

THE
C A S E
OF
I R E L A N D'S
Being Bound by
ACTS OF PARLIAMENT
IN
E N G L A N D,
Stated.

By WILLIAM MOLLYNEUX, of *Dublin*, Esq;

To which is added, the

C A S E
OF
T E N U R E S

Upon the COMMISSION of

DEFECTIVE TITLES,

Argued by all the JUDGES of *IRELAND*.

With their Resolutions, and the Reasons of
their Resolutions.

L O N D O N:

Printed for W. BOREHAM at the *Angel*, in *Pater-Noster-Row*. 1720.



TO THE

KING.

SIR,

THE Expedition
Your MAJESTY
Undertook into
ENGLAND, to rescue
these Nations from Arbitrary
Power, and those
A 2 Un-

Black
1715

OCT 16 1912 290215

Unjust Invasions that were made on our Religion, Laws, Rights and Liberties, was an Action in it Self so *Great*, and of such Immense Benefit to our Distressed Countries, that 'tis Impossible to give it a Representation so *Glorious* as it deserves. Of all Your Majesty's Kingdoms, none was more sensible of the Happy Effects thereof, than Your *Kingdom of IRELAND*, which from the Depth of Misery and Despair, is raised by Your Majesty
to

to a Prosperous and Flourishing Condition. And we presume most humbly to Implore the Continuance of Your Majesty's Graces to us, by Protecting and Defending those *Rights and Liberties* which we have Enjoy'd under the Crown of *England* for above Five Hundred Years, and which some of late do Endeavour to Violate. Your most Excellent Majesty is the *Common Indulgent Father* of all Your Countries; and have an *equal* Regard to the
A 3 *Birth-*

Birth-Rights of all Your *Children*; and will not permit the *Eldest*, because the *Strongest*, to encroach on the Possessions of the *Younger*: Especially considering with what *Duty*, *Loyalty*, and *Filial Obedience*, we have ever behav'd our selves to Your Majesty; insomuch that I take Leave to assert, That Your Majesty has not in all Your Dominions a People more *United* and *Steady* to Your Interests, than the *Protestants of Ireland*; Which has

mani-

manifestly appear'd in all our Actions and Parliamentary Proceedings, since Your Majesty's Happy Accession to the Throne. To relieve the Distress'd, has ever been the peculiar *Character* of Your Majesty's *Glorious Family*. The *United Provinces* have found this in Your *Famous Ancestors*: And all *Europe* has been sensible of this in Your *Royal Person*. To this End more particularly You came into these Kingdoms, as Your Majesty has been pleas'd

pleas'd to declare: And
 as You have Establish'd
 the *Rights and Liberties of*
England on a Foundation,
 that we hope can never
 be shaken; So we doubt
 not but Your Sacred Ma-
 jesty will have a Tender
 Care of Your poor Sub-
 jects of *Ireland*, who are
 Equally Your Subjects,
 as the rest of Your Peo-
 ple.

PARDON, I most hum-
 bly beseech Your Maje-
 sty, my Presumption, in
 Appealing to You on this

Oc-

Occasion: Nothing but
 the *Dignity and Weight* of
 the Subject, can excuse
 my Boldness herein: But
 if That be consider'd, it
 deserves the Regard of the
Greatest Prince; 'Tis no
 less than the *Rights and*
Liberties of one of His
 Kingdoms, on which their
 Religion, their Property,
 their *All* depends; and
 which they have enjoy'd
 for Five Hundred Years
 past. This, I think I
 have clearly shewn in the
 following Leaves: I am
 sure, if my *Management*
 thereof,

thereof, were suitable to
the *Justice* of our Cause,
our *Friends* of *England*
can no longer doubt it.

At Your Majesty's
Feet therefore, I throw
it; and with it the Un-
worthy Author thereof, I

(*May it please Your Majesty*)

Your MAJESTY'S

Most Dutiful, Loyal,

And Obedient

Subject and Servant,

William Molyneux,



PREFACE

TO THE
READER.

I Have nothing to offer in
this Preface, more than
to let the Reader know,
how Unconcern'd I am
in any of those particular
Inducements, which might
seem at this Juncture to have
occasion'd the following Dis-
course.

I have

*I have not any concern in
Wool, or the Wool Trade.*

*I am no ways Interested in
the Forfeitures, or Grants.
I am not at all Solicitous,
whether the Bishop, or So-
ciety of Derry, Recover the
Land they Contest about.*

*So that I think I am as free
from any Personal Preju-
dice in this Cause, as 'tis
possible to expect any Man
should be, that has an Estate
and Property in this King-
dom, and who is a Mem-
ber of Parliament therein.
I hope*

*I hope therefore 'tis a Pub-
lick Principle that has mo-
ved me to this Undertaking:
I am sure I am not Consci-
ous to my self, of any other
Intention.*

*I have heard it has been
said, That perhaps I might
run some Hazard in attempt-
ing this Argument: But I
am not at all apprehensive of
any such Danger. We are in
a miserable Condition indeed,
if we may not be allowed
to Complain, when we
think we are Hurt; and to
give our Reasons with all
Ma-*

Modesty and Submission
*But were it otherwise, it
 would not in the least affect
 or discourage me in an At-
 tempt, where I think my
 Cause good, and my Country
 Concern'd, and where I am
 fully persuaded, the True
 Interest of England is as
 deeply engaged, as the Pro-
 testant Interest in Ireland.*

*The Great and just Coun-
 cil of England freely Al-
 lows all Addresses of this
 sort. To Receive and Hear
 Grievances, is a great part
 of their Business, and to
 Redress*

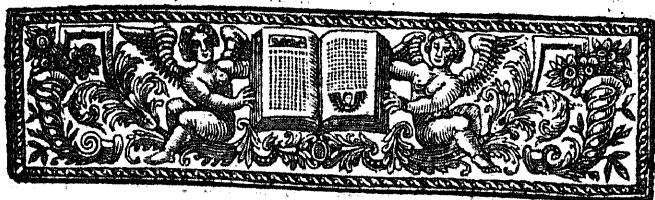
*Redress them, is their chief
 Glory. But this is not to
 be done, till they are laid
 before them, and fairly Sta-
 ted for their Consideration.*

*This I have endeavour'd
 in the following Paper. What
 Success it may have, I am
 not very solicitous about. I
 have done what I thought
 was my Duty, and commit
 the Event to God Almight-
 ty, and the Wise Council
 of England.*

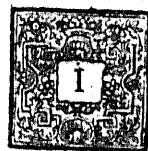
*Dublin, Febr. 8.
 1698.*

W. MOLLINEUX.

The



THE
C A S E
OF
I R E L A N D's
Being Bound by
ACT of PARLIAMENT
IN
E N G L A N D,
S T A T E D.



HAVE ever been so fully INTRODUCTION
perswaded of the strict and Occasion of
Justice of the Parliament of this Disquiti-
ENGLAND, that I could
never think that any of their Proceed-
ings, which might seem to have the
least Tendency to Hardship on their
Neighbours, could arise from any thing
but

but want of due Information, and a right State of the Business under their Consideration. The want of which, in Matters wherein another People are chiefly Concern'd, is no Defect in the Parliament of *England*, but is highly Blameable in the Persons whose Affair is transacting, and who permit that Illustrious Body of Senators to be misinform'd, without giving them that Light that might Rectify them.

I could never imagine that those Great Assertors of their *Own Liberties* and *Rights*, could ever think of making the least Breach in the *Rights* and *Liberties of their Neighbours*, unless they thought that they had *Right* so to do; and this they might well surmise, if their Neighbours quietly see their Inclosures Invaded, without *Expostulating* the Matter at least, and shewing Reasons, why they may think that Hardships are put upon them therein.

THE Consideration hereof has excited me to undertake this Disquisition, which I do with all imaginable Diffidence of my own Performance, and with the most profound Respect and Deference to that August Senate. The present Juncture of Affairs, when the
Business

Business of IRELAND is under the Consideration of both Houses of the *English* Parliament*, seems to require this from some Person; and seeing all Others silent, I venture to expose my own Weakness, rather than be wanting at this time to my Country; I might say indeed to Mankind, for 'tis the Cause of the whole Race of ADAM, that I argue: Liberty seems the inherent Right of all Mankind; and on whatsoever Ground any one Nation can Challenge it to themselves, on the same Reason may the Rest of Adam's Children Expect it.

IF what I offer herein, seems to carry any Weight, in relation to my own Poor Country, I shall be abundantly happy in the Attempt: But if after all, the Great Counsel of *England* Resolve the contrary, I shall then believe myself to be in an Error, and with the lowest Submission, ask Pardon for my Assurance. However, I humbly presume I shall not be hardly Censur'd by them, for offering to lay before them a fair State of our Case, by such Information as I can procure; especially when at the same time I declare my Intention of a Submissive Acquiescence, in whatever they Resolve for or against what I Offer.

* Bishop of DERRY in the House of Lords, and Prohibiting Exportation of our Woollen Manufacture in the House of Commons.

Subject of this Enquiry.

THE Subject therefore of our present Disquisition shall be, *How far the Parliament of ENGLAND may think it Reasonable to intermeddle with the Affairs of IRELAND, and bind us up by Laws made in their House.*

AND seeing the *Right* which *England* may pretend to, for Binding us by their Acts of Parliament, can be founded only on the *Imaginary Title of Conquest* or *Purchase*, or on *Precedents* and *Matters of Record*; We shall Enquire into the following Particulars.

(1.) *First*, How *Ireland* became a Kingdom *Annex'd* to the Crown of *England*? And here we shall at large give a faithful Narrative of the *First Expedition of the Britains* into this Country, and King *Henry* the Second's Arrival here, such as our best Historians give us.

(2.) *Secondly*, We shall Enquire, Whether this Expedition, and the *English* Settlement that afterwards follow'd thereon, can properly be call'd a *Conquest*? Or whether any Victories obtain'd by the *English*, in any succeeding Ages in this Kingdom, upon any *Rebellion*,

bellion, may be call'd a *Conquest* thereof?

(3.) *Thirdly*, Granting that it were a *Conquest*, we shall Enquire what *Title* a *Conquest* gives.

(4.) *Fourthly*, We shall Enquire what *Concessions* have been from time to time made to *Ireland*, to take off what, even the most Rigorous Assertors of a Conqueror's Title do pretend to. And herein we shall shew by what Degrees the *English* Form of Government, and the *English* Statute-Laws, came to be received among us: And this shall appear, to be wholly by the *Consent* of the People and Parliament of *Ireland*.

(5.) *Fifthly*, We shall Enquire into the Precedents and Opinions of the Learned in the Laws, relating to this Matter, with Observations thereon.

(6.) *Sixthly*, We shall Consider the Reasons and Arguments that may be farther Offered on one Side and t'other; and shall draw some General Conclusions from the Whole.

As to the First, We shall find the History of the First Expedition of the *English* Britain's first Expedition into Ireland.

English into *Ireland*, to be briefly thus; In the Reign of King *Henry* the Second, *Dermot Fitzmurchard*, commonly called *Mac-Morrogh*, Prince of *Leinster*, who was a Man Cruel and Oppressive, after many Battles with other Princes of *Ireland*, and being Beaten and put to Flight by them, apply'd for Relief to King *Henry* the Second, who was then busied in *Aquitain*; the King was not then in such Circumstances as to afford him much Help: However thus much he did for him, By Letters Patents he granted License to all his Subjects throughout his Dominions, to Assist the said Prince to Recover his Dominions. These Letters Patents are to be seen in * *Giraldus Cambrensis*, who was Historiographer and Secretary to King *Hen. II.* and Accompanied him in his Expedition into *Ireland*, and from him it is that we have this Relation. The *Irish* Prince brought these Letters into *England*, and caused them to be Read in the Audience of many People; Beating up, as it were, for Voluntiers and free Adventurers into *Ireland*. At length, *Richard* Earl of *Strigul* (now *Chepstow* in *Monmouthshire*) Son of Earl *Gilbert*, call'd *Strongbow*, Agreed with him, to Assist him in the Recovery of his Country, on Condition that *Dermot* should give him his

* *Giraldus*
Camb. Hib.
Expug. Lib.
C. I.

his Eldest Daughter in Marriage, and his Kingdom of *Leinster* after his Death. About the same time, *Robert Fitz-Stephen*, Governour of *Aberlesie* in *Wales*, Agreed likewise with *Dermot* to help him, on Condition that he would grant to him, and *Maurice Fitzgerald* in Fee, the City of *Wexford*, with two Cantreds, or Hundreds, of Land, near adjoining.

THESE Adventurers afterwards went over, and were Successful in Treating with the *Irish*, and taking *Wexford*, *Waterford*, *Dublin*, and other Places, Whereupon Earl *Richard Strongbow*, Married *Dermot's* Daughter, and according to Compact, succeeded him in his Kingdom.

A little after the Descent of these Adventurers, King *Henry II.* himself went into *Ireland* with an Army, in *Novemb. 1172.* and finding that his Subjects of *England* had made a very good Hand of their Expedition, he obtain'd from Earl *Richard Strongbow* a Surrender of *Dublin*, with the Cantreds adjoining, and all the Maritime Towns and Castles, But *Strongbow* and his Heirs, were to Enjoy the Residue of *Dermot's* Principality.

Iris submit to
him.

KING Hen. II. Landed at *Waterford*, from *Milford* in *Pembrokeshire*, and staying there some few Days, (says *Giraldus Cambrensis*) *Rex Corcagiensis Dormitius* advenit ei, & tam *Subjectionis vinculo quam fidelitatis Sacramento Regi Anglorum se sponte submitit. He freely swore Fealty and Subjection to the King of England.*

FROM thence he went to *Lismore*, and thence to *Cashel*, where *Dunaldus* King of *Lymerick*, *se quoque fidelem Regi exhibuit.* The like did all the Nobility and Princes in the South of *Ireland.*

AFTERWARDS he marched to *Dublin*, and there the Princes of the Adjacent Countries came to him, & *sub Fidelitatis & Subjectionis obtentu a Rege Pacem impetrabant.* Thus *Cambrensis* in his *Hibernia Expugnata*; and there he mentions the several Princes that came in, viz. *Macshaghlin* King of *Ophaly*, *O Carrol* King of *Uriel* (now *Lowth*) *O Rourk* King of *Meath*, *Rotherick* *O Connor* King of *Connaught*, and *Monarch*, as it were, of the whole Island, with divers others, *qui firmissimis fidelitatis & subjectionis vinculis Domino Regi inmodarunt & in singulari Rotherico Conactiæ Principe tanquam Insulae Monarchâ subditi redduntur universi,*

versi, nec alicujus fere in Insula vel nominis vel ominis erat qui Regiæ Majestati & Debitam Domino Reverentiam, non exhiberet.

THE same Relation we have from *Roger Hoveden* (*Annal. parsposter. fol. 301.*) About the Kalends of *November* 1172. (saith he) King *Henry II.* of *England*, took Shipping for *Ireland* at *Milford*, and Landed at *Waterford*, & *ibi venerunt ad eum Rex Corcagiensis, Rex de Lymerick, Rex de Oxenie, Rex Midia, & fere omnes Hibernia Potentes.* And a little afterwards in the same Place speaking of King *Henry* the Second's being at *Waterford*, *ibidem venerunt ad Regem Angliæ omnes Archiepiscopi, Episcopi, & Abbates totius Hiberniæ, & receperunt eum in Regem & Dominum Hiberniæ jurantes ei & heredibus suis Fidelitatem & Regnandi super eos Potestatem in perpetuum & inde Dederunt ei Chartas suas. Exemplo autem Clericorum predicti Reges & Principes Hiberniæ receperunt simili modo Henricum Regem Angliæ in Dominum & Regem Hiberniæ & sui devenerunt, & ei & Heredibus suis Fidelitatem contra omnes juraverunt.*

Matthew

Matthew Paris likewise in his History, speaking of King *Hen. II.* being in *Ireland*, saith, *Archiepiscopi & Episcopi ipsum in Regem & Dominum receperunt, & ei Fidelitatem & Jura verunt.*

John Brampton Abbot of *Jornal*, in his *Historia Jornalensis*, pag. 1070, speaking of *Hen. II.* hath these Words, *Recepit ab unoquoque Archiepiscopo & Episcopo Hiberniæ Literas cum Sigillis suis in modum Chartæ pendentibus, Regnum Hiberniæ sibi & Heredibus suis Confirmantes, & Testimonium perhibentes ipsos in Hibernia eum & Heredes suos sibi in Reges & Dominos in perpetuum Constituisse.* All the *Archbishops, Bishops, and Abbots* of *Ireland* came to the King of *England*, and Received him for King and Lord of *Ireland*, swearing Fealty to him and his Heirs for ever. The Kings also and Princes of *Ireland*, did in like manner receive *Henry* King of *England*, for Lord of *Ireland*, and became his Men, and did him Homage, and swore Fealty to him and his Heirs against all Men. And he received Letters from them with their Seals pendent in manner of Charters, confirming the Kingdom of *Ireland* to him and his Heirs; and Testifying, That

That they in *Ireland* had Ordain'd him and his Heirs to be their King and Lord of *Ireland* for ever. After which, he return'd into *England* in *April* following, viz. *April 1173.*

I come now to enquire into our ^{IRELAND,} second Particular propos'd, ^{whether ever} *Viz.* Whether *Ireland* might be properly said to be Conquer'd by King *Henry* the Second, or by any other Prince in any succeeding Rebellion. And here we are to understand by *Conquest*, an Acquisition of a Kingdom by Force of Arms, to which, Force likewise has been Oppos'd, if we are to understand *Conquest* in any other Sense. I see not of what Use it can be made against *Ireland's* being a Free Country. I know *Conquestus* signifies a Peaceable Acquisition, as well as an Hostile Subjugating of an Enemy. *Vid. Spelman's Glos.* And in this Sense *William* the First is call'd the Conqueror, and many of our Kings have used the Epocha, *post Conquestum.* And so likewise *Henry* the Second stiled himself *Conquestor & Dominus Hiberniæ*; but that His Conquest was no violent Subjugation of this Kingdom, is manifest from what foregoes: For here we have an Intire and Voluntary Submission of all the Ecclesiastical and Civil States of *Ireland,*

land, to King Henry II. without the least Hostile Stroke on any side; We hear not in any of the Chronicles of any Violence on either Part, all was transacted with the greatest Quiet, Tranquility, and Freedom, imaginable. I doubt not but the barbarous People of the Island at that time were struck with Fear and Terror of King Hen. II's powerful Force which he brought with him; but still their Ease and Voluntary Submissions, exempts them from the Consequences of an *Hostile Conquest*, whatever they are; where there is no Opposition, *such a Conquest* can take no place.

I have before taken Notice of Henry the II's using the Stile of *Conquestor Hibernie**; I presume no Argument can be drawn from hence, for *Ireland's* being a Conquer'd Country; for we find that many of the Kings of *England* have used the *Æra*, of *post Conquestum*; *Edward* the Third was the first that used it in *England*, and we frequently meet with *Henricus post Conquestum Quartus*, &c. as taking the *Norman* Invasion of *William* the First, for a *Conquest*. But I believe the People of *England* would take it very ill to be thought a *Conquer'd Nation*, in the Sense that some impose it on
Ire-

* Mr. SELDEN will not allow that ever H. 2. used this Stile: *Tit. Hon. Par. 2. C. 5. Sect. 26.*

Ireland: And yet we find the same Reason in one Case, as in t'other, if the Argument from the King's Stile of *Conquestor* prevail. Nay, *England* may be said much more properly to be *conquer'd* by *William* the First; than *Ireland* by *Henry* the Second: For we all know with what Violence and Opposition from *Harrold*, King *William* obtain'd the Kingdom, after a bloody Battle nigh *Hastings*. Whereas *Henry* the Second receiv'd not the least Opposition in *Ireland*, all came in peaceably, and had large Concessions made them of the like Laws and Liberties with the People of *England*, which they gladly accepted, as we shall see hereafter. But I am fully satisfied, that neither King *William* the First, in his Acquisition of *England*, or *Henry* II. in his Acquest of *Ireland*, obtain'd the least Title to what some would give to *Conquerors*. Tho' for my own Part, were they *Conquerors* in a Sense never so strict, I should enlarge their Prerogative very little or nothing thereby, as shall appear more fully in the Sequel of this Discourse.

ANOTHER Argument for *Henry* the Second's *Hostile Conquest* of *Ireland*, is taken from the Opposition which the Natives of *Ireland* gave to
the

the first Adventurers, *Fitz-Stephens*, *Fitzgerald*, and *Earl Strongbow*, and the Battles they fought in assisting *Mac-Morrogh* Prince of *Leinster*, in the Recovery of his Principality.

It is certain there were some Conflicts between them and the *Irish*, in which the Latter were constantly beaten; but certainly the Conquests obtain'd by those Adventurers, who came over only by the King's *License* and *Permission*, and not at all by his particular *Command* (as is manifest from the Words of the Letters Patents of License recited by *Giraldus Cambrensis*, *Heb. Expug.* pag. 760. *Edit. Francof.* 1603. *Angl. Norm. Hiber. Cambd.*) can never be call'd the Conquest of *Henry* the Second, especially considering that *Henry* the Second himself does not appear to have any Design of Coming into *Ireland*, or Obtaining the Dominion thereof, when he gave to his Subjects of *England* this License of Assisting *Mac-Morrogh*. But I conceive rather the contrary appears, by the Stipulations between *Mac-Morrogh* and the Adventurers, and especially between him and *Strongbow*, who was to succeed him in his Principality.

FROM what foregoes, I presume it appears, that *Ireland* cannot properly be said

Suppressing
Rebellions,
whether a
Conquest.

said *so to be Conquer'd* by *Henry* the Second, as to give the Parliament of *England* any Jurisdiction over us; it will much more easily appear, that the *English Victories* in any succeeding *Rebellions* in that Kingdom, give no *Pretence* to a *Conquest*: If every Suppression of a Rebellion may be call'd a *Conquest*, I know not what Country will be excepted. The Rebellions in *England* have been frequent; in the Contests between the Houses of *York* and *Lancaster*, one side or other must needs be *Rebellious*. I am sure the Commotions in King *Charles* the First's Time, are stiled so by most Historians. This Pretence therefore of *Conquest* from *Rebellions*, has so little Colour in it, that I shall not insist longer on it: I know *Conquest* is an hateful Word to *English* Ears, and we have lately seen a Book * undergo a severe Censure, for offering to broach the *Doctrine of Conquest* in the *Free Kingdom of England*.

BUT, to take off all Pretence from this Title by *Conquest*, I come in the third Place to enquire, *What Title Conquest gives by the Law of Nature and Reason?*

AND in this Particular I conceive, that if the Aggressor, or Insulter, invades a Nation *Unjustly*, he can never thereby have a Right over the Conquered:

This

* Bishop of
Salisbury's Pa-
storal Letter.

What Title is
obtain'd by
Conquest.

No Title gain'd
by an unjust
Conquest.

This I suppose will be readily granted by all Men: If a Villain with a Pistol at my Breast, makes me convey my Estate to him, no one will say that this gives him any Right: And yet just such a Title as this has an *Unjust Conquerour*, who with a Sword at my Throat forces me into Submission; that is, forces me to part with my *Natural Estate*, and Birth-right, of being govern'd only by Laws to which I give my *Consent*, and not by his Will, or the Will of any other.

What Title by a Just Conquest. LET us then suppose a *Just Invader*, one that has *Right* on his Side, to Attack a Nation in an Hostile manner; and that those who oppose him are in the *Wrong*: Let us then see what Power he gets, and over whom.

None over the Assisters in the Conquest. FIRST, 'Tis plain he gets by his Conquest no Power over those who *Conquered with him*; they that fought on his Side, whether as private Soldiers or Commanders, cannot suffer by the Conquest, but must at least be as much Freemen, as they were before; If any lost their Freedom by the *Norman Conquest*, (supposing King *William* the First, had *Right* to invade *England*) it was only the *Saxons* and *Britains*, and not the *Normans* that Conquered with him. In like manner supposing

Hen.

Hen. II. had *Right* to Invade this Island, and that he had been oppos'd therein by the Inhabitants, it was only the *Ancient Race* of the *Irish*, that could suffer by this Subjugation; the *English* and *Britains*, that came over and Conquered with him, retain'd all the Freedoms and Immunities of *Free-born* Subjects; they nor their Descendants could not in reason lose these, for being Successful and Victorious; for so, the State of both *Conquerors* and *Conquered* shall be equally *Slavish*. Now 'tis manifest that the great Body of the present People of *Ireland*, are the Progeny of the *English* and *Britains*, that from time to time have come over into this Kingdom; and there remains but a meer handful of the *Ancient Irish* at this Day; I may say, not one in a thousand: So that if I, or any Body else, claim the like Freedoms with the Natural Born *Subjects* of *England*, as being descended from them, it will be impossible to prove the Contrary. I conclude therefore, that a *Just Conqueror* gets no Power, but only over those who have actually *Assisted* in that *Unjust* Force that is used against him.

And as those that joyned with the Conqueror in a just Invasion, have lost no Right by the Conquest; so nei-

None over the Non-Opposers.

C

ther

ther have those of the Country who *Oppos'd him not*: This seems so reasonable at first Proposal, that it wants little Proof. All that gives Title in a *Just* Conquest, is the *Opposers* using *Brutal Force*, and quitting the Law of Reason, and using the Law of Violence; whereby the Conqueror is entitled to use him as a *Beast*; that is, Kill him, or Enslave him.

SECONDLY, Let us consider what Power that is, which a *Rightful Conqueror* has over the Subdued *Opposers*: And this we shall find extends little farther than over the *Lives* of the *Conquer'd*; I say *little farther* than over their *Lives*; for how far it extends to their *Estates*, and that it extends not at all to deprive their *Posterity* of the *Freedoms* and *Immunities* to which all *Mankind* have a *Right*; I shall shew presently. That the *Just Conqueror* has an absolute Power over the *Lives* and *Liberties* of the *Conquered*, appears from hence, because the *Conquer'd*, by putting themselves in a *State of War*, by using an unjust Force, have thereby *forfeited* their *Lives*. For quitting *Reason*, (which is the Rule between Man and Man) and using *Force*, (which is the Way of *Beasts*) they become liable to be de-

Just Conqueror intitled to the Lives of the Opposers.

destroy'd by him against whom they use *Force*, as any savage wild *Beast* that is dangerous to his Being.

AND this is the Case of *Rebels* in a settled Commonwealth, who forfeit their *Lives* on this Account. But as for forfeiting their *Estates*, it depends on the Municipal Laws of the Kingdom. But we are now enquiring what the Consequence will be, between two Contesting Nations.

WHICH brings me to consider how far a *Just Conqueror* has Power over the *Posterity* and *Estates* of the *Conquered*,

As to the *Posterity*, they not having joyn'd or assisted in the *Forcible Opposition* of the *Conquerors* *Just Arms*, can lose no Benefit thereby. 'Tis unreasonable any Man should be punish'd but for his own Fault. Man being a free Agent, is only Answerable for his own Demerits; and as it would be highly Unjust to hang up the Father for the Son's Offence, so the Converse is equally Unjust, that the Son should suffer any Inconvenience for the Father's Crime. A Father hath not in himself a Power over the Life or Liberty of his Child, so that no Act of his can possibly forfeit it. And tho' we find in the Municipal

Just Conqueror how far impower'd over the Posterity of the Opposers.

Laws of particular Kingdoms; that the Son loses the Father's Estate for the Rebellion or other Demerit of the Father, yet this is consented and agreed to for the Publick Safety, and for deterring the Subjects from certain enormous Crimes that would be highly prejudicial to the Commonwealth. And to such Constitutions the Subjects are bound to submit, having consented to them, tho' it may be unreasonable to put the like in Execution between *Nation* and *Nation* in the *State of Nature*. For in settled Governments, Property in Estates is Regulated, Bounded and Determined by the Laws of the Commonwealth, consented to by the People, so that in these, 'tis no Injustice for the Son to lose his Patrimony for his Father's Rebellion or other Demerit.

How far over
their Estates.

IF therefore the *Posterity* of the Conquered, are not to suffer for the *Unjust Opposition* given to the Victor by their *Ancestors*, we shall find little Place for any Power of the Conquerors over the *Estates* of the subdued. The *Father* by his Miscarriages and Violence can forfeit but his own Life, he involves not his *Children* in his Guilt or Destruction. His *Goods*, which *Nature* (that willeth the Preservation of

of all *Mankind* as far as possible) hath made to belong to his *Children* to sustain them, do still continue to belong to his *Children*. 'Tis true indeed, it usually happens that *Damage* attends unjust Force; and as far as the *Repair* of this *Damage* requires it, so far the Rightful Conqueror may invade the *Goods* and *Estate* of the Conquered; but when this *Damage* is made up, his Title to the Goods ceases, and the *Residue* belongs to the *Wife* and *Children* of the subdued.

