a Time of Famine.

There was a Special Law made in behalf of the Church at *Jerusalem*, which had been found-
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ed by *Constantine the Great*, and named the *Resurrection*. The Occasion of it was the great Resort of Strangers to that City, People of all Conditions continually flocking thither from all Parts of the World, to Visit the holy Places; whose Relief and Entertainment (such of them I suppose who thro' Sickness or any unforeseen Misfortunes might be reduced to Want,) that Church was oblig'd to Provide for: *Omnibus enim hominibus manifestum est hoc, (saith Justinian) sanctissimam Resurrectionem eos, qui ex omni orbe eo confluunt, (quorum multitudinem infinitum est dicere) et suscipere, et alere, et facere sumptus immensos et insperatos his qui illic coacervati sunt sufficientes, &c.* But there were many of the wealthier Sort, and some of the highest Rank, who chose to fix their Abode at *Jerusalem*, as the fittest Place where to end their Days in Devotion. To accommodate these, and withal to provide for the others, the Stewards were by a Law made for the Purpose, enabled to sell such Houses as the Church was possess'd of about the City, the Rents whereof made the greatest Part of its Income, but for no less a Price than fifty Years Purchase, *non minori pretio quam de Pensionibus in quinquaginta annis colligitur.* And 'twas a further Condition of this Sale, that the Money arising from it, should be employ'd in buying in Rents as good, and more secure from Accidents, which might be had elsewhere for about 13 Years Purchase: *Potuit trecentis octoginta libris auri comparare redditum triginta (paulo plus*

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plus minus) auri librarum. The Emperor was the rather induc'd to make this Ordinance, because he look'd upon such Houses, as should be thus sold, as not altogether alienated from the Church; for as they were to be sold to such as came out of Devotion to dwell at *Jerusalem*, he thought it probable, that these would, upon the same Motive, in their last Wills leave them to the Church again.

It may perhaps be thought strange, that Churchmen should make use of this and those other Advantages which the Law gave them, in their Dealings with others. Nor do I see, how they could pass uncensured, if they accepted, (not to say exacted) those unequal Conditions, which were impos'd by Sovereign Authority upon such as purchas'd any part of the Church Revenues by Exchange, or with Money, in Case the Law were made for their Sakes only, as it would be, were the Bishops and the Clergy to share the Profits, in order to enrich themselves and their Families. But that was not the Case: The Intent of the Law, in this Respect, was in effect but to lay a Tax upon the Rich, for the Benefit of the Poor. The Bishops and Clergy of those Times, claim'd a Right to no more than was necessary for a decent Subsistence: As for what remain'd of the common Stock, were it ever so much, or so little, they, in regard to their own temporal Concerns, were neither the better nor the worse for it, being no otherwise interested therein, than as Trustees for the Church, and

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Overseers of the Poor, to take Care that the same should be applied to such Uses as were most agreeable to the Piety and Charity of the Donors. There was, its true, much in Use about this time, in the Western Parts at least, a *Quadripartite* Division of the Church Revenues between the Bishop, the Clergy, the Poor, and the sacred Edifices. But that Division did not alter the Nature and Property of the Things divided. The two first Shares, so far as they exceeded a Competency, were still applicable to the same Uses as before, and to no other. The Bishop himself, far from being Proprietor, was not so much as Usufructuary of the Portion assign'd to him; for, if any thing was sav'd out of it, he could not dispose of it as his own, either living or dying; as, indeed, he could not of any thing else, besides what was His before his Consecration, or came to him by Inheritance from some near Relation. If he had any thing more in his Possession, it was reckon'd among the Goods of the Church, and if it was not dispos'd of accordingly by him in his Life time, it return'd to the Church at his Death.

Interdicimus autem Sanctissimis Episcopis, res mobiles aut immobiles, seseque moventes, quæcunque post Episcopatum ad eos quoquo modo pervenerint, in proprios cognatos aut in alias quascunque transferre personas. In captivorum vero redemptionem et egentium pabula, et alias pias causas; aut pro utilitate propriæ Ecclesiæ ex his expendere licentiam habeant; et quicquid ex hujusmodi

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jusmodi rebus per obitum eorum in ipsorum facultate remanserit, jubemus hoc ad proprietatem Ecclesiarum quarum Sacerdotium habuerunt, competere. In illis enim solummodo rebus licentiam eis alienandi aut relinquendi quibus voluerint damus, quas ante Episcopatum probantur habuisse: post Episcopatum vero, quæ ex genere sibi conjuncto ad eos devoluta sunt, quibus ab intestato usque ad quartum gradum succedere potuerunt, Nov. 133. c. 9. Again, De his vero Episcopis qui nunc sunt, vel futuri sunt, sancimus, nullo modo habere eos facultatem testandi, vel donandi vel per aliam quamcunque excogitationem alienandi quid de rebus suis, quas postquam facti fuerint Episcopi, possederint et adquiesierint, vel ex testamentis vel ex donationibus, vel ex alia quacunque causa; exceptis duntaxat his quas ante Episcopatum habuerunt ex quacunque causa, vel quas post Episcopatum a Parentibus et Theiis, hoc est Patruis vel Avunculis et fratribus ad ipsos pervenerunt, perventuræque sunt: quæcunque enim post ordinationem ex quacunque causa, extra præfatas personas ad ipsos pervenerunt, ea jubemus ad sanctissimam Ecclesiam, cujus Episcopatum tenuerunt, pertinere, et ab ea vindicari et evinci: nulla alia persona potestatem habente, ex eo proprium quid auferre lucrum. l. 42. §. 2. C. de Ep. et Cler.

All this amounts to no more than a Civil Sanction given to the Canons of the Church, the Apostolical in particular above mention'd, which did not cease to be in force, when the Empire became

became Christian, as Bishop *Beveridge* hath fully prov'd from the Fathers of the 4th and 5th Centuries; St. *Athanasius* among others, who, when the Emperor *Constantius* took upon him to impose Bishops on the Church, declar'd his doing so to be a direct Violation of the Canons, by which, as the said Bishop shews, he cou'd mean no other than the Apostolical; by the 30th whereof it is ordain'd that a Bishop who is possess'd of a Church by means of the Secular Powers, shall be depos'd and excommunicated. As for those which concern the Goods of the Church, they are enlarg'd upon and enforc'd by the Synod of *Antioch*, held in the beginning of *Constantius's* Reign, whose Canons were confirm'd by the Council of *Calcedon*, and make part of the Ecclesiastical Code. The Matter contain'd in them perfectly agrees with the Doctrine and Practice of such Fathers who govern'd the Church not long before *Justinian's* Laws were made, such as St. *Ambrose*, St. *Chrysostome*, St. *Austin*, &c. of which, who so doubts, may be fully satisfied by consulting *Thomassin's Disciplina Ecclesiæ vetus et nova*, Pt. 4. The Capitulators of *Charles* the Great and his Successors inculcate the same things; as do many subsequent Synods. It hath been constantly taught in the Schools, that the Goods of the Church should be wholly applied to pious and charitable Uses; and so applied they were, whilst the Church enjoy'd her Liberty, in being govern'd according to her own Laws, and by Prelates of her own choosing. Whilst any Shadow

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dow of this Liberty was maintain'd against Papal Usurpations and other Encroachments, we hear of no Temporal Estates rais'd, but of very many Churches, Colleges, Schools, Hospitals built and Endow'd by Churchmen. It hath been already observ'd at what Time, and on what Occasions the Poor-Rates began in *England*, which now prove so burthensome to almost every Parish.

The Canon Law, as contain'd in the *Decretum* and *Decretals*, agrees for the most part with the Civil: In the former we have an Abstract of the *Leonine* Constitution, as amended by *Justinian*, and of his Additions to it. 10. q. 2. c. 2. In the *Decretals* c *Nulli* 5. *de reb. Eccl. non alien.* Churchmen are forbid to alienate or Mortgage their Lands, *pœnas timentes quas Leonina Constitutio comminatur.* In that C. the perpetual *Emphyteusis* is condemn'd as an Alienation: However in the next C. but one, which is a Decretal of Pope *Alex* 3. directed to the Bishop of *Worcester*, That Contract is allow'd of in one Case, which is the very Case wherein it was first us'd, Namely, when Lands overgrown with Wood were to be clear'd, and made arable; Lands of this Sort, being first charg'd with an annual Rent, might be settled upon such Persons and their Heirs, who were best able to undergo the Labour and the Charge: But then it is to be observed, that such Lands, when they return'd to the Church, either as forfeited by the Tenant, or thro' his want of Heirs, could not be leas'd out again.

again upon the like Terms, any otherwise than as That which gave Occasion to the first Demise, did still subsist, *viz.* their being wild and barren; for, if they were become fertile by Culture, they were alike unalienable with any other of the Churches Possessions.

But I do not find that this Law doth any where permit the said Contract to be made, as *Justinian* did in ordinary Cases, for 30 Years or 3 Lives. The longest Lease, expressly allowed of in the Canon Law, is one of Seven Years mention'd in a Rescript of the same, *Alex. 3.* to the Bishop of *Exeter*. *C. Querelam ne Prælati vices.* But the Canonists notwithstanding are agreed that before the *Pauline* Constitution Church Lands might have been let to Farm for any Term not exceeding nine Years. They ground their Opinion upon *C. 1. de reb. Eccl. in Cle.* Where, after a general Charge upon Superiors of Religious Houses not to let their Lands to any for Life or Years, upon pain of Suspension; it follows, *Verum præmissa ad locationes, vel etiam ad reddituum aut fructuum venditiones ad tempus modicum faciendas declaramus ullatenus non extendi.* Now ten Years being accounted a long Time in the Civil Law, the learned in the Canon Law reckon any Number of Years short of That to be *Tempus modicum*, and thence conclude, that according to the ancient Canon Law, Leases might be made for nine Years; but if they were extended to Ten, That, they say, would

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would be *longi temporis locatio*, which all agree to be a sort of Alienation.

