COMMENTARIES

ON

The Laws of England.

IN FOUR BOOKS.

By SIR WM. BLACKSTONE, KNT.

ONE OF THE JUSTICES OF HIS MAJESTY'S COURT OF COMMON PLEAS.

FROM THE LAST LONDON EDITION.

WITH THE LAST CORRECTIONS OF THE AUTHOR; AND WITH

NOTES AND ADDITIONS

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TO

THE QUEEN'S MOST EXCELLENT MAJESTY,

THE FOLLOWING VIEW

OF THE LAWS AND CONSTITUTION

OF ENGLAND,

THE IMPROVEMENT AND PROTECTION OF WHICH

HAVE DISTINGUISHED THE REIGN

OF HER MAJESTY'S ROYAL CONSORT,

IS,

WITH ALL GRATITUDE AND HUMILITY,

MOST RESPECTFULLY INSCRIBED

BY HER DUTIFUL

AND MOST OBEDIENT

SERVANT,

WILLIAM BLACKSTONE.

CHAPTER THE ELEVENTH.

OF THE CLERGY.

The people, whether aliens, denizens, or natural-born subjects, are divisible into two kinds; the clergy and laity: the clergy comprehending all persons in holy orders, and in ecclesiastical offices, will be the subject of the following chapter.

This venerable body of men, being separate and set apart from the rest of the people, in order to attend the more closely to the services of Almighty God, have thereupon large privileges allowed them by our municipal laws: and had formerly much greater, which were abridged at the time of the reformation on account of the ill use which the popish clergy had endeavoured to make of them. For the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. But it is observed by sir Edward Coke [a], that, as the overflowing of waters doth many times make the river to lose its proper channel, so in times past ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost or enjoyed not those which of right belonged to them. The personal exemptions do indeed for the most part continue. A clergyman cannot be compelled to serve on a jury, nor to appear at a court-leet or view of frank-pledge; which [377] almost every other person is obliged to do [b]: but if a layman is summoned on a jury, and before the trial takes orders, he shall notwithstanding appear and be sworn [c]. Neither can he be chosen to any temporal office; as bailiff,

a 2 Inst. 4. b F. N. B. 160. 2 Inst. 4. c 4 Leon. 190.

reeve, constable, or the like: in regard of his own continual attendance on the sacred function [d]. During his attendance on divine service, he is privileged from arrests in civil suits [e] (1). In cases also of felony, a clerk in orders shall have the benefit of his clergy without being branded in the hand; and may likewise have it more than once (2): in both which particulars he is distinguished from a layman [f]. But as they have their privileges, so also they have their disabilities, on account of their spiritual avocations. Clergymen, we have seen [g], are incapable of sitting in the house of commons (3); and by statute 21 Hen. VIII. c. 13. are not (in general) allowed to take any lands or tenements to farm, upon pain of 10*l. per* month, and total avoidance of the lease (4); nor upon like pain to keep any tanhouse or brewhouse (5); nor shall engage in any manner of trade, nor sell any merchandize, under

[d] Finch. L. 88.
[e] Stat. 50 Edw. III. c. 5. 1 Ric. II. c. 16.
[f] 2 Inst. 637. Stat. 4 Hen. VII. c. 13. and 1 Edw. VI. c. 12.
[g] page 175.

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(1) That is; for a reasonable time, *eundo, redeundo, et morando*, to perform divine service. 12 *Co.* 100.

(2) This is a peculiar privilege of the clergy, that sentence of death can never be passed upon them for any number of manslaughters, bigamies, simple larcenies, or other clergyable offences; but a layman, even a peer, may be ousted of clergy, and will be subject to the judgment of death upon a second conviction of a clergyable offence; for if a layman has once been convicted of manslaughter, upon production of the conviction, he may afterwards suffer death for bigamy, or any other felony, within clergy, or which would not be a capital crime to another person not so circumstanced. But for the favour of the clergy, there are few or no instances in which they have had occasion to claim the benefit of this privilege. See 4 vol. c. 28.

(3) See p. 175. n. 37. *ante.*

(4) But if they have not sufficient glebe, they may take a farm for the necessary expenses and consumption of their households. 21 *Hen. VIII.* c. 13. s. 8.

(5) The singular prohibition to keep a tanhouse probably originated from a practice peculiar to the time.

forfeiture of the treble value (6). Which prohibition is consonant to the canon law.

In the frame and constitution of ecclesiastical polity there are divers ranks and degrees: which I shall consider in their respective order, merely as they are taken notice of by the secular laws of England; without intermeddling with the canons and constitutions, by which the clergy have bound themselves. And under each division I shall consider, 1. The method of their appointment; 2. Their rights and duties; and 3. The manner wherein their character or office may cease.

I. An arch-bishop or bishop is elected by the chapter of his cathedral church, by virtue of a license from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair throughout all christendom; and this was promiscuously performed by the laity as well as the clergy[h]: till at length it becoming tumultuous, the empe-
[378] rors and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands; by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalties, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture, the elected bishop could neither be consecrated nor receive any secular profits. This right was acknowledged in the emperor Charlemagne, *A. D.* 773, by Pope Hadrian I, and the council of Luteran[i], and universally exercised by other christian princes: but the policy of the court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost

h Per clerum et populum. Palm. 25. i Decret. 1, dist. 63. c. 22.
2 Roll. Rep. 102. M. Paris. A. D. 1095.

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(6) Though a clergyman is subject to this penalty for trading, yet his contracts are valid, and he is liable to be made a bankrupt. *Cooke, Bankr.* 33.

equivalent to a direct right of nomination. Hence the right of appointing to bishopricks is said to have been in the crown of England [k] (as well as other kingdoms in Europe) even in the Saxon times; because the rights of confirmation and investiture were in effect (though not in form) a right of complete donation [l]. But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting these investitures, which was *per annulum et baculum*, by the prince's delivering to the prelate a ring, and pastoral staff or crosier: pretending, that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction: and pope Gregory VII, towards the close of the eleventh century, published a bulle of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them [m]. This was a bold step towards effecting the plan then adopted by the Roman see, of rendering the clergy entirely independent of the civil authority: and [379] long and eager were the contests occasioned by this papal claim. But at length, when the emperor Henry V. agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future *per sceptrum* and not *per annulum et baculum*; and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalties, instead of investing them by the ring and crosier; the court of Rome found it prudent to suspend for a while its other pretensions [n].