IT may seem a strange Doctrine, that any one should have a Power over the *Life* of another Man, and not over his *Estate*; but this we find every Day, for tho' I may *kill* a Thief that sets on me in the High Way, yet I may not take away his *Money*; for 'tis the *Brutal Force* the Aggressor has used, that gives his Adversary a Right to take away his *Life*, as a noxious Creature: But 'tis only *Damage sustain'd*, that gives Title to another Man's *Goods*.

IT must be confess'd that the Practice of the World is otherwise, and we commonly see the Conqueror (whether *Just* or *Unjust*) by the Force he has over the Conquer'd, compel them with a Sword at their Breast to stoop to his Conditions, and submit to such

Practice of
Conquerors
otherwise.

a Government as he pleases to afford them. But we enquire not now, what is the *Practise*, but what *Right there is to do so*. If it be said the Conquered submit by their own *Consent*; then this allows *Consent* necessary to give the Conqueror a Title to Rule over them. But then we may enquire, whether Promises extorted by *Force* without *Right*, can be thought *Consent*, and how far they are *obligatory*; and I humbly conceive they *bind not at all*. He that *forces* my Horse from me, ought presently to *restore* him, and I have still a *Right* to retake him: So he that has *forced* a Promise from me, ought presently to *restore* it, that is, quit me of the *Obligation* of it, or I may chuse whether I will perform it or not: For the *Law of Nature* obliges us only by the *Rules* she prescribes, and therefore cannot oblige me by the *Violation* of her Rules; such is the *Extorting* any thing from me by *Force*.

FROM what has been said, I presume it pretty clearly appears, that an *Unjust* Conquest gives *no Title* at all; That a *Just* Conquest gives Power only over the *Lives* and *Liberties* of the *Actual Opposers*, but not over their *Posterity* and *Estates*, otherwise than as before is mentioned; and not at all

over

over those that did *not Concur* in the *Opposition*.

THEY that desire a more full Disquisition of this Matter, may find it at large in an Incomparable *Treatise*, concerning the *True Original Extent and End of Civil Government*, Chap. 16. This Discourse is said to be written by my Excellent Friend, JOHN LOCKE, *Esq;* Whether it be so or not, I know not; This I am sure, whoever is the Author, the greatest Genius in *Christendom* need not dishown it.

BUT granting that all we have said in this Matter is *Wrong*, and granting that a Conqueror, whether *Just* or *Unjust*, obtains an *Absolute* Arbitrary *Dominion* over the Persons, Estates, Lives, Liberties and Fortunes of all those whom he finds in the Nation, their *Wives*, *Posterity*, &c. so as to make perpetual *Slaves* of them and their Generations to come; Let us next enquire, whether *Concessions* granted by such a victorious *Hero*, do not bound the Exorbitancy of his Power, and whether he be not obliged strictly to observe these Grants.

AND here I believe no Man of Common Sense or Justice, will deny it; none that had ever consider'd the Law of Nature and Nations, can possibly

C 4

sibly

sibly hesitate on this Matter; the very proposing it, strikes the Sense and common Notions of all Men so forcibly, that it needs no farther Proof. I shall therefore insist no longer on it, but hasten to consider how far this is the Case of *Ireland*: And that brings me naturally to the fourth Particular propos'd, *viz.* to shew by Precedents, Records, and History, what Concessions and Grants have been made from Time to Time to the People of *Ireland*, and by what Steps the Laws of *England* came to be introduced into this Kingdom.

What Concessions have been made from the Crown of *England* to the Kingdom of *Ireland*.
 WE are told by *Matth. Paris*, Historiographer to *Hen. III.* that *Henry* the Second, a little before he left *Ireland*, in a Publick Assembly and Council of the *Irish* at *Lismore*, did cause the *Irish* to receive, and swear to be govern'd by the Laws of *England*: *Rex Henricus* (saith he) *antequam ex Hibernia Rediret apud Lismore Concilium Congregavit ubi Leges Angliæ sunt ab omnibus gratanter receptæ, & Furatoriâ cautione præstitâ Confirmatæ*, Vid. *Matth. Paris*, ad An. 1172. Vit. H. 2.

By HENRY II. the Laws of *England*:
 AND not only thus, but if we may give Credit to *Sir Edward Cook*, in the 4th Instit. Cap. 1. and 76. and to the Inscription to the *Irish Modus Tenendi*

tenendi Parliamentum, it will clearly appear, that *Henry* the Second did not only settle the Laws of *England* in *Ireland*, and the Jurisdiction Ecclesiastical there, by the *Voluntary Acceptance* and *Allowance* of the Nobility and Clergy, but did likewise allow them the Freedom of *holding of Parliaments* in *Ireland*, as a separate and distinct Kingdom from *England*; and did then send them a *Modus* to direct them how to hold their Parliaments there. The Title of which *Modus* runs thus:

Henricus Rex Angliæ Con-
questor & Dominus Hiberniæ,
&c. Mittit hanc formam Ar-
chiepiscopis, Episcopis, Abbati-
bus, Prioribus, Commitibus, Ba-
ronibus, Justiciariis, Viceco-
mitibus, Majoribus, Præpositis,
Ministris & omnibus Fidelibus
suis Terræ Hiberniæ Tenendi
Parliamentum.

In primis Summonitio Parli-
amenti præcedere debet per Qua-
draginta Dies.

And so forth,

THIS

THIS *Modus* is said to have been sent into *Ireland* by *Hen. II.* for a Direction to hold their Parliaments there. And the Sense of it agrees for the most part with the *Modus Tenendi Parl.* in *England*, said to have been allowed by *William the Conqueror*, when he obtain'd that Kingdom; where 'tis alter'd, 'tis only to fit it the better for the Kingdom of *Ireland*.

I know very well the Antiquity of this *Modus*, so said to be transmitted for *Ireland* by *Hen. II.* is question'd by some Learned Antiquaries, particularly

(a) *Tit. Hon. by Mr. Selden (a) and (b) Mr. Pryn,*
Par. 2. C. 5. who deny also the English Modus as
Sess. 26. Edit.
Lon. An. 1672. well as this. But on the other hand,
 (b) *Against*
Cook's 4th In-
stit. pag. 12. and 349. does strenu-
ously assert them both. And the late
Reverend and Learned Dr. Dopping
Bishop of Meath, has Published the
Irish Modus, with a Vindication of
its Antiquity and Authority in the
Preface.

THERE seems to me but two Objections of any Moment raised by *Mr. Pryn* against these *Modi*. The One relates both to the *English* and *Irish Modus*; the other chiefly strikes at the *Irish*. He says the Name *Parliament,*

ament, so often found in these *Modi*, was not a Name for the great Council of *England* known so early as these *Modi* pretend to. I confess I am not prepar'd to disprove this Antiquary in this particular: But to me it seems reasonable enough to Imagine, that the Name *Parliament*, came in with *William the Conqueror*: 'Tis a Word perfectly *French*, and I see no reason to doubt its coming in with the *Normans*. The other Objection affects our *Irish Modus* for he tells us, that *Sheriffs* were not establish'd in *Ireland* in *Henry II's* time, when this *Modus* was pretended to be sent hither, yet we find the Word *Vicecomes* therein. To this I can only Answer, that *Hen. II.* intending to Establish in *Ireland* the *English* Form of Government, as the first and chief step thereto, he sent them Directions for holding of Parliaments, designing afterwards, by degrees, and in due time, to settle the other Constitutions agreeable to the Model of *England*. If therefore *England* had then *Sheriffs*, we need not wonder to find them nam'd in the *Irish Modus*, tho' they were not as yet establish'd amongst us, for they were design'd to be appointed soon after, and before the *Modus* could be put regularly in execution; and

and accordingly we find them established in some Counties of Ireland in King John's Time.

THIS *Irish Modus* is said to have been in the Custody of Sir Christopher Preston of Clane in Ireland, Ann. 6. Hen. IV. and by Sir John Talbot Lord Lieutenant of Ireland, under King Hen. IV. It was exemplified by *Inspecimus* under the great Seal of Ireland, and the Exemplification was sometimes in the Hands of Mr. Hackwel of Lincoln's-Inn, and by him was Communicated to Mr. Selden. The Tenor of which Exemplification runs thus.

*Henricus Dei Gratia Rex Angliæ
& Franciæ, & Dominus Hiberniæ,
omnibus ad quos presentes
Literæ pervenerint salutem In-
speximus Tenorem Diversorum Ar-
ticulorum in quodam Rotulo Per-
gameneo Scriptorum cum Christo-
phero Preston, Milite Tempore
Arrestationis suæ apud Villam de
Clare, per Deputatum Dilecti &
Fidelis nostri Johanne Talbot de
Halomshire Chivaler locum nostrum
Tenentis Terræ nostræ Hiberniæ,
nuper factæ inventorum ac coram
nobis & Concilio nostro in eadem
terræ nostra apud Villam de Trim.
Nono*

*Nono die Januarij ultimo præte-
riti in hæc verba.*

“ *Modus Tenendi Parliamenta Hen-
ricus Rex Angliæ, Conquestor.
& Dominus Hiberniæ, Mittit
hanc formam Archiepiscopis, &c.
and so as before, “ Et omnibus
Fidelibus suis Terræ Hiberniæ
Tenendi Parliamentum Impri-
mum Summonitio, &c.” and
then follows the Modus, agreeable
in most Things with that of En-
gland; only fitted to Ireland.
Then the Exemplification con-
cludes:*

*Nos autem tenores Articulorum
prædictorum de Assensu præfati
Locum tenentis & Concilii præ-
dicti tenore præsentium duximus
Exemplificandum & has Literas
nostras fieri fecimus Patentes.
Teste Præfato Locum nostrum te-
nente apud Trim. 12. die Janua-
rii Anno Regni nostri sexto.*

*Per ipsum Locum tenentem &
Concilium.*

Now we can hardly think it credi-
ble (says the Bishop of Meath) that an
Exem-

Exemplification could have been made so solemnly of it, by King *Henry* the Fourth, and that it should refer to a *Modus* transmitted into *Ireland* by King *Henry* the Second, and affirm that it was produced before the Lord Lieutenant and Council at *Trim*, if no such thing had been done: This were to call in question the Truth of all former Records and Transactions, and make the Exemplification contain an Egregious Falshood in the Body of it.

THE Reverend Bishop of *Meath*, in his fore-cited Preface, does believe that he had obtain'd the very Original Record, said by my Lord *Cook* to have been in the Hands of Sir *Christopher Preston*: It came to that Learned Prelate's Hands amongst other Papers and Manuscripts of Sir *William Domville's*, late Attorney General in this Kingdom, who in his Life-time, upon an occasional Discourse with the Bishop concerning it, told him, that this Record was bestow'd on him (Sir *W. Domville*) by Sir *James Cuffe*, late Deputy Vice Treasurer of *Ireland*, that Sir *James* found it among the Papers of Sir *Francis Aungier*, Master of the Rolls in this Kingdom; and the present Earl of *Longford* (Grandson to Sir *Francis Aungier*) told the

the Bishop, that his said Grandfather had it out of the Treasury of *Waterford*.

WHILST I write this, I have this very Record now before me, from the Hands of the said Bishop of *Meath's* Son, my Nephew, *Samuel Dopping*; and I must confess it has a Venerable Antient Appearance, but whether it be the True Original Record, I leave on the Arguments produced for its Credit by the said Bishop.

THIS I am sure of, that whether PARLIAMENTS very early in Ireland this be the very Record transmitted hither by King *Henry* the Second, or not, yet 'tis most certain, from the Unanimous Concessions of all the fore-mentioned Antiquaries, *Cook*, *Selden*, *Pryn*, &c. That we have had Parliaments in *Ireland* very soon after the Invasion of *Henry* II. For *Pryn* confesses, that (a) (a) Against the King *Hen.* II. after his Conquest of *Ireland*, 4th Inst. c. 76. P. 249. and the general voluntary Submission, Homages and Fealties of most of the *Irish* Kings, Prelates, Nobles, Cities and People, to him, as to their Sovereign Lord and King, *Anno* 1170, (it should be 1172.) held therein a General Council of the Clergy at *Cashal*, wherein he rectify'd many Abuses in the Church, and Establish'd sundry Ecclesiastical Laws, agreeable to those in the

the Church of ENGLAND; *Ecclesiæ illius statum ad Anglicanæ Ecclesiæ formam Redigere Modis omnibus elaborando*; To which the *Irish* Clergy promis'd Conformity, and to observe them

for time to come, as (a) *Giraldus Cambrensis*, who was then in Ireland, and other (b) Historians, relate: *Et ut in singulis Observatio similis Regnum Colligaret utrumque* (that is England and Ireland) *passim omnes unanimi voluntate communi Assensu, Pari desiderio Regis imperio se subjecerunt, omnibus igitur hoc modo Consummatis, in Concilio habito apud Lismore Leges Angliæ ab omnibus sunt gratantur receptæ, & juratoriâ cautione præstitâ Confirmatæ*, says *Matth. Paris*.

CAN any Concession in the World be more plain and free than this? We have heard of late much Talk in England of an *Original Compact* between the King and People of England; I am sure 'tis not possible to shew a more fair *Original Compact* between a King and People, than this between Henry the Second, and the People of Ireland, *That they should enjoy the like Liberties and Immunities, and be govern'd by the same mild Laws, both Civil and Ecclesiastical, as the People of England.*

FROM

FROM all which it is manifest, that there were no Laws imposed on the People of Ireland, by any Authority of the Parliament of England; nor any Laws introduced into that Kingdom by Henry the Second, but by the Consent and Allowance of the People of Ireland: For both the Civil and Ecclesiastical State were settled there, *Regiæ sublimitatis Autoritate*, solely by the King's Authority, and their own good Wills, as the *Irish* Statute, 11 Eliz. c. 1. expresses it, And not only the Laws of England, but the Manner of holding Parliaments in Ireland to make Laws of their own (which is the Foundation and Bulwark of the Peoples Liberties and Properties) was directed and established there by Henry the Second, as if he were resolved that no other Person or Persons should be the Founders of the Government of Ireland, but himself and the Consent of the People, who submitted themselves to him against all Persons whatsoever.

LET us now see by what farther Degrees the Government of Ireland grew up conformable to that of England.

ABOUT the Twenty-third Year of Henry the Second, which was within five Years after his Return from Ireland)

D

he

(a) Topograph. Hibern. l. 3. c. 18. Hib. Ex. pag. l. 11. c. 33. 34. (b) Hoveden Annual pars. post. 302. Bramp. 171. Knighton de Even. Angl. l. c. c. 10 col. 2394, 2395. Pol. Virg. Hist. Angl. l. 13. Rudal. de Decretis. Walsingham, &c. Original Compact for Ireland.

of King John made King of Ireland.

he created his younger Son *John, King of Ireland*, at a Parliament held at *Oxford*. Soon after *King John* being then about twelve Years of Age, came into *Ireland*, from *Milford* to *Waterford*, as his Father had formerly done. The *Irish* Nobility and Gentry immediately repaired to him; but being received by him and his Retinue with some Scorn and Derision, by reason of their long rude Beards, *quas more Patrio grandes habebant & proluxas* (says *Giraldus Cambrensis, Hib. Expug. Cap. 35.*) they took such Offence thereat, that they departed in much Discontent; which was the Occasion of the young King's staying so short a Time in *Ireland*, as he did this his first Time of being here.

By this *Ireland* made an absolute separate Kingdom.

AND here, before we proceed any farther, we shall observe, That by this Donation of the Kingdom of *Ireland* to *King John*, *Ireland* was most eminently set apart again, as a *separate* and *distinct* Kingdom by it self from the Kingdom of *England*; and did so continue, until the Kingdom of *England* descended and came unto *King John*, after the Death of his Brother *Richard* the First, King of *England*, which was about Twenty two Years after his being made King of *Ireland*; during which

which space of Twenty two Years, both whilst his Father *Henry* the Second, and his Brother *Richard* the First, were living and reigning, King *John* made divers Grants and Charters to his Subjects of *Ireland*, which are yet in Being in this Kingdom; wherein he stiles himself *Dominus Hiberniæ*, (the constant Stile till *Henry* the Eighth's Time) and in others, *Dominus Hiberniæ & Comes Meritonæ*. By which Charters both the City of *Dublin*, and divers other Corporations enjoy many Privileges and Franchises to this Day. But after the said Grant of the Kingdom of *Ireland* to King *John*, neither his Father *Henry* II. nor his Brother King *Richard* I. Kings of *England*, ever stiled themselves, during their Lives, King or Lord of *Ireland*; for the Dominion and Regality of *Ireland* was wholly and separately vested in King *John*, being absolutely granted unto him without any Reservation. And he being Created King in the Parliament at *Oxford*, under the Stile and Title of *Lord of Ireland*, enjoy'd all manner of *Kingly Jurisdiction, Preheminence, and Authority Royal*, belonging unto the *Imperial State* and *Majesty of a King*, as are the express Words of the *Irish* Statute, 33 *Hen.*

VIII. c. 1. by which Statute the Stile of *Dominus* was changed to that of *Rex Hiberniæ*.

LET us then suppose that *Richard* the First, King *John's* Elder Brother, had not died without Issue, but that his Progeny had fate on the Throne of *England*, in a continued Succession to this Day: Let us suppose likewise the same of King *John's* Progeny, in relation to the Throne of *Ireland*; where then had been the *Subordination* of *Ireland* to the *Parliament*, or even to the *King of England*? Certainly no such thing could have been then pretended: Therefore if any such *Subordination* there be, it must arise from something that followed *after* the Descent of *England*, to King *John*; for by that *Descent*, *England* might as properly be *subordinate* to *Ireland*, as the *Converse*; *Ireland* being vested in the Royal Person of King *John*, Two and twenty Years before his Accession to the Crown of *England*, and being a more *ancient Kingdom* than the Kingdom of *England*. As the English Orators in the Council of *Constance*, *Ann.* 1417.

(a) Selden's Tit.
son. Par. 1.
C. 8. Sect. 5.
The Archbishop
of Ar-
magh, of the
Religion of the Ancient Irish, Cap. 11.

(a) confess'd and alleged, as an Argument in the Contest between *Henry* the Fifth's Legates, and those of *Charles* the Sixth King of *France*, for *Precedence*:

denice: Satis Constat (say they) (a) (a) *Act. Concil. secundum Albertum Magnum & Bartholomeum de Proprietatibus Rerum, quod toto Mundo in tres partes Diviso, scilicet in Europam, Asiam & Africam* (for *America* was not then discovered) *Europa in quatuor Dividitur Regna scilicet, Primum Romanum, Secundum Constantinopolitanum, Tertium Regnum Hiberniæ (quod jam translatum est in Anglos) & Quartum Regnum Hispaniæ. Ex quo patet, quod Rex Angliæ & Regnum suum sunt de Eminentioribus Antiquioribus Regibus & Regnis totius Europæ.* The *Antiquity* and *Precedence* of the King of *England*, was allow'd him wholly on the Account of his Kingdom of *Ireland*.

PERHAPS it will be said, That this *IRELAND* in *Subordination* of the Kingdom of *Ireland*, to the Kingdom of *England*, proceeds from *Ireland's* being annex'd to, and as it were united with the Imperial Crown of *England*, by several Acts of Parliament both in *England* and *Ireland*, since King *John's* Time. But how far this operates, I shall enquire more fully hereafter; I shall only at present observe, that I conceive little more is effected by these Statutes, than that *Ireland* shall not be *alien'd* or *separated* from the King of *England*, who

cannot hereby dispose of it otherwise than in *Legal Succession* along with *England*; and that whoever is *King of England*, is *ipso facto King of Ireland*, and the Subjects of *Ireland* are oblig'd to obey him as their Liege Lord.

King JOHN comes a second time into Ireland. The People submit to him.

To proceed therefore. After both Crowns were united, on the Death of *Richard* the First without Issue, in the Royal Person of King *John*: He, about the Twelfth Year of his Reign of *England*, went again into *Ireland*, viz. the Twenty eighth Day of *June*, 1210. and *Matth. Paris* tells us, p. 220. *Cum Venisset ad Dublinensem Civitatem Occurrerunt ei ibidem plus quam 20 Reguli illius Regionis qui omnes Timore maximo preterriti homagium ei & Fidelitatem fecerunt. Fecit quoque Rex ibidem, Construere Leges & Consuetudines Anglicanas, ponens Vicecomites aliosque Ministros, qui populum Regni illius juxta Leges Anglicanas Judicarent.*

Concessions from Hen. III.

HIS Son, King *Henry* the Third, came to the Crown the Nineteenth of *October* 1216. and in *November* following he granted to *Ireland* a *Magna Charta*, Dated at *Bristol* 12 *November*, the First Year of his Reign. 'Tis Prefaced, *that for the Honour of God, and Advancement of Holy Church, by the*
Advice

Advice of his Council of England, (whose Names are particularly recited) He makes the following *Grant to Ireland*; and then goes on exactly agreeable to the *Magna Charta* which he granted to *England*; only in ours we have *Civitas Dublin, & Avenlaffee*, instead of *Civitas London*, and *Thamesis* with other Alterations of the like kind where needful. But ours is Eight Years older than that which he granted to *England*, it not being 'till the Ninth Year of his Reign; and ours is the First Year. This *Magna Charta* of *Ireland* concludes thus, *Quia vero sigillum nondum Habuimus presentem Cartam Sigillis Venerabilis Patris nostri Domini Gualt. Apost. Sedis Legati & Willelmi Marescalli Comitis Pembroke Rectoris nostri & Regni nostri fecimus Sigillari. Testibus omnibus prænominatis & alijs Multis Dat per Manus Prædictorum Domini Legati & Willelmi Marescalli. Apud Bristol Duodecimo die Novembr. Regni nostri Anno Primo.* An ancient Copy of this *Magna Charta of Ireland* is to be found in the *Red Book* of the *Exchequer*, *Dublin*.

IN *February* following in the First Year likewise of his Reign, by Advice of all his Faithful Counsellors in *England*,

(a) *Pryn* against *gland*, to gratify the *Irish* (says (a) the 4th Inst. *Pryn*) for their eminent Loyalty to his Father and Him, he granted them out of his *special Grace*, that they and their Heirs for ever should enjoy the *Liberties* granted by his Father and Himself to the Realm of *England*; which he reduced into Writing, and sent seal'd thither under the Seal of the Pope's Legat, and W. Earl Marshal his Governor, because he had then no Seal of his own. This as I conceive refers to the foremention'd *Magna Charta Hiberniæ*. The Record as recited by Mr. *Pryn*, here follows.

PA. 1. H. III.
m. 13. entus.

“ Rex Archiepiscopis, Episcopis, Ab-
“ batibus, Comitibus, Baronibus,
“ Militibus & Libere Tenentibus,
“ & omnibus Fidelibus suis per
“ Hiberniam Constitutis, Salu-
“ tem: Fidelitatem vestram in
“ Domino Commendants quam
“ Domino Patri nostro semper
“ Exhibuistis & nobis estis diebus
“ nostris Exhibituri: Volumus
“ quod in signum Fidelitatis vestræ,
“ tam præclaræ, tam Insignis Li-
“ bertatibus Regno nostro Angliæ
“ a Patre nostro & nobis Con-
“ cassis, de gratia nostra & Dono
“ in Regno nostro Hiberniæ gua-
“ deatis

“ deatis vos & vestri Hæredes in
“ perpetuum. Quas distincte in
“ Scriptum Reductas de Commu-
“ ni Consilio omnium Fidelium
“ nostrorum vobis Mittimus Sig-
“ natas Sigillis Domini nostri G.
“ Apostolicæ Sedis Legati & Fide-
“ lis nostri Com. W. Marefc. Re-
“ ctoris nostri & Regni nostri quia
“ Sigillum nondum habuimus,
“ eadem processu temporis de
“ Majori Consilio proprio Sigillo
“ Signaturi.

Teste apud Glouc. 6 Februar.

HERE we have a free Grant of all the *Liberties of England* to the People of *Ireland*, But we know the *Liberties* of Englishmen are founded on that Universal Law of Nature, that ought to prevail throughout the whole World, of being govern'd only by such Laws to which they give their own Consent by their Representatives in Parliament.

AND here, before I proceed farther, I shall take notice, That in the late raised Controversie, *Whether the House of Commons were an Essential part of Parliament*, before the 49th Year of *Henry the Third*: The Learned Mr. *Petyt*, Keeper of the Records in the Tower

Record out of
Mr. *Petyt* of
the Antiquity
of Parliaments
in Ireland.

Tower, in his Book on that Subject, pag. 71. deduces his 9th Argument From the Comparison of the Ancient Generale Concilium, or Parliament of Ireland, instanced An. 38. Hen. III. with the Parliament in England, wherein the Citizens and Burgesles were; which was eleven Years before the pretended beginning of the Commons in England.

FOR thus we find it in that Author.

“ As great a Right and Privilege
 “ surely was, and ought to be allow'd
 “ to the *English* Subjects as to the *Irish*,
 “ before the 49th of Hen. III. And if
 “ that be admitted, and that their (the
 “ *Irish*) *Commune Concilium*, or Parlia-
 “ ment, had its Platform from ours (the
 “ *English*) as I think will not be deny'd
 “ by any that have consider'd the Histo-
 “ ry and Records touching that Land
 “ (*Ireland*) we shall find the ensuing
 “ Records, Ann. 38. Hen. III. clearly
 “ evince, that the Citizens and Burgesles
 “ were then a part of their (the *Irish*)
 “ great Council or Parliament.

Rot. 38. H. III.

m 4. Hibernia.

“ THAT King being in *partibus*
 “ *Transmarinis*, and the Queen being
 “ left Regent, she sends Writs (or a
 “ Letter) in the King's Name, directed
 “ *Archiepiscopis, Episcopis, Abbatibus,*
 “ *Prioribus*

“ *Prioribus, Comitibus, Baronibus, Mi-*
 “ *litibus, Liberis Hominibus, Civibus*
 “ *& Burgensibus, Terra sua Hibernia;*
 “ telling them that, *Mittimus Fratrem*
 “ *Nicholaum de Sancto Neoto, Fra-*
 “ *trem Hospitij Sancti Johannis Jeru-*
 “ *salem in Anglia ad partes Hibernie*
 “ *ad exponendum vobis* (together with
 “ *J. Fitz-Geoffery* the King's Justice)
 “ the State of his Land of *Vascony*
 “ endangered by the Hostile Invasion
 “ of the King of *Castile*, *qui nullo jure*
 “ *sed potentia sua Confisus Terram no-*
 “ *stram Vasconie per ipsius Fortitudi-*
 “ *nem, a manibus nostris Auferre &*
 “ *a Domino Regni Anglia segregare*
 “ *Proponit.* And therefore *universita-*
 “ *tem Vestram Quanta possumus Af-*
 “ *fectione Rogantes quatenus nos &*
 “ *jura nostra totaliter indefensa non*
 “ *deserentes nobis in tanto periculo*
 “ *quantumcunque poteritis de Gente*
 “ *& Pecunia subveniatis;* which would
 “ turn to their everlasting Honour;
 “ concluding, *his nostris Augustijs ta-*
 “ *liter Computientes, quod nos & He-*
 “ *rædes nostri vobis & Hæredibus vestris*
 “ *sumus non immerito Obligati. Teste*
 “ *Regina, & R. Comite Cornubiæ,*
 “ *apud Windesor, 17. die Februar.*

Per Reginam.

Thus far Mr. Petyt.

HERE

HERE we have a Letter from the Queen Regent to the *Parliament* in *Ireland*, in an humble manner beseeching them for an Aid of *Men* and *Money* against the King of *Castile's* Hostile Invasion of *Gascony*; from whence we may perceive, that in those Days, no more than at present, *Men* and *Money* could not be rais'd but by *Consent of Parliament*. I have been the more particular in Transcribing this Passage out of Mr. *Petyt*, to shew that we have as Antient and Express an Authority for our present Constitution of *Parliaments* in *Ireland*, as can be shewn in *England*. And I believe it will not be thought Adviseable in these latter Days, to break in upon *Old Settled Constitutions*: No one knows how fatal the Consequents of that may be.

Farther Con-
cessions from
Hen. III.

To return therefore where we digress'd. *Henry* the Third, about the Twelfth Year of his Reign, did specially Impower *Richard de Burgh*, then *Justice of Ireland*, at a certain day and Place, to summon all the Archbishops, Bishops, Abbots, Priors, Earls, Barons, Knights, Freeholders and Sheriffs of each County, and before them to cause to be read the Charter of his Father King *John*, whereunto his Seal was Appendant, whereby

whereby he had granted unto them the *Laws* and *Customs* of *England*, and unto which they swore Obedience: And that he should cause the same *Laws* to be observed and Proclaimed in the several Counties of *Ireland*, that so none presume to do contrary to the King's Command. The Record I have taken out of Mr. (a) *Pryn*, in these Words:

(a) Against
Cook's 4th. In-
stit. p. 252.