But by the Constitution, *Ambitiosæ* of Paul 2d. made in 1468, this Term is reduc'd to three Years, and they who shall exceed it, if Bishops or Abbots, are interdicted *ab ingressu Ecclesiæ*, and, if they make not Satisfaction within six Months, are suspended from all Administration both Spiritual and Temporal; other benefic'd Persons are *ipso facto* depriv'd.

Besides all this, those greater Prelates took an Oath to the Pope at their Consecration, part whereof was, *Possessiones ad mensam meam pertinentes* [Demeans] *non vendam, nec donabo, neque impignorabo, nec de novo infeudabo vel aliquo modo alienabo, etiam cum consensu Capituli Ecclesiæ meæ, inconsulto Romano Pontifice; et si ad aliquam alienationem devenero, pœnas in quadam super hoc edita Constitutione contentas eo ipso incurrere volo.* In this Oath, as 'twas taken by Abbots, instead of *ad mensam meam*, the Words are *Monasterium meum*, and for *Capituli Ecclesiæ meæ*, *Conventus mei*.

There is a Dispute among the Canonists concerning the Constitution referr'd to in the last Clause of this Oath, some take it to be the *Leonine*, others the *Pauline*. I shall not trouble the Reader with the Arguments used on one Side or the other; possibly both may be in the Right, and that the former was intended, till the latter came to be substituted in its Place. I say this in case those Words *Si ad aliquam alienationem—*
were

were anciently a Part of the Oath, which there is great Cause to doubt. But it is certain that long before the Pontificat of *Paul* the 2d. Prelates were restrain'd from alienating any Part of their Possessions without License from the Pope, tho' they had the Consent of their respective Chapters and Convents, and Archbishops that of their Suffragans. This appears from a Deed extant at the End of *Du Chesnes* Collection of the *Norman* Historians, whereby an Exchange was made between our King *Richard* I. and the Archbishop of *Rouen* in 1197, which begins thus, *Richardus Dei gratia Rex Angliæ—Facta est hæc permutatio inter Ecclesiam Rothomagi et Archiepiscopum Rothom. Galterum ex una parte, et nos ex altera, de manerio de Andiliaco in hac forma, scilicet, Quod idem Archiepiscopus de consensu et voluntate Domini Papæ, Celestini [III.] et de assensu Capituli Rothom. Ecclesiæ et Coepiscoporum suorum et Cleri ejusdem Archiepiscopatus concessit, &c.* In a Decretal of this same Pope *Celestin* III. *c ult de Eccl. ædij.* we find mention of an Oath taken by Bishops, *de rebus Ecclesiæ non alienandis*; and that it was taken to the Pope, appears from another of his Decretals directed to the Archbishop of *Ravenna*, wherein we read, *Cum ex sacramento fidelitatis tenearis sedi Apostolicæ, nihil alienare* C. 8. *de reb. Eccl. non alien.* In one of *Innocent* III. *Celestins* immediate Successor, directed to the Archbishop of *Milan* are these Words; *Quamvis juramento tenearis astrictus non infeudare de novo, Romano Pontifice inconsulto,*
C. 2.

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C. 2. *de Feudis*. In *England* we find this Oath taken by *John de Hereford*, when admitted Abbot of *St. Albans* in 1235, in pursuance of a Decree made by the last nam'd Pope in the *Lateran Council*, held in 1215; a Copy of it, as Sworn by that Prelate, is extant in the 2d. Vol. of *Spelman's Councils*, pag. 198, where it ends thus: *Possessiones ad Monasterium meum Spectantes non vendam, neque donabo, neque impignorabo, neque de novo infeudabo, inconsulto Romano Pontifice*. The like Form was used at the Consecration of Archbishops, as appears from Dr. *Duck's Life of Archbishop Chichele*, and Archbishop *Parkers* of his Predecessor *Dean*; and there is no Cause to doubt but the same Oath was taken in course by *Warham* and *Cranmer*.

Foreign Writers Speak of this Oath as taken only by such Prelates as are promoted by the Pope, or consecrated by virtue of his Briefs. But in *England* it was impos'd upon all the Bishops at least, if not upon all the Abbots and Conventual Priors. Archbishop *Parker* saith that *hoc Juramentum a singulis Episcopis præstari consuevit*; of which there is an Authentic Proof in the 1st. Vol. of Bishop *Burnet's History of the Reform.* pag. 123, where we have an Account of its being read in Parliament at the King's Instance. The *English* Copy which was so read, begins, *I John Bishop or Abbot of ———* and Ends thus, *I shall not alienate or sell my Possessions without the Pope's Counsil.*

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I know not whether or no the *Pauline* Constitution was ever receiv'd in this Kingdom before Queen *Mary's* Reign, it being of a later Date than *Lyndewoods Provinciale*. Sir *H. Spelman*, its true, hath inserted it into his second Vol. pag. 709, as transcrib'd from an ancient Manuscript, which may probably have been found in the Archives of some Episcopal See or Monastery. But the Omission of the Penal Clause in the Oath, as it was taken here, seems to be a stronger Argument against its having been publicly submitted to. But then 'tis certain, that it hath been receiv'd in many Parts of Christendom, and is still in force, so far as to prohibit and annul Leases for more than three Years, where the Penalties do not take Place. In *Spain* for Instance, as we learn from *Navarrus Manuale* C. 27. n. 149, where he reports, that the Case of a Lease made for more than three Years, coming before him and other Judges at *Salamanca*, they all declar'd it to be void, but would not pronounce the Lessor to have incurr'd the Penalties denounced in the Constitution; Their Reason was, because they believ'd the same *in paucis locis esse receptam quoad pœnas extrinsecas, quanquam in multis est recepta quoad dispositionem principalem, et pœnam intrinsicam nullitatis alienationis et locationis factæ in plures quam tres annos*. In *Portugal* he says, it is not receiv'd so far as that comes to; his Reason is because tis usual in That Kingdom to make Leases for four Years. But *Molina* a Professor at *Evora* a Portuguese University,

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sity, was inform'd upon Enquiry, by the Ecclesiastical Judges, and the most experienc'd Advocates, that it was in force through out that Kingdom. *Gama*, a *Portuguese*, as quoted by him, says the same thing, and that all Judicatures there determine Causes according to the *Pauline* Constitution, and vacate such Leases as are made for above three Years. With these agree *Azorius* and *Ribellus Portugueses* likewise. The latter answers *Navarrus* in the Words used by Pope *Innocent* the 3d. on a like Occasion, *Multa per patientiam tolerari, quæ si in judicium deducerentur, exigente Justitia, non deberent tolerari*. But *Molina* and *Azorius*, and before them, *Covarruvias* and others, as I suppose, agree in This, which they take to be an equitable Construction of the Law, Namely, that the Term of three Years ought to be understood of three profitable or fruit-bearing Years. According to which Construction, Lands which lye Fallow every third Year, might legally be leas'd out for four Years, and for six in the Case of Olive Yards, the Trees whereof bear but every other Year, and for nine where there is but one Crop in three Years, which may be the Case of Underwoods design'd for Fuel. *Boerius Epo* Professor of Law at *Douai* is the boldest Writer on this Subject that I have met with: He, as quoted by *Uffellus*, in his Notes upon *Covarruvias* 2 Vol. 255, maintains, That, in time of War at least, where a Country hath been laid wast, Estates belonging to Monasteries might be let to Farm for a
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very long Term, even that of twelve Years, *Totos duodecim annos*, provided there was no Fine in the Case, *Dummodo caveatur ne anticipatis solutionibus fierent Elocationes*; tho' he owns at the same time, that this Doctrine was contrary to the *Jus commune*. But he wrote in a Countrey which was then, and was long like to be, the seat of War, and where the *Pauline* constitution as it seems, had never been submitted to: For these Reasons, I suppose, it was decreed in a Synod of the Low Countries held at *Antwerp* in 1610, That the Arable Lands of Religious Houses might be let for nine Years, Meadow and Pasture for six, but Tythes never for more than three. At the same Time it was decree'd that no new Leases should be granted before two Thirds of those Terms were expired. And what the common Opinion was in those Parts about the taking up Money before hand on these Occasions, we may learn from *Lessius* a Jesuite, and one never reckoned among the more rigid Casuists, even of that Order; *Non tamen est tolerabile quod quibusdam in locis fit, ubi Beneficarii prædia Ecclesiæ ad multos annos, exigua Pensione elocant, ea lege ut Conductor Statim solvat poculum vini (ut vocant) mille florenorum: fraudant enim hoc modo successores, si forte interea mori contingat, præcipientes partem successoribus debitam. Unde tenentur eorum hæredes ad restitutionem ex illa pecunia anticipata pro numero annorum qui post mortem Beneficarii supersunt.* p. 334.