This concession was obtained from king Henry the first in England, by means of that obstinate and arrogant prelate, archbishop Anselm [o]: but king John (about a century afterwards)

k Palm. 28.

l "Nulla electio praelatorum (sunt verba Inguiphi) erat mere libera et canonica; sed omnes dignitates tam episcoporum, quam abbatum, per annulum et baculum regis curia pro sua complacentia conferebat." Penes clericos et monachos fuit electio, sed electum a rege postulabant. Selden. Jan. Ang. l. 1. sec. 39.

m Decret. 2. caus. 16. qu. 7. c. 12 and 13.

n Mod. Un. Hist. xxv. 363. xxix. 115.

o M. Paris. A. D. 1107.

in order to obtain the protection of the pope against his discontended barons, was also prevailed upon to give up by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops; reserving only to the crown the custody of the temporalties during the vacancy; the form of granting a license to elect, (which is the original of our *conge d' eslire*) on refusal whereof the electors might proceed without it; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause *p*. This grant was expressly recognized and confirmed in king John's *magna carta q*, and was again established by statute 25 Edw. III. st. 6. § 3.

But by statute 25 Hen. VIII. c. 20. the ancient right of nomination was, in effect, restored to the crown (7): it being enacted that, at every future avoidance of a bishoprick, the king may send the dean and chapter his usual license to proceed to election; which is always to be accompanied with a letter missive from the king, containing the name of [380] the person whom he would have them elect: and, if the dean and chapter delay their election above twelve days, the nomination shall devolve to the king, who may by letters patent appoint such person as he pleases. This election or nomination, if it be of a bishop, must be signified by the king's letters patent to the arch-bishop of the province; if it be of an arch-bishop, to the other arch-bishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate the person so elected: which they are bound to perform

p M. Paris. A. D. 1214. 1 Rym. Fœd. 196. *q* Cap. 1. edit. Oxon. 1759.

(7) This statute was afterwards repealed by 1 Edw. VI. c. 2. which enacted that all bishopricks should be donative as formerly. It states in the preamble that these elections are in very deed no elections; but only by a writ of *conge d' elire* have colours, shadows, or pretences of election, 1 *Burn. Ec. L.* 183. This is certainly good sense. For the permission to elect where there is no power to reject can hardly be reconciled with the freedom of election. But this statute was afterwards repealed by 1 Ma. st. 2. c. 20. and other statutes. 12 *Co.* 7. But the bishopricks of the new foundation were always donative. *Harg. Co. Litt.* 134. As also are all the Irish bishopricks by the 2 Eliz. c. 4. *Irish Statutes.*

immediately, without any application to the see of Rome. After which the bishop elect shall sue to the king for his temporalties, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only (8). And if such dean and chapter do not elect in the manner by this act appointed, or if such arch-bishop or bishop do refuse to confirm, invest, and consecrate such bishop elect, they shall incur all the penalties of a *praemunire* (9).

An arch-bishop is the chief of the clergy in a whole province; and has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause r (10). The arch-bishop has also his own

r Lord Raym. 541.

(8) It is a prevailing vulgar error, that every bishop, before he accepts the bishoprick which is offered him affects a maiden coyness and answers *nolo episcopari*. The origin of these words and this notion I have not been able to discover; the bishops certainly give no such refusal at present, and I am inclined to think they never did at any time in this country.

(9) It is directed in the form of consecrating bishops, confirmed by various statutes since the reformation, that a bishop when consecrated must be full thirty years of age. There seems to have been no restriction of this kind in ancient times; for bishop Godwin informs us, that George Nevile, the brother of the earl of Warwick the king-maker, was chancellor of Oxford, *et in episcopum Exoniensem consecratus est anno* 1455, *nondum annus natus viginti. Anno deinde* 1460 (*id quod jure mirere*) *summus Angliæ factus est cancellarius*. A few years afterwards he was translated to the arch-bishoprick of York. *Hoc sedente episcopus Sancti Andreæ in Scotiâ archiepiscopus per Sixtum quartum creatus est, jussis illi duodecim episcopis illius gentis subesse, qui hactenus archiepiscopi Eboracensis suffraganei censebantur. Reclamante quidem Eboracensi, sed frustra; asserente pontifice, minimè convenire, ut ille Scotiæ sit metropolitanus, qui præsertim crebra inter Scotos ac Anglos bella Scotis plerumque hostis sit capitalis.* Godw. Comm. de Praesul. 693.

(10) In the 11 W. III. the bishop of St. David's was deprived for simony, and other offences, in a court held at Lambeth before the arch-bishop, who called to his assistance six other bishops. The bishop of St. David's appealed to the delegates, who affirmed the sentence of the arch-bishop; and after several fruitless applications to the

diocese, wherein he exercises episcopal jurisdiction; as in his province he exercises archiepiscopal. As arch-bishop, he, upon receipt of the king's writ, calls the bishops and clergy of his province to meet in convocation: but without the king's writ he cannot assemble them[s]. To him all appeals are made from inferior jurisdictions within his province; and, as an appeal lies from the bishops in person to him in person, so it also lies from the consistory courts of each diocese to his archiepiscopal court. During the vacancy of any see in his province, he is guardian of the spiritualties thereof, as the king is of the temporalties; and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of prior of Canterbury was abolished at the reformation[t]. The arch-bishop is entitled to present by lapse to all the ecclesiastical livings in the disposal of his diocesan bishops, if not filled within six months. And the arch-
[381] bishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan bishop; in lieu of which it is now usual for the bishop to make over by deed to the arch-bishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the arch-bishop himself shall choose; which is therefore called his *option*[u]: which options are only binding on the bishop himself who grants them, and not on his successors (11). The prerogative itself seems to be derived from the

s 4 Inst. 322, 323. *t* 2 Roll. Abr. 22. *u* Cowel's interp. tit. option.

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court of king's bench and the house of lords, he was at last obliged to submit to the judgment. *Lord Raym.* 541. 1 *Burn. Ec. L.* 212.

(11) The consequence is, that the arch-bishop never can have more than one option at once from the same diocese. These options become the private patronage of the arch-bishop, and upon his death are transmitted to his personal representatives; or the arch-bishop may direct by his will, whom, upon a vacancy, his executor shall present; which direction, according to a decision in the house of lords, his executor is compellable to observe. 1 *Burn Ec. L.* 226. If a bishop dies during the vacancy of any benefice within his patronage, the

legatine power formerly annexed by the popes to the metropolitan of Canterbury [w]. And we may add, that the papal claim itself (like most others of that encroaching see) was probably set up in imitation of the imperial prerogative called *primae* or *primariae preces*; whereby the emperor exercises, and hath immemorially exercised [x], a right of naming to the first prebend that becomes vacant after his accession in every church of the empire [y]. A right, that was also exercised by the crown of England in the reign of Edward I [z]; and which probably gave rise to the royal corodies which were mentioned in a former chapter [a]. It is likewise the privilege, by custom, of the arch-bishop of Canterbury, to crown the kings and queens of this kingdom (12). And he hath also by the statute 25 Hen. VIII. c. 21. the power of granting dispensations in any case, not contrary to the holy scriptures and the law of God, where the pope used formerly to grant them: which is the foundation of his granting special licenses, to marry at any place or time, to hold two livings, and the like (13): and on this also is founded the right he exercises of

[w] Sherlock. of options. 1.