“ Rex Dilecto & Fideli suo Richardo
“ de Burgo Justic' suo Hibern. Sa-
“ lutem. Mandamus vobis firmiter
“ precipientes quatenus certo die
“ & Loco faciatis venire coram
“ vobis Archiepiscopos, Episcopos,
“ Abbates, Priores, Comites &
“ Barones Milites & libere Tenen-
“ tes & Ballivos singulorum Comi-
“ tatum & coram eis Publice legi
“ faciatis Chartam Domini J.
“ Regis Patris nostri cui Sigillum
“ suum appensum est, quam fieri
“ fecit & jurari a Magnantibus
“ Hibern. de Legibus & Consue-
“ tudinis Angliæ Observandis in
“ Hibernia. Et præcipiatis eis ex
“ parte nostra quod Leges illas &
“ Consuetudines in Charta præ-
“ dicta contentas de cætero firmi-
“ ter teneant & observent & hoc
“ idem per singulos Comitatus
“ Hiberniæ

Claus. 12. H.
III. m 8 de Le-
gibus & Con-
suetudinibus
Observandis in
Hibernia.

" Hiberniæ clamari faciat is & te-
 " neri prohibentes firmiter ex par-
 " te nostra & super foris facturam
 " nostram nequis contra hoc
 " Mandatum nostrum venire præ-
 " sumat, &c. Feste me ipso apud
 " Westm' 8 die Maij Ann. Reg.
 " nostri 12.

By what foregoes, I presume it plain-
 ly appears, that by three several Esta-
 blishments under the three first Kings
 of *Ireland* of the *Norman Race*, the
Laws and Liberties of the People of
England, were granted to the *People*
of Ireland. And that neither of these
 three Kings Establish'd those *Laws* in
Ireland by any *Power* of the *Parlia-*
ment of England, but by the free *Con-*
sent, Allowance and Acceptance of the
People of Ireland.

Recapitulation. HEN. II. first introduc'd the *Laws*
 of *England* into *Ireland*, in a Pub-
 lick assembly of the *Irish* at *Lismore*,
 and allowed them the Freedom of
Parliaments to be held in *Ireland* as
 they were held in *England*.

KING *John*, at the *Request* and by
 the *Consent* of the *Irish*, did appoint
 the *Laws of England* to be of Force
 in *Ireland*; and tho' he did not this
 till the twelfth Year of his Reign of
 Eng-

England, yet he did it not as King of
England, but as Lord of *Ireland*:
 For the Crown of *England* came to
 him by *Descent* from his Brother
Richard, who had *no Regal Power* in
Ireland; and what his Brother had
 could not descend to him.

Henry the Third in the first Year of
 his Reign gave *Ireland* a *Magna Char-*
ta; and in the twelfth Year of his
 Reign did provide, That all the *Laws*
 of *England* should be observed in
Ireland; and that the Charter granted
 to the *Irish* by his Father King *John*
 under his Seal, when he was in that
 Kingdom, should be kept inviolably.

AND from the Days of these three
 Kings, have *England* and *Ireland* been
 both govern'd by the like Forms of Go-
 vernment under one and the same su-
 preme Head, *the King of England*; yet
 so, as both Kingdoms remain'd Separate
 and Distinct in their several Jurisdic-
 tions under that one Head, as are the
 Kingdoms of *England* and *Scotland*
 at this Day without any *Subordination*
 of the one to the other,

IT were endless to mention all the
 Records and Precedents that might be
 quoted for the Establishment of the
Laws of England in *Ireland*; I shall
 therefore enter no farther into that
 Matter,

(a) *Fourth In-* Matter, but herein refer to Lord Chief
stit. Justice Cook, (a) *Pryn*, (b) *Reyly*,
 (b) Against the 4th *Instit.* (c) *&c.*

(c) *Placita* IF now we enquire, *What were*
Parliamenta- those *Laws of England that became*
ria. thus *establish'd in Ireland?* Surely we
 English Laws must first reckon the great *Law of Par-*
 Established in Ireland. *liaments*, which *England* so justly
 Law of Parli- challenges, and all *Mankind* have a
 ament. Right to. By the *Law of Parliament*,
 I mean that Law whereby all Laws
 receive their Sanction, *The free Debates*
and Consent of the People, by them-
selves, or their chosen Representatives.
 That this was a main Branch of the
 English Law establish'd in this King-
 dom, and the very Foundation of our
 Future Legislature, appears manifest from
 Parliaments being so early convok'd
 in *Ireland*, as the foremention'd Pre-
 cedents express.

Mr. *Pryn* acknowledges one in
Hen. II's time, (*pag.* 259. against
 the 4th *Instit.*) but makes a very false
 Conclusion, that there appears no
 Footsteps of a Parliament afterwards,
 till the third Year of *Edward* the Se-
 cond; because the Acts of that Parlia-
 ment are the first that are Printed in
 our *Irish* Statute Book: For so we
 may argue the Parliaments of *Eng-*
land to be of later Date than pretend-
 ed,

ed, when we find the first Printed Acts
 in *Keeble* to be no older than the 9th
 of *Hen.* III. Whereas 'tis most cer-
 tain, that Parliaments have been held
 in *England* some Ages before that.

AFTER this great Law of *Parlia-* Common
ments, we may reckon the *Common* Law.
Law of England, whether it relates
 to Regulating and Settling of *Property*,
 and Estates in Goods or Land, or to
 the *Judiciary* and *Executive* Parts of
 the Law, and the Ministers and Pro-
 cess thereof, or to *Criminal* Cases.
 These surely were all Establish'd in this
 Country, by the three first Kings of
Ireland of the *Norman* Race.

LET us now consider the State of Statute Law
 the *Statute Laws* of *England* under
 these three Kings, and their Predeces-
 sors; For by the *Irish* Voluntary Sub-
 mission to, and Acceptance of the Laws
 and Government of *England*, we must
 repute them to have submitted them-
 selves to these likewise; till a regular
 Legislature was Establish'd amongst
 them, in pursuance of that Submission
 and Voluntary Acceptance.

AND here we shall find, that in Statute Law
 those Times, *viz.* from the *Norman* of *England*
 Conquest to *Henry* the Third's Time from the *Nor-*
 inclusive, the Statute Laws of *Eng-* man Conquest
land were very few and slender. 'Tis to *Hen.* III.
 E true,

true, that before the 12th *Hen. III.* we find against the English Historians frequent mention of the Laws of *Edward the Confessor, William the Conqueror, Hen. I. Hen. II. King John,* and *Hen. III.* All which are only *Charters*, or several Grants of *Liberties* from the King; which nevertheless had the Force of Acts of Parliament, and and laid as great Obligations both upon Prince and People, as Acts of Parliament do at this Day: Whereof we may read several Proofs in the *Princes Case, Cook's 8th Report.* But these were only so many *Confirmations* of each other, and all of them were *Sanctions of the Common Laws* and *Liberties of the People of England, ab Antiquo Usitate & Comprobatae per totam terram & in quibus ipsi & eorum Patres nati & nutriti sunt,* as the Words of the Manuscript *Chronicle of Litchfield* express it.

Law of Edward the Confessor.

THE Laws of *Edward the Confessor*, held in so great Veneration in Ancient Times, & *per universum Regnum corroboratae & confirmatae prius inventae & constitutae fuerunt Tempore Regis Edgari Avi sui. Verum tamen post mortem ipsius Regis Edgari, usque ad Coronationem Sancti Regis Edwardi* (which was 67 Years) *prae-*

predictae Leges Sopitae sunt & penitus intermissae. Sed postquam Rex Edwardus in Regno sublimatus fuit consilio Baronum Angliae Legem illam sopitam, Excitavit, Excitam Reparavit, Reparatam Decoravit, Decoratam Confirmavit; & confirmatae vocantur Lex Sancti Regis Edwardi, non quod ipse primus eam ad invenisset; sed quod Reparavit, Restituitque, (a.) (a) Selden Nota & spicileg. ad eadmerum, pag. 171. These Laws of *Edward the Confessor* were Transcribed by *Ingulphus Abbot of Croyland* under *William the Conqueror*, and are annex'd to his History.

THE Laws of *William the Conqueror* are but a *Confirmation* of the Laws of *Edward the Confessor*, with some small alterations, as the very Letter of those Laws themselves express it. *(b) Hoc quoque praecipimus ut omnes habeant & teneant Leges Edwardi Regis in omnibus Rebus adhaerentibus quas constituimus ad Utilitatem Anglorum.* (b) Leges W. 1. Cap. 63. inquit Selden in notis ad eadmerum, p. 192.

THE Laws of *Henry I.* which are in the *red Book of the Exchequer*, in the Custody of the King's *Remembrancer* in England, are but a summary confirmation both of the Laws of *Edward the Confessor*, and *William the*

the First as the Charter it self expresses
 (c) *Vid. Seldenit, (c) Lagam Regis Edwardi vobis*
ut supra. reddo cum illis emendationibus quibus
Pater meus emendavit Consilio Baro-
rum suorum.

OF Hen. II.

THE Laws of Henry II. called
Constitutiones Clarendoniae, and the
Affize of Clarendon in the 2d. part of
Cooks Inst. p. 6. are all but Confirmations
 and Vindications of the King's
 just Prerogative against the Usurpations
 of the Pope and Clergy: As we
 find at large in *Chron. Gervastj. Do-*
roborn p. 1387. Edit. Lond. An. 1652.

OF K. John.

THE Laws of King John, called
 the *Great Charter of King John*, granted
 in the 17th Year of his Reign, upon the
 Agreement made between him and his
 Barons at *Running Mead* between
Stains and *Windsor*, was but a
 Confirmation of the Laws of *Edward*
the Confessor, and *Henry the*
First, as (d) *Mat. Paris* relates it.
 (d) *Mat. Paris. adan. 1215. Anno Regis Johannes 17. venientes ad*
Regem magnates petierunt quasdam
Libertates & Leges Regis Edwardi
cum alijs libertatibus sibi & Regno
Angliae & Ecclesiae Anglicanae con-
cessis confirmari prout in Charta Re-
gis Hen. I. ascriptae continentur. The
 same Historian gives us also at large
 both *Charta Libertatum*, and *Charta*
de

de Foresta, which are not extant in
 the Rolls of those Times; nor to be
 found in any till the 28th of *Edward*
I. and that but by *inspeximus*,

THE Laws of *Henry III.* contain'd OF Hen. III.
 in *Magna Charta* and *Charta de Fo-*
resta, both which are called *Magna*
Chartae Libertatis Angliae, and were
 establish'd about the 9th Year of *Henry*
III. are for the most part but *declara-*
tory of the common municipal Laws
 of *England*, and that to no new de-
 claration thereof; for King *John* in the
 17th Year of his Reign had granted the
 like before, which was also called
Magna Charta. (a) And by the Eng- (a) *Cook's Pref.*
 lish Statute 25 *Ed. I. c. 1.* it is En- to the 2d. *Inst.*
 acted, That the great *Charter*, and the
Charter of the Forrest be taken as the
Common Law of England.

BY what foregoes, I conceive it is
 very clear, that all the *Charters*, and
Grants of Liberties from *Edward the*
Confessor's Time, down to the 9th of
Henry the Third, were but *Confirmati-*
ons one of another, and all of them
Declarations; and Confirmations of
 the *Common Law of England.* And
 by the several Establishments, which we
 have formerly mention'd, of the Laws
 of *England* to be of Force in *Ireland*:
 First, in the 13th of *Henry II.* Se-

condly in the 12th of King *John*. Thirdly, in the 12th of *Henry III*. All those Laws and Customs of *England*, which by those several Charters were Declared and Confirm'd to be the Laws of *England*, were establish'd to be of Force in *Ireland*. And thus *Ireland* came to be governed by one and the same Common Law with *England*; and those Laws continue as part of the municipal and fundamental Laws of both Kingdoms to this Day.

Engl. Statutes since the 9th. Hen III. introduced in *Ireland*.

It now remains that we enquire, how the Statute Laws and Acts of Parliament made in *England* since the 9th of *Henry the Third* came to be of Force in *Ireland*; and whether all, or any of them, and which, are in Force here, and when, and how they came to be so.

AND the first Precedent that occurs in our Books, of Acts of Parliament in *Ireland* particularly mentioning and confirming special Acts of Parliament in *England*, is found in a Marginal Note of *Sir Richard Bolton* formerly Lord Chief Baron of the Exchequer in *Ireland*, affixed in his Edition of the *Irish Statutes* to Stat. 10. Hen. 7. Cap. 22. to this purport, That in 13 *Edw. II.* by Parliament in this Realm of *Ireland* the Statutes of

Statutes of Merton, Marlebr. Westm. Gloucest.

Merton, made the 20th of Hen. II. and the Statutes of Marlebridge, made the 52d of *Henry the Third*; The Statute of Westminster the first, made the 3d of *Edward the First*; The Statute of Gloucester, made the 6th of *Edward the First*; And the Statute of Westminster the Second, made the 13th of *Edward the First*, were all confirm'd in this Kingdom, and all other Statutes which were of Force in *England*, were referred to be examined in the next Parliament; and so many as were then allowed and Published, to stand likewise for Laws in this Kingdom. And in the 10th of *Henry the Fourth*, it was Enacted in this Kingdom of *Ireland*, That the Statutes made in *England* should not be of Force in this Kingdom, unless they were allow'd and Published in this Kingdom by Parliament. And the like Statute was made again in the 29th of *Henry the Sixth*. These Statutes are not to be found in the Rolls, nor any Parliament Roll of that time; but he (*Sir Richard Bolton*) had seen the same exemplify'd under the great Seal, and the Exemplification remaineth in the Treasury of the City of *Waterford*. Thus far the Note. If we consider the frequent Troubles and Distractions in *Ireland*, we shall not won-

der that these, and many other Rolls and Records, have been lost in this Kingdom: For from the third Year of *Edward* the Second, which was *Anno* 1310. through the whole Reigns of *Edward* III. *Richard* II. *Henry* IV. and *Henry* V. and so to the 7th Year of *Henry* the Sixth, *Anno* 1428. which is about 118 Years, there are not any *Parliament Rolls* to be found (a) yet certain it is that divers Parliaments were held in *Ireland* in those Times: (b) The same may be said from *Henry* the Second's coming into *Ireland*, *Anno* 1172. to the third Year of *Edward* the Second, *Anno* 1310. about 138 Years.

PERHAPS it may be said that if there were such Statutes of *Ireland* as the said Acts of the 10th of *Henry* the Fourth, and the 29th of *Henry* the Sixth; as they shew, that the Parliaments of *Ireland* did think that *English* Acts of Parliament could not bind *Ireland*; yet they shew likewise, that even in those Days the Parliaments of *England* did claim this Superiority; or else, to what purpose were the said Acts made, unless in denial of that Claim?

All which I hope may be readily granted without any Prejudice to the Right

(a) Annals of *Ireland* at the End of *Camden's Britan.* Edit. 1637. page 196, 197, &c.
(b) *Ibid.* p. 160. *Prjn* against the 4th Infit. Chap. 76.

Right of the *Irish* Parliaments: There is nothing so common, as to have one Man claim another Man's Right: And if bare *Pretence* will give a *Title*, no Man is secure: And it will be yet worse, if when another so *Pretends*, and I insist on *my Right*, my just Claim shall be turned to my Prejudice, and to the Disparagement of my Title.

WE know very well that many of the Judges of our Four Courts have been from time to time sent us out of *England*; and some of them may easily be supposed to come over hither *Prepossessed* with an Opinion of our Parliament's being subordinate to that of *England*: Or at least some of them may be *Scrupulous*, and desirous of full *Security* in this Point; and on their Account, and for their Satisfaction, such Acts as aforesaid, may be devised and Enacted in *Ireland*. But then, God forbid that these Acts should afterwards be laid hold of to a clear other intent than what they were framed for; and instead of Declaring and Securing our Rights, should give an Handle of Contest, by shewing that our Rights have been question'd of Ancient Time.

IN conclusion of all, If this Superiority of the Parliament of *England* have been *Doubted* a great while ago,

so it has been as great a while ago strenuously *Opposed*, and absolutely *Denied* by the Parliaments of *Ireland*. And by the way, I shall take Notice, That from whencesoever this Ancient *Pre- tence* of *Ireland's Subordination* proceeded in those Days, it did not arise from the *Parliament* of *England* itself: For we have not one single Instance of an English Act of Parliament expressly *Claiming* this Right of binding us: But we have several Instances of Irish Acts of Parliament, *Expressly Denying* this *Subordination*, as appears by what foregoes.

AFTERWARDS by a Statute made in *Ireland* the 18th of *Hen. VI. Cap. 11.* All the Statutes made in *England* against the *Extortions* and *Oppressions* of *Purveyors*, are Enacted to be holden and kept in all *Points*, and put in Execution in this *Land* of *Ireland*.

AND in the 32d. Year of *Henry*, the Sixth, *Cap. 1.* by a Parliament in *Ireland*, tis Enacted, *That all the Statutes made against* *Provisors to the Court of Rome*, as well in *England* as in *Ireland*, be had and kept in Force.

AFTER this in a Parliament at *Drogheda* the 8th of *Edward IV. Cap. 1.* it was Ratified, that the *English* Statute against *Rape*, made the 6th of

of *Richard* the Second, should be of Force in *Ireland* from the 6th Day of *March* last past: *And that from hence forth the said Act, and all other Statutes and Acts made by Authority of Parliament within the Realm of England, be Ratified and Confirmed, and adjudged by the Authority of this Parliament in their Force and Strength, from the said sixth Day of March.* We shall hereafter have occasion of taking farther Notice of this Statute upon another Account.

LASTLY, In a Parliament held at *Drogheda* the 10th of *Henry* the Seventh, *Cap. 22.* it is enacted, *That all Statutes late* (that is, as the *(a)* Learned in the Laws expound it, *before that time*) made in *England*, concerning the *common and Publick Weal* of the *same*, from henceforth be deem'd *effectual in Law*, and be Accepted, Used and Executed within this *Land* of *Ireland* in all *Points*, &c.

(*b*) AND in the 14th Year of the same King's Reign, in a Parliament held at *Tristle Dermot*, it was Enacted, That all Acts of Parliament made in *England* for Punishing *Customers, Controulers* and *Searchers*, for their *Misde- meanors*; or for Punishment of *Mer- chants* or *Factors*, be of Force here in *Ireland*,

All English Statutes before the 10th of Hen. VII. in force in Ireland.

(a) Cook's 4th Instit. cap. 76. p. 351.

(b) vid. Irish Stat.

Ireland, Provided they be first proclaim'd at *Dublin, Drogheda*, and other Market Towns.

THUS we see by what Steps and Degrees, all the Statutes which were made in *England* from the time of *Magna Charta*, to the 10th of *Henry* the Seventh, which did concern the common Publick Weal, were Received, Confirm'd, Allow'd and Authoriz'd to be of Force in *Ireland*; all which was done by Assent of the *Lords Spiritual and Temporal*, and the *Commons* in the *Parliament of Ireland* Assembled, and *no otherwise*.

English Statutes Declaratory of the Common Law in Force in *Ireland*.

WE shall next enquire, whether there are not other Acts of the *English* Parliament, both *before* and *since* the 10th of *Henry* the Seventh, which *were* and *are* of Force in *Ireland*, tho' not allow'd of by Parliament in this Kingdom. And we shall find that by the Opinion of our best Lawyers, *there are divers such*; but then they are only such as are *Declaratory* of the *Ancient Common Law of England*, and *not introductive of any new Law*: For these become of Force by the first *General Establishment* of the *Common Laws of England* in this Kingdom, under *Henry* the Second, King *John* and *Henry* the Third; and need no par-

particular Act of *Ireland* for their Sanction.

As to those *English* Statutes since the 10th of *Henry* the Seventh, that are *introductive* of a *New Law*, it was never made a Question whether they should bind *Ireland*, without being allow'd in Parliament here; till of very late Years this Doubt began to be moved; and how it has been carried on and promoted, shall appear more fully hereafter.

I say, *Till of very late Years*; for the *ancient* Precedents which we have to the contrary, are very numerous. Amongst many, we shall mention the following Particulars.

IN the 12th of *Henry* the 8th, an Act was made in *England* making it Felony in a Servant that runneth away with his Master's or Mistress's Goods. This Act was not receiv'd in *Ireland* till it was Enacted by a Parliament held here in the 33d of *Henry* the 8th, c. 5. Sec. 1.

IN the 21st of *Henry* VIII. c. 19. there was a Law made in *England*, That all Lords might Distrain on the Lands of them holden, and make their Avowry not naming the Tenant, but the Land. But this was not of Force in

in *Ireland* till Enacted here in the 33d of *Henry VIII. C. 1. Sec. 1.*

AN Act was made in *England, Ann. 31 Henry VIII.* That Joint-Tenents and Tenents in Common should be compelled to make Partition, as Coparceners were compellable at Common Law. But this Act was not receiv'd in *Ireland* till Enacted here, *An. 33 Henry VIII. c. 10.*

Anno 27 Henry VIII. c. 10. The Statute for Transferring Uses into Possession was made in *England*; but not admitted in *Ireland* till 10 *Car. 1. Sec. 2.*

IN like manner, the *English* Statute 33 *Henry VIII. c. 1.* directing how Lands and Tenements may be dispos'd by Will, &c. was not of Force in *Ireland* till 10 *Car. 2. Sec. 2.*

THE Act of Uniformity of Common Prayer and Administration of the Sacraments was made in *England* the 1st of *Eliz. c. 2.* but was not establish'd in *Ireland* till the 2d of *Eliz. c. 2.* And so that of *England, 14 Car. 2. c. 14.* was not receiv'd in *Ireland* till 17 & 18 *Car. 2. c. 6.*

THE Statute against wilful Perjury, made in *England 5 Eliz. c. 9.* was not Enacted in *Ireland* till 28 *Eliz. c. 1.*

So

So the *English* Act against Witchcraft and Sorcery made 5 *Eliz. c. 16.* And another Act against Forgery, 5 *Eliz. c. 14.* were neither of them in Force in *Ireland* till the 28th of Her Reign, Cap. 3 and 4.

THE *English* Statutes against Pirates was made the 28th of *Hen. 8. c. 15.* but not in *Ireland* till the 12th of King *James, c. 2.*

IN *England* an Act was made the 27th of *Eliz. c. 4.* against Fraudulent Conveyance; but it was not in Force in *Ireland* till Enacted here the 10th of *Charles, c. 3. Sec. 2.*

IN the 15th Year of King *Charles* the 1st. in a Parliament held at *Dublin* there were six *English* Statutes made Laws of this Kingdom, with such Alterations as best fitted them to the State thereof, *viz.*

21 *Jac. c. 14.* For pleading the General Issue in Intursions brought by the King, by Chap. 1. of the *Irish* Statutes.

31 *Eliz. c. 2.* For Abridging of Proclamations on Fines, by Chap. 2.

2 and 3 *Edw. 6. c. 8.* Concerning Offices before the Escheator, by Chap. 4.

31 *Eliz. c. 1.* Discontinuance of Writs of Error in the Exchequer Chamber, by Chap. 5.

8 *Eliz.*

8 *Eliz.* c. 4. and 18 *Eliz.* c. 7. concerning Clergy, by Chap. 7.

24 *Hen.* 8. c. 5. Concerning killing a Robber, by Chap. 9.

THERE are six *English* Statutes likewise passed in the Time of King *Charles* the 2d upon and soon after the Restoration; some of which were not passed into Laws in *Ireland* till a Year, two or three, afterwards: As will appear by consulting the Statute-Books. (a)

(a) *Irish* Stat.

13 C. 2. c. 2.

13 C. 2. c. 3.

14 & 15 C. 2.

c. 1.

14 & 15 C. 2.

c. 19.

17 & 18 C. 2.

c. 3.

17 & 18 C. 2.

c. 11.

English Stat.

12 C. 2. c. 12.

12 C. 2. c. 3.

12 C. 2. c. 14.

12 C. 2. c. 24.

12 C. 2. c. 33.

16 & 17 C. 2.

c. 5.

* For we had

two several

Acts transmit-

ted to us at dif-

ferent Times, to this very Purpose.

One we rejected in the Lord

SYDNEY'S Government, t'other we pass'd under the Lord CAPELL.

THE like may we find in several other Statutes of *England* passed since his present Majesty's Accession to the Throne,

Throne, which have afterwards been passed here in *Ireland*, with such Alterations as make them practicable and agreeable to this Kingdom. Such as are amongst others, the Act for *Disarming Papists*. The Act of *Recognition*. The Act for taking away *Clergy* from some Offenders. The Act for taking *Special Bail* in the Country, &c. The Act against *Clandestine Mortgages*. The Act against *Cursing and Swearing*.

THESE, with many more, are to be found in our Statute-Books in the several Reigns of *Henry* the 8th. *Edward* the 6th. *Queen Elizabeth*, *King James*, *King Charles* the 1st and 2d, and *King William*. But it is not to be found in any Records in *Ireland*, that ever any Act of Parliament introductive of a new Law made in *England* since the Time of *King John*, was by the Judgment of any Court received for Law, or put in Execution in the Realm of *Ireland*, before the same was Confirmed and Assented to by Parliament in *Ireland*.

AND thus I presume we have pretty clearly made out our *Fourth Enquiry* forementioned; and shewn plainly the several Steps by which the *English* Form of Government, and the *English*

Statute Laws were received in this Kingdom; and that this was wholly by the Peoples Consent in Parliament, to which we have had a very ancient Right, and as full a Right as our next Neighbours can pretend to, or challenge.

Objections answered.

I shall now consider the Objections and Difficulties that are moved on this Head drawn from Precedents, and Passages in our Law-Books that may seem to prove the contrary.

Objection from the Stat. of Rape.

FIRST 'tis urg'd, That in the Irish Act, concerning Rape, passed Anno 8 Edward 4. c. 1. 'tis expressed, That a Doubt was conceiv'd whether the English Statute of the 6th of Richard the 2d c. 6. ought to be of Force in Ireland, without a Confirmation thereof in the Parliament of Ireland. Which shews (as some allege) that even in those Days it was held by some, That an Act of Parliament in England might bind Ireland before it be consented to in Parliament here.

BUT I conceive this Gloss is rais'd meerly for want of expressing the Reason of the said Doubt in the Irish Statute of the 8th of Edward the 4th. c. 1. which we may reasonably judge was this. By the Statute of Westminster the 2d. c. 34. a Woman that eloped from

from her Husband, and lived with the Adulterer, or a Wife that being first Ravish'd did afterwards consent, and lived with the Ravisher, she should loose her Dower. This Statute of Westminster the 2d, was made of Force in Ireland, by an Act passed here the 13th of Edward the 2d, as we have seen before, pag. 68, 69. Afterwards by the English Statute of the 6th of Richard the 2d c. 6. there was a farther Addition made to the said Statute of Westminster the 2d. to this effect, That a Maiden or Wife being Ravished, and afterwards consenting to the Ravishers, as well the Ravisher, as she that was Ravished, shall be disabled to claim all Inheritance or Dower after the Death of her Husband or Ancestor.

ON this Account the Doubt was here raised in Ireland, in the 8th of Edward the 4th, c. 1. Whether this latter English Statute of the 6th of Richard the 2d. c. 6. were not in Force in Ireland by Virtue of the Irish Statute of the 13th of Edward the 2d which confirmed the Statute of Westminster the 2d c. 34. And for settling this Doubt the said Statute of the 8th of Edward the 4th, c. 1. was passed in Ireland, and we find very good Reason for the said Doubt. For the English

gliff Statute of the 6th of *Richard* the Second, c. 6. contained but a small Addition to the Statute of *Westminster* the 2d. c. 34. and we see that even this Addition it self was judged not to be of Force in *Ireland* till Enacted here. For the said *Irish* Statute of the 8th of *Edward* the 4th, c. 1. makes the said Statute of the 6th of *Rich.* 2d c. 6. of Force in *Ireland* only from the 6th of *March*, then last past.

'Tis urg'd, Secondly, That tho' perhaps such Acts of Parliament in *England*, which do not Name *Ireland*, shall not be construed to Bind *Ireland*, yet all such *English* Statutes as mention *Ireland*, either by the *General Words* of *all his Majesty's Dominions*, or by particularly Naming of *Ireland*, are and shall be of Force in this Kingdom.

THIS being a Doctrine first broach'd directly (as I conceive) by *Will. Hussey*, Lord Chief Justice of the King's Bench in *England*, in the first Year of *Henry* the Seventh, and of late revived by the Lord Chief Justice *Cook*, and strongly urged, and much rely'd upon in these latter Days; I shall take the Liberty of enlarging thereon, tho' I venture thereby to swell this Pamphlet to a Size greater than I desire or design'd.