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Possibly he might have his Eye upon *England* in saying *quibusdam in locis*, for this corrupt and scandalous Practice had long before been abolish'd in Countries, where the Council of *Trent* was receiv'd, and in *France* where it was not receiv'd, by the Temporal Laws, as will appear in the sequel. By *Poculum vini* I suppose he means the same as in *France* they call *Pots de Vin* in *Spain* and *Portugal* *Propinas*, which I take to be a Fee or Perquisite claim'd by the King's Officers, in letting any Part of the Royal Revenues to Farm, which others took afterwards in Imitation of them on the like Occasions, and inhauc'd according to the Value of the Things Farm'd.

It hath been a Question among the Canonists, whether a Contract made for a longer Term than the Law allows of, shall hold good for the legal Number of Years, tho' it be void for the rest? some were for the Affirmative, grounding their Opinion upon that Common Rule of Law, *Utile per inutile non debet vitiari*; but that which holds such Contracts to be void from the Beginning seems to have prevail'd, especially if it appear'd that the Tenant would not have taken the Lease for a shorter Term than six or nine Years; for in that Case the Contract is void in respect of the first three, as having never been consented to by the Parties; for a conditional Consent is as if it were never given upon failure of the Condition. The aforesaid Rule holds only in *Separabilibus*, but the Question is concerning one individual Contract,

Contract, which must be good in the Whole or not at all.

There is another Question agitated abroad in the Divinity-Schools, as well as in those of Law, which makes more for our present Purpose; and that is, Whether a Lease made for a certain Number of Years limited by Law, may be renew'd any considerable time before the legal Term be expir'd? I say any considerable time, for the Nature of the Thing requires that some time be allow'd for the Landlord to seek out for another Tenant; and, for the Tenant, if the Estate be in Land, to provide himself with Stock and other Necessaries for managing the Farm; for which Reason our Restraining Acts allow Leases of 21 Years to be renew'd at the End of eighteen, and not before.

This Question, as 'tis commonly put, is whether a Lease of three Years may, after the Lapse of one Year, be renew'd for three to come? But, to bring the matter home to ourselves, let us put it thus: If a Lease of one and twenty Years may from time to time be renew'd at the End of Seven? The common Answer is, that if the Lease be continued in the same Hands and no alteration made in the Rent which is the very Case with us, this pretended Renewal ought to be deem'd a fraudulent Contrivance to elude the Law by lengthening out the old Lease beyond the legal Term, and not the Grant of a new. *Velasco* indeed, as quoted by *Molina* 2 V. Disp. 466. N. 11. is of Opinion, that, if either the Tenant or

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the Rent be chang'd, it would then be a new Lease, rather than a Continuation of the Old. But *Molina*, thinks, that unless the Tenant be chang'd, as well as the Rent, there is cause sufficient to presume a Fraud, since it was an easy Matter for the Parties, when they first made the Bargain to agree upon two different Rents, payable at different Times; and he quotes *Cavalcantius* as being of the same Opinion. What would these Men think of Leases renew'd, as it were of Course, fourteen Years before their Expiration, and That in Opposition to the declar'd Intent of one Law, (13 *Eliz.*) and the very Letter of another (18 *Eliz.*) would any Jesuite think that our fictitious Surrenders can justify such a Practice?

This Question hath more than once been determined by the Parliament of *Paris*, as appears by several *Arrests* or Decrees which, according to the Report of *French* Lawyers, have been made by that Court, to vacate Leases granted by Colleges, Chapters and other Communities, whilst former Grants were in force, that is, I suppose, before the Time allow'd for Renewals, which in *France* where Leases are commonly made for nine Years, is eighteen Months, if the Estate be in Land, and but six, if it be in Houses.

One Reason that mov'd the Court to annul those Leases, was in all likelyhood, a probable Presumption that they had not been granted before the proper Time, but upon some valuable consideration,

sideration, such as is the Payment of what we call a Fine, or of Money in hand, to be abated afterwards with Usury in the yearly Rent That this great Abuse was not unknown in *France* and other Countries any more than in our own, the Laws every where made to remedy it are a sufficient Proof. Among which an Ordinance of the now mention'd Court, dated in the Year 1577, may perhaps deserve your Notice, whensoever the Case of our Universities shall come into Parliament; to me it seems an effectual Cure for an Evil, which, without some timely Remedy may prove destructive to those Bodies: By it

The Superiors of Colleges within the Universities of that Kingdom are prohibited to Lease out, or let to Farm any of their Houses, Lands, Manors or other Revenues, otherwise than in Public to the last and highest Bidder, after Notice given by Bills affixed to the Church Doors of the Parishes, where such Houses, Lands, &c. are situate, and publish'd in the Churches at the Time when there is usually a full Congregation, (*aux Prosnes des Messes Parochiales*.) But what makes more to our Purpose,

They are forbid likewise to take Money on such Occasions, either by way of Advance, or upon pretence of the above mention'd Perquisite, on pain of forfeiting fourfold. Leases for more than nine Years are declar'd to be Null, and they that make them punishable at Discretion. *Edits et Ordon. 2. V. p. 1198.*

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Tho' the *Pauline* Constitution was receiv'd, as hath been said in many Parts of *Christendom*, it did not wholly prevent the making long and unreasonable Leases, nor consequently the taking up Rents before hand even in those Parts; some were still made for a longer Term of Years than the Canon Law, as it stood before that Constitution, allow'd of; some for a much longer than even the Civil Law would permit. This was done by virtue of Dispensations which the Lessors undertook to purchase at the Court of *Rome*, and in that Consideration no doubt in-hanc'd the Fines at the Expence of their Successors. And it seems that Fines were sometimes taken when it was not thought fit to procure Dispensations, and where, without them, Leases could be made but for three Years. *Redoanus* in his Treatise *de rebus Ecclesiæ non alienend.* p. 287. reports, that being at *Trent*, whilst the Council was sitting, and meeting there with the Bishop of *Minori*, (in the Kingdom of *Naples*) was told by him, that he could not reside upon his Bishoprick, because his Predecessor had anticipated the Rents of it for a Term, of which 2 Years were still to come. But the Council put an End to that evil Practice by the following Decree, which, as my Author says, was made upon the Complaint of that Prelate, when the Question concerning Residence was in Debate.

Magnam Ecclesiis perniciem asferre solet, cum earum bona representata pecunia in Successorum præjudicium, aliis locantur; omnes igitur hæc locationes

tationes nullatenus in præjudicium Successorum validæ intelligantur, quocunque indulto aut privilegio non obstante; nec hujusmodi locationes in Romana Curia vel extra eam confirmentur.—— Locationes vero rerum Ecclesiasticarum, etiam auctoritate Apostolica confirmatas, Sancta Synodus irritas decernit, quas a triginta annis citra ad longum tempus, seu ut in nonnullis partibus, ad viginti novem, seu bis viginti novem annos factas vocant, Synodus Provincialis, vel deputandi ab ea contra Canonicas Sanctiones contractas fuisse judicabunt.

After this we need seek no further for the Opinions of Canonists, concerning Leases made in consideration of anticipated Rents, or for any long Term of Years, it being no longer in the Pope's Power to legitimate either. But, as the Council of *Trent* sat after the Reformation, this Decree, which pass'd in the last Session held in 1564, could have no Effect in *England*, other than to make us blush, that such Abuses should generally prevail here, which an Assembly, consisting for the most part of Men servilely devoted to the Court of *Rome*, was ashamed of, and cou'd not but condemn as unjust, notwithstanding their having been formerly Authorised by the Popes themselves.

That the Canon Law, as it prohibits all manner of Alienations, except in certain Cases to be mention'd hereafter, was received in *England*, appears from the following Constitution of the Synod or Council of *Oxford*, held there in 1222, by *Stephen Langton* Archbishop of *Canterbury*.

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Ecclesiarum indemnitatibus consulere cupientes, præsentis Concilii auctoritate duximus statuendum, ut nullus Abbas vel Prior, nullus omnino Archidiaconus vel Decanus, nec alii habentes Personatum seu Dignitatem, sed nec Clericus inferior, possessiones, vel redditus. Dignitatis, vel Ecclesiæ sibi commissæ consanguineis vel amicis suis, vel quibuscunque aliis, vendere, impignorare, infeudare de novo, vel quolibet modo alienare præsumat, nisi forma Canonis observata. Si quis autem contra hoc venire præsumserit, et quod in hac parte præsumtum fuerit viribus careat, et Præsumtor Dignitate, vel Personatu, vel Ecclesia quam sic læsit persuum Superiorem spoliatur, nisi quod alienaverit, infra tempus a suo Superiore præfixum sine damno Ecclesiæ suis sumptibus duxerit revocandum. Is quoque qui Ecclesiastica bona receperit de cætero, et commonitus ea præsumserit detinere, Excommunicationis sententia percellatur, donec restituerit, ea nullatenus absolvendus. Idem Prælati majores observent.

But this Decree does not limit any certain Term of Years for letting to Farm the Possessions of Churchmen, which were not manag'd by themselves, as indeed there was little Occasion for any such Limitation in regard to those of the greater Prelates; who as hath been shewn, used at that time and for two or three hundred Years after, to hold their Lands in their own Manurance, cultivated by their Tenants in Villenage, under the Inspection of their Stewards and Reeves.

But this was not always the Case of Deans, Archdeacons and other Dignitaries, nor of many Reli-

Religious Houses, Chapters, and Colleges, these having the Rectories of Parish Churches appropriated to them for their Maintenance, (the Cures with the small Tythes being left to the Incumbent Vicars,) which as they often lay in Places remote from the Abode of those they belong'd to, and could not be manag'd by them, were put into the Hands of others; and for the Security of all concern'd, were commonly demised by Lease, under such Regulations as were provided by the Laws of the Realm as well Ecclesiastical as Temporal; Those of the former sort were to the Effect following.