[x] Goldast. *constit. Imper.* tom. 3. p. 466.

[y] Dufresne. V. 806. Mod. Univ. Hist. xxix. 5.

[z] Rex, etc. salutem. Scribatis episcopo Karl quod—Roberto de Icard pensionem suam, quam ad preces regis praedicto Roberto concessit, de cactero solvet; et de proxima ecclesia vacatura de collatione praedicti episcopi, quam ipso Robertus acceptaverit, respiciat. Brev. II Edw. I. 3 Pryn. 1264.

[a] Ch. 8. page 284.

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presentation devolves to the crown; so likewise if a bishop dies after an option becomes vacant, and before the arch-bishop or his representative has presented, and the clerk is instituted, the crown *pro hac vice* will be entitled to present to that dignity or benefice. *Amb.* 101. For the grant of the option by the bishop to the arch-bishop has no efficacy beyond the life of the bishop.

(12) It is said that the arch-bishop of York has the privilege to crown the queen-consort, and to be her perpetual chaplain. 1 *Burn. Ec. L.* 178.

(13) When the dominion of the pope was overturned in this country, this prerogative of dispensing with the canons of the church was transferred by that statute to the arch-bishop of Canterbury in all

conferring degrees (14), in prejudice of the two universi-
ties [b].

[382] The power and authority of a bishop, besides the administration of certain holy ordinances peculiar to that sacred order, consist principally in inspecting the manners of the people and clergy, and punishing them in order to reformation, by ecclesiastical censures. To this purpose he has several courts under him, and may visit at pleasure every part of his diocese. His chancellor is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some university [c]. It is also the business of a bishop to institute, and to direct induction, to all ecclesiastical livings in his diocese.

Arch-bishopricks and bishopricks may become void by death, deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior [d]. Therefore a bishop must resign to his metropolitan; but the arch-bishop can resign to none but the king himself (15).

b See the bishop of Chester's case. Oxon. 1721.

c Stat. 37 Hen. VIII. c. 17.

d Gibs. cod. 822.

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cases in which dispensations were accustomed to be obtained at Rome; but in cases unaccustomed, the matter shall be referred to the king and council. The pope could have dispensed with every ecclesiastical canon and ordinance. But in some of the cases where the arch-bishop alone has authority to dispense, his dispensation with the canon, as to hold two livings, must be confirmed under the great seal.

(14) But although the arch-bishop can confer all the degrees which are taken in the universities, yet the graduates of the two universities, by various acts of parliament and other regulations, are entitled to many privileges which are not extended to what is called a Lambeth degree: as, for instance, those degrees which are a qualification for a dispensation to hold two livings, are confined by 21 Hen. VIII. c. 13. s. 29. to the two universities.

(15) The following are some of the popular distinctions between arch-bishops and bishops. The arch-bishops have the titles and

II. A DEAN and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see [e]. When the rest of the clergy were settled in the several parishes of each diocese, (as hath formerly [f] been mentioned,) these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or dean, being probably at first appointed to superintend ten canons or prebendaries.

All ancient deans are elected by the chapter, by *conge d' elire* from the king, and letters missive of recommendation; in the same manner as bishops (16): but in those chapters, that were founded by Henry VIII. out of the spoils of the dissolved monasteries (17), the deanery is donative, and the installation merely by the king's letters patent [g]. [383] The chapter, consisting of canons or prebendaries, are sometimes appointed by the king, sometimes by the bishop, and sometimes elected by each other.

The dean and chapter are, as was before observed, the nominal electors of a bishop. The bishop is their ordinary (18) and immediate superior; and has, generally speaking, the power of visiting them, and correcting their excesses and

[e] 3 Rep. 75. Co. Litt. 103. 300. [f] page 113, 114. [g] Gibs. cod. 173.

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style of *grace*, and *most reverend father in God by divine providence*; the bishops those of *lord*, and *right reverend father in God by divine permission*. Archbishops are inthroned, *inthronizati*; bishops installed.

(16) See a very learned note, containing a full history of the election, presentation, or donation to deaneries, by Mr. Hargrave in Co. Litt. 95.

(17) The new deaneries and chapters to old bishopricks are eight, *viz.* Canterbury, Norwich, Winchester, Durham, Ely, Rochester, Worcester, and Carlisle; and five new bishopricks with new deaneries and chapters annexed were created, viz. Peterborough, Chester, Gloucester, Bristol, and Oxford. *Harg. Co. Litt.* 95. n. 3.

(18) The bishop is generally called the ordinary, but *the ordinary* has a more extensive signification, as it includes every ecclesiastical judge who has the regular *ordinary* jurisdiction independent of another. 1 *Burn. Ec. L.* 22. *Co. Litt.* 344.

enormities. They had also a check on the bishop at common law: for till the statute 32 Hen. VIII. c. 28. his grant or lease would not have bound his successors, unless confirmed by the dean and chapter [h].

Deaneries and prebends may become void, like a bishoprick, by death, by deprivation, or by resignation to either the king or the bishop [i]. Also I may here mention, once for all, that if a dean, prebendary, or other spiritual person be made a bishop, all the preferments of which he was before possessed are void; and the king may present to them in right of his prerogative royal. But they are not void by the election, but only by the consecration [j].

III. An arch-deacon hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, throughout the whole of his diocese, or in some particular part of it. He is usually appointed by the bishop himself; and hath a kind of episcopal authority, originally derived from the bishop, but now independent and distinct from his [k]. He therefore visits the clergy; and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognisance.

IV. The rural deans are very ancient officers of the church [l] but almost grown out of use; though their deaneries [384] still subsist as an ecclesiastical division of the diocese, or arch-deaconry. They seem to have been deputies of the bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and report dilapidations, and to examine the candidate for confirmation; and armed, in minuter matters, with an inferior degree of judicial and coercive authority [m].

V. The next, and indeed the most numerous, order of men, in the system of ecclesiastical polity, are the parsons and vicars of churches: in treating of whom I shall first mark out the distinction between them; shall next observe the method by which one may become a parson or vicar; shall then

h Co. Litt. 103.
i Plowd. 498.
j Bro. *Abr. t. presentation.* 3. 61. Cro. Eliz. 542. 790. 2 Roll. Abr. 352. 4 Mod. 200. Salk. 137.
k 1 Burn. eccl. law. 66, 69.
l Kennet. par. antiq. 633.
m Gibs. cod. 872, 1550.

briefly touch upon their rights and duties; and shall, lastly, shew how one may cease to be either.