FIRST

FIRST therefore, As to such *En-Object. English*
gliff Statutes as seem to comprehend Statutes com-
Ireland, and to bind it, under the ge- prehending Ire-
 neral Words of *all his Majesty's Domi- land* by general
 nions or *Subjects*, whatever has been Words.
 the Opinion of Private and Particular
 Lawyers in this Point, I am sure the
 Opinions of the Kings of *England*,
 and their Privy Council, have been
 otherwise: 'Tis well known since *Poy-ning's* Act in *Ireland*, the 10th of *Henry*
 the 7th, no Act can pass in our Parli-
 ament here, 'till it be first Assented to
 by the King and Privy Council of
England, and transmitted hither un-
 der the Broad Seal of *England*: Now
 the King and his Privy Council there,
 have been so far from surmising that
 an Act of Parliament of *England*,
 mentioning only in General *All the*
King's Dominions, or *Subjects*, should
 bind *Ireland*, that they have clearly
 shewn the contrary, by frequently trans-
 mitting to *Ireland*, to be pass'd into
 Laws here, *English* Statutes, wherein the
general Words of *all the King's Domini-*
ons or *Subjects* were contain'd; which
 would have been to no purpose, but
 meerly *Actum Agere*, had *Ireland* been
 bound before by those *English* Statutes.

OF this I shall give the following
 Examples, amongst many others.

F 3

THE

Act against
Appeals to
Rome.

THE Act of Parliament in *England* against *Appeals to Rome*, 24 *Hen. 8. c. 12.* by express Words extends to all his Majesty's Dominions; yet the same was not in Force, nor receiv'd in *Ireland*, till it was Enacted by Parliament there, the 28th of *Hen. 8. c. 6.*

Act of First
Fruits and Fa-
culties.

IN like manner the Statutes made in *England* concerning *First Fruits*, 26 *Hen. 8. c. 3.* and the Act of *Fa-*

(a) Title in the
English Statutes
is, No *Imposi-*
tion shall be
paid to the Bi-
shop of Rome.

culties, (a) 25 *Hen. 8. c. 21.* though each of them by express Words com-
prize *All his Majesty's Subjects and Dominions*; were not receiv'd as Laws in *Ireland*, till the former was Enacted

there, 28 *Hen. 8. c. 4.* and the latter the 28 *Hen. 8. c. 19.* and so the Statute Restoring to the Crown all Jurisdiction Ecclesiastical made in *England*, *Anno 1 Eliz. c. 1.* and therein giving Power to Erect an Ecclesiastical *High-Commission-Court* in *England* and *Ireland*, yet was not of Force in *Ireland* till Enacted there, *Anno 2 Eliz. c. 1.* And tho' the said *English* Act, in Relation to Erecting such an *High-Commission-Court*, was Repeal'd 17 *Car. 1. c. 11.* and the Repeal confirm'd the

High-Com-
mission-Court.

13 *Car. 2. c. 12.* And the late Bill of Rights, 1 *W. and M. Sef. 2. c. 2.* in *England*, has damn'd all such Courts. Yet the Act in *Ireland*, 2 *Eliz. c. 1.*

re-

remains still in Force here; and so it was lately declar'd here by the Lord High-Chancellor *Porter*, Lord Chief-Justice *Reynel*, Lord Chief-Baron *Hely*, Mr. Justice *Cox*, Mr. Justice *Jefferyson*, in the Case of *Dr. Thomas Hacket*, late Bishop of *Down*, who was depriv'd of the said Bishoprick by such a Commission, for great Enormities; the Commissioners being *Dr. Dopping*, late Bishop of *Meath*, *Dr. King*, the present Bishop of *London-Derry*, and *Dr. Wiseman*, late Bishop of *Dormore*.

AND truly I see no more Reason for Binding *Ireland* by the *English* Laws under the General Words of *all his Majesty's Dominions or Subjects*, than there is for binding *Scotland* by the same; for *Scotland* is as much his Dominion, and *Scots-Men* as much his Subjects; as *Ireland* and *Irish-Men*: If it be said, That *Scotland* is an ancient, separate, and distinct Kingdom from *England*; I say, So is *Ireland*: The difference is, *Scotland* continued separate from the Kings of *England* till of late Years, and *Ireland* continued separate from *England* but a very little While in the Person of King *John*, before the Death of his Father, and of his Brother *Richard* the First, without

F 4

Issue.

Issue. But then 'tis to be considered, that there was a *Possibility*, or even a *Probability*, that *Ireland* might have continued *separate* from the Crown of *England*, even to this very Day, if *Richard* the First had left behind him a numerous Progeny.

English Statutes naming Ireland.

Secondly, As to such *English* Statutes as particularly *Name Ireland*, and are therefore said to be of Force in this Kingdom, tho' never Enacted here; I shall consider only the more *ancient* *Precedents* that are offered in Confirmation of this Doctrine: For as to those of *later Date*, 'tis these we complain of, as bearing hard on the *Liberties* of this Country, and the *Rights* of our Parliaments, and therefore *these* ought not to be produced as Arguments against us. I presume, if I can shew, that the *ancient* *Precedents* that are produced, *do not conclude* against us; it will follow that the *Modern* Instances given, *ought not to conclude* against us; that is to say plainly, These *ought* not to have been made as they are, as wanting Foundation both from Authority and Reason.

THE *ancient* *Precedents* of *English* Statutes, particularly *Naming Ireland*, and said to be made in *England* with a Design of Binding *Ireland*, are chiefly these Three:

1. Sta-

1. *Statutum Hibernie*, 14. H. 3.
2. *Ordinatio pro Statu Hibernie*, 17. Edw. 1.
3. And the Act, that all *Staple* Commodities passing out of *England* or *Ireland*, shall be carried to *Calis*, as long as the *Staple* is at *Calis*, 2. Hen. 6. c. 4. on which *Hussey* delivered his Opinion, as we shall see more fully hereafter.

THESE Statutes, especially the two first, being made for *Ireland*, as their Titles import, have given occasion to think that the Parliament of *England* have a *Right* to make Laws for *Ireland*, without the Consent of their Chosen Representatives, But if we enquire farther into this matter, we shall find this Conclusion not fairly deduced.

FIRST, The *Statutum Hibernie*, 14 Hen. 3. as 'tis to be found in the Collection of English Statutes, is plainly thus: The Judges in *Ireland* conceiving a Doubt concerning Inheritances devolved to Sisters or Coheirs, *viz.* Whether the younger Sisters ought to hold of the Eldest Sister, and do Homage to her for their Portions, or of the Chief Lord, and do Homage unto him; therefore *Girald Fitz Maurice*, the then Lord Justice of *Ireland*, dispatched four Knights to the King in
Engl-

England, to bring a Certificate from thence of the *Practice* there used, and what was the *Common Law of England* in that *Case*. Whereupon *Hen.* 3. in this his Certificate or Rescript, which is called *Statutum Hibernie*, merely informs the Justice what the *Law and Custom* was in *England*, viz. That the Sisters ought to hold of the Chief Lord, and not of the Eldest Sister: And the close of it commands, that *the aforesaid Customs that be used within our Realm of England in this Case, be Proclaim'd throughout our Dominion of Ireland, and be there observed. Teste meipso apud Westminst.* 9 Feb. *An. Reg.* 14.

FROM whence 'tis manifest, that this *Statutum Hibernie* was no more than a Certificate of what the *Common Law of England* was in that *Case*, which *Ireland* by the original Compact was to be governed by. And shews no more, that therefore the Parliament of *England* may bind *Ireland*, than it would have proved, that the *Common Wealth of Rome* was subject to *Greece*, if, after *Rome* had received the *Law of the Twelve Tables*, they had sent to *Greece* to know what the *Law* was, in some special *Case*.

THE

THE Statute call'd *Ordinatio pro Statu Hibernie*, made at *Nottingham* ^{*Statu Hibernie*} the 17th of *Edward* the First, and to be found in *Pulton's Collection* pag. 76. *Edit. Lond.* 1670. was certainly never received or of Force in *Ireland*. This is manifest from the very first Article of that Ordinance, which Prohibits the *Justice of Ireland* or others the *King's Officers there, to Purchase Land in that Kingdom, or within their respective Balliwicks without the King's Licence, on Pain of Forfeitures*. But that this has ever been otherwise, and that the Lords Justices, and other Officers here have Purchased Lands in *Ireland*, at their own Will and Pleasure, needs no Proof to those who have the least Knowledge of this Country. Nor does it appear by any Inquisition, Office, or other Record, that any one ever Forfeited on that Account.

MOREOVER this *Ordinatio pro Statu Hibernie*, is really in it self *No Act of Parliament*, but merely an Ordinance of the *King* and his *Privy Council* in *England*; which appears as well from the Preamble to the said Ordinance, as from this Observation likewise, That *King Edward* the First held no Parliament in the 17th Year of

of his Reign: Or if this were a Parliament, this *Ordinatio pro Statu Hibernia*, is the only *Act* thereof that is Extant: But 'tis very improbable, that only this single *Ordinance* should Appear, if any such Parliament were called together.

Staple Act.

THIRDLY, As to the *Staple Act* 2 *Hen.* 6. c. 4. which expressly names *Ireland*, and *Hussey's* Opinion thereon. The Case as we find it in the Year-Books of *Mich.* 2. *Rich.* 3. fol. 11. and *Mich.* 1 *Hen.* 7. fol. 3. is in short thus: The Merchants of *Waterford* having Ship'd off some Wool, and consign'd it to *Sluice* in *Flanders*, the Ship by stress of Weather was put in at *Callis*, where Sir *Thomas Thwaites*, Treasurer of *Callis*, seized the said Wool as forfeited, half to himself, and half to the King, by the said Statute; hereupon a Suit was commenced between the said Merchants and the said Treasurer, which was brought before all the Judges of *England* into the *Exchequer* Chamber: The Merchants pleaded the King's *License*, to the Citizens of *Waterford* and their Successors, for carrying Wooll where they pleased; and the Questions before the Judges were two, *Viz.* *Whether this Staple Act binds Ireland;* And Secondly, *Whether the King*

Merchants of
Waterford's
Case.

King could grant his *License* contrary to the Statute, and especially where the Statute gives half the Forfeiture to the Discoverer.

THE first Point only relates to our present purpose; and herein we find in the aforesaid Year Book of 2. *Rich.* 3. fol. 12. to Report it thus; *Et ibi* (in the *Exchequer* Chamber *quoad Primam Questionem dicebant quod Terr. Hibern. inter se habent Parliament. & omnimodo Cur. prout in Angl. & per idem Parliamentum faciunt Leges & Mutant Leges & non Obligantur per Statuta in Anglia, quia non hic habent Milites Parliamenti* (and is not that an unanswerable Reason?) *sed hoc intelligitur de terris & rebus in terris illis tantum efficiendo; sed Personæ eorum sunt Subjcti. Regis & tanquam Subjcti erunt Obligati ad aliquam rem extra Terram illam faciend. contra Statut. sicut habitantes in Caleſia Gascoignie, Guen, &c. dum fueri Subjcti; & Obedientes erunt sub Admiral. Angl. de re fact. super altum Mare; & similit. Brev. de Errore de Judicio reddit. in Hibern. in Banco Reg. hic in Angl.*

I have *verbatim* transcribed this Passage out of the aforesaid Year Book, that I might be sure to omit nothing that

that may give the Objection its full weight; and all that I can answer to it is this:

1. THAT when the aforesaid Case came a second Time under the Consideration of the Judges in the *Exchequer* Chamber in *Mich. 1. Hen. 7. fol. 3.* we find it reported thus. *Hussey, the Chief Justice, said, That the Statutes made in England shall bind those of Ireland, which was not much gain-said by the other Judges, notwithstanding that some of them were of a contrary Opinion the last Term in his Absence.* How the Presence and Opinion of the Chief Justice came to influence them now, I leave the Reader to judge.

2. THAT *Brook* in Abridging this Case of the first of *Hen. 7. fol. 3. Tit. Parliament, Sec. 90.* adds, *Tamen Nota, That Ireland is a Kingdom by it self, and hath Parliament's of its own;* intimating thereby, That therefore *Hussey's Opinion* herein was *Unreasonable.*

3. THAT 'tis manifest, if *Hussey* mean by his Words, that *All Acts of Parliament in England shall bind Ireland,* it is directly contrary to the Judges Opinion in the second of *Richard the Third,* before recited; For within the Land of *Ireland,* they
are

are all positive, That the Authority of the Parliament of *England* will not affect us. They seem at the utmost reach to extend the Jurisdiction of the *English* Parliament over the Subjects of *Ireland,* only in relation to their Actions beyond Seas, out of the Realm of *Ireland,* as they are the *King of England's* Subjects; but even this will appear Unreasonable, when we consider, that by the same Argumentation, *Scotland* it self may be bound by *English* Laws in relation to their Foreign Trade, as they are the *King of England's* Subjects. The Question is, Whether *England* and *Ireland* be two distinct Kingdoms? And whether they have each their respective Parliaments; neither of which will be deny'd by any Man: And if so, there can be no Subordination on either Side, each is complete in its own Jurisdiction, and ought not to interfere with fother in any thing. If being the *King of England's* Subjects, be a Reason why we ought to submit to Laws (in relation to our Trade abroad, in Places where the Parliament of *England* has no Jurisdiction) *which have not received our Assent;* the People of *England* will consider, whether they also are not the King's Subjects, and may therefore by
this

this way of Reasoning) be bound by Laws which the King may Assign them without their Assent, in relation to their Actions *Abroad*, or Foreign Trade: Or whether they had not been Subjects to the *King of France*, had our Kings continu'd their Possession of that Country, and there kept the Seat of the Monarchy; and then, had *France* been stronger than *England*, it might seem that the Subjects of these Kingdoms might have been bound by Laws made at *Paris*, without their own Consent. But let this Doctrine never be mention'd amongst the *Free-born* Subjects of these Nations.

THUS I have done with the *Three principal* Instances that are usually brought against us, on the Stress that is laid on *English* Acts of Parliament, particularly *Naming Ireland*.

Members from
Ireland in the
Parliament of
England.

THERE have been other Statutes or Ordinances made in *England* for *Ireland*, which may reasonably be of Force here, because they were made and assented to by our own Representatives. Thus we find in the *White Book* of the *Exchequer* in *Dublin*, in the 9th Year of *Edward* the First, a Writ sent to his Chancellor of *Ireland*, wherein he mentions *Quædam Statuta per nos de Assensu Prelatorum Comitum*
Baro-

Baronum & Communitates Regni nostri Hiberniæ, nuper apud Lincoln & quædam alia Statuta postmodum apud Eborum facta. These we may suppose were either Statutes made at the Request of the States of *Ireland*, to explain to them the *Common Law of England*; or if they were introductive of *New Laws*, yet they might well be of Force in *Ireland*, being Enacted by the Assent of our own Representatives, The Lords Spiritual and Temporal, and Commons of *Ireland*; as the Words afore-mention'd do shew: And indeed, these are Instances so far from making against our Claim, that I think nothing can be more plainly for us; for it manifestly shews, that the King and Parliament of *England* would not Enact Laws to bind *Ireland*, without the *Concurrence* of the Representatives of this Kingdom.

FORMERLY, when *Ireland* was but thinly Peopled, and the *English* Laws not fully currant in all Parts of the Kingdom, 'tis probable that then they could not frequently assemble with conveniency or safety to make Laws in their own Parliament at home; and therefore during the Heats of *Rebellions*, or Confusion of the Times, they were forced to Enact Laws in *En-*
G *gland*

gland. But then this was always by their proper *Representatives*: For we find that in the Reign of *Edward the Third*, and by what foregoes, 'tis plain it was so in *Edward the First's* Time) *Knights of the Shire, Citizens and Burgeses* were Elected in the *Shires, Cities and Burroughs of Ireland*, to serve in Parliament in *England*, and have so served accordingly. For amongst the Records of the *Tower of London, Rot. Claus. 50. Edw. 3. Parl. 2. Membr. 23.* We find a Writ from the King at *Westminster*, directed to *James Butler*, Lord Justice of *Ireland*, and to *R. Archbishop of Dublin*, his Chancellor, requiring them to issue Writs under the great Seal of *Ireland*, to the several Counties, Cities and Burroughs, for satisfying the Expences of the Men of that Land, *who last came over to serve in Parliament in England.* And in another Roll the 50th of *Edw. III. Membr. 19.* On Complaint to the King by *John Draper* who was chosen Burges of *Cork* by Writ, and served in the Parliament of *England*, and yet was denied his Expences by some of the Citizens, Care was taken to re-imburse him.

IF from these last mention'd Records, it be concluded that the Parliament

ment of *England* may bind *Ireland*; it must also be allowed that the People of *Ireland* ought to have their *Representatives* in the Parliament of *England*. And this I believe we should be willing enough to embrace; but this is an Happiness we can hardly hope for.

THIS sending of Representatives out of *Ireland* to the Parliament in *England*, on some occasions, was found in process of time to be very Troublesome and Inconvenient; and this we may presume, was the Reason, that afterwards, when Times were more settled, we fell again into our old Track, and regular Course of Parliaments in our own Country; and hereupon the Laws afore-noted, pag. 64, were Enacted, Establishing that *no Law made in the Parliament of England should be of Force in Ireland, till it was Allowed and Published in Parliament here.*

I have said before, pag. 85, that I ^{Modern Acts} would only consider the *more Ancient* ^{of the Parliament of England, naming Ireland.} *Precedents* that are offered to prove, That *Acts of England particularly naming Ireland*, should bind us in this Kingdom; and indeed it were sufficient to stop here, for the Reason above alledged. However, I shall venture to

come down lower, and to enquire into the *Modern-Precedents of English* Acts of Parliament alledged against us: But still with this Observation, That 'tis these we complain against as Innovations; and therefore they ought not to be brought in Argument against us.

I do therefore again assert, that before the Year 1641. there was no Statute made in *England* introductory of a *New Law* that interfered with the Right which the People of *Ireland* have to make Laws for themselves, except only those which we have before mention'd, and which we have discuss'd at large, and submit to the Readers Judgment.

BUT in the Year 1641. and afterwards in *Cromwel's* time, and since that, in King *Charles II.* and again very lately in King *William's* Reign, some Laws have been made in *England* to be of Force in *Ireland.* But how this came to pass, we shall now enquire.

IN the 17th Year of K. *Charles I.* which was in the Year 1642. there were three or four Acts of Parliament made in *England* for encouraging Adventurers to raise Money for the speedy suppression of the Horrid Rebellion which broke out in *Ireland* the 23d of *October, 1641.* The Titles of these Acts

we

Acts in Favour
of Adventu-
rers. 1641.

we have in *Pulton's Collections of Statutes:* But with this Remark, *That they are made of no Force by the Acts of Settlement and Explanation* passed in King *Charles II's* time in the Kingdom of *Ireland.* So that in these we are so far from finding Precedents for *England's Parliament* binding *Ireland,* that they plainly shew, that the Parliament of *Ireland* may Repeal an Act passed in *England* in relation to the Affairs of *Ireland.* For 'tis very well known, that Persons who were to have Interests, and Titles in *Ireland* by virtue of those Acts passed in *England,* are cut off by the *Acts of Settlement and Explanation.* And indeed there is all the Reason in the World that it should be so; and that Acts made in a Kingdom by the Legal Representatives of the People, should take place of those made in another Kingdom. But however, it will be said, that by those Acts 'tis manifest that *England* did presume they had such a Right to pass Acts binding *Ireland,* or else they had never done it. To which I answer, That considering the condition *Ireland* was in at that time, *viz.* under an horrid *intestine Rebellion,* flaming in every Corner of the Kingdom; 'twas impossible to have a Parliament of our own; yet it was

G 3 abso-

absolutely necessary that something should be done towards suppressing the Violences then raging amongst us: And the only means could then be practised, was for the Parliament of *England* to interpose, and do something for our Relief and Safety; these were the best Assurances could be had at that juncture. But when the Storm was over and the Kingdom quieted, we see new Measures were taken in a Legal Parliament of our own.

Acts in Cromwell's Time.

As to what was done for *Ireland* in the Parliament of *England*, in *Cromwell's* Time, besides the Confusion and Irregularity of all Proceedings in those Days, which hinders any of them to be brought into Precedent in these Times. We shall find also that then there were *Representatives* sent out of this Kingdom, who sat in the Parliament of *England*, which then was *only* the *House of Commons*. We cannot therefore argue from hence, that *England* may bind us; for we see they allowed us *Representatives*, without which they rightly concluded, they could not make Laws *Obligatory* to us.

I come now to King *Charles* the Second's Time, and in it we shall find the following *English* Statute made, in which the Kingdom of *Ireland's* is concerned.

THE

THE First is an Act against *Im-Cattle Act.* porting Cattle from *Ireland* or other Parts beyond Seas. It was only Temporary by 18 *Ch. 2. c. 2.* but made perpetual 20 *Ch. 2. c. 7.* and 32 *Ch. 2. c. 2.* This Act however prejudicial to the Trade that was then carried on between *Ireland* and *England*, does not properly bind us, more than it does any other Country of the World. When any thing is Imported and Landed in *England*, it becomes immediately subject to the Laws thereof, so that herein we cannot be said properly to be bound.

SECONDLY, the Acts against *Tobacco Act.* Planting *Tobacco* in *England* and *Ireland* 12 *Ch. 2. c. 34.* and 15 *Ch. 2. c. 7.* and 22 and 23 *Ch. 2. c. 26, &c.* do positively bind *Ireland*. But there has never been an Occasion of Executing it here; for I have not heard that a Rood of *Tobacco* was ever planted in this Kingdom. But however that takes not off the *Obligation* of the Law: 'Tis only want of our Consent, that I urge against that. I see no more Reason for sending a Force to trample down an Acre of *Tobacco* in *Ireland* by these Statutes, than there would be for cutting down the Woods of *Sheela*, were there an Act made in *England* against

G 4

against our Planting or having *Timber*.

Navigation
Act.

THIRDLY, The *Act for encouraging Shipping and Navigation*, by express Name, mentions and binds *Ireland*; and by the last Clause in the Act obliges all Ships belonging thereto importing any Goods from our Foreign Plantations to touch first at *England*.

Note, Exporting Wool from *Ireland*, is made Penal by the *Irish Stat. 13. Hen. 8. c. 2. 28. Hen. 8. c. 17.* But both these Statutes are obsolete:

The like may we observe of the 11 *Eliz. c. 10. & 13. El. c. 4.*

FOURTHLY, The Acts prohibiting the Exportation of *Wool* from *Ireland*, to any Country except to *England*, do likewise strongly bind us, and by the 12 *Char. 2. c. 32.* it was made highly penal on us, and by the 14th of *Char 2. c. 18.* 'tis made Felony.

To these three last Acts, I must confess, I have nothing to urge, to take off their Efficacy; name us they do most certainly, and bind us so, as we do not transgress them. But how rightfully they do this is the matter in Question. This I am sure of, that before these Acts in King *Charles the Second's* Time, (the eldest of which is not over thirty seven Years) *there is not one positive full Precedent to be met with in all the Statute Book, of an English Act binding the Kingdom of Ireland.* And on this Account we may venture to assert, That these are at least *Innovations* on us, as not being warranted by any former Precedents. And

AND shall Proceedings only of *Thirty Seven Years standing*; be urg'd against a Nation, to deprive them of the *Rights and Liberties* which they Enjoy'd for Five Hundred Years before, and which were Invaded without and against their *Consent*, and from that day to this have been constantly complain'd of? Let any *English Heart* that stands so *Justly* in Vindication of his own *Rights and Liberties*, answer this Question, and I have done.

I am now arriv'd at our Present English Acts Days, under the Happy Government of ^{Binding Ireland since King} His Majesty King *William the Third*; ^{Williams's} and I am sorry to reflect, That since the ^{Reign.} late Revolution in these Kingdoms, when the Subjects of *England* have more strenuously than ever Asserted their own *Rights*, and the *Liberty* of Parliaments, it has pleas'd them to bear harder on their Poor Neighbours, than has ever yet been done in many Ages foregoing. I am sure what was then done by that Wise and Just Body of Senators, was perfectly out of good Will and Kindness to us; under those Miseries which our Afflicted Country of *Ireland* then suffered. But I fear some Men have since that, made use of what was then done, to other Purposes than at first intended. Let us now see what that

that was, and consider the Circumstances under which it was done.

IN the Year 1689, when most of the Protestant Nobility, Gentry, and Clergy of *Ireland*, were driven out of that Kingdom by the Insolencies and Barbarities of the *Irish Papists*, who were then in Arms throughout the Kingdom, and in all Places of Authority under King *James*, newly return'd to them out of *France*; the only Refuge we had to fly to was in *England*, where Multitudes continued for many Months, destitute of all manner of Relief, but such as the Charity of *England* afforded, which indeed was very *Munificent, and never to be forgotten.*

Act for the
Protestant
Irish Clergy.

THE Protestant Clergy of *Ireland*, being thus Banish'd from their Benefices, many of them Accepted such small Ecclesiastical Promotions in *England*, as the Benevolence of well dispos'd Persons presented them with. But this being directly contrary to a Statute in this Kingdom, in the 17 and 18 of *Charles* the Second, *Cap. 10.* Intituled, *An Act for Disabling of Spiritual Persons, from holding Benefices or other Ecclesiastical Dignities in England or Wales, and in Ireland at the same time.* The Protestant *Irish* Clergy thought they could not be too secure in avoiding the Pen-

ty

ty of the last mention'd Act, and therefore apply'd themselves to the Parliament of *England*, and obtain'd an Act in the first Year of King *William* and Queen *Mary*, c. 29. Intituled, *An Act for the Relief of the Protestant Irish Clergy.* And this was the first Attempt that was made for *Binding Ireland* by an Act in *England*, since his Majesty's Happy Accession to the Throne of these Kingdoms.

AFTERWARDS in the same Year, ^{Act against} and same Session, Chap. 34. there pass'd an Act in *England*, ^{Commerce} *Prohibiting all Trade and Commerce with France,* both from *England* and *Ireland.* This also binds *Ireland*, but was during the Heat of the War in that Kingdom, when 'twas impossible to have a regular Parliament therein, all being in the Hands of the *Irish Papists.* Neither do we complain of it, as hindring us from corresponding with the King's Enemies, for 'tis the Duty of all Good Subjects to abstain from that. But as *Scotland*, tho' the King's Subjects, Claims an Exemption from all Laws but what they Assent to in Parliament; so we think this our Right also.

WHEN the Banish'd Laity of *Ireland* observ'd the Clergy thus careful to secure their Properties, and provide for

the

the worst as well as they could in that Juncture, when no other means could be taken by a Regular Parliament in *Ireland*; they thought it likewise advisable, for them to do something in relation to their Concerns. And accordingly they obtain'd the *Act for the better Security and Relief, of their Majesties Protestant Subjects of Ireland, 1. W. and M. Ses. 2. c. 9.* Wherein King *James's Irish Parliament* at *Dublin*, and all *Acts* and *Attainders* done by them, are declared *void*. 'Tis likewise thereby Enacted, that no Protestant shall suffer any Prejudice in his Estate or Office, by reason of his absence out of *Ireland*, since *December 25. 1685.* and that there should be a Remittal of the King's Quit-Rent, from *25. December 1688.* to the end of the War. Thus the Laity thought themselves secure.

AND we cannot wonder that during the Heat of a Bloody War in this Kingdom, when it was impossible to Secure our Estates and Properties by a Regular Parliament of our own; we should have recourse to this Means, as the only, which then could be had. We concluded with our selves, that when we had obtained these Acts from the Parliament in *England*, we had gone a great

Act for Security of the Protestants of Ireland.

great way in securing the like Acts to be passed in a regular Parliament in *Ireland*, whenever it should please God to re-establish us in our own Country: For we well knew *our own Constitution under Poyning's Law, That no Act could Pass in the Parliament of Ireland till approved of by the King and Privy Council of England.* And we knew likewise, That all the Lords and others of His Majesties Privy Council in *England* are Members of the Lords or Commons House of Parliament there. And that by obtaining their Assent to Acts of Parliament in Favour of the *Irish* Protestants, they had in a manner pre-engaged their Assent to the like Bills when they should hereafter come before them as Privy Councillors, in order to be regularly transmitted to the Parliament of *Ireland*, there to be passed into Laws of that Kingdom. But instead of all this, to meet with another Construction of what was done herein, and to have it pleaded against us as a Precedent of our Submission, and absolute Acquiescence in the Jurisdiction of the Parliaments of *England* over this Kingdom, is what we complain of as an Invasion (we humbly conceive) of that *Legislative Right* which our Parliament of *Ireland*, claims within this Kingdom.