That no such Demise should be made without Licence from the Bishop of the Diocese, nor to any other Persons, nor upon any other Conditions than such as He should approve of.

The Bishop was to approve of none but Clerks, subject to his Jurisdiction, and answerable to him for their Conduct.

These Demises could not be made for more than *five Years*, nor continued to the same Persons at the Expiration of that Term, they being incapable of having the Estates leas'd to them again till after they had been held for some time by other Tenants.

Such is the Ecclesiastical Law of *England* concerning this Matter, as it hath been often declar'd in our Synods, both National and Provincial; of which the many Constitutions, that have from time to time been enacted to that Purpose, are a sufficient Proof, to which I referr, they being

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set forth at large by Sir *H. Spelman* in his Collection of Councils. I shall trouble you with but one of them, and some Parts of the rest that enforce and explain it.

Cum laicis Ecclesias dari ad firmam sit penitus in honestum, et Clericis quibuscunque ad longum tempus propter continuationem temporis quæ afferre consuevit periculum, et Ecclesiæ possit esse damnosum: Utrumque districtius inhibentes præcipimus, ut nec Laicis unquam, nec personis Ecclesiasticis Ecclesiæ ultra Quinquennium de cætero conferantur; nec finito eo renouentur eisdem, nisi alii habeant immediate; et, ut omnia sint in tuto, præcipimus ut Episcopis præsentibus, vel Archidiaconis, firmaria fiat conventio: ex qua plures conscribantur literæ, quarum una remaneat penes ipsos.

This pass'd in a Council of both Provinces stiled *Pan-Anglicum* held by *Otho* Legat of *P. Gregory* 9, in the Year 1237, and was afterwards, viz. in 1268. (and not as it is set by a Mistake in the aforesaid Collection 1248,) confirm'd in a like Assembly held by *Ottobon* Legat of *Clement* 4. and Offenders made liable to forfeit one Third of the Profits accruing from Rectories let out to Laymen, or even to Churchmen beyond the Term of five Years. Contracts made for that purpose were at the same time declared to be of no effect.

Archbishop *Stretford* in a Provincial Synod assembled at *London* in 1342, approves of the Constitutions made in this Behalf by *Otho* and *Ottobon*;

Ottobon; and withal gives a Reason why it was thought indecent (*inhonestum*;) that Laymen should hold such Farms, viz. *Laici prætextu firmarum hujusmodi in Ecclesiarum sic demissarum mansionibus et domibus cum uxoribus et pueris et familia morantur, tabernas in eis publicas facientes, et inhonestæ alia facientes, unde Scandala pullulant.*

But this, tho' a good Reason why such Inhabitants should be kept out of the Parsonage Houses, made nothing against letting the Glebe Lands to Lay Tenants, which surely might then, as they commonly are now, be held by them without Scandal, and yet we find such Lands to be particularly intended by the Makers of those Constitutions; for the Archdeacons, whose Business it was to see them put in Execution, were directed to make this among other Enquiries in their Visitations: *An Laicis detur ad firmam aliqua libera Terra alicujus Ecclesiæ?* Spelman 2 Vol. 192. As for Tythes, they could not regularly be let out, even to Clerks, for more than one Harvest at a Time. In effect, Archbishop Stretford gives another Reason for this Restriction, in the Words immediately following those last recited, viz. — *Ac Ecclesiis hujusmodi circa sua jura plurimum derogatur.* The Rights of the Church were, it seems, in those Times greatly infring'd when her Possessions were trusted in any other than Churchmens Hands; and that apparently because the Bishops could then oblige none but Churchmen to a faithful Discharge of their

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their Trust: This is plainly intimated in the following Words of a Decree pass'd in the Council at *Lambeth* under Archbishop *Peccham* in 1281—*Ut Ecclesiæ nullis dentur ad firmam nisi Personis Ecclesiasticis sanctis et honestis quas locorum Episcopi libere valeant coercere.* The Bishops had still so much Power left, that they could, upon occasion, compel their Clerks to comply with their Obligations; which is more than they could do by Laics, who might put a stop to their Proceedings by Prohibitions and Attachments, which in those times went out, as it were of Course, from the Temporal Courts, upon any false or frivolous suggestions. Of this we have so many Instances collected from the Records in the Tower by the diligent Mr. *Prynne*, that one would think it to have been the chief Business of the *K. B.* during the greatest part of *H.* the 3d's. Reign, to issue out and proceed upon such Writs, against those who held Pleas or prosecuted Suites in the *Court Christian*, even in Causes, which before, and afterwards, were always allow'd to be of Ecclesiastical Cognisance. It was to little Purpose that Laws were made in the two following Reigns to restrain these Exorbitances, such as the Statute *Circumspecte agatis* and the *Articuli Cleri*: For the Temporal Judges got Commissions to make Enquiries upon the Ecclesiastical, *whether these made just Process or excessive* in Causes notoriously appertaining to their Cognisance: So that had not a stop been put to that Practice by the 18 E. 3. no Cause could
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be tried in the Spiritual Courts, which, let the Proceedings upon it be ever so just and regular, might not be tried over again in the Temporal; and 'tis no wonder that the Clergy did all that was possible to avoid coming into them, considering how much our Common-Law abounded with Chicanerie before the 14 E. 3. and many Subsequent Acts made to reform it, particularly those relating to *Mispleadings* and *Jeofailes* of which you have a very instructive Account in Sir E. Coke's 5th Book of Reports, and in *Blakemore's Case*, lib. 8.

But to say the Truth, the Spiritual Courts at that time were not without their Faults of a like kind, which prov'd so much more scandalous in them as they had better Rules to go by. The Bishops in *England*, like those of other Countries, had for the most part ceas'd to exercise their Jurisdiction in Person, to which they here, as 'tis said, could no longer attend, since, besides their being part of the great Council of the Nation, they had been oblig'd by the Statute of *Clarendon* to assist at the ordinary Courts which were held by the King three times in the Year. The Conqueror had as was before observ'd, compelled the great Prelates to hold part of their Lands, which till then were all absolutely free, *per servitium Baronie* that the same might be subject to Military Service. *Hen. 2.* required this further Service of them, that they, as well as other Barons and Tenants in *Capite*, should pay Suit to his Courts, which hath been given for
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a Reason why their own Courts were committed to the management of Officials, (Chancellors) and Commissaries, who instead of determining Causes, as the Bishops had done, *ex æquo et bono*, without Expense or Delay, affected to proceed by such Forms and Methods as were no less vexatious than those of other Judicatures. How those Courts came to be ordered, may in part appear from what Archbishop *Peccham*, in the Council aforesaid, reports concerning the Advocates, *viz.* That they apply'd themselves wholly to study *Fraudes horribiles et impeditivas Processus judicialis*. As this Change was made in *France* about the same time as in *England*, so the Effects of it were much the same there, if not a great deal Worse, at least if we can believe *Duarennus*, who gives this Account of the Proceedings in the Ecclesiastical Courts of that Kingdom. *Sed nec ea Jurisdictio ab Episcopis ipsis nunc exercetur, quod olim non solum magna cum gravitate et decore, sed etiam lenitate, ac simplicitate fiebat; sed a Vicariis quibusdam juridicis, qui Officiales vulgo dicuntur. Quorum auditoria calumniis, imposturis ac Strophis forensibus quæcunque regia ac prophana tribunalia longe superant.*

But the Case of these Courts was not, it seems, quite so bad in *England*, if it were, their Adversaries needed not have gone so far, as they did for a pretence to crush them; had they such crying Abuses to accuse them of, it is not likely they would object only to the Extent of their
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Jurisdiction, as intrenching on the King's Prerogative, and tending to the Disherison of his Crown; the meaning of which was, if it had any meaning, that the Bishops were setting up the Pope's Authority in opposition to the Kings; This in the Reign of *Hen.* the 3d. when none more vigorously withstood the Papal Usurpations than our *English* Prelates, or more tamely submitted to them than that weak Prince. Whereas 'tis certain that the Jurisdiction in question, was never more extensive, or less controlled than when the Popes had little or nothing to do in this Kingdom. In the Saxon Times each Bishop had the Temporal Jurisdiction over the Lands belonging to the Church within his Diocese, and those that dwelt upon them, whether Tenants others. He sat likewise as one of the two Judges in the County Courts, where Causes of the greatest Importance were dispatch'd in a summary Manner, without the assistance of Lawyers, for there were none then of that Profession in *England*. His chief Business there was indeed to determine Ecclesiastical Causes, but, if we can believe Sir *H. Spelman*, he had Power likewise to direct his Colleague and set him right, upon Occasion.

Presidebat autem (Comes) foro Comitatus, non solus sed adjunctus Episcopo, hic ut jus divinum, ille ut humanum dicerit; alterque alteri auxilio esset & Consilio; præsertim Episcopus Comiti: Nam in hunc illi animadvertere sæpe licuit, et errantem cohibere. Gloss. verb. Comes.