A parson, *persona ecclesiae*, is one that hath full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person the church, which is an invisible body, is represented; and he is in himself a body corporate, in order to protect and defend the rights of the church (which he personates) by a perpetual succession [n]. He is sometimes called the rector or governor, of the church; but the appellation of *parson* (however it may be depreciated by familiar, clownish, and indiscriminate use) is the most legal, most beneficial, and most honourable title that a parish priest can enjoy; because such a one, (sir Edward Coke observes,) and he only, is said *vicem seu personam ecclesiae gerere*. A parson has, during his life, the freehold in himself of the parsonage house, the glebe, the tithes, and other dues. But these are sometimes *appropriated*; that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; which the law esteems equally capable of providing for the service of the church, as any single private clergyman. This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient in subtile inventions for the increase of their own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed in a fourfold division; one for the use of the bishop, another for maintaining the fabric of the church, a third for the poor, and the fourth to provide [385] for the incumbent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes and the division was into three parts only. And hence it was inferred by the monasteries, that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities, (the endowment of which was construed to be a work of the most exalted piety,) subject to the burden of reparing the church and providing for its con-

[n] Co. Lit. 300.

stant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the king's license, and consent of the bishop, must first be obtained: because both the king and the bishop may some time or other have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to the use of a corporation, which never dies: and also because the law reposes a confidence in them, that they will not consent to any thing that shall be to the prejudice of the church. The consent of the patron also is necessarily implied: because (as was before observed (the appropriation can be originally made to none, but to such spiritual corporation, as is also the patron of the church; the whole being indeed nothing else, but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church. When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church; and must sue and be sued, in all matters concerning the rights of the church by the name of parsons *p*.

This appropriation may be severed, and the church become disappropriate, two ways: as first, if the patron or appropriator presents a clerk, who is instituted and inducted [386] to the parsonage: for the incumbent so instituted and inducted is to all intents and purposes complete parson; and the appropriation, being once severed, can never be reunited again, unless by a repetition of the same solemnities *q*. And, when the clerk so presented (19) is distinct from the

o Plowd. 496—500. *p* Hob. 307. *q* Co. Litt. 46.

(19) The editor conceives that there is no authority or reason to suppose, that the appropriator can thus create a sinecure rector. But if the appropriator or impropriator should, either by design or mistake, present his clerk to the parsonage, it is held that the vicarage will ever afterwards be dissolved, and the incumbent will be

vicar; the rectory thus vested in him becomes what is called a *sine-cure* (20); because he hath no cure of souls, having a vicar under him to whom that cure is committed[r]. Also, if the corporation which has the appropriation is dissolved, the parsonage becomes disappropriate at common law; because the spirituality of power is gone, which is necessary to support the appropriation.

In this manner, and subject to these conditions, may appropriations be made at this day (21): and thus were most, if not all, of the appropriations at present existing originally made; being annexed to bishopricks, prebends, religious houses, nay even to nunneries and certain military orders, all of which were spiritual corporations. At the dissolution of monasteries by statutes 27 Hen. VIII. c. 28. and 31 Hen. VIII. c. 13. the appropriations of the several parsonages, which belonged to those respective religious houses, (amount-

r Sine-cures might also be created by other means. 2 Burn. eccl. law. 347.

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entitled to all the tithes and dues of the church as rector. *Wats. c.* 17. 2 *R. Ab.* 338.

(20) Wherever a rector and vicar are presented and instituted to the same benefice, the rector is excused all duty, and has what is properly called a sinecure. But where there is only one incumbent, the benefice is not in law a sinecure, though there should be neither a church nor any inhabitants within the parish.

(21) It surely may be questioned whether such a power any longer exists; it cannot be supposed that, at this day, the inhabitants of a parish, who had been accustomed to pay their tithes to their officiating minister, could be compelled to transfer them to an ecclesiastical corporation, to which they might perhaps be perfect strangers. Appropriations are said to have originated from an opinion inculcated by the monks, that tithes and oblations though payable to some church, yet were an arbitrary disposition of the donor, who might give them, as the reward of religious service done to him, to any person whatever from whom he received that service. 1 *Burn. Ec. L.* 53. And till they had got complete possession of the revenues of the church, they spared no pains to recommend themselves as the most deserving objects of the gratitude and benefaction of the parish. There probably have been no new appropriations since the dissolution of monasteries.

ing to more than one third of all the parishes in England[s],) would have been by the rules of the common law disappropriated; had not a clause in those statutes intervened, to give them to the king in as ample a manner as the abbots, &c. formerly held the same, at the time of their dissolution. This, though perhaps scarcely defensible, was not without example; for the same was done in former reigns, when the alien priories (that is, such as were filled by foreigners only) were dissolved and given to the crown[t]. And from these two roots have sprung all the lay appropriations of secular parsonages, which we now see in the kingdom; they having been afterwards granted out from time to time by the crown[u].

[387] Those appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service, and administer the sacraments, in those parishes of which the society was thus the parson. This officiating minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *vicarius*, or *vicar*. His stipend was at the discretion of the appropriator, who was however bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus, debeat respondere*[w]. But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose: and accordingly it is enacted by statute 15 Ric. II. c. 6. that in all appropriations of churches, the diocesan bishop shall ordain (in proportion to the value of the church) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be *sufficiently* endowed. It seems the parishes were frequently sufferers, not only by the want of divine service, but also by withholding those alms, for which, among other purposes, the payment of tithes was originally imposed: and therefore in this act a pension is directed to be

s Seld. review of tith. c. 9. Spelm. Apology. 35.

t 2 Inst. 584.

u Sir H. Spelman (of tithes, c. 29.) says, these are now called impropriations, as being *improperly* in the hands of laymen.

w Seld. tith. c. 11. 1.

distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend: and therefore by statute 4 Hen. IV. c. 12. it is ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, not removable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the ordinary, for these three express purposes, to do divine service, to inform the people, and to keep hospitality (22). The endowments in consequence of these statutes have usually been by a portion of the glebe, or land, belonging to

(22) From this act we may date the establishment of vicarages; for before this time the vicar in general was nothing more than a temporary curate, and when the church was appropriated to a monastery, he was generally one of their own body, that is, one of the regular clergy; for the monks who lived *secundum regulas* of their respective houses or societies, were denominated regular clergy, in contradistinction to the parochial clergy, who performed their ministry in the world *in seculo*, and who from thence were called secular clergy. All the tithes or dues of the church of common right belonged to the rector or to the appropriator or impropriator, who have the same rights as the rector; and the vicar is entitled only to that portion which is expressed in his endowment, or what his predecessors have immemorially enjoyed by prescription, which is equivalent to a grant or endowment. And where there is an endowment he may in general recover all that is contained in it; and he may still retain what he and his predecessors have enjoyed by prescription though not expressed in it; for such a prescription amounts to evidence of another consistent endowment. But I have heard lord chancellor Eldon declare, that, if a vicar enjoys property not mentioned in an endowment, and has never within time of memory possessed what is expressly contained in it, a jury might presume that he had the former in lieu of the latter. These endowments frequently invest the vicar with some part of the great tithes: therefore the words rectorial and vicarial tithes have no definite signification. But great and small tithes are technical terms, and which are, or ought to be, accurately defined and distinguished by the law.

the parsonage, and a particular share of the tithes which the appropriators found it most troublesome to collect, and which are therefore generally called privy or small tithes; the greater, or predial, tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally, and some more scantily, endowed: and hence the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial tithes.