THE

Act appointing
new Oaths.

THE next Act pass'd in the Parliament of *England*, Binding *Ireland*, is that for *Abrogating the Oath of Supremacy in Ireland, and Appointing other Oaths*, 3 and 4 *William and Mary*, c. 2. To this the Parliament convened at *Dublin*, *Anno*. 1692. under Lord *Sydney*, and that likewise *Anno*. 1695. under Lord *Capel*, paid an intire Obedience. And by this ('tis alledged) we have *given up our Right*, if any we had, and have for ever acknowledged our *Subordination to the Parliament of England*. But let us a little consider the Force of this Argument.

I readily grant, that this and the other fore-mentioned Acts in *England* since the Revolution, when they were made, were look'd upon highly in our Favour, and for our Benefit; and to them as *such*, we have conform'd our Selves. But then, in all Justice and Equity, our Submission herein is to be deemed *purely voluntary*, and not at all proceeding from the *Right* we conclude thereby in the Legislators. If a Man, who has *no Jurisdiction* over me, *command* me to do a thing that is *pleasing* to me, and I do it; it will not thence follow, that thereby he obtains an *Authority* over me, and that ever hereafter I must Obey him of *Duty*. If I *voluntarily* give my
Mo-

Money to a Man when I *please*, and think it *convenient* for me; this does not Authorise him at any time to *command* my Money from me when *he pleases*. If it be said, this allows Subjects to Obey, only whilst 'tis *convenient* for them; I pray it may be considered, whether any Men obey *longer*, unless they be *forced* to it; and whether they will not *free* themselves from this *Force* as soon as they can. 'Tis impossible to hinder Men from desiring to *free* themselves from *Uneasiness*, 'tis a Principle of Nature, and cannot be eradicated. If Submitting to an Inconvenience be a *less* Evil than endeavouring to Throw it off, Men will Submit. But if the Inconvenience grow upon them, and be *greater* than the hazard of getting rid of it, Men will offer at putting it by, let the Statesman or Divine say what they can.

BUT I shall yet go a little further, and venture to assert, That the Right of being subject *Only* to such Laws to which Men give their *own Consent*, is so inherent to all Mankind, and founded on such Immutable Laws of Nature and Reason, that 'tis not to be *Alien'd*, or *Given up*, by any Body of Men whatsoever: For the End of all Government and Laws, being the Publick
Good

Good of the Commonwealth, in the Peace, Tranquility and Ease of every Member therein; whatsoever Act is contrary to this End, is in it self void, and of no effect: And therefore for a Company of Men to say, *Let us Unite our selves into a Society, and let us be absolutely Govern'd by such Laws, as such a Legislator, without ever Consulting us, shall devise for us:* 'tis always to be understood, *Provided we find them for our Benefit:* For to say, We will be Govern'd by those Laws, *whether they be Good or Hurtful to us,* is absurd in it self: For to what End do Men joyn in Society, but to avoid Hurt, and the Inconveniencies of the State of Nature?

MOREOVER, I desire it may be considered, whether the General Application of the Chief part of the *Irish* Protestants, that were at that time in *London*, to the Parliament at *Westminster*, for obtaining these Laws, may not be taken for their *Consent*, and on that Account, and no other, these Acts may acquire their *Binding Force*. I know very well, this cannot be look'd upon as a Regular and Formal *Consent*, such as might be requisite, at another more favourable Juncture: But yet it may be taken *talis qualis*, as far as their Circumstances

Cumstances at that time would allow; 'till a more convenient Opportunity might present it self.

I am sure, if some such Considerations as these, may not plead for us, we are of all his Majesty's Subjects the most Unfortunate: The *Rights* and *Liberties* of the Parliament of *England* have received the greatest Corroborations since his Majesty's Accession to the Throne; and so have the *Rights* of *Scotland*; but the *Rights* of the People of *Ireland*, on the other Hand, have received the greatest Weakening under his Reign, by our Submission (as 'tis alledged) to these Laws that have been made for us.

THIS certainly was not the Design of his Majesty's Glorious Expedition into these Kingdoms; That, we are told by himself (whom we cannot possibly mistrust) was to assert the Rights and Liberties of these Nations; and we do humbly presume that his Majesty will be graciously pleased to permit us to enjoy the Benefits thereof.

AND thus I have done with the *Fourth Article* proposed. As to the *Fifth*, viz. *The Opinions of the Learned in the Laws relating to this Matter*; 'tis in a great Measure dispatch'd by what I have offer'd on the *Fourth*

H

Head;

The Opinions
of the Lawyers
thereon.

Lord Chief Justice Cook's Opinion differs'd.

Head; I shall therefore be the more brief thereon. And I think indeed the only Person of Note that remains to be considered by us, is the Lord Chief Justice *Cook*, a Name of great Veneration with the Gentlemen of the Long Robe, and therefore to be treated with all Respect and Deference.

(a) 20 H. 6. 8.
Pilkington's Case.
32 H. 6. 25.
20 Eliz. Dyer.
360.
Plowd. Com.
360.

IN his Seventh Report in *Calvin's Case*, he is proving, that *Ireland* is a Dominion separate and divided from *England*; for this he quotes many Authorities (a) out of the Year-Books and Reports; and amongst others, he has that which I have before-mention'd, pag. 91. 2 R. 3. f. 12. which he transcribes in this manner, *Hibernia habet Parliamentum, & faciunt Leges & nostra Statuta non ligant eos, quia non mittunt Milites ad Parliamentum*; and then adds, in a Parenthesis, (*which is to be understood, unless they be specially named*) *sed Personæ eorum sunt subiecti Regis sicut inhabitantes in Calesia, Gasconia, & Guyan*. The first thing I shall observe hereon, is the very *unfaithful* and *broken* Citation of this Passage, as will manifestly appear by comparing it with the true Transcript I have given thereof before, pag. 91. Were this all, 'twere in some measure pardonable. But what cannot be excused,

is the unwarrantable Position in his Parenthesis, without the least Colour or Ground for it in his Text. Herein he concludes down right Magisterially, *So it must be, this is my Definitive Sentence*; as if his *plain Assertion*, without any *other Reason*, ought to prevail; nay, even point Blank against the irrefragable Reason of the Book he quotes. I confess in another place of *Calvin's Case*, viz. Fol. 17. b. he gives this Assertion a Colour of Reason, by saying, *That tho' Ireland be a distinct Dominion from England, yet the Title thereof being by Conquest, the same by Judgment of Law might by express Words be bound by the Parliaments of England*. How far Conquest gives a Title, we have enquired before: But I would fain know, what Lord *Cook* means by *Judgment of Law*: Whether he means the *Law of Nature* and *Reason*, or of *Nations*; or the *Civil Laws* of our *Commonwealths*; in none of which Senses, I conceive, will he, or any Man, be ever able to make out his Position.

Is the Reason of *England's* Parliament not Binding *Ireland*, *Because we do not send thither Representatives?* And is the Efficacy of this Reason taken off, by *our being Named* in an

English Act? Why should sending Representatives to Parliament, bind those that send them? Meerly because thereby the *Consent* of those that are bound, is obtain'd, as far as those sort of Meetings can possibly permit; which is the very *Foundation* of the *Obligation* of all Laws. And is *Ireland's being Named* in an *English* Act of Parliament, the least Step towards obtaining the *Consent* of the *People of Ireland*? If it be not, then certainly my Lord *Cook's* Parenthesis is to no purpose. And 'tis a Wonder to me, that so many Men have run upon this vain Imagination, meerly from the Assertion of this Judge: For I challenge any Man to shew me, that any one *before* him, or any one *since*, but *from him*, has vended this *Doctrine*: And if the *bare Assertion* of a Judge, shall bind a *whole Nation*, and dissolve the *Rights* and *Liberties* thereof, we shall make their Tongues very powerful, and constitute them greater Lawgivers than the greatest Senates. I do not see why my *Denying* it, should not be as *authentick* as his *affirming* it. 'Tis true, he was a great Lawyer and a powerful Judge; but had no more Authority to *make a Law*, than I or any Man else. But some will say, he was a Learned Judge,

Judge, and may be supposed to have *Reason* for his Position. Why then does he not give it us? And then what he asserts would prevail, not from the *Authority of the Person*, but from the *Force of the Reason*. The most Learned in the Laws have no more Power to make or alter a Constitution, than any other Man; and their Decisions shall no farther prevail, than supported by Reason and Equity. I conceive my Lord Chief Justice *Cook* apply'd himself so wholly to the Study of the *Common Laws* of *England*, that he did not enquire far into the *Laws of Nature* and *Nations*; if he had, certainly he could never have been guilty of such an erroneous Slip; he would have seen demonstrably, that *Consent only* gives Humane Laws their Force, and that therefore the Reason in the Case he quotes is unanswerable, *Quia non mittunt Milites ad Parliamentum*. Moreover, the Assertion of *Cook* in this Point is directly contrary to the whole Tenour of the Case which he cites: For the very Act of Parliament on which the Debate of the Judges did arise, and which they deemed not to be of Force in *Ireland*, particularly names *Ireland*. So that here again Lord *Cook's* Error appears most plainly.

ly. For this I refer to the Report, as I have exactly delivered it before, pag. 90, 91. by which it appears clearly to be the unanimous Opinion of all the Judges then in the *Exchequer Chamber*: That *within the Land of Ireland*, the Parliaments of *England* have no Jurisdiction, whatever they may have over the Subjects of *Ireland* on the *open Seas*: And the Reason is given, *Quia Hibernia non mittit Milites ad Parliamentum in Angliâ.*

THIS Assertion likewise is inconsistent with himself in other Parts of his Works. He tells us in his 4th Inst, pag. 349. *That 'tis plain that not only King John (as all Men allow) but Henry the Second also, the Father of King John, did Ordain and Command, at the Instance of the Irish, That such Laws as had been in England should be observ'd, and of Force in Ireland. Hereby Ireland being of it self a distinct Dominion, and no part of the Kingdom of England, was to have Parliaments holden there as in England.* And in pag. 12. he tells us, *That Henry the Second sent a Modus into Ireland, directing them how to hold their Parliaments.* But to what End was all this, if *Ireland* nevertheless were subject to the Parliament of *England*?

gland? The King and Parliaments of these Kingdoms are the supream Legislators; If *Ireland* be subject to Two, (its Own, and that of *England*) it has *Two Supreams*; 'tis not impossible, but they may Enact *different or contrary* Sanctions; Which of these shall the People obey? He tells us in *Calvin's Case*, Fol. 17. b. *That if a King hath a Christian Kingdom by Conquest, as Henry the Second had Ireland, after King John had given to them, being under his Obedience, and Subjection, the Laws of England for the Government of that Country, no succeeding King could alter the same without Parliament.* Which, by the way, seems directly contradictory to what he says concerning *Ireland*, six Lines below this last cited Passage. So that we may observe my Lord *Cook* enormously stumbling at every Turn in this Point.

THUS I have done with this *Reve-* Opinions of
rend Judge; and, in him, with the *other Judges,*
 only *positive Opinion against us.* *in Favour of*
Ireland.
 shall now consider what our *Law-*
Books offer in our *Favour* on this
 Point.

To this purpose we meet a *Case*
 fully opposite, reported in the *Year-*
Book of the 20th of *Henry* the 6th,

Fol. 8. between one *John Pilkington*, and one *A.*

Pilkington's
Case.

Pilkington brought a *Scire Facias* against *A.* to shew Cause, why Letters Patents whereby the King had granted an Office in *Ireland* to the said *A.* should not be repeal'd, since the said *Pilkington* had the same Office granted to him by former Letters Patents of the same King, to be occupied by himself or his Deputy. Whereupon *A.* pleaded, That the Land of *Ireland*, Time out of Memory, hath been a Land separated and distinct from the Land of *England*, and Ruled and Governed by the Customs of the same Land of *Ireland*. That the Lords of the same Land, which are of the King's Council, have used from Time to Time, in the Absence of the King, to Elect a *Justice*, who hath Power to pardon and punish all Felons, &c. and to call a Parliament, and by the Advice of the Lords and Commonalty to make Statutes. He alledged further, That a Parliament was Asssembled, and that it was Ordain'd by the said Parliament, (a) That every Man who had an Office within the said Land, before a certain Day, shall occupy the said Office

(*) This Statute we may reckon, amongst the Number of those that are

lost during the long Intervals of our *Irish* Acts, noted before, pag. 65. to be about 118 Years.

Office by himself, otherwise, he should forfeit. He shew'd that *Pilkington* occupied by a Deputy; and that therefore his Office was void, and that the King had granted the said Office to him the said *A.* Hereupon *Pilkington* demurr'd in Law; and it was debated by the Judges, *Telverton*, *Fortescue*, *Portington*, *Markham*, and *Ascough*, whether the said Prescription in Relation to the State and Government of *Ireland*, be good or void in Law. *Telverton* and *Portington* held the Prescription void. But *Fortescue*, *Markham*, and *Ascough* held the Prescription good, and that the Letters Patents made to *A.* were good, and ought not to be Repeal'd. And in this it was agreed by *Fortescue* and *Portington*, That if a Tenth or Fifteenth be granted by Parliament in *England*, that shall not bind *Ireland*, although the King should send the same Statute into *Ireland* under his Great Seal; except they in *Ireland* will in their Parliament approve it; Because they have not any Commandment by Writ to come to the Parliament of *England*: And this was not denied by *Markham*, *Telverton*, or *Ascough*.

THE

Merchants of
Waterford's
Case.

THE *Merchants of Waterford's Case* which I have observed before, pag. 90, as reported in the Year Book of the 2d of *Richard* the 3d fol. 11, 12, is notorious on our behalf, but needs not be here repeated.

Prior of *Lanthony's*
Case.

THE Case of the Prior of *Lanthony* in *Wales*, mentioned by Mr. *Pryn* against the 4th Inst. ch. 76. p. 313. is usually cited against us. But I conceive 'tis so far from proving this, that 'tis very much in our behalf. The Case was briefly thus. The Prior of *Lanthony* brought an Action in the *Com. Pleas of Ireland* against the Prior of *Mollingar*, for an Arrear of an Annuity, and Judgment went against the Prior of *Mollingar*; hereon the Prior of *Mollingar* brought a Writ of Error in the King's *Bench of Ireland*, and the Judgment was affirmed. Then the Prior of *Mollingar* appeal'd to the Parliament in *Ireland* held 5 *Hen. 6.* before *James Butler* Earl of *Ormond*, and the Parliament revers'd both Judgments. The Prior of *Lanthony* removed all into the King's *Bench* in *England*; but the King's *Bench* refused to intermeddle, as *having no Power over what passed in the Parliament of Ireland*. Hereupon the Prior of *Lanthony* Appealed to the Parliament of *England*.

land. And it does not appear by the Parliament Roll (a) that any thing ^{(a) Rot. Parl. An. 8 H. 6. in ult.} was done on this Appeal; all that is entred being only the Petition itself at the end of the Roll. *Vid. Pryn* against chap. 76. p. 313.

Now whether this be a Precedent proving the Subordination of our *Irish* Parliament to that of *England*, I leave the Reader to judge. To me it seems the *clear Contrary*. For first we may observe, the King's *Bench* in *England* absolutely disclaiming any Cognisance of what hath passed in the Parliament of *Ireland*. And next we may observe, That nothing at all was done therein upon the Appeal to the Parliament of *England*: Certainly if the Parliament of *England* had thought themselves to have a Right to enquire into this Matter, they had so done, one way or t'other, and not left the Matter undetermined and in suspence.

It has ever been acknowledged that the Kingdom of *Ireland* is inseparably ^{Argument from Acts of Succession and Recognition pass'd in Ireland.} annexed to the Imperial Crown of *England*. The Obligation that our Legislature lies under by *Poyning's Act* 10 *H. 7. c. 4.* makes this Tye between the two Kingdoms indissoluble. And we must ever own it our Happiness to be thus annexed to *England*: And that the

the Kings and Queens of *England* are by undoubted Right, *ipso facto* Kings and Queens of *Ireland*. And from hence we may reasonably conclude, that if any Acts of Parliament made in *England*, should be of Force in *Ireland*, before they are Received there in Parliament, they should be more especially such Acts as relate to the *Succession* and *Settlement of the Crown*, and *Recognition of the King's Title* thereto, and the *Power and Jurisdiction* of the King. And yet we find in the *Irish Statutes*, 28 *Hen. VIII. c. 2. An Act for the Succession of the King and Queen Ann.* and another, Chap. 5. declaring the King to be *Supream Head of the Church of Ireland*; both which Acts had formerly pass'd in the Parliament of *England*. So likewise we find amongst the *Irish Statutes*, *Acts of Recognition of the King's Title to Ireland*, in the Reigns of *Henry the Eighth*, *Queen Elizabeth*, *King James*, *King Charles the Second*, *King William* and *Queen Mary*. By which it appears that *Ireland*, tho' annexed to the Crown of *England*, has always been look'd upon to be a *Kingdom Compleat within it self*, and to have all Jurisdiction to an *Absolute Kingdom*, belonging, and Subordinate to no Legislative

gislative Authority on Earth. Tho' tis to be noted, these *English Acts* relating to the *Succession*, and *Recognition of the King's Title*, do particularly Name *Ireland*.

As the *Civil State of Ireland* is thus ^{*Ireland's State Ecclesiastical Independent.*} *Absolute* within it self, so likewise is our State *Ecclesiastical*. This is manifest by the *Canons*, and *Constitutions*, and even by the *Articles of the Church of Ireland*, which differ in some things from those of the *Church of England*. And in all the *Charters and Grants of Liberties and Immunities to Ireland*, we still find this, That *Holy Church shall be Free*, &c. I would fain know what is meant here by the Word *Free*: Certainly if our *Church be Free*, and *Absolute* within it self, our State must be so likewise; for how our *Civil and Ecclesiastical Government* is now interwoven, every Body knows. But I will not enlarge on this Head, it suffices only to hint it; I shall detain my self to our *Civil Government*.

ANOTHER Argument against the Parliament of *England's Jurisdiction* ^{Argument from a Record in *Reyley*.} over *Ireland*, I take from a Record in *Reyley's Placita Parliamentaria*, page 569. to this Effect, (a) In the 14th of *Edward the Second*, the King sent his Letters ^{(a) 14 Ed. 2. Par. 2. Membr. 21 Int.} Patents to the Lord Justice of *Ireland*, letting

letting him know, that he had been moved by his *Parliament at Westminster*, that he would give Order that the *Irish Natives of Ireland*, might enjoy the *Laws of England* concerning *Life and Member*, in as large and ample manner as the *English of Ireland* enjoy'd the same. This therefore the King gives in Commandment, and orders accordingly, by these his Letters Patents. From hence, I say, we may gather, That the Parliament of *England* did not then take upon them to have any *Jurisdiction* in *Ireland*, (for then they would have made a Law for *Ireland* to this Effect) but instead thereof, they apply to the King, that he would interpose his Commands, and give Directions that this great Branch of the Common Law of *England* should be put in Execution in *Ireland*, indifferently to all the King's Subjects there, pursuant to the Original Compact made with them on their first Submission to the Crown of *England*.

Objection
drawn from a
Writ of Error.

LET us now consider the great Objection drawn from a Writ of *Error's* lying from the King's *Bench* of *England*, on a Judgment given in the King's *Bench* in *Ireland*; which proves (as 'tis insisted on) that there is a *Subordination* of *Ireland* to *England*; and that

that if an inferior Court of Judicature in *England*, can thus take cognizance of, and over-rule the Proceedings in the like Court of *Ireland*; it will follow, that the *Supream* Court of Parliament in *England* may do the same, in relation to the Proceedings of the Court of Parliament in *Ireland*.

IT must be confess'd that this hath been the constant Practice; and it seems to be the great thing that induced my Lord *Cook* to believe, that an Act of Parliament in *England*, and mentioning or including *Ireland* should bind here. The Subordination of *Ireland* to *England*, he seems to infer from the Subordination of the King's *Bench* of *Ireland*, to the King's *Bench* of *England*. But to this I answer:

I. THAT 'tis the Opinion of several Learned in the Laws of *Ireland*, That this Removal of a Judgment from the King's *Bench* of *Ireland*, by *Writ of Error*, into the King's *Bench* of *England*, is founded on an Act of Parliament in *Ireland*, which is lost amongst a great Number of other Acts, which we want for the space of 130 Years at one time, and of 120 at another time, as we have noted before, pag. 65. But it being only a *General Tradition*, that there was such an Act of

of our Parliament, we only offer it as a *Surmise*, the Statute it self does not appear.

2. WHERE a Judgment in *Ireland* is removed, to be revers'd in *England*, the Judges in *England* ought and always do judge, according to the Law and Customs of *Ireland*, and not according to the Laws and Customs of *England*; any otherwise than as these may be of Force in *Ireland*; but if in any thing the two Laws differ, the Law of *Ireland* must prevail, and guide their Judgment. And therefore in the Case of one *Kelly*, removed to the King's Bench in *England*, in the beginning of King *Charles* the First, one Error was assign'd that the *Præcipe* was of *Woods* and *Underwoods*, which is a manifest Error, if brought in *England*; but the Judges finding the Use to be *Otherwise* in *Ireland*, judged it *no Error*. So in *Crook, Charles*, fol. 511. *Mulcarry* vers. *Eyres*. Error was assigned for that the Declaration was of one hundred Acres of *Bogg*, which is a Word not known in *England*; but 'twas said, it was well enough understood in *Ireland*, and so adjudged *no Error*.

FROM whence, I conceive, 'tis manifest, that the Jurisdiction of the
Kings

King's Bench in *England*, over a Judgment in the King's Bench of *Ireland*, does not proceed from any Subordination of one Kingdom to the other; but from some other Reason, which we shall endeavour to make out.

3. WE have before observed, That in the Reign of K. *Henry* the Third, *Gerald Fitz-Maurice*, Lord Justice of *Ireland*, sent four Knights to know what was held for Law in *England* in the Case of *Coparceners*. The occasion of which Message (as before we have noted out of the King's Rescript) was because the King's Justice of *Ireland* was ignorant what the Law was. We may reasonably imagine that there were many Messages of this kind; for in the Infancy of the *English* Government it may well be supposed, that the Judges in *Ireland* were not so deeply versed in the Laws of *England*: This occasioned Messages, to *England*, before Judgment given in *Ireland*, to be inform'd of the Law. And after Decrees made, Persons who thought themselves aggrieved by *erronious* Judgments, apply'd themselves to the King in *England* for Redress. Thus it must be, that Writs of Error (unless they had their Sanction in Parliament) became in use. Complaints to the King by
I thote

those that thought themselves injur'd, increased; and at last grew into Custom, and obtain'd the Force of Law.

PERHAPS it may be Objected, That if the Judges of the King's Bench in *England* ought to regulate their Judgment by the Customs of *Ireland*, and not of *England*, it will follow, that this Original which we assign of Writs of Error to *England*, is not right.

I Answer, That this may be the *Primary Original*, and yet consist well enough with what we have before laid down: For tho' the Common Law of *England* was to be the Common Law of *Ireland*, and *Ireland* at the beginning of its *English* Government might frequently send into *England* to be inform'd about it; yet this does not hinder, but *Ireland* in a long process of Time, may have some smaller Customs and Laws of its own, gradually, but insensibly crept into Practice, that may in some measure differ from the Customs and Practice of *England*; and where there is any such, the Judges of *England* must regulate their Sentence accordingly, tho' the first rise of Writs of Error to *England*, may be as we have here suggested. In like manner, where the Statute Law of *Ireland* differs from that of *England*, the Judges of

of *England* will regulate their Judgments by the Statute Law of *Ireland*: This is the constant Practice, and notoriously known in *Westminster-Hall*: From which it appears, that removing a Judgment from the King's Bench of *Ireland*, to the King's Bench of *England*, is but an Appeal to the King in his Bench of *England*, for his Sense, Judgment, or Exposition of the Laws of *Ireland*. But of this more hereafter.

4. WHEN a Writ of *Error* is Returned into the King's Bench of *England*, Suit is made to the King *only*; the matter lies *altogether before him*; and the Party complaining applies to *no Part* of the Political Government of *England* for Redress, but to the King of *Ireland only*, who is in *England*: That the King only is sued to, our Law-Books make plain. This Court is call'd *Curia Domini Regis*, and *Aula Regia*, because the King used to sit there in Person, as *Lambard* tells us; and every Cause brought there is said to be *coram Domino Rege*, even at this very Day, *Cooke* 4 Inst. p. 72. Therefore if a Writ be returnable *coram nobis ubicunque fuerimus*, 'tis to be Returned to the King's Bench. But if it be returnable *coram Justiciarijs nostris apud Westm.* 'tis to be return'd into

the *Common Pleas*. This Court (as *Glanvil* and other Ancients tell us) used to travel with the King, wherever he went. And *Fleta* in describing this Court, says, *Habet Rex Curiam suam & Justiciarios suos, coram quibus, & non alibi nisi coram semet ipso, &c. falsa Judicia & Errores revertuntur & Corriguntur*. The King then (as *Britton* says) having supreme Jurisdiction in his Realm, to judge in all Causes whatsoever; therefore it is, that *erronious Judgments* were brought to him out of *Ireland*. But this does not argue that *Ireland* is therefore *Subordinate to England*; for the People of *Ireland* are the Subjects of the King to whom they Appeal. And 'tis not from the *Country* where the Court is held, but from the *Presence and Authority* of the King (to whom the People of *Ireland* have as good a Title as the People of *England*) that the *Præminence* of the *Jurisdiction* does flow, and I question not, but in former times, when these Courts were first Erected, and when the King exerted a greater Power in Judicature than he does now, and he used to sit in his own Court, that if he had travell'd into *Ireland*, and the Court had follow'd him thither, *Erronious Judgments* might

might have been removed from *England* before him into his Court in *Ireland*; for so certainly it must be, since the Court travell'd with the King. From hence it appears, that all the Jurisdiction that the Kings Bench in *England* has over the Kings Bench in *Ireland*, arises only from the Kings Presence in the former. And the same may be said of the *Chancery* in *England* if it will assume any Power to Controul the *Chancery* in *Ireland*; because as *Lambard* says, p. 69, 70) The Chancery did follow the King, as the Kings Bench did; and that as he tells us out of the Lord Chief Justice *Scroope*, the Chancery and the Kings Bench were once but one Place. But if this be the Ground of the Jurisdiction of the Kings Bench in *England* over the Kings Bench in *Ireland*, (as I am fully perswaded it is) the Parliament in *England* cannot from hence claim any Right of Jurisdiction in *Ireland*, because they claim a *Jurisdiction of their own*; and their Court is not the *Kings Court*, in that proper and strict Sense that the *King's Bench* is.

BUT granting that the *Subordination* of the *Kings Bench* in *Ireland*, to the *Kings Bench* in *England*, be rightly concluded from a *Writ of Error* out of the latter, lying on a Judgment in

the former. I see no Reason from thence to conclude, that therefore the Parliament of Ireland is *Subordinate* to the Parliament in England, unless we make any *one sort* of Subordination, or in any *one Part* of Jurisdiction, to be a Subordination in *all Points*, and all Parts of Jurisdiction. The Subjects of Ireland may appeal to the King in his Bench in England for the *expounding* of the Old Common and Statute Law of Ireland; will it therefore follow that the Parliament of England shall make new Laws to bind the Subjects in Ireland? I see no manner of Consequence in it; unless we take *expounding Old Laws*, (or *Laws already made*) in the King's Bench, and *making new Laws in Parliament*, to be *one* and the *same thing*. I believe the best Logician in Europe will hardly make a Chain of *Syllogisms*, that from such *Premises*, will regularly induce such a *Conclusion*.

To close this Point, we find that a Judgement of the Kings Bench in Ireland, may be removed by a Writ of Error to the Parliament in Ireland: But the Judgment of the Parliament of Ireland was never question'd in the Parliament of England. This appears from the *Prior of Lanthony's Case* aforegoing.

I shall

I shall conclude this our fifth Article Declaration in with a memorable Passage out of our ^{the Irish Act of Faculties.} *Irish Statutes*, which seems to strengthen what we have deliver'd on the Business of a *Writ of Error*, as well as the chief Doctrine I drive at; and that is 28 H. VIII. Chap. 19. *The Act of Faculties*. This Statute is a Recital at large of the *English Act* of the 25 Hen. VIII. c. 21. In the Preamble of which *English Act* 'tis declared, *That this Your Graces Realm Recognizing no Superior but Your Grace, hath been and yet is free from any Subjection to any Mans Laws, but only such as have been devised within this Realm, for the Wealth of the same, or to such others, as by Sufferance of Your Grace and Your Progenitors, the People of the Realm have taken at their free Liberties by their own Consent; and have bound themselves by long Use and Custom to the Observance of, &c.*

THIS Declaration, with the other Clauses of the said *English Act*, is *verbatim* recited in the *Irish Act of Faculties*, and in the said *Irish Act* it is Enacted, *That the said English Act, and every Thing and Things therein contained, shall be Established, Affirmed, Taken, Obeyed and Accepted within this Land of Ireland as a good and perfect*

Law, and shall be within the said Land of the same Force, Effect, Quality; Condition, Strength and Virtue, to all Purposes and Intents, as it is within the Realm of England; (if so, then the said Clause declares our Right of being bound only by Laws to which we consent, as it does the Right of the People of England) And that all Subjects within the said Land of Ireland, shall enjoy the Profit and Commodity thereof in like manner as the Kings Subjects of the Realm of England.