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When the Conqueror had separated the two Jurisdictions, and caus'd them to be exercis'd in distinct Courts, the Bishops, as hath been shewn, had for many succeeding Reigns the sole Cognisance of Causes relating to Ecclesiastical Fees. And 'tis observable that the Writs of Prohibition collected by Mr. *Prynne*, which bear Date before the 8 *Hen.* 3. are grounded upon no other Suggestion than that the Judges of Courts Christian, *tenuerunt placitum de laico feodo, quod intendunt trahere in puram Elemosynam*; had there been any of an elder Date to be found in the Forms that were afterwards used, it is not likely they would have escaped the Notice of a Person so exceeding diligent, and so affected, as Mr. *Prynne* was, to Church and Churchmen.

From the Conquest till about the End of the twelfth Century, Causes of Ecclesiastical Cognisance were determin'd by the Bishops, and their respective Clergy in the Diocesan Synods, which were assembled twice, or once at least in every Year; On the first of the three Days, which were commonly assign'd for such Assemblies the Clergy brought in their Complaints, if they had any to make, as the Laity did on the second, which were all consider'd on the third. Those of lesser Moment seem to have been determin'd in the Chapters, which were Monthly held by the Archdeacons, but with more than ordinary solemnity once in every Quarter.

Hugh the *Carthusian* Bishop of *Lincoln* who died in 1200, 2d. *Job.* seems to have been one of

of the last of our *English* Prelates, who sat in Person to hear and determine Causes: Of Him *Baronius* reports, from the Writer of his Life, that *Singularem a Domino gratiam acceperat justum ab injusto discernendi; ita ut peritissimi Jurisconsulti cum admiratione dicerent, nunquam se talem virum reperisse in decidendis etiam difficillimis subtilissimis que Causis, quamvis ille hujusmodi praxin nunquam didicerat.* The rather perhaps for that very Reason. One so qualify'd, and so much taken notice of for giving a right Judgment in the most difficult Cases did not, we may sure fail to exercise his Jurisdiction upon any proper Occasion, nor was his doing so taken for an Encroachment on the Royal Prerogative: The Esteem our Princes had for him shews the contrary. King *Henry* 2d. who was never wanting to assert his own Authority, used to value himself for having preferr'd so worthy a Prelate. K. *John*, being at *Lincoln*, to receive the Homage of *William* King of *Scotland*, when the Body of this Bishop was brought thither to be bury'd, both those Kings condescended to set their shoulders to the Bier, as thinking they did Honour to themselves by the Respect they paid to his Memory.

It cannot indeed be deny'd that many Papal Decretals were by this time receiv'd in *England*, and had the force of Law, as were likewise many Imperial Rescripts, which had the same force in the Ecclesiastical and other Courts; but the Jurisdiction of those Courts was neither founded,
upon

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upon nor enlarg'd by either ; they serv'd only to direct the Judges in their Proceedings upon Matters of which they had Cognisance before, by an Authority derived from the Crown. Nor had those Decretals or Rescripts their force in this Kingdom from any legislative Power, which either Popes or Emperors could have in *England*, or any otherwise than as they were generally received and approved of here. There are many Constitutions of both Sorts which were never so receiv'd in this Kingdom, and for that reason were never allowed here for Law ; among these are some Decretals directed to Persons in *England* relating to the Subject Matter now in Hand, which tho' they made part of the Canon Law, as That prevail'd in other Countries, were of no force in this Kingdom ; One of these is the *C. Querelam* mention'd above, which is an Injunction laid by Pope *Alex. 3.* upon the then Bishop of *Exeter*, that he should compel a certain Rector in his Diocese to make good a Lease, that he had granted of his Living for seven Years ; Another is *C. vestra de loc. et Cond.* by which *P. Innocent 3.* declares to a certain Abbot and Convent within the Diocese of *London*, that they might let their Tythes to any such Persons, from whom they could get the best Conditions ; and this without any other Limitation of Time, than that the Demise should not amount to an Alienation or Enfeofment, with a *Non-obstante* to any Ordinance made by the Diocesans to the contrary.

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The Rubric saith that *eadem ratio est de aliis rebus Ecclesiæ*.

These Decretals, before *Paul* 2d. derogated from them, were in other parts of Christendom taken for authentic Decisions in all Cases of a like Nature, being commonly quoted for such by the Canonists; but how little they were regarded in *England* the abovementioned Constitutions shew, which as they were made by our *English* Prelates in opposition to the Pope's Authority, were maintained and enforced by them, so long as they could support their own, against any such Bulls of Exemption as the Monks and others procured from *Rome*. Witness the last of those Constitutions made above 100 Years after that above recited, in order to confirm both it and the rest, which concludes with these Words. *Et quia Religiosi et alij beneficia Ecclesiastica nostræ Provinciæ in proprios usus tenentes, se Constitutionibus prædictis asserunt non ligari: Præsentis approbatione Concilii statuimus, quod si ipsi beneficia hujusmodi, vel suas, quas virtute appropriationis in eis decimarum aut proventuum percipiunt, portiones ad firmam tradiderint Clericis, non obtenta Diocæsani licentia, vel Laicis quovis modo, seu alias qualitercunque, contra præsentis, aut aliarum constitutionum tenorem excesserint, pæna prædicta de cætero percellantur. Stret. in Conc Londin, 1342.* The Penalty was one Third of what the Thing demis'd was worth, applicable to the Fabric of the Cathedral Church.

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How long these Constitutions continued in force, I must leave to their Enquiry who have better Opportunities to search the Registrys of Episcopal Sees, and Religious Houses. What I have casually met with making for this purpose, is as follows.

One of the Statutes given by Bp. *Molend* or *Longspee*, Consecrated in 1256, to the Cathedral of *Litchfield* hath this, among other Clauses. *Finiatur omnis Firma omni quinquennio in quinquennium*. This I suppose in pursuance of the Decree passed in *Concil. Panagl.* It follows indeed, *et non ultra 20 annos per Decanum et Capitulum de cætero concedatur*, which seems to give a greater liberty to the Dean and Chapter than that Decree allows of, *viz.* to continue a Farm in the same Hands, by three several Renewals, *Monast. 3 V. Eccles. Cathed. 249.*

Harpsfield reports that Archbishop *Reinolds* animadverted upon the Superior of a Religious House, who had made a Demise of a certain Rectory without his Consent, tho' but for five Years; *Præsidem Cænobij S. Bertini pænitentia multavit quod Chilhamensis Ecclesiæ fructus ad quinquennium, se incio, locasset.* Hist. Eccl. Angl. 539.

There is enter'd upon the Registry of *Ely*. a License granted by Bishop *Arundel* in 1376, to the Prior and Chapter of that Place, to Lease out their Appropriate Rectory of *Wychem* for five Years, to any qualify'd Person *cuicunque Personæ ad hoc idoneæ*: The same Bishop in
1380,

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1380, licenses the Priores and Nuns of *Haliwell*, to let the Rectory of *Trumpington* for the same Number of Years, to the Prior and Convent of *Barnwell*, whom he enables at the same time to take that Rectory to Farm. After this such Licenses are restrain'd to three Years, for what Reason appears not, the Bull of *Paul 2.* being of a much latter Date; as is one granted to the Rector of *Papworth Anneys* in 1384. *ut possit dimittere fructus Ecclesiæ suæ ad firmam viris ad hoc idoneis per triennium.* Another the next Year to the Warden and Fellows of *Merton Hall* in *Oxford*, *Dimittendi ad firmam per triennium medietatem Ecclesiæ Parochialis de Gamlingaie Eliens, Dioc eis appropri.* I have seen several Leases of Rectories granted by a certain College in *Cambridge*, for three Years only, one dated 19 R. 2. 1396, another 5 H. 7. 1488, a Third H. 8. 1520, which last hath this remarkable Condition, That the Tenant is obliged to pay a Years Rent extraordinary at the Expiration of the said Term, and not beforehand, according to the present Practice. There is one of twelve Years bearing Date 26 H. 6. and 'tis not unlikely, but many may have been granted about the same Time, and afterwards for a like or a much greater Number of Years.

For long before that Time, many Religious Houses and other Collegiate Bodies had purchased Bulls from *Rome* to dispense with our Provincial Constitutions, and all other Laws Ecclesiastical that relate to this Matter: I do not in-

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deed find that such Dispensations took effect, or were exhibited to the Bishops before the Reign of *Hen. 6.* The Reason I suppose was, because the Purchasers might not think it safe to produce them, whilst those severe Laws were in force which had been made in the four preceding Reigns against all Intercourse with *Rome*, that occasioned the sending Money out of the Kingdom. But during the said King's Minority, the Courts of *Rome* and *England* came to a better understanding with each other, they who had here the Power in their Hands, taking upon them to dispense with the Laws of the Realm, as the Popes did with those of the Church, for which Money was taken on both sides, at *Rome* for Bulls of all Sorts; in *England* for Licences to put the same in Execution; and these being now enforc'd by Royal as well as Papal Authority, it is not likely that many Bishops had the Courage to withstand them. In effect, Dispensatory Bulls were then produc'd and admitted, as it were of Course, not only such as were of a fresh Date, but even such as had been granted by Popes long since dead, as will appear from the following Entries upon the Registry of *Ely*, of which fort many no doubt are to be found on those of other Diocesses.