The distinction therefore of a parson and vicar is this: the parson has for the most part the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an appropriator over him, entitled to the best part of the profits, to whom he is in effect perpetual curate, with a standing salary (23). Though in some places the vicarage has been considerably augmented by a large share of the great tithes; which augmentations were greatly assisted by the statute 29 Car. II. c. 8. enacted in favour of poor vicars and curates, which rendered such temporary augmentations (when made by the appropriators) perpetual.

The method of becoming a parson or vicar is much the same. To both there are four requisites necessary: holy orders; presentation; institution; and induction. The me-

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(23) A vicar, from what has been advanced in the preceding page and note, must necessarily have an appropriator over him, or a sinecure rector, who in some books is considered and called an appropriator. Of benefices, some have never been appropriated; consequently in those there can be no vicar, and the incumbent is rector, and entitled to all the dues of the church. Some were appropriated to secular ecclesiastical corporations, which appropriations still exist, except perhaps some few which may have been dissolved; others were appropriated to the houses of the regular clergy; all which appropriations, at the dissolution of monasteries, were transferred to the crown; and in the hands of the king or his grantees, are now called impropriations: but in some appropriated churches no perpetual vicar has ever been endowed; in that case the officiating minister is appointed by the appropriator or impropriator, and is called a perpetual curate.

thod of conferring the holy orders of deacon and priest, according to the liturgy and canons [x], is foreign to the purpose of these commentaries; any farther than as they are necessary requisites to make a complete parson or vicar. By common law, a deacon, of any age, might be instituted and inducted to a parsonage or vicarage: but it was ordained by statute 13 Eliz. c. 12. that no person under twenty-three years of age, and in deacon's orders, should be presented to any benefice with cure; and if he were not ordained priest within one year after his induction, he should be *ipso facto* deprived: and now, by statute 13 and 14 Car. II. c. 4. no person is capable to be admitted to any benefice, unless he hath been first ordained a priest (24); and then he is, in the language of the law, a clerk in orders. But if he obtains orders, or a license to preach, by money or corrupt practices (which seems [389] to be the true, though not the common, notion of simony) the person giving such orders forfeits [y] 40*l.* and the person receiving 10*l.* and is incapable of any ecclesiastical preferment for seven years afterwards.

Any clerk may be presented [z] to a parsonage or vicarage; that is, the patron to whom the advowson of the church belongs, may offer his clerk to the bishop of the diocese to be instituted. Of advowsons, or the right of presentation, being a species of private property, we shall find a more convenient place to treat in the second part of these commentaries. But when a clerk is presented, the bishop may refuse him upon many accounts. As, 1. If the patron is excommunicated, and remains in contempt forty days [a]. Or, 2. If the clerk be unfit [b]; which unfitness is of several kinds. First, with regard to his person; as if he be a bastard (25), an outlaw, an excommuni-

[a] See 2 Burn. eccl. law. 103.
[y] Stat. 31 Eliz. c. 6.
[z] A layman may also be presented; but he must take priest's orders before his admission. 1 Burn. 103.
[a] 2 Roll. Abr. 355.
[b] Glan. l. 13. c. 20.

(24) By canon 34, no one shall be admitted to the order of a deacon till he be twenty-three years old; and by that canon, and also by 13 Eliz. c. 12. no one can take the order of a priest till he be full four and twenty years old. 3 *Burn. Ec. L.* 27.

(25) Though this be classed in the books among the causes of re-

cate, an alien, under age, or the like [c]. Next, with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se*: but if the bishop alleges only in generals, as that he is *schismaticus inveteratus*, or objects a fault that is *malum prohibitum* merely, as haunting taverns, playing at unlawful games, or the like: it is not good cause of refusal [d]. Or, lastly, the clerk may be unfit to discharge the pastoral office for want of learning. In any of which cases the bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning, or other matter of ecclesiastical cognizance, there the bishop must give notice to the patron of such his cause of refusal, who, being usually a layman, is not supposed to have knowledge of it; else he cannot present by lapse: but if the cause be temporal, there he is not bound to give notice [e].

[390] If an action at law be brought by the patron against the bishop for refusing his clerk, the bishop must assign the cause. If the cause be of a temporal nature and the fact admitted, (as, for instance, outlawry,) the judges of the king's courts must determine its validity, or whether it be sufficient cause of refusal: but if the fact be denied, it must be determined by a jury. If the cause be of a spiritual nature, (as, heresy, particularly alleged,) the fact, if denied, shall also be determined by a jury; and if the fact be admitted or found, the court upon consultation and advice of learned divines shall decide its sufficiency [f]. If the cause be want of learning, the bishop need not specify in what points the clerk is deficient, but only allege that he is deficient [g]: for the statute 9 Edw. II. st. 1. c. 13. is express, that the examination of the fitness of a person presented to a benefice belongs to the ecclesiastical judge. But because it would be

c 2 Roll. Abr. 356. 2. Inst. 632. Stat. 2 Ric. II. c. 3. 7 Ric. II. c. 12.
d 5 Rep. 58.
e 2 Inst. 632.
f 2 Inst. 632.
g 5 Rep. 58. 3 Lev. 313.

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fusal, yet such is the liberality of the present times, that no one need apprehend that his preferment would be impeded by the incontinence of his parents, or by any demerit but his own.

nugatory in this case to demand the reason of refusal from the ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit: therefore if the bishop returns the clerk to be *minus sufficiens in literatura*, the court shall write to the metropolitan, to re-examine him, and certify his qualifications; which certificate of the arch-bishop is final [h].

If the bishop hath no objections, but admits the patron's presentation, the clerk so admitted is next to be instituted by him; which is a kind of investiture of the spiritual part of the benefice: for by institution the care of the souls of the parish is committed to the charge of the clerk. When a vicar is instituted, he (besides the usual forms) takes, if required by the bishop (26), an oath of perpetual residence; for the maxim of law is, that *vicarius non habet vicarium*: and, as the non-residence of the appropriators was the cause of the perpetual establishment of vicarages, the law judges it very improper for them to defeat the end of their constitution,
and by absence to create the very mischief which they [391]
were appointed to remedy: especially as, if any profits are to arise from putting in a curate and living at a distance from the parish, the appropriator, who is the real parson, has undoubtedly the elder title to them. When the ordinary is also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a collation to a benefice. By institution or collation the church is full, so that there can be no fresh presentation till another vacancy, at least in the case of a common patron: but the church is not full against the king, till induction: nay, even if a clerk is instituted upon the king's presentation, the crown may revoke it before induction, and present another clerk [i]. Upon institution also the clerk may enter on the parsonage house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them till induction.