Farther Reasons offered in behalf of Ireland.

England's Title to Ireland by Purchase.

I am now arrived at our Sixth and Last Article proposed, *viz.* The *Reasons and Arguments that may be farther offered on one side and t'other in this Debate.*

I have before taken Notice of the Title *England* pretends over us from *Conquest*: I have likewise enquired into the *Precedents* on one side and t'other, from *Acts of Parliament*, from *Records*, and from *Reports* of the Learned in the Laws. There remains another Pretence or two for this *Subordination*, to be considered; and one is founded on *Purchase*.

'Tis said, That vast Quantity of Treasure, that from time to time has been spent by *England* in Reducing the *Rebellions*, and carrying on the

the Wars of *Ireland*, has given them a just *Title* at least to the *Lands* and *Inheritances* of the *Rebels*, and to the absolute Disposal thereof in their Parliament; And as particular Examples of this, we are told of the great Sums advanced by *England* for suppressing the Rebellion of the *Irish* Papists in 41, and opposing the late Rebellion since King *WILLIAM's* Accession to the Throne.

To this I answer, That in a War, there is all Reason imaginable that the Estates of the unjust Opposers should go to repair the Damage that is done. This I have briefly hinted before. But if we consider the Wars of *Ireland*, we shall perceive they do not resemble the common Case of Wars between two Foreign Enemies; Ours are rather *Rebellions*, or *intestine Commotions*; that is, The *Irish* Papists rising against the *King* and *Protestants* of *Ireland*; and then 'tis plain, that if these Latter, by the Assistance of their Brethren of *England*, and their Purse, do prove Victorious, the People of *England* ought to be fully repaid: But then the manner of their Payment, and in what way it shall be levied, ought to be left to the People of *Ireland* in Parliament assembled: And so it was after the

Rebellion of 41. The *Adventurers* then were at vast Charges, and there were several Acts of Parliament in *England* made for their Re-imbursing, by disposing to them the Rebels Lands. But after all, it was thought reasonable that the Parliament of *Ireland* should do this in their own way; and therefore the *Acts of Settlement* and *Explanation*, made all the former *English* Acts of *no Force*; or at least did very much *alter* them in many Particulars, as we have noted before. In like manner we allow that *England* ought to be repaid all their Expences in Suppressing this late Rebellion: All we desire is, That, in Preservation of our own Rights and Liberties, we may do it in our own Methods regularly in our own Parliament: And if the Re-imbursment be all that *England* stands upon, what availeth it whether it be done this way or that way, so it be done? We have an Example of this in Point between *England* and *Holland* in the Glorious Revolution under His present Majesty: *Holland*, in assisting *England*, expended 600000 Pounds, and the *English* Parliament fairly repay'd them: It would have look'd oddly for *Holland* to have insisted on Disposing of Lord *Powis's* and other Estates,

Estates, by their own Laws, to reimburse themselves.

It is an ungenerous Thing to villice good Offices, I am far from doing it, but with all possible Gratitude acknowledge the mighty Benefits *Ireland* has often receiv'd from *England*, in helping to suppress the Rebellions of this Country; To *England's* Charitable Assistance our Lives and Fortunes are owing: But with all humble Submission, I desire it may be considered, whether *England* did did not at the same time, propose the *Prevention of their own Danger*, that would necessarily have attended our Ruin; if so, 'twas in some measure their *own Battles* they fought, when they fought for *Ireland*; and a great part of their Expence must be reckon'd in their *own Defence*.

ANOTHER thing alledged against *Ireland* is this; If a Foreign Nation, as *France* or *Spain* for instance, prove prejudicial to *England*, in its Trade; or any other way; *England*, if it be stronger, redresses it self by Force of Arms, or Denouncing War; and why may not *England*, if *Ireland* lies cross their Interests, restrain *Ireland*, and bind it by Laws, and maintain these Laws by Force?

To

To this I answer: *First*, That it will hardly be instanced, that any Nation ever declared War with another, meerly for over-topping them in some signal Advantage, which otherwise, or but for their Endeavours, they might have reaped. *War* only is justifiable for *Injustice* done, or *Violence* offer'd, or *Rights* detain'd. I cannot by the Law of Nations, quarrel with a Man, because he, going before me in the Road, finds a Picce of Gold, which possibly, if he had not taken it up, I might have light upon and gotten. 'Tis true, we often see Wars commenced on this Account *under-hand*, and on Emulation in Trade and Riches; but then this is never made the *open Pretence*, some other *Colour* it must receive, or else it would not look *fair*; which shews plainly, that this Pretence of *being prejudicial*, or of reaping Advantages which otherwise you might partake of, is not *justifiable* in it self. But granting that it were a good Justification of a War with a *Foreign Nation*, it will make nothing in the Case between *England* and *Ireland*; for if it did, why does it not operate in the same manner between *England* and *Scotland*, and consequently in like manner draw after it *England's* binding *Scotland* by their
Laws

Laws at *Westminster*? We are all the same King's Subjects, the Children of one *Common Parent*; and tho' we may have our *distinct* Rights and Inheritances absolutely within our selves; yet we ought not, when these do chance a little to interfere to the Prejudice of one or 'tother Side, immediately to treat one another as Enemies; fair amicable Propositions should be proposed, and when these are not hearkened to, then 'tis time enough to be at Enmity, and use Force.

THE last Thing I shall take Notice ^{Object. Ireland} of, that some raise against us, is; That ^{a Colony.} *Ireland* is to be look'd upon only as a *Colony* from *England*: And therefore as the *Roman Colonies* were subject to, and bound by, the Laws made by the *Senate at Rome*; so ought *Ireland* by those made by the *Great Council at Westminster*. Of all the Objections raised against us, I take this to be the most extravagant; it seems not to have the least *Foundation* or *Colour* from *Reason* or *Record*: Does it not manifestly appear by the *Constitution of Ireland*, that 'tis a *compleat Kingdom* within it self? Do not the Kings of *England* bear the *Stile of Ireland* amongst the rest of their Kingdoms? Is this agreeable to the Nature of a *Colony*?

lony? Do they use the Title of Kings of *Virginia, New-England, or Maryland*? Was not *Ireland* given by *Henry* the Second in a Parliament at *Oxford* to his Son *John*, and made thereby an *absolute Kingdom, separate* and wholly *independent* on *England*, 'till they both came *United* again in him, after the Death of his Brother *Richard* without Issue? Have not Multitudes of Acts of Parliament both in *England* and *Ireland*, declared *Ireland* a *compleat Kingdom*? Is not *Ireland* stiled in them all, the *Kingdom, or Realm* of *Ireland*? Do these *Names* agree to a *Colony*? Have we not a Parliament, and Courts of Judicature? Do these *things* agree with a *Colony*? This on all hands involves so many Absurdities, that I think it deserves nothing more of our Consideration.

THESE being the only remaining Arguments that are sometimes mention'd *against us*, I now proceed to offer what I humbly conceive *demonstrates* the Justice of our Cause.

AND herein I must beg the Reader's *Patience*, if now and then I am forced lightly to touch upon some Particulars foregoing. I shall endeavour all I can to avoid prolix Repetitions; but my Subject requires, that sometimes I just
men-

mention, or refer to, several Notes before delivered.

FIRST therefore, I say, *That Ireland should be bound by Acts of Parliament made in England, is against Reason, and the Common Rights of all Mankind.*

ALL Men are by Nature in a State ^{Against the Rights of Mankind.} of Equality, in respect of Jurisdiction or Dominion: This I take to be a Principle in it self so evident, that it stands in need of little Proof. 'Tis not to be conceiv'd, that Creatures of the same Species and Rank, promiscuously born to all the same Advantages of Nature, and the Use of the same Faculties, should be subordinate and subject one to another; These to this or that of the same Kind. On this Equality in Nature is founded that Right which all Men claim, of being free from all Subjection to positive Laws, 'till by their own *Consent* they give up their Freedom, by entering into Civil Societies for the common Benefit of all the Members thereof. And on this ^{Consent only gives Law force.} *Consent* depends the *Obligation* of all *Humane Laws*; insomuch that without it, by the unanimous Opinion of all *Jurists*, no Sanctions are of any *Force*. For this let us appeal, amongst many, only to the *Judicious Mr. Hoeker's Eccles.*

cles. Polity, Book I. Sect. 10. Lond. Edit. 1676. Thus He.

Howbeit, *Laws do not take their constraining Force from the Quality of such as devise them, but from that Power which doth give them the strength of Laws. That which we spake before, concerning the Power of Government, must here be applied to the Power of making Laws whereby to Govern, which Power God hath over all; and by the Natural Law, whereunto he hath made all subject, the lawful Power of making Laws, to command whole Politick Societies of Men, belongeth so properly unto the same entire Societies, that for any Prince or Potentate, of what kind soever upon Earth, to exercise the same of himself, and not either by express Commission immediately and personally receiv'd from God, or else by Authority derived at the first from their Consent, upon whose Persons they impose Laws, it is no better than meer Tyranny. Laws they are not therefore, which publick Approbation hath not made so: But Approbation not only they give, who personally declare their Assent by Voice, Sign, or Act; but also when others do it in their Names, by Right Originally, at the least, derived from*

them :

them: *As in in Parliaments, Councils, &c.*

AGAIN, *Sith Men naturally have no full and perfect Power to command whole Politick Multitudes of Men; therefore utterly without our Consent, we could in such sort be at no Man's Commandment living. And to be commanded we do consent, when that Society whereof we are Part, hath at any time before consented, without revoking the same after by the like Universal Agreement: Wherefore as any Mans Deeds past is good, as long as himself continueth, so the Act of a Publick Society of Men, done five hundred Years sit hence, standeth as theirs who presently are of the same Societies, because Corporations are immortal; we were then alive in our Predecessors, and they in their Successors do still live. Laws therefore humane of what kind soever are available by Consent, &c.*

AND again, *But what matter the Law of Nations doth contain, I omit to search; the strength and vertue of that Law is such, that no particular Nation can lawfully prejudice the same by any their severall Laws and Ordinances, more than a Man by his private Resolutions the Law of the whole Commonwealth or State wherein he liveth;*

K

for

for as Civil Law being the Act of a whole Body Politick, doth therefore over-rule each Civil Part of the same Body; so there is no Reason that any one Commonwealth of it self should to the Prejudice of another, annihilate that whereupon the whole World hath agreed.

To the same purpose may we find the Universal Agreement of all Civilians, *Grotius, Puffendorf, Locke's Treat. Government, &c.*

No one or more Men, can by Nature challenge any Right, Liberty or Freedom, or any Ease in his Property, Estate or Conscience, which all other Men have not an equally just Claim to. Is England a Free People? So ought France to be. Is Poland so? Turkey likewise, and all the Eastern Dominion, ought to be so: And the same runs throughout the whole Race of Mankind.

Secondly, 'TIS against the Common Laws of England which are of Force both in England and Ireland, by the Original Compact before hinted. It is declared by both Houses of the Parliament of England, 1 Jac. cap. 1. That in the High Court of Parliament, all the whole Body of the Realm, and every particular Member thereof, either

177

in Person, or by Representation (upon their own Free Elections) are by the Laws of this Realm deemed to be Personally present. Is this then the Common Law of England, and the Birth-right of every Free-born English Subject? And shall we of this Kingdom be denied it, by having Laws imposed on us, where we are neither Personally, nor Representatively present? My Lord Cooke in his 4th Inst. cap. 1. saith, That all the Lords Spiritual and Temporal, and all the Commons of the whole Realm, ought ex Debito Justitiæ to be Summon'd to Parliament, and none of them ought to be Omitted. Hence it is call'd Generale Concilium in the Stat. of Westminster. 1. and Commune Concilium, because it is to comprehend all Persons and Estates in the whole Kingdom. And this is the very Reason given in the Case of the Merchants of Waterford foregoing, why Statutes made in England, should not bind them in Ireland, *Quia non habent Melites hic in Parlamento*; because they have no Representatives in the Parliament of England. My Lord Hobbard in the Case of Savage and Day, pronounced it for Law, that whatever is against natural Equity and Reason, is against Law; nay if an Act of Parliament were made

K 2

against

against Natural Equity and Reason, that Act was void. Whether it be not against Equity and Reason that a Kingdom regulated within it self, and having its own Parliament, should be bound without *their Consent*, by the Parliament of another Kingdom, I leave the Reader to consider. My Lord Cooke likewise in the first Part of his Institutes, fol. 97. b. saith, *Nihil quod est contra Rationem est Licitum*. And in the old *Modus tenendi Parliamenti* of England, said to be writ about *Edward the Confessor's* time, and to have been Confirmed and Approved by *William the Conqueror*: It is expressly declared, That all the *Lords Spiritual and Temporal, and the Knights, Citizens, and Burghesses* ought to be summoned to Parliament. The very same is in the *Modus* sent into Ireland by *Henry the 2d.* And in King *John's* Great Charter dated 17 *Johannis*, 'tis granted in these Words, *Et ad habend. Commune Concilium Regni de Auxilijs & Scutagijs Assidendis, submoneri faciemus Archiepiscopos, Episcopos, Abates, Comites, & Majores Barones, Regni Sigillatim per Literas nostras, & faciemus submoneri in generali per Vicecomites omnes alios, &c. Math Paris ad An. 17. Johann.* All are to be Summoned

Summoned to Parliament, the *Nobility* by special Writs; the *Commons* by general Writs to the Sheriffs. And is this the *Common Law* of England? Is this part of those *Liberæ Consuetudines*, that were contain'd in the Great Charter of *Liberties* of the People of England; and were so solemnly granted by *Henry II. King John, and Henry III.* to the People of Ireland, that they should enjoy and be govern'd by; and unto which they were sworn to be Obedient? And shall they be of Force only in England, and not in Ireland? Shall Ireland receive these Charters of *Liberties*, and be no Partakers of the Freedoms therein contain'd? Or do these Words signifie in England one thing, and in Ireland no such thing? This is so repugnant to all Natural Reason and Equity that I hope no rational Man will Contest it: I am sure if it be so, there's an end of all Speech amongst Men; all Compacts, Agreements and Societies, are to no purpose.

3. It is against the Statute Laws both of England and Ireland: this has been pretty fully disus'd before; however shall here again take Notice, That (a) in the 10 of *Henry* the 4th it was Enacted in Ireland, that Statutes made in England should not be of Force in

Against the Statute Law both of England and Ireland.

(a) See before pag. 65.

Ireland, unless they were allowed and Published by the Parliament of *Ireland*. And the like Statute was made the 29th of *Henry* the 6th. And in the 10th Year of *Henry* the 7th. Chap. 23. *Irish* Statutes, The Parliament which was held at *Drogheda*, before Sir *Christopher Preston*, Deputy to *Jaspar* Duke of *Bedford*, Lieutenant of *Ireland*, was declared Void, for this Reason amongst others, *That there was no General Summons of the said Parliament to all the Shires, but only to Four.* And if Acts of Parliament made in *Ireland* shall not bind that People, because some Counties were omitted; how much less shall either their Persons or Estates be Bound by those Acts made in *England*, whereat no one County, or Person of that Kingdom is present? In the (b) 35th of *Edward* the 1st. Cap. 6. It was Enacted by the Parliament of *England* in these Words, *Moreover from henceforth we shall take no manner of Aid, Taxes or Prizes, but by the common Assent of the Realm.* (c) And again in the Statute of *Liberties*, by the same King, Cap. 1. *De Tallag. non Concedend.* it is Enacted in these Words. *No Tallage or Aid shall be taken or levy'd by us, or our Heirs, in our Realm, without the Good Will and Assent of Archbishops,*

(b) Pultons
Col. Eng.
Stats. Edit.
1670. pag. 63.

(c) *ibid* page
75.

bishops, Bishops, Earls, Barons, Knights, Burgesses, and other Free-men of the Land. The like Liberties are specially Confirm'd to the Clergy, (d) the 14th of *Edward* the 3d. And (d) *ibid* page 113. were these Statutes, and all other Statutes and Acts of the Parliament of *England* Ratify'd, Confirmed and Adjudg'd by several Parliaments of *Ireland* to be of Force within this Realm? And shall the People of *Ireland* receive no Benefit by those Acts? Are those Statutes of Force in *England* only? And can they add no Immunity or Privilege to the Kingdom of *Ireland*, when they are received there? Can the King and Parliament make Acts in *England* to bind his Subjects of *Ireland* without their Consent? And can he make no Acts in *Ireland* without their Consent; whereby they may receive any Privilege or Immunity? This were to make the *Parliaments* of *Ireland* wholly illusory and of no Effect. If this be Reasonable Doctrine, To what end was *Poyning's* Law in *Ireland*, (e) that (e) 10H.7.c.22. makes all the Statutes of *England* before that, in Force in this Kingdom? This might as well have been done, and again undone, when they please, by a single Act of the English Parliament. But let us not make thus light

of Constitutions of Kingdoms, 'tis *Dangerous* to those who *do it*, 'tis *Grievous* to those that *suffer it*.

MOREOVER, had the King or his Council of *England*, In the 10th Year of *Hen. VII.* in the least dreamt of this Doctrine, to what end was all that strict Provision made by *Poyning's Act*, Irish Stat. cap. 4. That no Act of Parliament should pass in *Ireland*, before it was first Certified by the Chief Governour and Privy Council here, under the Broad Seal of this Kingdom, to the King and his Privy Council in *England*, and received their Approbation, and by them be remitted hither under the Broad Seal of *England* here to be pass'd into a Law? The design of this Act seems to be the Prevention of any thing passing in the Parliament of *Ireland* *Surreptitiously*, to the *Prejudice* of the King, or the *English* Interest of *Ireland*. But this was a needless Caution, if the King and Parliament of *England*, had Power at any time to revoke or annul any such Proceedings. Upon this Act of *Poyning's*, many and various Acts have passed in *Ireland*, relating to the Explanation, Suspension or farther Corroboration thereof, in divers Parliaments, both in *Henry* the Eighth's, *Phil.* & *Mary's*, and *Q. Eliz.*

Eliz. Reigns; for which see the Irish Statutes. (a) All which shew that this ^{(a) 28 H. 8. c. 4. 28 H. 8. c. 20. 3 & 4. Ph. & M. c. 4. 11 Eliz. Sef. 2. c. 1. 11 Eliz. Sef. 3. c. 8.} Doctrine was hardly so much as *Surmised* in those Days, however we come to have it raised in these *Latter Times*.

Fourthly, 'Tis against several *Charters of Liberties* granted unto the Kingdom of *Ireland*: This likewise is clearly made out by what foregoes. I shall only add in this place, That in the Patent-Roll of the 17 *Rich. 2. m. 34. de Confirmatione*, There is a Confirmation of several *Liberties* and *Immunities* granted unto the Kingdom and People of *Ireland* by *Ed. III.* The Patent is somewhat long, but so much as concerns this Particular, I shall render *verbatim*, as I have it transcribed from the Roll by Sir *William Domville*, Attorney General in *Ireland* during the whole Reign of King *Charles II.* "Rex "omnibus, &c. Salutem: Inspeximus "Literas Patentes Domini Edwardi "nuper Regis Angliæ, Avi nostri fact. "in hæc verba: Edwardus dei Gra. "Rex Angliæ & Franciæ, & Dominus "Hiberniæ, Archiepiscopis, Episcopis, "Abbatibus, Prioribus, Ministris nostris tam Majoribus quam Minoribus, " & quibuscunque aliis de Terra nostra "Hiberniæ fidelibus nostris ad quos "Præ-

" Præsentes Literæ pervenerint, Salu-
 " tem: Quia, &c. Nos hæc quæ se-
 " quuntur Ordinanda Duximus & fir-
 " miter observanda, &c. Imprimis,
 " viz. Volumus & Præcipimus quod
 " Sancta Hibernicana Ecclesia suas Li-
 " bertates & Liberas Consuetudines ille-
 " gas habeat, & eis Libere gaudeat &
 " Utatur. Item volumus & præcipi-
 " mus quod nostra & ipsius Terræ Ne-
 " gotia presertim Majora & Ardua in
 " Consiliis per Peritos Consiliarios no-
 " stros ac Prælatos & Magnates & quos-
 " dam de Discretioribus & Probioribus
 " Hominibus de partibus vicinis ubi ipsa
 " Concilia teneri Contigerit propter
 " hoc evocandos, in Parliamentis vero
 " per ipsos Conciliarios nostros ac Præ-
 " latos & Proceres aliosque de terra
 " prædicta prout Mos Exegit secundum
 " Justiciam Legem Consuetudinem &
 " Rationem tractentur deducantur &
 " fideliter timore favore odio aut præ-
 " tio post positis discutiantur ac etiam
 " terminentur, &c. In Cujus Rei Te-
 " stimonium has Literas nostras fieri
 " fecimus Patentes Teste meipso Apud
 " Westminst. 25 die Octob. Anno
 " Regni nostris Angliæ 31, Regni vero
 " Franciæ 18. Nos autem Ordinationes
 " Voluntates & Præcepta Prædicta ac
 " omnia alia & singula in Literis præ-
 " dictis

" dictis Contenta Rata Habentes &
 " Grata ea pro nobis & Hæredibus no-
 " stris quantum in nobis est Accepta-
 " mus, Approbamus, Ratificamus, &
 " Confirmamus prout Literæ prædictæ
 " rationabiliter testanter. In Cujus,
 " &c. Test. Reg. apud Westminst. 26
 " die Junii."

Fifthly, It is inconsistent with the ^{Inconsistent}
Royalties and *Præeminence* of a ^{with the Roy-}
sepa- ^{alties of a}
rate and distinct Kingdom. That we ^{Kingdom.}
 are thus a *distinct Kingdom*, has been
 clearly made out before. 'Tis plain,
 the Nobility of *Ireland* are an Order
 of Peers clearly distinct from the Peer-
 age of *England*, the Priviledges of the
 one, extend not into the other King-
 dom; a Lord of *Ireland* may be Ar-
 rested by his Body in *England*, and so
 may a Lord of *England* in *Ireland*,
 whilst their Persons remain Sacred in
 their respective Kingdoms: A *Voyage*
Royal may be made into *Ireland*, as
 the Year-Book, 11 *Hen. 4.* 17. Fol. 7.
 and Lord *Cook* tells us; and King *John*,
 in the 12th Year of his Reign of *En-*
gland, made a *Voyage-Royal* into *Ire-*
land; and his Tenants in Chief, which
 did not attend him in that Voyage, did
 pay him *Escuage*, at the Rate of Two
 Marks for every *Knight's Fee*; which

was imposed *super Prelatis & Baronibus pro Passagio Regis in Hibernia*, as appears by the Pipe-Roll, Scutag. 12 Johannis Regis in Scaccario Angl. which shews that we are a *complete Kingdom* within our selves, and not little better than a *Province*, as some are so extravagant as to assert; none of the Properties of a *Roman Province* agreeing in the least with our Constitution. 'Tis Resolved in Sir Richard Pembrough's Case in the 44th of Edw. III. That Sir Richard might lawfully refuse the King, to serve him as his *Deputy* in *Ireland*, and that the King could not *compel* him thereto, for that were to *Banish him into another Kingdom*, which is against *Magna Charta*, Chap. 29. Nay, even tho' Sir Richard had great Tenures from the King, *pro servitio Impenso & Impendendo*, for that was said must be understood *within the Realm of England*, Cook's 2d Inst. pag. 47. And in *Pilkington's* Case aforementioned, *Fortescue* declared, That the Land of *Ireland* is, and at all times hath been, a *Dominion separate, and divided from England*. How then can the Realms of *England* and *Ireland*, being *distinct Kingdoms*, and *separate Dominions*, be imagin'd to have any *Superiority* or

Juris-

Jurisdiction the one over the other. 'Tis absurd to fancy that Kingdoms are *separate* and *distinct* merely from the *Geographical Distinction of Territories*. Kingdoms become *distinct*, by *distinct Jurisdictions*, and *Authorities Legislative* and *Executive*; and as *Rex est qui Regem non habet*, so *Regnum est quod alio non Subjicitur Regno*: A Kingdom can have no *Supream*; 'tis in it self *supream* within it self, and must have all *Jurisdictions*, *Authorities* and *Præminencies* to the Royal State of a Kingdom belonging, or else 'tis none: And that *Ireland* has all these, is declared in the *Irish Stat.* 33 Hen. VIII. c. 1. The Chief of these most certainly is, the *Power of Making and Abrogating its own Laws*, and being bound only by such to which the *Community* have given their *Consent*.

Sixthly, It is against the Kings *Prerogative*, that the Parliament of *England* should have any *Co-ordinate Power* with Him, to introduce *New Laws*, or *Repeal Old Laws* Established in *Ireland*. By the Constitution of *Ireland* under *Poyning's Act*, the King's *Prerogative* in the Legislature is advanced to a much higher Pitch than ever was challenged by the Kings in *England*, and the Parliament of *Ireland* stands

Against the King's Prerogative.

stands almost on the same bottom as the King does in *England*; I say almost on the same Bottom, for the *Irish* Parliament have not only a *Negative Vote* (as the King has in *England*) to whatever Laws the King and his Privy Councils of both or either Kingdom, shall lay before them; but have also a Liberty of *Proposing* to the King and his Privy Council here, such Laws as the Parliament of *Ireland* think expedient to be pass'd. Which Laws being thus Proposed to the King, and put into form, and transmitted to the Parliament here, according to *Poyning's Act*, must be Pass'd or Rejected in the *very Words*, even to a *Tittle*, as they are laid before our Parliament, we cannot alter the least *Iota*. If therefore the *Legislature* of *Ireland* stand on this Foot, in relation to the King, and to the Parliament of *Ireland*; and the Parliament of *England* do Remove it from this Bottom, and Assume it to themselves, where the King's Prerogative is much *Narrower*, and as it were *Reversed*, (for there the King has only a *Negative Vote*) I humbly conceive 'tis an *Incroachment* on the Kings *Prerogative*: But this I am sure, the Parliament of *England* will be always very Tender of, and His Majesty will be very loth to have such

such a Precious Jewel of his Crown handled roughly. The Happiness of our Constitutions depending on a Right Temperament between the *Kings* and the *Peoples Rights*.

Seventhly. It is against the Practice of all former Ages. ^{Against the Practice of former Ages.} Wherein can it appear, that any Statute made in *England*, was at any time since the Reign of *Henry* the Third, allowed and put in practice in the Realm of *Ireland*, without the *Authority* of the *Parliament* of *Ireland*? Is it not manifest by what foregoes, that from the Twentieth of King *Henry* the Third, to the Thirteenth of *Edward* the Second, and from thence to the Eighteenth of *Henry* the Sixth, and from thence, to the Thirty-Second of *Henry* the Sixth, and from thence, to the Eighth of *Edward* the Fourth, and from thence, to the Tenth of *Henry* the Seventh, there was special care taken to Introduce the Statutes of *England*, (such of them as were necessary or convenient for this Kingdom) by degrees, and always with *Allowance*, and *Consent* of the *Parliament* and *People* of *Ireland*. And since the *General Allowance*, of all the *English* Acts and Statutes in the Tenth of *Henry* the Seventh, there have several Acts of Parliament, which were made in *England*

land in the Reigns of all the Kings from that Time, successively to this very Day, been particularly received by Parliament in *Ireland*, and so they become of force here, and not by reason of any *General Comprehensive* Words, as some Men have lately fancied. For if by *General Comprehensive Words*, the Kingdom of *Ireland* could be bound by the Acts of Parliament of *England*, what needed all the former *Receptions* in the Parliament of *Ireland*, or what use will there be of the Parliament of *Ireland* at any time? If the Religion, Lives, Liberties, Fortunes, and Estates of the Clergy, Nobility, and Gentry of *Ireland*, may be dispos'd of, without their *Privity* and *Consent*, what Benefit have they of any Laws, Liberties, or Privileges granted unto them by the Crown of *England*? I am loth to give their Condition an *hard Name*; but I have no other Notion of *Slavery*, but being Bound by a Law to which I do not *Consent*.

Against the
Resolution
of
Judges.