On that of Bishop *Bourgchier* who was translated from *Worcester* to *Ely* in 1443, is enter'd at length a Bull of P. *Boniface* (the 9th, I suppose and last of the Name) bearing Date the 8th Year of his Pontificate, viz. 1397, Whereby
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the Abbot and Convent of St. Marys in York (who had possessions in the said Diocese particularly the Rectory of Haslingfield,) are enabled *Ut omnes fructus, redditus et proventus maneriorum, Ecclesiarum, capellarum, decimarum ac portionum, aliarumque possessionum, ad se suumque monasterium pertinentium et spectantium certis personis idoneis sive Clericis, sive Laicis, prout ipsis magis videbitur expediens, non in perpetuum, sed ad congruum tempus, etiam antequam fructus et proventus, decimæ ac portiones hujusmodi a solo vel a novem partibus, separantur, Ordinarij seu Ordinariorum loci vel locorum sub cujus vel quorum Jurisdictione maneria, Ecclesiæ, decimæ, portiones ac possessiones hujusmodi fuerint, licentia super hoc minime requisita, vendere, arrendare, locare seu ad firmam dare, libere, et licite, valeant, Apostolicæ Sedis vel Legatorum ejus, nec non provincialibus et synodali- bus et aliis Constitutionibus ac statutis et Consuetudinibus contrariis juramento, confirmatione Apostolica vel quacunque firmitate alia roboratis non obstantibus quibuscunque, what effect this Bull had in the Province of York will appear anon.*

A like Bull of Gregory 11, who dy'd in 1378, was exhibited to Bishop Grey's Official in 1457, by the Prior and Convent of Thetford, Proprietors of the Rectory of Dullingham, enabling them *libere et licite dimittere ad firmam dictam Rectoriam suam Laicis vel aliis quibuscunque, licentia minime petita a loci Ordinario, seu obtenta,* and another in 1473 of Urban 6, Gregory's Successor to the same purpose by the Master and Fellows of Corpus Christi, otherwise call'd

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Bennet-College in Cambridge, by Virtue whereof they might in the same manner dispose of their Rectory of *Granchester*.

Pope *Eugene 4*, more indulgent to the Canons Regular of *Barnewell*, than even *Boniface* the 9th, had been to the Monks of *York*, by his Grant Dated in the 12th Year of his Pontificate, 1442, and laid before the Bishops Official in 1454, gave them full Power to dispose of whatsoever belong'd to the Priory, wheresoever situate, whether Rectories, Lands, Portions of Tythes, Pensions, &c. for a Time, or for ever as they should think fit, *Diocesanorum locorum, et aliorum quorumlibet super hoc licentia minime requisita; non obstantibus Constitutionibus Apostolicis aut Legatinis, seu synodalibus vel Provincialibus; nec non Prioratus aut Ordinis juramento, confirmatione Apostolica, vel quavis alia firmitate roboratis et consuetudinibus Statutisque contrariis quibuscunque.*

There is no reason to doubt but that Bulls of this sort might be purchas'd by any such Communities that would go to the Price of them; for it appears not that these were granted upon any other Consideration: This in all likelihood dispos'd some Bishops to be before-hand with the Court of *Rome*, by dispensing with the Ecclesiastical Laws within their respective Dioceses, to prevent their being forc'd to it, or seeing it done without them by a foreign Power; which, as the Times went, they were not then able to resist. This is certain, That Bishop Grey of *Ely*
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in 1454, gave a general License to the Master and Fellows of *Peterhouse* in *Cambridge*. *Quod ipsi fructus, redditus et proventus Ecclesiarum suarum, dicto Collegio unitarum et annexarum, nec non omnium possessionum suarum personis ad hoc idoneis, cum quibus conditionem dicti Collegij potuerint facere meliorem, ad firmam dimittere, arrendare vel ad tempus sub annuo censu locare.* This License to continue during Pleasure.

We find among *Maddox's Formulæ*, a more ample one granted by *John Bishop of Lincoln* to the *Priores and Nuns of St. Michael near Stanford*. *Ut fructus, redditus, proventus, et obventiones omnium et singularum Ecclesiarum, vobis et Prioratui vestro appropriatarum, quibuscunque Personis idoneis, etiam et Laicis, ad firmam arrendare locare sive dimittere, licite et libere tam vobis dimittendi quam hujusmodi Personis idoneis sive Laicis,—tenore præsentium concedimus Specialem, pro toto tempore regiminis nostri, duraturam; universis Officiariis nostris et Ministris quibuscunque injungentes, ut vos et Procuratores sive firmarios vestros occasione præmissorum, absque mandato nostro speciali minime molestare præsumant.* Form 59. This in the Printed Copy is dated 1 Jan, 1407, *et nostræ Consecrationis anno 6to*, by a Mistake, for *Philip*, (and not *John*) *Repington* was then Bishop of that See, and this was the second, not the sixth Year of his Consecration; it should doubtless be 1457, which was the sixth Year of *John Chedworth* elected to that See in 1451. It is not unlikely, but more such Licenses may have

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been given about that time, by the same and other Bishops; and probably their Lordships might sometimes think it but reasonable to take the same liberty themselves, which they gave to others; and this is the only account I can give of such Grants and Leases, (if any such are to be found,) as were made by Bishops in those times, contrary to the Ecclesiastical Laws then in force.

What effect the Papal Dispensations had in the Province of *York*, and probably elsewhere, may in part appear from the Preamble to a Constitution made by Archbishop *Kemp*, (translated from *London* to *York* in 1426,) in a Synod of his Province, which is as follows: *Spelman* 2 V. 708.

Nos fida et concordi relatione informati, et rerum Experientia edocti, quod nonnulli Abbates, Priores Abbates proprios non habentes, Hospitalarij et alij Administratores bonorum Ecclesiasticorum, in desolationes Monasteriorum, Prioratuum, et locorum aliorum quibus præsunt, et prodesse deberent, bona hujusmodi Monasteriorum, &c. videlicet arbores Sylvarum cæduarum, et etiam non cæduarum, redditus, possessiones et alia jura sua vendunt et alienant, ac pensiones, corrodia, et liberationes ad vitam vel longi temporis spatium vendunt et concedunt; nec non Ecclesias sibi et eorum Monasteriis appropriatas ad firmam dimitunt, et pecunias præ manibus acceptas in usus proprios exponunt et convertunt, mutuumque recipiant, ac se et Monasteria sua, Successoresque suos et jura redditus, et possessiones sua perinde obligant

gant et districtioni sæculari submittunt; nec non et alia bona sua mobilia suis notis et amicis in immensum donant et contribuunt; sic quod occasione præmissorum eorum Monasteria ac domus et loca eis pertinentia, propter defectum reparationis collabuntur, et maximam minantur ruinam; divinus cultus in locis hujusmodi præmissorum occasione diminuitur, et observantia regularis negligitur, ac bona hujusmodi Monasteriorum propter abusus hujusmodi, quod dolenter referimus, devastata sunt pariter et consumpta.

We have here, its confess'd, an Authentic Proof that divers Communities actually did, what the Lawers tell us all Corporations aggregate might do by Law, before the Restraining Acts: They made Grants of and out of the Possessions belonging to their respective Foundations according to their Wills, without the Leave or Consent of others either had or ask'd; They sold or Mortgaged the Lands, or charged them with Pensions, Corrodies and Liveries for Years or Lives; and then for their appropriate Rectories, which they could not, it seems, so freely dispose of as of the rest of their Possessions, they did what came next to an Alienation or a Mortgage, at least; They Leas'd them out for Fines paid in hand, which they shar'd among themselves for each Man's private Use, which I take to be the meaning of *Pecunias præmanibus acceptas in usus proprios exponunt et convertunt*. Thus did these wicked Monks squander away the sacred Patrimony that was committed to their
Trust,

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Trust, with an Extravagancy which the Civil Law will not suffer in a private Person; For where That prevails, One who shall be found making such Wast and Havock of his own Estate, as these Men did of that which was not their own, will have a *Curator* put upon him, without whose Direction and Authority any Contract he shall make, can have no effect in Law. And is it credible that the Common Law of *England* could ever approve of all this Prodigality in the Monks, so far as to ratify such Bargains, as they could not make without incurring the Guilt of Robbery and Sacrilege? These things, we may be sure, were never publickly allowed of in any Christian or Civilised Nation, by any other Authority than that which the Popes have arrogated to themselves. It is true indeed that these Words *Se et Monasteria sua Successoresque suos—obligant, et districtioni seculari submittunt*, plainly intimate that the secular Courts in those times did, in some sort, authorise the said Bargains, for otherwise how could the innocent Successors of those who made them become liable to *Distresse*? But all that can be infer'd from thence, is, that they who then presided in those Courts exceeded their Commission, by acting contrary to the Common Law, as it stood for several Ages after the Conquest, and had never been alter'd in this respect, if it ever could be, by any Statute of the Realm. I say, if it ever could be, for the Lawyers tells us, that Acts of Parliament when found repugnant to natural Justice, are

are Null of themselves; and that several such Acts have for that reason been declar'd void in the Courts below; and it must appear exceeding strange if those Gentlemen shall assume to themselves an Authority to alter the Common Law, which by their own Confession belongs only to the Sovereign Legislature, and not only That, but a Power to alter the very Nature of Things, as they would do both, if they pretended that any arbitrary Decision reported in their Books, made That become Lawful which is in itself highly Criminal, and had always and every where before been condemn'd as such: In fact, that the Common Law had undergone no such Alteration, as to this matter, will appear from hence.

When King *Henry VIII.* had appointed a general Visitation of all the Religious Houses in *England*, in order to find out Reasons for the Resolution he had taken to suppress them, the Visitors were instructed to make the following, among other Enquiries in every such House.

Whether any of the Lands be sold or mortgaged, and for what Sums?

Whether any be let to farm by the Master of this House for Term of Years, and for how many Years? and specially whether they be letten for small Sums, or for less Sums than they were wont to be letten, to the intent to have great Sums of ready Money before hand?