[h] 2 Inst. 632. [i] Co. Litt. 344.

(26) It does not appear that the bishop can dispense with the vicar's oath, which is, that he will be resident upon his vicarage, unless dispensed withal, by his diocesan. 1 *Burn. Ec. L.* 148.

Induction is performed by a mandate from the bishop to the arch-deacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the parishioners due notice, and sufficient certainty of their new minister, to whom their tithes are to be paid. This therefore is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or parson imparsonee [k].

The rights of a parson or vicar, in his tithes and ecclesiastical dues, fall more properly under the second book of these commentaries: and as to his duties, they are principally of ecclesiastical cognizance; those only excepted which are laid upon him by statute. And those are indeed so numerous, that it is impracticable to recite them here with [392] any tolerable conciseness or accuracy. Some of them we may remark, as they arise in the progress of our inquiries, but for the rest I must refer myself to such authors as have compiled treatises expressly upon this subject [l]. I shall only just mention the article of residence, upon the supposition of which the law doth style every parochial minister an incumbent. By statute 21 Hen. VIII. c. 13. persons wilfully (27) absenting themselves from their benefices, for one month together, or two months in the year, incur a penalty of 5*l.* to the king, and 5*l.* to any person that will sue for the same (28): except chaplains to the king, or others therein men-

[k] Co. Litt. 300.

[l] These are very numerous: but there are few which can be relied on with certainty. Among these are bishop Gibson's *codex*. Dr. Burn's *ecclesiastical law*, and the earlier editions of the *clergyman's law*, published under the name of Dr. Watson, but compiled by Mr. Place a barrister.

(27) Ill health, or any inevitable absence, is an exemption from the penalties of this statute. *Gibs. Cod.* 887.

(28) This statute must be put in suit by a common informer within a year, or by the king within two years after the end of that year;

tioned [m], during their attendance in the household of such as retain them (29): and also except [n] all heads of houses, magistrates (30), and professors in the universities, and all students under forty years of age residing there, *bonâ fide*, for study. Legal residence is not only in the parish, but also in the parsonage house, if there be one: for it hath been resolved [o], that the statute intended residence, not only for serving the cure, and for hospitality; but also for maintaining the house, that the successor also may keep hospitality there: and, if there be no parsonage house, it hath been holden that the incumbent is bound to hire one, in the

m Stat. 25 Hen. VIII. c. 16. 33 Hen. VIII. c. 28.

n Stat. 28 Hen. VIII. c. 13.

o 6 Rep. 21.

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so that 12 penalties, or 120*l.* may be recovered at once by a subject for himself and the king, or the king may recover at once 25 penalties or 250*l.* (See 4 vol. 308.) But, independent of this statute, the bishop in his court may compel the residence of all clergy, who have the cure or care of souls within his diocese. 3 *Burn. Ec. L.* 281. *Gibs.* 987. This statute is not confined to parsonages and vicarages, but extends to all arch-deaconries, deaneries, and dignities in cathedral and collegiate churches. Those who have two benefices or dignities, upon each of which residence is required, must reside upon one or the other. But it has lately been decided, that the incumbent of an augmented curacy cannot be prosecuted under the statute for the penalties of non-residence. 4 *T. R.* 665.

Several actions having been brought for penalties incurred under this act for non-residence, proceedings in those actions were repeatedly stayed (by statutes 41 Geo. III. U. K. c. 102. 42 Geo. III. c. 30 86.) At the time of passing these acts it was understood that some permanent regulations on this subject were in the contemplation of the legislature.

(29) The king can give a license to his chaplains for non-residence, even whilst they do not attend his household; but the chaplains of noblemen are only excused during their actual attendance upon their lords or ladies. 3 *Burn. Ec. L.* 290.

(30) Viz. the chancellor, vice-chancellor, commissary, doctors of the chair, (*i. e.* doctors who used to preside in the public schools,) and readers of lectures; and under this description only, can professors claim an exemption from residence.

same or some neighbouring parish (31), to answer the purposes of residence. For the more effectual promotion of which important duty among the parochial clergy, a provision is made by the statute 17 Geo. III. c. 53. for raising money upon ecclesiastical benefices, to be paid off by annually decreasing instalments, and to be expended in rebuilding or repairing the houses belonging to such benefices (32).

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(31) It has been decided, by the court of king's bench, that even where there is no parsonage-house, the incumbent is bound to reside within the parish. *Cowp.* 429. If a clergyman had one benefice with a parsonage-house, and another benefice without a house, the Editor conceives that he is not bound to reside in that parish, in which there is a house, for more important duties may impel him to reside within the parish where there is no house; and that such residence would exempt him from the penalties of the statute. But where the arch-deacon of St. Alban's had the living of Bushey within his arch-deaconry, to which living there is a parsonage-house belonging, and he resided in the parish of Bushey, but not in the parsonage-house; it was held by the court of king's bench, that he was subject to the penalties of non-residence, though he was living within the limits of his arch-deaconry, to which dignity there is no house appurtenant. 5 *Burr.* 2722. If then the Editor's opinion be well founded, the decision must have been different, if he had resided in any other part of his arch-deaconry out of the parish of Bushey.

(32) This act enables the incumbent, when there is no parsonage-house, or where it is so ruinous as not to be repaired with one year's income of the living, to borrow with the consent of the patron and ordinary, upon mortgage of the revenue of the living, a sum not exceeding two years clear value to be laid out in repairs, building, or the purchase of a house. The interest of the money borrowed, is to be repaid by the incumbent yearly, and *6l. per cent.* of the original sum; or *10l. per cent.* if he does not reside twenty weeks within a year. And where the income is 100*l.* a year, and the incumbent does not reside twenty weeks within a year, the patron and the ordinary are empowered to undertake this without his consent. The governors of queen Anne's bounty may lend money upon such mortgages, at *4l. per cent.* interest; and 100*l.* upon a living under 40*l.* a year without any interest. Colleges and other corporations may lend money for this purpose upon their own livings, without interest. For forms and mode of proceeding, consult the statute at large. It is very remarkable that, under this act, the money borrowed was di-

We have seen that there is but one way, whereby one may become a parson or vicar: there are many ways by which one may cease to be so. 1. By death. 2. By cession, in taking another benefice. For by statute 21 Hen. VIII. c. 13. if any one having a benefice of 8*l. per annum*, or upwards, (according to the present valuation in the king's books*p*,) accepts any other, the first shall be adjudged void, unless he obtains a dispensation (33), which no one is entitled to have, but the

p Cro. Car. 456.