Eighthly, 'T is against several *Resolutions* of the *Learned Judges*, of former times in the very Point in Question. This is manifest from what foregoes. in the Case of the *Merchants of Waterford*, *Pilkington's Case*, *Prior of Lanthony's*

Lanthony's Case, &c. But I shall not here enlarge farther thereon.

Ninthly, THE Obligation of all Destroys *Property* Laws having the same Foundation, if *property*. One Law may be Imposed without *Consent*, any Other Law whatever, may be Imposed on us without our *Consent*. This will naturally introduce *Taxing us without our Consent*; and this as necessarily destroys our *Property*. I have no other Notion of *Property*, but a *Power of Disposing my Goods as I please*, and not as another shall Command: Whatever another may *Rightfully* take from me without my *Consent*, I have certainly no *Property* in. To *Tax* me without *Consent*, is little better, if at all, than *down-right Robbing me*. I am sure the Great Patriots of Liberty and *Property*, the Free People of *England*, cannot think of such a thing, but with Abhorrence.

Lastly, THE People of *Ireland* are *Creates Confusion* left by this Doctrine in the greatest *Confusion*. *Confusion*. *Confusion* and *Uncertainty* imaginable. We are certainly bound to obey the *Supream Authority* over us; and yet hereby we are not permitted to know *Who* or *What* the same is; whether the *Parliament of England*, or that of *Ireland*,

L or

or *Both*; and in what Cases the *One*; and in what the *Other*: Which *Uncertainty* is or may be made a Pretence at any time for *Disobedience*. It is not impossible but the different Legislatures we are subject to, may Enact different, or contrary Sanctions: Which of these must we obey?

Inconvenient
to England to
assume this
Power.

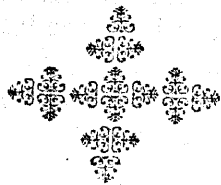
To conclude all, I think it highly *inconvenient* for *England* to assume this *Authority* over the Kingdom of *Ireland*: I believe there will need no great Arguments to convince the wise Assembly of *English* Senators, how *inconvenient* it may be to *England*, to do that which may make the *Lords* and *People of Ireland* think that they are not *well used*, and may drive them into *Discontent*. The *Laws* and *Liberties of England* were granted above Five hundred Years ago to the People of *Ireland*, upon their Submissions to the Crown of *England*, with a Design to make them *easie* to *England*, and to keep them in the Allegiance of the King of *England*. How consistent it may be, with true Policy, to do that which the People of *Ireland* may think is an *Invasion* of their Rights and Liberties, I do most humbly submit to the Parliament of *England* to consider. They are Men of *great Wisdom, Honour,*

now, and *Justice*; and know how to prevent all future *Inconveniencies*. We have heard great Out-cries, and deservedly, on breaking the *Edict of Nantes*, and other Stipulations; How far the breaking our Constitution, which has been of Five hundred Years standing, exceeds that, I leave the World to judge. It may perhaps be urg'd, That 'tis *convenient* for the State of *England*, that the *Supream Council* thereof should make their Jurisdiction as *large* as they can. But with Submission, I conceive that if this *assumed Power* be not *just*, it cannot be *convenient* for the State. What *Cicero* says in his *Offices*, *Nihil est Utile, nisi idem sit Honestum*, is most certainly true. Nor do I think, that 'tis any wise *necessary* to the *Good of England* to assert this High Jurisdiction over *Ireland*. For since the Statutes of this Kingdom are made with such *Caution*, and in such *Form*, as is prescribed by *Poyning's Act* 10 H. 7. and by the 3d and 4th of *Phil.* and *Mar.* and whilst *Ireland* is in *English Hands*, I do not see how 'tis possible for the Parliament of *Ireland* to do any thing that can be in the least *prejudicial* to *England*. But on the other Hand, If *England* assume a *Jurisdiction* over *Ireland*, whereby they think their

The CASE of

Rights and Liberties are taken away ; That their Parliaments are rendred meerly nugatory, and their Lives and Fortunes depend on the Will of a Legislature wherein they are not Parties ; there may be ill Consequences of this. Advancing the Power of the Parliament of England, by breaking the Rights of an other, may in time have ill Effects.

THE *Rights of Parliament* should be preserved *sacred and inviolable*, wherever they are found. This kind of Government, once so *universal* all over *Europe*, is now almost *vanished* from amongst the Nations thereof. Our King's Dominions are the only Supporters of this noble *Gothick Constitution*, save only what little Remains may be found thereof in *Poland*. We should not therefore make so light of that sort of Legislature, and as it were abolish it in One Kingdom of the Three, wherein it appears ; but rather cherish and encourage it wherever we meet it.



THE

CASE

OF

TENURES

Upon the COMMISSION of

DEFECTIVE TITLES,

Argued by all the JUDGES of

I R E L A N D.

With their RESOLUTION, and
the REASONS of their RE-
SOLUTION.





To the Right Honourable

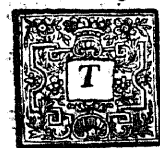
JOHN,

Viscount WENTWORTH,

Lord Deputy-General of

I R E L A N D.

My LORD,



*HIS WORK is
Yours, by more
than one Interest,
and therefore it returns na-
turally unto You, for to
lay aside my particular Re-
spects (it being by Your
Lordship's Favour, that I*

L 4 *serve*

D E D I C A T I O N .

serve his Majesty in this Place) You are Pater Patrae, and not more by Your Office, than by your Love to this Nation, and Your most equat, and indifferent Dispensation of Justice, (next under his Majesty) the Father of this Church, and Commonwealth; And for whom can an Oblation of this Nature be more proper? Besides, all that is here, as it was at first spoken, in an humble Obedience to Your Lordship's Order, so it was after upon a Noble Invitation from You digested into this Form, and it is now made
pub-

D E D I C A T I O N .

publick by Your Commandment; so that in all the Passages of it, it carries Your Image, Your Supercription, and therefore by this Dedication, I do not so much give it, as restore it. If there be any thing in it, that is mine, that answers Your Expectation, even in that, that it answers Your Expectation, I have my Reward; for all that are below Your Lordship, I hope it shall have this Use, it shall satisfie them, that Your Lordship's Proceedings in this Business have been in all Points agreeable both to Honour and Justice; God
lead

D E D I C A T I O N .

lead Your Lordship by the Hand, until You have finished those Great and Heroical Works so happily begun; May they all prosper to the High Pleasure of Almighty God, the Increase of Honour, and Revenne to his Majesty, of Peace, and Prosperity to this Kingdom, and to Your own Immortal Glory,

YOUR LORDSHIP'S

Most humble Servant,

James Barry.



T H E
C A S E
O F
T E N U R E S
Upon the Commission of
Defective Titles.

Trin. 13. Caroli Regis.



T the late enquiry concerning his Majesty's Title to the County of *Mayo*, there was an Act of State Published, wherein it was declared, *That it was not his Majesty's intention, to take from his People any thing that was justly theirs, and that therefore none who held any Land, or other Hereditaments whatsoever within that County, by Letters Patents from the Crown, should be any ways prejudiced by finding his Majesty's Title, although*

though their Letters Patents were not found, or well and certainly found, in the great Office then intended to be taken, but that they should have the same Benefit of them, as if they had been specially found, so as they did produce their Letters Patents, or the enrollment thereof, before the Lord Deputy and Council, at the Council Board, by a certain Day limited in the Act, and that they were allowed by that Board, to be good and effectual in Law.

IN Pursuance of that Act, there were several Letters Patents produced, and among the rest, the Lord Viscount Dillon did shew forth Letters Patents, obtained from his late Majesty, and passed upon the late Commissions of Defective Titles; upon perusal and consideration whereof, his Majesty's Council were of Opinion that they were void in Law, and therefore it was thought fit, and so ordered by the Lord Deputy and Council, That the doubt arising upon the Letters Patents, should be drawn up into a Case, and that that Case should be openly argued at the Council Board, by Council learned on both sides.

The

The Case was afterwards drawn up in these Words.

KING JAMES by Commission under the great Seal dated the second Day of March, in the fourth Year of his Reign, did Authorize certain Commissioners to grant the Manor of Dale, by Letters Patents under the great Seal of this Kingdom, to A. and his Heirs, and there is no direction given in the said Commission touching the Tenure to be reserved.

There are Letters Patents by colour of the said Commission passed unto A. and his Heirs to hold by Knights service, as of his Majesties Castle of Dublin.

The Question is, Whether the said Letters Patents be void in the whole, or only as to the Tenure?

THIS Case was argued on several Days, first by *Nicholas Plunket* for the Lord Dillon, and Serjeant *Catin* for the King, and after by *John Polesfen* for the Lord Dillon, and *Osbaldeston* Attorney General for the King.

AND because it was a Case of great weight and importance, it was deliver'd unto

unto the *Judges*, and they were required by the Lord *Deputy* and *Council*, to conferr and consider of it, and to return unto them their Resolution concerning it, but they (upon private Conference among themselves) did not agree in Opinion, and therefore it was thought necessary, for publick Satisfaction, that it should be argued solemnly by them all: and thereupon in *Trinity* Term last, the Case was argued by *Rives Puisne* Judge of his Majesties Court of Chief Place, *Barry* second Baron of the Exchequer, and *Cressy* one of the Judges of the Court of Chief Place: And after on another Day appointed for the Case, by *Mayart* one of the Judges of the Common Pleas, *Bolton* Chief Baron, *Lowther* Chief Justice of the Common Pleas, and *Shurley* Chief Justice of the Court of Chief Place.

AND for that I intend to make as summary a Report as I can: I will first set down such Arguments and Objections as were made by them that argued for the Maintenance of the Letters Patents.

It was objected by them, *that the Letters Patents were good for the Land. and void only as to the Tenure.*

For

For divers Reasons,

1. *Regularly* where a Man doth less than the Authority or Commandment committed unto him, there (the Commandment or Authority being not pursued) the Act is void: But where a Man doth that which he is Authoris'd to do, and more, there it is good for that which is warranted, and void for the rest. *Cokes instit. sect. 434. Perk, 189. vid. 8 Coke 85.* But in the Case in Question, the Commissioners do that which they had Authority to do, and they do more, therefore for that which they had Authority to do, that is to grant the Lands, the Letters Patents are good, for that which they do more, that is, the reserving of a Tenure they are void.

THEIR Authority was, to grant the Mannor of *Dale* to *A.* and his Heirs, that they have fully done, and if they had stayed there, no Man will deny, but they had well executed their Authority; but they go farther and do more, and reserve a Tenure, therefore for that more, for that Reservation, their Act is only void.

2. *Where* a Man hath Authority to do an Act, and he doth it in Substance, tho'

tho' he differ in the manner, yet the Authority is well executed. As if a Man made a deed of Feoffment of *Black-acre*, and *White-acre*, and a Letter of Attorney to enter into both Acres and to deliver *seisin* of both of them, according to the form and effect of the Deed; and he entrench into *Black-acre*, and delivers *seisin secundum formam Cartæ*, this *livery* and *seisin* is good, albeit he did not enter into both, nor into one in the Name of both; and yet this is done in another manner, than his Authority warrants; for his Authority was, to enter into both, and to deliver *seisin* of both, neither of which he doth, no not so much as enter into one in the Name of both.

So When the Feoffment is made to two or more, and a Letter of Attorney to make *livery* to both, and the Attorney makes *livery* of *seisin* to one of the *Feoffees, secundam formam & effectum Cartæ*, this is good to both, and yet in that Case, he that is absent may wave the *livery*; Surely this is done by the Attorney in another Manner, than the Authority warrants, for this warrant was to make *livery* to both, and the intention of the *Feoffor* was, that both should take, and the Estate should be settled in both, and yet he makes

makes *Livery* to one only, and so that the Estate may be settled only in him, and yet he hath well executed his Authority, for in Substance he hath done that which he is commanded, and tho' it differs in the manner, it is not material; both those Cases are put in *Cokes Inst. Sect. 66.*

BUT in the Case in Question, the Commissioners have done in substance that which was commanded them, therefore their Authority is well executed, and the Act they have done is good. That they have done in substance, that which was commanded them, appears in it self, for their Authority was to grant the Mannor of *Dale* to *A.* and his Heirs, this they have done: And if they have added any thing to the grant, whereby it may be said to be done in another manner, yet the Act being done in Substance, it shall be good.

3. THAT wherein they have exceeded their Authority, *scilicet*, the reservation of the Tenure, it is not of the essence of the Grant: Of the Essence of a Grant are only Grantor, Grantee, and the thing to be granted, and apt Words in an Instrument or Patent; besides of the Essence of a Grant it cannot be, for Grants were at Common Law, Te-

nures were introduced by the Conquest. *Selden* in his *Not. to Eadmer.* 194. *Bracton libr. 2. de acquir. rerum Domin.* The Tenure is another distinct Thing, *aliud* from the Land, in that they cannot consist in one Person, the Land is the thing granted, that belongs to the Patentee, the Tenure is reserved to the King, that belongs to him, the Reservation is *aliud*, or *supra*, or *præter* the Grant, not *alio modo*. And therefore the Letters Patents may be void for the Tenure, and yet good for the Grant of the Land.

4. ALTHOUGH it were admitted that the reservation of the Tenure, be not a distinct thing, or *aliud* from that which they had Authority to do, but is rather a doing of the same thing, for which they had warrant, in another Manner than their Authority does warrant; yet it will not follow, that the whole Act is void: For an Authority given, may be executed in another manner, *alio modo* then the Commission doth warrant, and yet stand good, for that which is done according to the Authority.

And that may be in these Cases.

1. WHERE the Authority is cloathed with an Interest, for there in many
Cases

Cases, he that hath the Authority may vary from the Authority, and the Act tho' it be done in another manner, shall be good. As where the Custom of a Mannor is, that the Lords may grant Lands by *Copy of Court-Roll* in Fee, if the Grant be in *tail*, or but for *Life*, this is good, *Stanton and Barnes's Case Hill. 36. Eliz. Rot. 492.* in *B. R.* Co. Lit. 52. b. *Cokes inst. Sect. 66.*

So where the Custom was, to grant Copies for two Lives, and he grants to the Husband for Life, and after to the Wife *durante viduitate*. This is good. 4 R. P. 29. *Downes and Hopkins Case P. 36.* 3 Cro. 323. a. *Eliz. B. R.* The Statute of 32. *Henry 8.* doth enable Tenant in *tail*, to make a Lease for one and twenty Years, if he makes a Lease for twenty Years only, or to one for ten Years, and after makes a Lease to another for 11 Years more, this is good, and so it hath been resolved in *Tompson*, and *Trafford's Case, Popb. Lion.* *Hill. 35. Eliz. B. R.*

2. WHERE the varying from the Authority given, is in Letter, or Circumstance, and not in a point material, or in Substance, for that see the Cases cited before, *Cokes inst. Sect. 66.* & *Litt. 434.*

3. WHERE the variance from the Authority, although it be in matter of

substance, is supply'd by Operation of Law. As if a Licence be granted to a Copy holder for Life, to make a Lease for ten Years if he shall so long live, the Copy-holder makes a Lease for ten Years absolutely, without the limitation, *videlicet*, if he shall so long live, yet adjudged good; and the License well pursued. It was *Hatt and Arrow-smith's Case Hillar 38. Elizabeth. B. R.*

3 Cor. 462.

AND in the Case in question, where all agree, that the Kings meaning in his Commission was, that a Tenure in *Capite* should be reserved, albeit it be not expressed in Words; or if it had been in express Terms, that a Tenure in *Capite* should be reserved, and they had only granted the Mannor, without reservation of any Tenure, yet the Law supplying this defect, and raising a Tenure in *Capite*, this shall make the Grant good.

4. WHERE the variance from the Authority is cured by the party himself, by some other Act. As if Tenant in *tail*, Husband and Wife, a Bishop, &c. who are Authoriz'd by the Statute of 32 *Hen. 8.* to make Leases for one and twenty Years, or three Lives of Lands usually lett, make a Lease of Lands usually lett, and of Lands not usually lett, reserving

reserving one entire Rent, all is void: *Shepherds Case*; But if Tenant in *tail* will make such a Lease, and reserve the accustomed Rent for the Lands usually Lett, and another Rent for the Lands not usually Lett, here the Lease shall be good for the Lands usually Lett, and voidable only for the other; for by these several reservations, the variance from the Authority is cured. *Tanfield and Rogers's Case Trin. 36. 3 Cro. 401. Eliz. B. R.*

5. WHERE the variance from the Authority (how material soever it be) is notwithstanding made void, either by the Common Law or Act of Parliament; As where the King does License *I. S.* to grant twenty Markes annuity in *Mortmain*, and he grants the Annuity with Clause of Distress, by *Hussey*, and *Bryan* Chief Justices, and *Starkey* Chief Baron, and Justice *Fairfax*, the addition of Distress is without warrant, and void; yet all admit the grant of the Rent good notwithstanding, 2 & 3 *H. 7. Grants 36.*

BY the Statute of 1 *Elizabeth.* A Grant by a Bishop of an ancient Office of Seneschal-ship or two, that had never before been granted, but to one, is adjudged void: 10 *Coke 61.* the Bishop of *Salisbury's Case*, put Case then

then that such a Grant is made by a Bishop to *I. S.* and to an *Infant*, jointly, or the one after the other, this is a material variance, and yet, because the Grant in respect of the *Infant* is void, (as it was held in *Scamblear* and *Walters Case*, *M. 40. & 41. Eliz. B. R.* cited in *Cokes inst. sect. 1.* the Grant to *I. S.* (as they held) is good.

Although the *habendum*, *tenendum*, *condition*, &c. be parts of a Grant, yet the *habendum* may be void, and the Grant good, as in Auditor *King's Case* cited in 8 *Coke 56.* in the Earl of *Rutland's Case*; where the Case was, the King granted Lands to *A.* and his Heirs, in the premises, *habendum* to him, and his Assignes, omitting the Word *Heirs* in the *habendum*, yet the Fee shall pass by the premises, and the *habendum* shall be void.

THE condition may be void, as in *Littleton's Case* a Feoffment upon condition that he shall not alien; and yet the Grant remain Good.

6. THE Reservation of a Tenure was not necessary in the Grant, if it were not necessary, it is *inutile*, and *utile per inutile, non vitatur.* 3. *Coke 10. Dowries Case.*

7. THE Honour of the *King* shall be preferred before his Profit 9 *Coke 131.*

in

in *Berweleys Case*: And therefore when the King's Grant may be taken to two intents good, in many Cases, it shall be taken to that intent, which is most Beneficial for the King; but if it may be taken to one intent good, and to another intent void, there for the Honour of the King, and the Benefit of the Subject, it shall be taken in such manner, that the Grant of the King may take Effect, for it was not the intent of the King, to make a void Grant, *vid. 8 Coke 56.* the Earl of *Rutland's Case*, the Lord *Stafford's Case*, 8 *Coke 77.* the Earl of *Cumberland's Case*, 8 *Coke 167.*

UPON this Rule the Case of *Pridle* and *Napper.* 11. *Coke 11.* was put, which was said to be a far stronger Case than the Case in Question, and that in Case of an Authority executed in other manner, *alio modo*, and yet good: The Point resolved, as to this Purpose, was this, King *Hen. 8* did grant License to the Prior and Covent of *Mountacute*, to appropriate the Church of *Tintinhul* to their Priory, and this was *per verba de presenti tempore.*

IT did appear, that at the time of the License, the Church was full of an Incumbent, and so that no appropriation could be made, *in presenti*, but *in futuro*, by special Words to take effect,

M 4

fect, after the Death of the present Incumbent; and therefore the Licence ought to have been special, otherwise the King was deceived in his Grant, and so the Appropriation void, which by colour of that Licence, they made to take effect, after the Death of the Incumbent: But it was *resolved*, that the Appropriation was sufficient in Law, for the Licence was general, and therefore, it shall be taken in such Sence, that it may take effect, that is, to take effect after the Death of the Incumbent. And the Reason there given, is the Rule before remembered, for Construction of the Kings grants.

IN which Case it is to be observed, first that the Licence or Authority given by the King was in general Words, to make the appropriation presently. *Secondly*, That this Authority could not be executed in that manner. *Thirdly*, By virtue of that Licence, they make the appropriation *in futuro*, S. to take effect after the Death of the Incumbent; So they do it in another manner than their Authority warrants, and yet good, and their Authority well pursued.

THEN if that Authority executed in so different a Manner, from the Words of the Authority, was adjudged to be well executed, much more shall

shall it in this Case be said to be well executed, when they have pursued the very Words of the Authority; and if to some Intent there might be a Construction made, to make the Grant void; yet if by another Construction, the Grant may be made good, and the *King's* Intention fulfilled, without any Prejudice to him, than for the honour of the *King*, and the Benefit of the Subject, that Construction shall be made, that the Grant shall be good, and such Construction may be made in this Case, for here the Tenure reserved being void (as it is agreed by all) a Tenure in *Capite*, (being the Tenure intended by the Commission) shall be raised by Implication of Law; by this Construction the Grant shall be made good, and the *King's* Intention shall be fulfilled, without any Prejudice to him.

THEY agree, that in all Grants of Lands by Letters Patents here in *Ireland*, by Virtue of the *King's* Commission, or Letter Misive under the Privy Signet, if that Tenure be not reserved, either by the Letters Patents, or by the Law, which is directed by the said Commission, or Letter Misive, there the Grant shall be void in the Whole, both for the Land and Tenure.

AND

AND therefore, where the *King* gives Power, to grant Lands, and to reserve a Tenure, which the Law will not create, or to reserve some other thing, which the Law it self will not reserve; as if the Commission had been to grant Lands, and to reserve a Tenure by Knights Service, if the Land be granted, reserving a Tenure in *Socage*, the Grant is void in the Whole.

So if the Commission had been, to grant Land, and to reserve twenty Shillings Rent, and they reserve ten Shillings; in these Cases the *Commissioners* have not done so much as they should, the *King* is prejudiced, and no Construction or Implication of Law can help, as in our Case it doth.

AND here in this Case, the Tenure reserved shall not toll that Tenure, which is implied by the Law, because the Tenure reserved is void: For that they cited the Case of *Littleton*, in his Chapter of *Frank-almoigne Sect.* 140.

A Man that holds Lands by Knights Service, at this Day grants them, by License to an Abbot, &c. to hold in *Frank-almoigne*, the Tenure reserved is void; and he shall hold by Knights Service, and so a Gift in *Frank-marriage*, reserving a Rent, this Reservation is void,
and

and he shall hold only by Fealty, 4 *H.* 6. 22. otherwise it would be, if the Reservation were good, for there the tacite Reservation shall be silent, as in *Wheeler's Case*, 6 *Coke* 6.

THEY agree, that if these Letters Patents had been made, by Bill signed by the *King's* own Hand, under the Great Seal of *England*, the Tenure reserved would controul the Tenure, which the Law would have raised; for in Letters Patents past in *England*, the Letters Patents are *ultima intentio Regis*, and the Judges (who are to make Construction thereof) are to ground their Judgment, upon the Letters Patents themselves, and the Contents thereof, without any Regard to the Particular, or any thing without the Letters Patents, *Doddington's Case* 2 *Coke* 34.

BUT in Letters Patents of Lands in *Ireland*, under the Great Seal of *Ireland*, the Letters Patents are not *ultima intentio Regis*, but *tota, & sola, prima, & ultima intentio Regis* are all to be taken, and gathered out of the Commission, or Warrant from the *King* under the Privy Signet, upon which they are passed; and here the *Judges* are to ground their Judgment upon the Commission, or Warrant, as well as upon the Letters Patents.

And

And to these Seven Arguments, or Reasons, all that was spoken by them, that argued for the Letters Patents may be reduced.

But it was resolved by the two Chief Justices, the Chief Baron, BARRY, and Justice RYVES (with whom Baron LOWTHER agreed in Opinion, though he could not then argue, by reason of Sickness.)

That the Letters Patents are void in Law, both to the Land, and to the Tenure.

In this Case five Things did fall into Consideration.

1. THE Commission mentioned in the Case, and the Authority of it.
2. Authorities, and their several Sorts, and how they ought to be pursued.
3. THE Authority in this Case, what it is, if it be pursued, as it ought to be, wherein it is not pursued.
4. Tenures, what they are in the Grant, that the Reseryation of a Tenure is *modus Concessionis*, that it is not *aliud*, or a distinct thing from the Grant, that Tenures had their Original

nal in England, before the Norman Conquest.

5. The Reasons why the Letters Patents are void in the whole, and the Authorities upon which the Resolution is grounded.

1. The Commission mentioned in the Case, is the Commission that was in Force, in the Time of his late Majesty, for the strengthening of Defective Titles; a Commission that was one of the greatest Graces, and Bounties, that ever (before that Time) was vouchsafed by the Kings of England to their Subjects of this Kingdom; a Commission, that was agreed by all, to be a good, and legal, and effectual Commission, and to contain in it self full Power, and Authority to grant.

OF which the Chief Justice of the Common Pleas in his Argument said, that upon this Occasion he did seriously peruse it, and in his Judgment, it was as full, and strong a Commission, for granting the Lands (*Concurrentibus hijs quæ de jure requiruntur*) as any he had seen. There was in the Commission (as he said) *plenitudo potestatis*; there is not any Question of the Commission, nor of the Power granted by the Commission; neither (as it was declared)

clared) was it the Intention of his Majesty, to deny unto the Subject, the full Benefit of it in all things, wherein the Commissioners had pursued their Authority, given by the Commission, and proceeded according to the Law.

FOR that, that there was no Direction in the Commission for the Tenure, it was no Defect in the Commission (as the *Chief Baron* observed) nor any Omission, or Negligence in them, that were trusted with the Drawing of it, it was done upon good Advice, and of Purpose; for the Cases of them, that were to pass upon that Commission, were so different, and there was such Variety of Tenures, that it was not possible to give any certain Direction in the Commission concerning them.

BESIDES, the Intention of that Commission was not to give Authority, for the Alteration, or Diminution of the *Kings* Tenures; it was intended only for the Establishing of the Estates and Possessions of the Subject: And therefore there is not a Word in it of any Tenure, so that the Purpose of it was, where any former Tenure was *in esse*, to preserve it, and where no Tenure was *in esse*, to leave it to the Reservation of the Law.

So

So that now the Commission being cleared, and agreed to be good, and legal, and to contain full Power, and ample Authority to grant the Lands.

The sole Question will be, of the Pursuance of the Commission, and whether this Power granted by the Commission, be well executed, and pursued by the Commissioners?

2. To find out the Law in this Case, the several Sorts of Authorities in our Books were considered, and how they ought to be pursued.

FOR Authorities these Differences were agreed for Law.

ALL Authorities are either Authorities in Law or Authorities in Fact, 8 Coke 146. the 6 Carpenters Case.

Authorities in Law are, where the Law gives Authority, without any Authority from the Party; as the Law gives Authority to the Lord, to distrain for his Rent, and Service, to the Owner of the Soil, to distrain Damage feasant to him in the Reversion, to enter, and see if Waste be done, and the like.

AN

AN *Authority in fait*, is where the Authority is given by the Party.

Authorities in fait, are either
 } *Nude* and bare Authorities, or Authorities clothed with an Interest, *Coke's Inst.* 52.

Nude Authorities are given either by
 { 1. *Deed.*
 2. *Commission.*
 3. *Patent.*
 4. *Writ.*
 5. Or *Act of Parliament.*

AND for all those Authorities, it is a certain *Rule*, and *Ground* in our Law, that they are to be pursued strictly, and precisely, both for matter and form, or otherwise, the *Act done by colour of that Authority is void*, 10 *H.* 7. 15.

BUT the execution of *Authorities* that are clothed with an Interest, are of a more large and favourable interpretation, than the execution, of those that are but bare Authorities, 5 *Coke* 94, & 95, in *Barwick's Case*.

1. THAT Authorities by *Deed* are to be pursued strictly, and precisely, both for Matter and Manner.

ner. See the Case of 12. *Ass.* 24, 26. *Ass.* 39.

THERE the Case was, that the *Plaintife* did make a Charter of *Fee-simple* to the *Tenant*, and a Letter of Attorney to deliver *livery* of *seisin*, the Attorney delivers *livery* upon condition; this *livery* is void; for the *Authority is not pursued in the manner*.

SO on the contrary, if the Letter of Attorney had been to deliver *livery* of *seisin* upon condition, and the Attorney makes *livery* without condition, this is void. *Cokes Inst.* 258. 11 *H.* 4. 3. A Letter of Attorney is made, to make *livery* after the Death of *I. S.* and the Attorney makes *livery* during the Life of *I. S.* all is void. 40. *Ass.* 38.

IF I command a Man to make a Deed of Feoffment in my Name according to a Copy shown unto him in *Latin*, if he makes a Deed of Feoffment according to the Effect of the same Words, in *English* or *French*, the Feoffment is without Warrant; for in that Case, he does not pursue the *Authority in the manner*. 10 *Hen.* 7. 9. So where an Authority is given to Enfeoffe, and he levies a Fine, *ibid* & 10 *Hen.* 7. 15.