Now these Queries, tho' they should be all of them answered with a full Confession of the things

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things in Question, would have been altogether impertinent to that King's Purpose, if the Persons concern'd had a legal Right to do those things, since they could not supply his Majesty with any matters of Accusation, that would affect them ; for, great as their Guilt might be in regard to a higher Tribunal, the Law itself must have clear'd them of the Charge in Man's Judgment : This I say would have been the Case, if there be any Truth in what we find so confidently asserted in the Law Books. That "Corporations aggregate then had as full Power and Authority of themselves alone, without the Confirmation or Consent of any, to lease, grant, or alien any or all of their Ecclesiastical Possessions, of which they were seiz'd in Fee, as any Person seiz'd of a Temporal Estate in his Natural Capacity then had, or as yet hath."

But its plain that Archbishop *Kemp* could not perceive that those Bodies, had any such Power either of themselves or vested in them by the Laws of this Realm, or by any Authority acknowledg'd here to be in the Pope. Nor can he be suppos'd ignorant, how far the one and the other extended in matters of this kind, being, as he was, both Chancellor of the Kingdom, and a Member of what they call the sacred College at *Rome*. In short, He with the Consent of his suffragans condemns the Exercise of that pretended Power, as highly Criminal in itself, and contrary to the ancient Canons and Constitutions, which
he

he declares to be still in force, adding new Penalties to those contain'd in them, annulling withal such Grants and Bargains as should thereafter be made, of, and for any considerable Part of the Possessions belonging to Religious Houses, without the Consent and Approbation of their Diocefans, besides other Conditions which I shall presently have occasion to mention.

It's true indeed that this Decree was not put in Execution either by that Prelate, or by his immediate Successor, probably on Account of some strong Opposition it was like to meet with from the Courts either of *Rome* or of *Westm.-Hall*; and should it come from the latter, it would not be the only Instance of Papal Usurpations being supported by the Temporal Courts, in derogation of the Laws then in force: Two very remarkable Instances of this Sort are produc'd from the Year-books, by Bishop *Stillingfleet* in his *Case of Commendams* p. 443, viz. of Judgments given in favour of a Power which the Popes had arrogated to themselves of Collating to Benefices here in *England*, which Power, saith the Bishop, was *own'd by the Judges*; and this could not be done but in direct Contradiction to the Statute of *Provisors*: But, as we are told by the Bishop, it is said in the Year-books that the *Statute of Provisors was grown out of Use*, the Reason, I suppose, on which the said Judgments were founded.

The former of these was given in 41 of King *Edward 3.* in the 25th of whose Reign that Statute

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tute was made, it was affirm'd and reinforc'd by another in the 27th, and by another in the 38th, and could it *grow out of Use* by the 41 of the same Reign? The meaning, I suppose, was, that the Statute had not been executed during the three preceeding Years; but whatever the Reason of That may have been, whether the Want of Occasions, or, which is more likely, the Corruption and Negligence of those who should see to the Execution, such Non-usage neither did nor could abate of its force, as we are very well assured by the following Words of an Act pass'd in the next Reign. *Which Statute (25 E. 3.) always holdeth his force, and was never defeated, repealed nor annulled in any Point.*

The other Instance is of a like Judgment given for the very same Reason, *viz.* that *the Statute of Provisors was grown out of Use*, and that but two Years after it had been enacted in Parliament, *That all the Statutes and Ordinances made against Provisors, as well in the times of King Edward the third, and King Richard the second, as in the time of our Sovereign Lord the King that now is (Hen. 4.) with all the Pains and Additions to the same, shall, from henceforth be firmly holden and kept in all Points; 9 H. 4. c. 8.*

The Opposition suppos'd to have been made to Archbishop *Kemp's* Decree, from what Quarter soever it came, ceas'd upon the Translation of *George Neville* to the See of *York* from that of *Exeter*. This Prelate had for many Years before been Chancellor of the Kingdom, and therefore
could

could not but know how the Law stood as to matters in which he was immediately concern'd; and being Brother to the great Earl of *Warwick*, we may well suppose that his superior Quality secur'd him from any vexatious Chicanerie that his said Predecessor might apprehend: He finding the aforesaid Decree in the Registry of his Church, but not in that which was called the Statute-Book of the Province, by the Advice of his Suffragans and Clergy assembled in a Synod, order'd it to be enter'd upon That likewise, and incorporated with the other Provincial Constitutions, and, after due Promulgation, to be strictly observed in all Places within his Metropolitick Jurisdiction, which at that time, and for some Years afterwards, comprehended all *Scotland*.

This was in the Year 1466, when Pope *Paul* the 2d. for what reasons appears not, instead of interposing his Authority in behalf of the Monks, thought fit to follow the Example set him by our Archbishop; for he, soon after publish'd his so often mention'd Constitution *Ambitiosæ*. Whether this was ever publickly receiv'd in *England* before Queen *Mary's* Reign, is more than I know, but receiv'd it was in that Reign, tho' to little purpose, for I find the following, among other Decrees enacted in the Synod of *London*, held by Cardinal *Pool*, in the Year 1556.

Ecclesiarum indemnitatibus in posterum omnino prospicere cupientes, hac Synodo approbante, statuimus, Constitutionem fœlicis recordationis Pauli
Papæ 2.

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Papæ 2. quæ incipit Ambitiosæ, sub pœnis in ea contentis observari debere, quibuscunque aliis tam generalibus, quam hujus regni particularibus Ecclesiasticis Provisionibus super eadem re in suo nihilominus robore permansuris.

Note, that the Cardinal had a Royal License to exercise his Legatine Powers, and was specially authorised by the Queen to hold the said Synod, as were the Clergy likewise to assemble and give their Consent to the Canons that should be enacted therein; This to prevent their being ensnar'd in a *Præmunire*, as they had been in the Reign of *H. VIII.* when it might be truly said that the Statutes relating to that matter *were grown out of Use.* Note, likewise, that the 25 *H. VIII. c. 19*, commonly call'd the *Act of Submission*, was then under a Repeal; so that notwithstanding any thing contain'd in the same, this Canon seems to have the same legal force, as any other Constitution of that sort made before, or after it, had, or ought to have. Whether or how far it can consist with the Enabling Act is a Question which I presume not to determine. But this I suppose will admit of no Dispute that the utmost Liberty which that Act allows of, may be used without scruple in any of the Cases I am going to mention.

For after all, it must be acknowledg'd that there are certain Cases extraordinary, in which by all the Laws Ecclesiastical or Civil that have been any where in force, before our Restraining Acts, Churchmen were permitted, at least, if
not

not oblig'd, to alienate their Possessions for a Time, or for ever; provided they did it for such Causes, and in such Form and Manner, as the same Laws prescribe.

Now there are several Causes, which by the Canon and Civil Law, will justify an Alienation; but they may all be reduced under the one or the other of these two Heads, namely urgent Necessity, and apparent Utility.

Of the former Sort are, 1. The Payment of Debts contracted in behalf of the Church, upon any Occasion like those that follow, and cannot be discharged by any other means. 2. Rebuilding the Fabric, when in a ruinous Condition, and not otherwise to be kept in Repair. 3. The Relief of People in extreme Want and Misery, in a Time of Dearth, Pestilence, or any other public Calamity. 4. The Redemption of Captives, when great Numbers of innocent People are carried into Slavery; which was often the Case at the making those Imperial Laws, and Canons of the Church, which relate to this Matter; The Empire at that time lying open on all Sides to the Incurfions of *Goths, Huns, Vandals*. &c.

In these and the like Cases of Necessity, the Goods of the Church, whether Moveable or Immoveable, might, and ought to be pledg'd, mortgaged, or sold outright, as the Occasion requir'd.

There are likewise Cases of Utility, as the Canonists call them, in which Alienations either temporary, or perpetual, are authoris'd by the

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said Laws, that is, when they are made for the Advantage, not indeed of particular Persons, but of whole Communities, and that for the Time to come, rather than the present. Barren and uncultivated Grounds might be leas'd out for a long Term, (but without Fines or anticipation of Rents,) in order to their Improvement; so might ruinous Houses, on condition they should be repaired or rebuilt by the Tenants. It has been shewn above, that, by the Imperial Laws, which were afterwards incorporated in the Canon Law, Church Lands might be exchang'd for others of a greater Value, or lying at a more convenient Distance. Houses and Lands might likewise be made over for Life or Years, to such Persons as would settle upon the Church, Estates in Reversion of double the Value.

A Contract not unlike to this, but of greater Advantage by far to the Lay Contractors, was much used in the middle Ages, and had the Name of *Precariæ*; Father *Paul* saith it was invented in *France* since the Time of *Charlemagne*, which may be true of the Name, but the Rule concerning it to be found in the Capitulars of that Prince, and of his Son *Louis le Debonaire*; and that it was in Use before their Time, appears from a Draught of it among the *Formulae* collected by *Marculphus*, as it is suppos'd, about the middle of the seventh Century. By the Law of *Charlemagne* the Purchaser had this Advantage, that, when he gave the Reversion of an Estate to the Church, he had both That and another of double
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the Value settled upon him for his Life ; or if he made a present Surrender of his own, he might have his Life in Church Lands of three times the Value. Constitutions to this purpose were made in several Provincial Councils, which we find inserted both in the *Decretum*, and in the *Decretals*, and so made part of the Common Law Ecclesiastical, but with these two Cautions ; the first, That the Contract should be renew'd at the End of every five Years, in acknowledgement, I suppose, of the Churches Right, which might otherwise be overlooked or forgotten. The other, That a Successor should not be bound by any extravagant Bargain made by his Predecessor ; for tho' the Law be express, that *Precarium solvitur obitu ejus cui concessum est, non etiam concedentis*, yet if it appear'd to have been granted upon unreasonable Terms, it might be annull'd by the Successor.