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rected to be discharged by paying 5*l. per cent.* yearly upon the principal remaining due; the consequence was, that it would have been diminished by decreasing instalments, which would have produced an infinite series, or the whole could never have been paid. And it required another act, the 21 Geo. III. c. 66. which was passed merely for the purpose of correcting this palpable blunder, by which statute, the original sum must be paid, as stated, at the farthest, within twenty years.

(33) But both the livings must have cure of souls; and the statute expressly excepts deaneries, arch-deaconries, chancellorships, treasurerships, chantorships, prebends, and sinecure rectories; a dispensation in this case can only be granted to hold one benefice more, except to clerks, who are of the privy council, who may hold three by dispensation. By the canon law, no person can hold a second incompatible benefice without a dispensation; and in that case, if the first is under 8*l. per annum*, it is so far void that the patron may present another clerk, or the bishop may deprive; but till deprivation, no advantage can be taken by lapse. But independent of the statute, a clergyman by dispensations may hold any number of benefices, if they are all under 8*l. per annum*, except the last, and then, by a dispensation under the statute, he may hold one more.

By the 41st canon of 1603, the two benefices must not be farther distant from each other than 30 miles, and the person obtaining the dispensation must at least be a master of arts in one of the universities. But the provisions of this canon are not enforced or regarded in the temporal courts. 2 *Black. Rep.* 968. See note 14. p. 93.

It had been doubted whether the statute 1 Geo. I. st. 2. c. 10. which enacts that all churches, curacies, and chapels augmented by queen Anne's bounty shall become perpetual cures and benefices, had thereby brought them under the statute of pluralities, so as to produce the avoidance of other livings. But to remove all doubts upon that

chaplains (34) of the king, and others therein mentioned, the brethren and sons of lords and knights (35), and doctors and bachelors of divinity and law (36), *admitted by the universities*

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subject the 36 Geo. III. c. 83. has declared that such augmented churches and chapels shall be considered as presentative benefices, and that the license to them shall render other livings voidable in the same manner as institution to presentative benefices; but that every clergyman should continue in quiet possession of any benefices which he held in conjunction with such augmented cures before the passing of that act, viz. 14th May 1796.

(64) The number of the chaplains of the king and royal family, who may have dispensations, is unlimited. An arch-bishop may have eight, a duke and bishop six, a marquis and earl five, a viscount four; the chancellor, a baron, and knight of the garter three; a duchess, marchioness, countess, and baroness, being widows, two; the king's treasurer, comptroller, secretary, dean of the chapel, almoner, and the master of the rolls, two; the chief justice of king's bench, and warden of cinque ports, one. These chaplains only can obtain a dispensation under the statute.

If one person has two or more of these titles or characters united in himself, he can only retain the number of chaplains limited to his highest degree; and if a nobleman retain his full number of chaplains, no one of them can be discharged, so that another shall be appointed in his room during his life. 4 *Co.* 90. The king may present his own chaplains, *i. e.* waiting chaplains in ordinary, to any number of livings in the gift of the crown, and even in addition to what they hold upon the presentation of a subject without dispensation: but a king's chaplain being beneficed by the king, cannot afterwards take a living from a subject, but by a dispensation according to the statute 21 Hen. VIII. *c.* 13. *s.* 29. 1 *Salk.* 161.

(35) This privilege is not enjoyed by the brother and son of a baronet, for the rank of baronet did not then exist.

(36) The words of the statute are, "all doctors and bachelors of "divinity, doctors of laws, and bachelors of the law canon." Before the reformation, degrees were as frequent in the canon law as in the civil law. Many were graduates *in utroque jure*, or *utriusque juris*, J. U. D. or *juris utriusque doctor*, is still common in foreign universities. But Hen. VIII. in the 27th year of his reign, when he had renounced the authority of the pope, issued a mandate to the university of Cambridge, *ut nulla legatur palam et publice lectio in jure canonico sive pontificio, nec aliquis cujuscunque conditionis homo gra-*

of this realm. And a vacancy thus made, for want of a dispensation, is called cession (37). 3. By consecration; for, as was mentioned before q, when a clerk is pro- [393] moted to a bishoprick, all his other preferments are void the instant that he is consecrated. But there is a method by the favour of the crown, of holding such livings *in commendam*. *Commenda*, or *ecclesia commendata*, is a living commended by the crown to the care of a clerk, to hold till a proper pastor is provided for it. This may be temporary for one, two, or three years; or perpetual: being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere* (38). There is also a *commenda recipere*, which is to take a benefice *de novo*, in the bishop's own gift, or the gift of some other patron consenting to the same; and this is the same to him as institution and induction are to another clerk r. 4. By resignation. But this is of no avail, till accepted by the ordinary; into whose hands the resignation must be made r (39). 5. By deprivation, either, first, by sentence declara-

q Page 383. q Hob. 144. r Cro. Jac. 198.

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dum aliquem in studio illius juris pontificii suscipiat, aut in eodem in posterum promoveatur quovis modo. Stat. Acad. Cant. p. 137. It is probable that, at the same time, Oxford received a similar prohibition, and that degrees in canon law have ever since been discontinued in England.

(37) In the case of a cession under the statute, the church is so far void upon institution to the second living, that the patron may take notice of it, and present if he pleases; but there is great reason to think, that lapse will not incur from the time of institution against the patron, unless notice be given him; but lapse will incur from the time of induction without notice. 2 *Wils.* 200. 3 *Burr.* 1504.

(38) These commendams are now seldom or never granted to any but bishops; and in that case, the bishop is made commendatory of the benefice, while he continues bishop of such a diocese, as the object is to make it an addition to a small bishoprick; and it would be unreasonable to grant it to a bishop for his life, who might be translated afterwards to one of the richest sees. See an account of the proceedings in the great case of commendams, *Hob.* 140. and *Collier's Ec. Hist.* 2 vol. p. 710.

(39) It seems to be clear that the bishop may refuse to accept a

tory in the ecclesiastical courts, for fit and sufficient causes allowed by the common law; such as attainder of treason or felony [s], or conviction of other infamous crime in the king's courts; for heresy, infidelity [t], gross immorality, and the like: or, secondly, in pursuance of divers penal statutes, which declare the benefice void, for some non-feasance or neglect, or else some male-feasance or crime; as for simony [v]; for maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the book of common prayer [w]; for neglecting after institution to read the liturgy and articles in the church, or make the declarations against popery, or take the abjuration oath [w]; for using any other form of prayer than the liturgy of the church of England [x]; or for absenting himself sixty days in one year from a benefice belonging to a popish patron, to which the clerk was presented by either of the universities [y]; in all which, and similar cases [z] the benefice is *ipso facto* void, without any formal sentence of deprivation.