This Contract was not unknown in *England* before and after the Conquest ; we have several Instances of it in the History of *Ramsay Abby*, publish'd by Dr. *Gale*. *F. Paul*, and from him *F. Simon*, tell the World, that Churches and Monasteries have been greatly enrich'd by it ; which is not unlikely, where many such Agreements were made upon equal Terms ; But then, one would think that such a Practice should go a great way, to clear the Churchmen of those Times from the Imputation of Avarice, which 'tis the Business of these Writers to fix upon them, alleging This as a Proof of the Charge, which

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serves rather to confute it; Avaritious Men catch at Opportunities to enrich themselves at the publick Expence, and seldom forego their own Advantage for the sake of others: Churchmen in this Case parted with their present Possessions, for the Benefit of those that should come after them, doing good, where they could look for nothing again; which was certainly the Case of those Religious, who, according to *F. Simon*, purchas'd Estates for their Monasteries, of which, these were not to have the Possession, till after the fourth or fifth Generation.

But neither these nor any other of the mention'd Contracts were of force, unless made in the legal Manner, or, as the Canonists speak, with certain Solemnities, such as might serve for Proofs, that the Makers had no other End in View, than the common Good.

Before any of the said Contracts could be made, the whole Community, to which the Estate in question belong'd, was first to be consulted; the Community, I say, for it does not appear, that, since the Church was endow'd with real Estates, these were ever before our *Enabling Act*, so far in the Power of single Persons, as that they could dispose of them for any long Time; Sole Corporations, (Ecclesiastic at least) both Name and Thing, being unheard of till then, as they still are to all the World besides ourselves. The Community was to be assembled in a regular Manner, and that more than once, if the Occasion requir'd it, in order to what the
Canonists

Canonists call the *Tractatus*, in which every Member was heard, who had any thing to say either for or against the propos'd Alienation; the Stewards more especially were, according to the Laws of *Justinian*, to deliver their Sentiments upon Oath concerning the Necessity or Utility of the same. In *France* there is a formal Enquest, or Information taken, *de Commodo et Incommodo*. But then should a Majority, or the whole Body agree to the Proposal, that Agreement was not to take Effect, till it was approv'd of by a superior Authority, after that the Matter had been examin'd and canvass'd over again; the Parties immediately concern'd not being permitted to give final Judgment in their own Cause. It was the Bishop's Part, as it still is, by Common Right, to confirm or annul all such Agreements made by Religious Societies within his Diocese, those excepted wherein he was himself concern'd in Conjunction with his Clergy, as when Lands or Tenements belonging to them in Common were to be Sold, exchang'd or alienated for a Time; which, according to the Imperial Laws, were to be allow'd of, or declared void as the Metropolitan should see Cause. In Cases where the Metropolitan had a like Concern, two Bishops deputed by the Provincial Synod were to be the Judges.

When the Church Revenues came to be divided into seperate Portions between the Bishop and his Clergy, their Management, in this Respect, was still the same, as if they had continued to
Live

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Live upon one Common Stock ; for neither the one nor the others could sell, exchange, or otherwise alienate any part of their respective shares, till the Matter had been treated and debated in the manner above describ'd. In time, its true, the Chapter, where any was, came to represent the Body of the Clergy, and for want of a Chapter, this Business, as I take it, was transacted in the *Diocesan* Synods, which regularly were, as they ought still to be, for any thing that appears to the contrary, held twice, or once at least, in every Year. As for the Metropolitans Power in this Behalf, the Popes in latter Ages, among many other Usurpations, assumed That to themselves, so far at least, as to restrain the Bishops, (as they did likewise the greater Abbots) from Alienations and Enfeoffments of their Demeans, tho' consented to by their respective Communities, without License first had from *Rome*, as hath been shewn already.

Abbots and their Convents used to proceed in the Disposal of their Estates, as the Bishops and their Clergy did ; nor hath the Partition of the same, made likewise by them, occasion'd any Alteration in this respect ; even the Commendatory Abbot, who hath little else to do with his Monks, must give his Assent and Consent, and have theirs, before either can alienate any Part of their respective Portions ; and, when all are agreed, they are still subject by Common Right to the *Diocesan* Controul, who, if there be no Exemption in the Case, may vacate or confirm
the

of Church and College Leases. 183

the Bargain, as he finds it like to prove hereafter advantageous or detrimental to the Community. This Office is now indeed commonly executed by Visitors, or other Superiors of the Monastic Orders, since the Religious have for the most part been exempted from the Jurisdiction of the Ordinaries. But in *England* it was not so, even when the Popes Power was at the highest; for our Bishops were not then wanting, on Occasions, to assert their ancient Right, of which some Instances have been already given: We have a very remarkable one in the lately mentioned Constitution of Archbishop *Kemp* and his Suffragans, who, for a Remedy to the many great Abuses set forth in the former part of the same, conclude with the following Injunction on all the Religious of the Province, without Distinction of Exempt or not Exempt; which I shall transcribe at large, since it may serve to illustrate what hath been said under this Head.

Nos Johannes Archiepiscopus antedictus, Monasteriorum, Prioratum, Hospitalium, et locorum aliorum religiosorum infra Provinciam Eborum existentium, indemnitatibus occurrere desiderabiliter affectantes, et super eis remedium opportunum adhibere, de Suffraganeorum nostrorum advisamento et consilio, statuimus et ordinamus, quod salvis aliis provisionibus, Statutis, Constitutionibus, ordinationibus et remediis super hujusmodi venditionibus, alienationibus et concessionibus antiquorum Patrum auctoritate editis, cum venditio arborum, silvarum non cæduarum, vel cæduarum
ad

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ad magnam quantitatem, vel concessio jurium, reddituum. vel Possessionum aut Pensionum, corrodiorum, sive liberatarum ad vitam alicujus, vel longi temporis spatium fieret alienatio, Tractatus duorum dierum, ad minus, inter Abbatem et ejus Conventum, aut Priorem Abbatem proprium non habentem cum suo Conventu præcedere debeat diligens et maturus; et si, post Tractatum hujusmodi solemnem, præfatis Abbati et Conventui seu Priori, Abbatem proprium non habenti, & ejus Conventui visum fuerit, quod hujusmodi venditiones, alienationes, et liberatarum concessiones vel mutuæ receptiones eorum Monasteriis, Prioratibus vel aliis locis necessariæ fuerint et utiles seu opportunæ, tunc super alienationibus venditionibus et concessionibus præmissis nobiscum in nostra Diocesi, et Provincia nostra, et cum Suffraganeis nostris in eorum Diocesibus, ac nostris et suis successoribus temporibus profuturis Tractatum habeant specialem; et post licentiam et auctoritatem a nobis seu Suffraganeis in Diocesibus suis præhabitis, ad præmissas venditiones, alienationes et concessiones liberam habeant facultatem. Quod si Abbates prædicti, Priores vel Hospitalarii, contra hanc nostram Ordinationem sive Provisionem, venditiones vel concessiones, nulla præhabita auctoritate, fecerint, hujusmodi venditiones alienationes et concessiones ad vitam, vel in perpetuum pro nullo habeantur, et omnimoda careant firmitate: Et nihilominus præter alias pœnas in diversis Ordinationibus inde provisiss, prædicti Abbates, Priores et Hospitalarii hanc nostram Constitutionem violantes et contemnentes, eo facto a celebratione divinorum sint suspensi, et administratione

ministracione bonorum Monasteriorum, ac Dignitate et Officiis, quibus præsunt, ipso facto, in perpetuum privati existant.

There is one Formality still behind, which is prescrib'd in the *Leomine* Constitution, and enforc'd by *Justinian* in his Novells, but overlook'd by the Modern Canonists, though it be mentioned in *Gratians Decretum*, and is at this Day observ'd throughout *France* pursuant to the Laws of that Kingdom, both Ecclesiastical and Civil: According to these, when the Sale of any Lands or Tenements belonging to an Ecclesiastical Community, hath been agreed to, and allow'd of in Manner and Form above specify'd, Notice shall be given thereof by Proclamation, and a Writing set up in some public Place of Concourse. The Imperial Laws order this to be done twenty Days before the intended Sale, at which all People are admitted to offer what they think fit to give, Persons of Quality and of Power excepted, who are prohibited upon the severest Penalties to intermeddle in the Matter. The Purchase must be adjudg'd to him that shall offer most, but with this Charge, that, as he would make good his Title, he must take effectual Care that the Purchase-Money be laid out in supplying those very Occasions, that had been the Motives, on which the Alienation was agree'd to, and approv'd of; and he able to produce authentic Proofs, that it hath been laid out accordingly: If he shall fail herein, the Contract will be Null from the Beginning. He

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may

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may indeed, if there be no Collusion on his part, have his Action against the Officer, or such other Persons as receiv'd his Money, who shall be compell'd, but in their private Capacity, and no other, to refund so much of it as hath been interverted or misapplied. But it is with the Community, in this, as with *Minors* in any like Case, who will be answerable for no more than hath been actually employ'd to their Benefit.

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