VI. A CURATE is the lowest degree in the church; being in

s Dyer. 108. Jenk. 210.
t Fitz. Abr. t. Trial. 54.
v Stat. 31 Eliz. c. 6. 12 Ann. c. 12.
w Stat. 1 Eliz. c. 1 and 2. 13 Eliz. c. 12.
w Stat. 13 Eliz. c. 12. 14 Car. II. c. 4. 1 Geo. I. c. 6.
x Stat. 1 Eliz. c. 2.
y Stat. 1 W. and M. c. 26.
z 6 Rep. 29, 30.

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resignation, upon a sufficient cause for his refusal; but whether he can merely at his will and pleasure refuse to accept a resignation without any cause, and who shall finally judge of the sufficiency of the cause, and by what mode he may be compelled to accept, are questions undecided. In the case of the bishop of London and Fytche, the judges in general declined to answer whether a bishop was compellable to accept a resignation: one thought he was compellable by *mandamus*, if he did not shew sufficient cause; and another observed, if he could not be compelled, he might prevent any incumbent from accepting an Irish bishoprick, as no one can accept a bishoprick in Ireland till he has resigned all his benefices in England. But lord Thurlow seemed to be of opinion that he could not be compelled, particularly by *mandamus*, from which there is no appeal or writ of error. See 3 *Burn.* 304. and the opinions of the judges in *Cunningham's Law of Simony*, though ill reported.

the same state that a vicar was formerly, an officiating temporary minister, instead of the proper incumbent. [394] Though there are what are called *perpetual* curacies, where all the tithes are appropriated, and no vicarage endowed, (being for some particular reasons[z] exempted from the statute of Hen. IV.) but instead thereof, such perpetual curate is appointed by the appropriator. With regard to the other species of curates, they are the objects of some particular statutes, which ordain, that such as serve a church during its vacancy shall be payed such stipend as the ordinary thinks reasonable, out of the profits of the vacancy; or, if that be not sufficient, by the successor within fourteen days after he takes possession[a]: and that, if any rector or vicar nominates a curate to the ordinary to be licensed to serve the cure in his absence, the ordinary shall settle his stipend under his hand and seal, not exceeding 50*l*. *per annum*, nor less than 20*l*. and on failure of payment may sequester the profits of the benefice[b] (40).

[z] 1 Burn. eccl. law. 427.
[a] Stat. 29 Hen. VIII. c. 11.
[b] Stat. 12 Ann. st. 2. c. 12.

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(40) It was provided in 1603, by canon 33, that if a bishop ordains any person not provided with some ecclesiastical preferment, except a fellow or chaplain of a college, or a master of arts of five years standing, who lives in the university at his own expense, he shall support him till he shall prefer him to a living. 3 *Burn. Ec. L.* 28. And the bishops, before they confer orders, require either proof of such a title as is described by the canon, or a certificate from some rector or vicar, promising to employ the candidate for orders *bona fide* as a curate, and to grant him a certain allowance, till he obtains some ecclesiastical preferment, or shall be removed for some fault. And in a case where the rector of St. Ann's, Westminster, gave such a title, and afterwards dismissed his curate without assigning any cause, the curate recovered, in an action of assumpsit, the same salary for the time after his dismission which he had received before. *Comyn.* 437. And when the rector had vacated St. Ann's, by accepting the living of Rochdale, the curate brought another action to recover his salary since the rector left St. Ann's; but lord Mansfield and the court held that that action could not be maintained, and that these titles are only

Thus much of the clergy, properly so called. There are also certain inferior ecclesiastical officers of whom the common law takes notice; and that, principally, to assist the ecclesiastical jurisdiction, where it is deficient in powers. On which officers I shall make a few cursory remarks.

VII. Churchwardens are the guardians or keepers of the church, and representatives of the body of the parish[c]. They are sometimes appointed by the minister, sometimes by the parish, sometimes by both together, as custom directs. They are taken, in favour of the church, to be for some purposes a kind of corporation at the common law; that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish. Yet they may not waste the church goods, but may be

c In Sweden they have similar officers, whom they call *kiorckioewariandes*. Stierhook. l. 3. c. 7.

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binding upon those who give them, while they continue incumbent in the church for which such curate is appointed. *Doug.* 137.

The 36 Geo. III. c. 83. has given a power to the bishop or ordinary to grant an allowance not exceeding 75*l.* to any curate who shall be *employed* by any rector or vicar, or by any curate or incumbent of any church or chapel, which has been augmented by queen Ann's bounty, or by the curate or incumbent of any perpetual curacy, although it has not been so augmented.

And where a rector or vicar does not reside four months in the year at least, the bishop or ordinary may grant the use of the rectory or vicarage house with the garden and stable for one year to the curate for his actual residence in it. Or he may grant him 15*l.* a year in lieu of the rectory or vicarage house. The grant of the house he has power to renew, and at any time he may revoke it, and he may annex to it such conditions as he shall think reasonable. If the curate refuses to give up possession at the determination of the grant, he shall forfeit to his rector or vicar all the stipend, which shall be or become due to him, and 50*l.* besides. And the ordinary has power to license any curate, who shall be employed by any rector, vicar, or other incumbent of a parish church or chapel, although no nomination shall have been made to him for that purpose; or he may revoke his license, or remove any curate for a reasonable cause, but subject to an appeal to the arch-bishop of the province, to be determined in a summary manner.

removed by the parish, and then called to account by action at the common law; but there is no method of calling them to account, but by first removing them; for none can legally do it, but those who are put in their place. As to lands, or other real property, as the church, church- [395] yard, &c. they have no sort of interest therein, but if any damage is done thereto, the parson only or vicar shall have the action. Their office also is to repair the church, and make rates and levies for that purpose: but these are recoverable only in the ecclesiastical court. They are also joined with the overseers in the care and maintenance of the poor. They are to levy [d] a shilling forfeiture on all such as do not repair to church on sundays and holidays, and are empowered to keep all persons orderly while there; to which end it has been held that a churchwarden may justify the pulling off a man's hat without being guilty of either an assault or trespass [e]. There are also a multitude of other petty parochial powers committed to their charge by divers acts of parliament [f].

VIII. Parish clerks and sextons are also regarded by the common law, as persons who have freeholds in their offices; and therefore though they may be punished, yet they cannot be deprived, by ecclesiastical censures [g]. The parish clerk was formerly very frequently in holy orders, and some are so to this day. He is generally appointed by the incumbent, but by custom may be chosen by the inhabitants; and if such custom appears, the court of king's bench will grant a *mandamus* to the arch-deacon to swear him in, for the establishment of the custom turns it into a temporal or civil right [h].

[d] Stat. 1 Eliz. c. 2.
[e] 1 Lev. 196.
[f] See Lambard of churchwardens, at the end of his *eirenarcha*; and Dr. Burn, tit. *church, churchwardens, visitations.*
[g] 2 Roll. Abr. 234.
[h] Cro. Car. 589.