N

2. For

2. For Authorities by Commission, that they must be pursued, it is the Earl of *Leicester's Case in Plowd. Com.* 380.

THE Earl of *Leicester*, 1 Mar. was indicted of high Treason; before Sir *Richard Southwell*, and seven other Commissioners, by vertue of a Commission, directed to the said Sir *Richard* and fourteen more.

AFTER another Commission was directed to Sir *Thomas White*, and others, reciting that where the Earl of *Leicester* stood indicted, before Sir *Richard Southwell*, and fourteen other Commissioners, of divers Treasons, &c.

IT gave them Authority, *ad indictamentum prædictum recipiendum, & ipsum Robertum super inde audiendum, &c. ac debito sine triandum, terminandum, &c.*

BY colour of that Commission, they did arraign him upon that Indictment found before eight of the Commissioners, he confessed the Treasons, &c. and had his Judgment.

IT was resolved, that all that was done was void, and *coram non iudice*, for that they did not pursue their Authority.

3. Autho-

3. Authority by Patent must be pursued.

The King Licenses an Abbot and Covent to Alien, the Abbot sole Aliens, it is void, 21 *Hen.* 7. 7. & 8. And the Rule given by *Frowick*, when the King makes any Grant or License, it ought to be executed accordingly, and strictly, as if the King Grants me License to make a Feoffment by Deed, I cannot make a Feoffment without Deed; nor *é contra*, so that the License must ever be pursued, or otherwise the Act done is not warranted by the Licence, *vid.* 18 *Afs. Pl. ultimo.* The Lord *Clifford's Case* 2 *Coke* 80. *Stamf. prerog. Regis* 31.

THE License was to levy a Fine of the Mannor of *Dale*, to find two Chaplains, and he would have levy'd the Fine, leaving out the Chaplains, and could not be suffered. 3 *Ed.* 3. 5. *Stamf. ubi supra*, *vid.* 30 *Ed.* 3. 17.

4. Authorities by Writ must be pursued.

IN a *præcipe quod reddat* there must be two Summoners, therefore Summons by one Summoner is not good, *Plowd. Com.* 393. 50 *Ed.* 3. 16.

N 2

5. Autho-

Authority given by Parliament must be pursued.

THE Statute of *Merton Cap. 3* ordains, That in a *Redisseisin*, the Sheriff *assumptis secum custodibus placitorum Coronae, &c. accedat ad tenementum illud de quo facta fuerit querela.* If the Sheriff take but one Coroner, it is not good, for the Act appoints a Number, two at the least, which number ought to be satisfied, or else the Authority given by the Act is not pursued, 23 *Aff. 7. Plowd. Com. 393.*

So that by the *Rule* of all these *Books* it is manifest, that a *nude Authority* must be pursued strictly, both for matter and manner, or the Act done by colour of the Authority is void.

But in what Cases, the Act so void for not pursuing of the Authority, shall be void in the whole, or in Part only, this difference was taken.

WHERE he that hath an Authority doth that which he is Authorized to do, & *aliud*, and another thing distinct from that for which he hath Authority. And where he doth the same thing which he is Authorized to do, *alio modo*, in another manner, than the Authority does warrant. IN

IN the first Case it is good, for that which is warranted and void for the *aliud*. In the other it is void for the whole.

AND therefore if a Letter of Attorney be made to *I. S.* to make *livery* of *seisin* in *White-acre*, and he makes *livery* in *White-acre*, and *Black-acre*, there he doth *Idem & aliud*. And therefore it is good for *White-acre*, that is according to his Authority, and pursuant to it, and void for *Black-acre*, which is *aliud* from his Authority, *Perk. 38.*

OTHERWISE it would be, if the Letter of Attorney were to make *livery* of one Acre, and he makes *livery* of two Acres, there it is void for both; because he couples both together; and it is not named in certain in the Feoffment, of which Acre *livery* shall be made; according to 4 *H. 7. 5.* But in the Case of *Perk.* the Acre is named in certain, *White-acre*, and so a difference.

ON the other side, when the same thing is done in another manner than the Authority warrants, there is *idem alio modo*, and therefore all is void: As in the Case of 12 *Afs. 24. 26 Afs. 39, 40 Afs. 38. 10 H. 7. 9.* the Cases already cited.

THE true Reason why in all those Cases the Act is void, is, because the Authority is executed *Alio Modo*, And so is the reason expressly given in the Book of 12 As. why the *livery* is void, because the *Attorney doth it in other manner than the Authority warrants.*

THIS is the difference that must rule the Case one way or other.

AND therefore the only labour will be, to find out under which Part of that difference the Case in question doth lie.

3. For that, First it will be necessary to enquire?

*What the Authority in this Case is?
Whether it be pursued as it ought to be?
Wherein it is not pursued.*

THE Authority given to the Commissioners in this Case is two fold.

AN Authority expressed in their Commission.

S. to grant the Mannor of *Dale*.
And an Authority implied in Law,
to reserve a *Tenure in Capite*.

FOR where there is no direction for the *Tenure*, the *Law* will imply a *Tenure*

nure in *Capite*, as the best for the King.

IN this Case then by the very *Commission*, the *Tenure* is made a part of the Grant, and *Modus Concessions*, for the Authority though it be two fold, expressed and implied, yet both being put together, that which is to be done by vertue of that Authority, is but one entire Act, one Grant, a Grant of the Mannor of *Dale*, reserving a *Capite Tenure*, so that their Authority to grant the Land is not absolute, but *sub modo*, so that they reserve a *Tenure in Capite*, and although the Power to reserve a *Tenure in Capite*, be only implied by the Law, and be not given by express Words in their *Commission*, that makes no difference.

For by the Rule of our Books, Authorities implied in Law, as well as those that are expressed, must be pursued.

WHERE a Letter of Attorney is made to deliver *livery* of *seisin*, the Attorney hath a two fold Authority.

AN Authority expressed in his warrant, and that is general to deliver *seisin*.

AND an Authority implied in Law, that is to deliver an actual and express *livery*, and not a *livery* in Law. N 4 And

AND therefore if the Attorney delivers *Seisin* within the View, though it be warranted by his express Authority; yet because he hath not pursued his implied Authority, the Act is void. And so it was resolved, *P. 3 Eliz. C. B. in Yarham's Case, Coke's Instit. Sect. 66.*

This then being their Authority,
*S. to grant the Mannor of Dale,
 and upon the Grant to reserve a
 Tenure in Capite.*

Now, how have they executed this Authority?

There are Letters Patents passed to A. and his Heirs, by Colour of the Commission, to be holden by Knights Service, as of his Majesty's Castle of Dublin.

HERE they have not pursued their Authority, for where by the Commission either a Tenure *in Capite* ought to have been reserved, or else the Tenure left to the Reservation of the Law, they expressly reserve a Tenure by Common Knights Service.

THAT the *Letters Patents*, as to this *Tenure*, (thus reserved) are void, it was agreed on all Sides.

But

But whether they should be only void to the Tenure, or whether the reserving of a Tenure, so divers from the Tenure intended, and warranted by the Commission, shall destroy the whole Grant, both for the Land and Tenure, was the Point, wherein they did differ.

4. And for the clearing of that they did enquire, what the Reservation of a Tenure is to the Grant?

Whether it be a Part of the Grant, and *Modus Concessionis*?

Or whether it be a distinct Thing, and *aliud* from the Grant as this Case is?

FOR if (as they that argued for the *Letters Patents* held) the *Reservation* of the *Tenure*, and the *Grant* of the *Land*, be *Aliud*, & *Aliud*, two distinct Things in the Consideration of the whole Grant made, and the Authority given by the said Commission, for the making thereof, then peradventure the Patent may be void, as to the *Tenure*, and yet good for the *Grant* of the *Land*.

BUT if the *Reservation* of the *Tenure* be incident unto the Authority, and included within it; and the *Reservation* of the *Tenure*, and the *Grant*

of

of the Land make up but one entire Grant; so that the one is a Part of the other, and the Reservation of the Tenure be *Modus Concessionis*, then the granting of the Land, reserving a diverse or contrary Tenure, to that which their Authority did warrant them to reserve, is a doing of *Idem alio modo*; and so the whole Act is void.

They held that the Reservation of the Tenure is Modus Concessionis, and that it is not Aliud, S. a thing distinct and separate from the Authority of the Grant of the Land, but impliedly included within it, and incident to it.

ALTHOUGH a Grant may be without *Habendum*, express *Tenendum*, *Reddendum*, or *Condition*; yet when they, or any of them, are added, they are *de modo Concessionis*, and do direct, and rule the Grant.

I. FOR the *Habendum*.

THE proper Office of the *Habendum* is to limit the Estate;

YET sometimes it may

1. Alter the Estate in the Premises.
2. Diminish or enlarge.
3. Give to a Stranger.
4. Make the Grant void.

I. IT

I. IT may alter the Estate in the Premises.

As where Land is given to Two in the Premises, *Habendum*, the One Moiety to the One, and the Other Moiety to the Other, by the Premises they have a joint Estate, the *Habendum* makes them *Tenants in Common*, *Litt. 66.* So where Land is given to two, *Habendum* to the one for Life, the Remainder to the other, By the Premises they should have a joint Estate in Possession. But the *Habendum* doth alter that, and maketh the one sole Tenant of the Freehold for Life, and the other sole Tenant of the Remainder; 8 E. 3. 320. Feoffments and Faits, 73.

2. IT enlarges or diminishes the Estate that would pass by Implication in the Premises, and so destroys the Implication; this is common in every Grant.

3. IT gives to a Stranger not named in the Premises of the Grant.

As

As if a Man gives Lands to *I. S.* *Habendum* with *A.* his Daughter in *Frank-marriage*, there the Wife not named in the Premises, by the *Habendum*, takes a joint Estate with her Husband. *This Case is vouched in Pl. Com. 158; to be in 4 E. 3: which being not found in that Year, it is there so left without any further reference, but you shall find it in 5 E. 3. 17. So Coke's Instit. Sect. 17. yet vid. 4 E. 3, 4.* So likewise where a Lease is made to *A. Habendum* for twenty Years, the Remainder to *B.* and his Heirs; here *B.* gaineth an immediate Freehold, by the *Habendum*, and yet he is not named in the Premises of the Deed. *Plowd. Com. 158.*

4. IT will make the Grant void.

As if I have a Rent in Fee, and I grant it to another, if I stay there, the Grant shall be for Life: But if I say further, *Habendum* after the Death of *I. S.* there all shall be void, *Plowd. Com. 152, 156.*

So if the King grants Lands by Letters Patents, *Habendum* from a Day to come, there the whole Grant is made void

void by the *Habendum.* 5 Coke 93. *Barwick's Case.*

HE in the Reversion for Life grants his Estate, *Habendum* after *Michaelmas*, and after *Michaelmas* the Tenants returns, yet Resolved that the Grant is void; though if there had been no *Habendum*, it had been good by the Premises of the Deed; *Buckler's Case, 2 Coke 55.*

IN all these Cases, the *Habendum* being void, makes void the Grants, which would have been good without it.

2. As the *Habendum* hath these several Operations in the Grant, so hath the *Reddendum.*

As an Estate by *Implication* shall be controlled by an express Limitation; so an implied *Reservation* shall be controlled by an express Reservation.

A Man makes a Lease rendring Rent, and does not say to whom the Rent shall be paid, this by *Implication* shall be to the Lessor, and his Heirs; but if the Words be to the Lessor, the Heir shall not have it, 31 H. 8. *Dyer 45, 12. E. 3. Ass. 86. Plowd. Com. 171. in Hill and Grange's Case; 10 E. 4. 18. & 21 H. 7, 25.*

THE

THE Reservation of a Rent in some Cases shall make Severance of the Grant, and make several Grants, and several Reversions.

AS if a Man makes a Lease of three Mannors, reserving twenty Shillings for one, five Pound for another, and twenty Pounds for the third; there are several Reversions, and there shall be several Avowries, 14 *Eliz. Dyer*, 308. *Winter's Case*, 9 *E.* 3. 12; 5 *Coke* 55. *Knight's Case*.

3. FOR the *Tenendum*.

THE proper Office of the *Tenendum* is to reserve the Tenure, and to toll the Tenure by Implication.

BEFORE the Statute of *Quia Emptores terrarum*, if a Man made a Feoffment, the Feoffee held of the Feoffor by such Services, as the Feoffor held over. But if other Services were reserved, then the Feoffee held by such Services as were reserved.

THAT the Donee in Taile shall hold of the Donor, as the Donor held over, is regularly true, if the Donor make no special Reservation, for then the special Reservation excludes the Tenure, which the Law would create. *Coke's Inst.* Sect. 19. *vid.* 34 *H.* 8. *Dyer* 52.

4. FOR

4. FOR the *Condition*.

THAT does likewise direct, and rule the Grant, the *Condition* does change the Quality of the Grant, and makes the Estate conditional, and defeasible, which otherwise would be absolute, and indefeasible.

So that all these, viz. the *Habendum*, the *Reddendum*, the *Tenendum*, and the *Condition*, are, *de modo Concessionis*, and do rule, and direct the Grant, the first Limits, and sets forth the Quantity, the other describes the Quality of the Estate.

AND of all these the *Tenendum* is inseparably annexed to the Estate, the rest may be determined, and yet the Estate continue, but the Tenure cannot be determined, as long as the Estate continues.

1. THE *Condition* may be released.
2. THE *Rent* may be released.
3. THE *Estate* may be enlarged.

BUT the Tenure cannot be destroyed, it may be transferred from one another, in Case of common Persons; but a Tenure in *Capite* cannot be transferred, or extinct by any Release, or Grant,

Grant, for it is an Incident inseparably annexed to the Crown.

Obj. It was *Obj.* that the Tenure is *Aliud* from the Land, for the Land is the Subject, and the Tenure belongs to the King.

Resp. To that, 1. it was *answered*, that the *Question* is not, whether the Tenure be *Aliud* from the Land; for 'tis clear the Land is one thing, and the Tenure another: But the *Question* is, whether the Reservation of the Tenure be *Aliud* from the Authority of granting the Land; or included in it, as *Modus Concessionis*; S. they shall grant, and grant in this Manner?

2. It was *answered*, both are the *King's*; but the Tenure was asleep by the Possession in the *King*, and it is now to be awakened by this *Commission*, in which it appears, that the Intent, and plain Meaning of the *King* was, to grant the Land to the Subject, and to reserve the Tenure for himself. And that the Tenure is not such a Stranger to the Land, it is proved by our Books, in *Mary Blage's Case*, 1 *H. 4. 2.* it is said, that Land lies naturally in Tenure: that Land lies always in Tenure, and therefore the Tenure is of the Nature of the Land, it arises out of the Land, and hath Existence

istence in the Land, it is inherent in it, and inseparable from it, it is upon the Matter of the Essence of the Grant of the Land; for no Grant of Land in *Feesimple*, to a common Person, either from the *King*, or a common Person, can be without a Tenure, either expressed, or implied: We have not in our Law properly *Allodium*, that is, any Land in the Hands of a Subject, that is not holden, *Coke's Instit. Sect. 1.*

THE Lands only that are in the *King's* Possession are free from Tenure, for a Tenant is he that holdeth of some superior Lord, by some Service, and therefore the *King* cannot be a Tenant, because he hath no Superior but God. *Prædium domini Regis est directum dominium cujus nullus est Author nisi Deus.*

AND as *Bracton* saith, *lib. 1. cap. 8.*

Omnis quidem sub eo, & ipse sub nullo, nisi tantum sub Deo.

Vid. lestatute. 16 R. 2. c. 5. 14 Eliz. Dyer 313. 1 Coke 47. vid. 8 Coke 118. where it is said, that it would be against common Right and Reason, that the *King* should hold of any, or do Service to any of his Subjects; and therefore some have thought it not so proper, in the *King's Case*, to say, that he is seized *in dominico suo ut de feodo.*

O
Cowell

Cowell Interpret. verb. feudum & Institut. p. 66. as if *feodum* or *feudum* were taken in our Law, as it is in the *Feudal Law*, only for Lands held by Services.

BUT with us it hath another Signification, *Littleton* tells us, *feudum idem est quod hæreditas*; and so it was defined, long before *Littleton*, by *Bracton*, and *Briton*, and *Fleta*.

AND in Truth it hath two Significations in our Books; in the first, it is taken to be the same with an Inheritance, and so it is proper enough in the *King's Case*.

IN the other it is taken for Lands held, as in that of *Hors de son fee*.

We find both in *Bracton*, lib. 4. cap. 9. fol. 263. *Feudum est quod quis tenet ex quacunque causa sibi & hæreditibus suis, &c. & alio modo dicitur feudum, quod quis tenet ab alio sicut dicitur talis tenet de tali tot feuda per servicium militare.*

AND agreeing with him is *Fleta* (which for the most part is transcribed out of *Bracton*) lib. 5. cap. 5.

AND here just Occasion might be taken to clear our Master, *Littleton*, from that Imputation which is cast upon him, by the Author of the *Common Wealth of England*, pag. 127; where

where he lays Ignorance to his Charge, for saying, that *Feodum idem est quod hæreditas*, which (says he) it doth not signifie in any Language.

IT were easie to make it manifest, how proper that Sence is; but because it hath partly appeared, by that which hath been said, and for that the Author of that Book is not known; for some have doubted, whether *Sir Thomas Smyth* be the Author of it, or no, *Sir John Fernes's Generosity*, pag. 99. and so to argue with him, would be to fight with a Shadow, therefore they did abstain.

SO that it is clear, that only Lands in the *King's Possession* are free from Tenure; but if they once come into the Hands of a common Person, there if the Feoffor do not reserve a Tenure, the Law will.

BEFORE the Statute of *Quia Emptores Terrarum*, if a Man made a Feoffment in Fee, and reserved no Tenure; the Law did imply a Tenure, and the Feoffee held of the Feoffor, by such Services as the Feoffor held over.

UPON a Feoffment made after that Statute, if no Tenure were expressed, the Law will imply a Tenure *de Capitalibus dominis*.

AND as it is in the Case of common Persons, so in the *King's* Case; in every Grant wherein Fee-simple passes, there must be a Tenure either expressed, or implied.

OF such Necessity is the Reservation of a Tenure in the *King's* Grant, that although the *King* should grant Land without any Reservation of Tenure, or by express Words, *absque aliquo inde Reddendo*, yet the Law would create a Tenure in *Capite*, 33 *H.* 6, 7. 6 *Coke* 7. *Wheeler's* Case, 9 *Coke* 123. *Anthony Lowe's* Case.

14 *H.* 6. 12. *The Abbot of St. Bartholomew's* Case. The *King* grants Lands in Fee, *Tenendum cy Frankement come le Roy est en son Corone*, yet the Patentee shall hold in *Capite*, for it is vested in the *King* by his Prerogative, and cannot be extinct.

IT is so inseparable, it cannot be released. In *Anthony Lowe's* Case, the *King* grants, or releases the Services to his Tenant, and his Heirs, this Release cannot extinguish the Tenure in all, though where the Tenure is by Common Knights Service, or Socage, it extinguishes all the Services; but that only, which is an Incident inseparable to every Tenure, *viz.* Fealty, and all for this Reason, *Because there is a necessity*

cessity of a Tenure, and the *King's* Charter doth not alter the Law; the Tenure and Services are Part and Parcel of the Mannor, and shall go with the Mannor, and descend as the Mannor, to the Heir of the Part of the Mother, although it be newly created, 5 *E.* 2. *Avowry* 207.

BESIDES, consider the Tenure in the Commencement, and Fruits of it, it is ever inherent in, and Relative to the Land.

THE Commencement of the Tenurer S. the Form of doing *Homage* and *Fealty* is, that he shall be faithful and true for the Land that he holds.

THE Fruits of the Tenure, what are they? But the Profits of the Land, Wardship, Livery, Primer Seisin, Relief, fine for Alienation, and the rest.

AND therefore where the Land and Signiory meet in an equal Estate, and Right, in the same Person, the Signiory by Unity of Possession is extinguished, and there are two Reasons given of that Extinguishment.

1. Because the Signiory that was first extracted out of the Land, when it comes to the Land again, it is naturally extinct, for it is *Revolutio ad materiam primam*.

2. HE that hath all the Profits entirely, cannot be said to have part of the Profits. Sir J. Davy's Rep. 5.

THE Escheat, which is the last Resort of the Tenure, is the Land it self, and therefore the Reservation of the Tenure cannot be said, to be a distinct thing from the Grant of the Land, as *Black-acre* from *White-acre*.

Obj.

IT was objected, That *Tenures in Capite* were brought in by the *Conquest*, but Grants were by the Common Law; then if Grants have been ancients than Tenures, the Tenure of Necessity must be *aliud* from the Thing granted.

To prove that this Tenure was brought in by the *Norman Conquest*, *Selden* was cited in his *Spicileg.* to *Eadmer.* p. 194. where he hath that out of *Braeton de Acquir. rerum domin. lib. 2.*

Forinsecum servitium dicitur Regale servitium quia spectat ad Dominum Regem, & non ad alium, & secundum quod in Conquestu fuit ad inventum.

Resp.

IT was answered, that M. *Selden* in that Place does barely recite the Words of *Braeton*, not delivering any Opinion of his own:

FOR in that Book, cited pag. 170, and in his *Titles of Honour*, the last Edition, pag. 612. we find that he was
of

of another Opinion; and that this Tenure was in Use in *England*, in the Times of the *Saxons*.

WHAT were those *Thani Majores*, or *Thani Regis* among the *Saxons*? But the King's immediate Tenants of Lands, which they held by Personal Service, as of the King's Person by Grand Serjeanty, or Knights Service in *Capite*.

THE Land so held, was in those Times called *Thainland*, as Land holden in Socage was called *Reveland*, so frequently in *Domes-Day*. *Hec terra fuit terra Regis Edwardi Thainland, sed postea conversa est in Reveland.* *Coke's Instit. Sect. 117.*

AFTER some Years that followed the coming of the *Normans*, the Title of *Thane* grew out of Use, and that of *Baron* and *Barony* succeeded for *Thane* and *Thain-land*.

WHEREBY we may understand the true and original Reason of that which we have in the Lord *Cromwell's* Case, 2 *Coke* 81. That every *Barony* of ancient time was held by *Grand Serjeanty*; by that Tenure were the *Thain-lands* held in the Time of the *Saxons*, and those *Thain-lands* were the same that were after called *Baronies*.

IT is true the Possessions of *Bishops* and *Abbots* were first made subject to *Knights service in Capite* by *William* the *Conqueror*, in the *fourth Year* of his *Reign*, for their Lands were held in the Times of the *Saxons*, in *pura & perpetua Eleemosyna*, free, *ab omni servitio seculari*.

BUT he then turned their Possessions into Baronies, and so made them Barons of the Kingdom, by Tenure; so that as to them, this Tenure and Service may be said to be *in Conquestu adinventum*: But the *Thain-lands* were held by that Tenure before.

As the King's *Thane* was a Tenant in *Capite*, so the *Thanus mediocris*, or *middle Thane*, was only a Tenant by Knights Service, that either held of a mean Lord, and not immediately of the King, or at least of the *King*, as of an *Honour*, or *Mannor*, and not in *Capite*.

WHAT was that *Trimoda Necessitas*, which so often occurs in the Grants of the *Saxon* Kings, under this Form, *Exceptis istis tribus Expeditione, Arcis & pontis exstructione?* (See it in a Charter of King *Etheldred* in the Preface to *Coke's 6 Report*, &c.) but that which was after expressed by *salvo forinseco servitio*; *Bracton*, *lib. 2. cap. 26. &*

35. 12 *Edw. 1. Gard. 152. 26 Ass. 66 Selden Analect. Anglobrit. 78.*

AND therefore it was said that *Sir Henry Spelman* was mistaken, who in his *Glossary verbo Feudum*, refers the Original of *Feuds* in *England*, to the *Norman Conquest*.

IT is most manifest, that *Capite Tenures*, Tenures by *Knights service*, Tenures in *Socage*, *Frankalmoigne*, &c. were frequent in the Times of the *Saxons*.

AND if we will believe what is cited out of an old *French Customary* in a *Mss. Treatise of the Antiquity of Tenures in ENGLAND*, which is in many *Mens Hands*, all those Tenures were in use long before the *Saxons*, even in the Time of the *Britains*, there it is said; the first *British* King divided *Britain* into four Parts,

AND gave one Part to the *Archflammes* to pray for him, and his Posterity,

A Second Part he gave to his Earls and Nobility to do him *Knights service*.

A Third he divided among Husbandmen, to hold of him in *Socage*.

THE Fourth Part he gave to Mechanical Persons, to hold in *Burgage*.

BUT

BUT that Testimony was waved, there being little certainty, or Truth in the *British Story* before the Times of *Cæsar*. Neither would they make use of that, which we are taught by *William Roville* of *Alençon* in his *Preface* to the *Grand Customier* of *Normandy*, That all those *Customs*, (among which these *Tenures* are) were first brought into *Normandy* out of *England* by *Edward the Confessor*.

BESIDES that which hath been said, we find *Feuds*, both the Name and Thing in the Laws of those Times, among the Laws of *Edward the Confessor*. *Cap. 35*, where it is thus provided.

*Debent enim universi liberi homines.
&c. secundum feodum suum, &
secundum tenementa sua: Arma
habere, & illa semper prompta
conservare, ad tuitionem regni, &
servitium Dominorum suorum,
&c.* *Lambard Archaionem 135.*

THIS Law was after confirmed by *William the Conqueror*, *vid. Cokes inst. Sect 103.*

As these *Tenures*, were common in those Times, so were all the fruits of them, *Homage, Fealty, Escuage Reliefs, Wardships.*

FOR

FOR *Reliefs*, we have full Testimony in the *Reliefs* of their *Earls*, and *Thanes*, for which, see the Laws of King *Canutus cap. 68, & 69.* the Laws of *Edward the Confessor, cap. de Heterochijs*, and what out of the *Book of Domes-Day*, *Coke* hath it in his *Instit. Sect. 103. Campden in Berkshire, Selden in Eadmer, 154.*

THAT *Wardships* were then in use, and not brought in by the *Normans*, as *Camden* in his *Brit. 179.* Not by *Hen. 3.* as *Randolph Higden* in his *Polychronicon*, and others (not understanding him) would persuade, *vid. Selden's Notes on Fortescue. 51.*

AMONG the *Privileges* granted by *Edward the Confessor* to the *Cinque-Ports*, we meet with this, that their *Heirs* shall not be in *Ward*. *Lambard's Perambulation of Kent. 101.*

AND in the *Customs* of *Kent*, which are in the *Magna Charta* of *Tottells Edition*, and in *Lambard's perambulation*, There is a *Rule* for the *wardship* of the *Heir* in *Gavel-kind*, and that he shall not be *Marryed* by the *Lord*. And those *Customs* say of themselves, that they were, *Devant le Conquest, & en le Conquest.*

FOR the *Antiquity* of *Wardships* in *England*, and *Scotland*, see also *Hect. Boet.*

Boet. lib. II Buchanan rerum Scot. lib. 6. and the Laws of Malcolme 2. which prove the Antiquity of Wardship in Scotland, and therefore in England; before the Norman Conquest; for in those Times it is probable, the Laws of both Nations did not much differ, as for the Times after, it appears they did not by comparing their Regiam Majestatem, and our Glanvill. Neither is the bare Conjecture of Sir Hen. Spelman sufficient, to take away the Force of those Laws, vid Spelman Glosar. verbo Feudum.

UPON all this they did conclude, *That upon consideration of the Authority given, and Grant thereupon made, the Reservation of the Tenure cannot be said to be aliud. S. a separate and distinct thing from the Authority of granting the Land, but rather included within it: And that the reservation of the Tenure, though it be not ipsa concessio, the Grant it self, yet it is Modis concessionis, and a part of the Grant, and that therefore the Authority being not pursued in that, the whole Grant is void.*

5. And so it was resolved, for these Reasons, and upon these Authorities.

I. THE

I. THE *Main and Principal Reason*, why they did Resolve that the Letters Patents were void in the whole, was, *because that here the Commissioners had but an Authority, and that Authority they have not pursued.*

BY the *Commission* they were to Grant the Lands, and to reserve a Tenure in *Capite*, or to leave the Reservation to the Law; now there is a Tenure by common *Knights service* reserved, so they have executed their Authority *in another manner*, than the Commission warrants, they have done *Idem alio modo*, and therefore by the Rule of the Books before cited, the whole grant is void.

IT was agreed by all, that if the Commissioners here had granted the Land, Reserving a Tenure in *Capite*, the Patent would have been good, and effectual, or if they had granted the Land, and reserved no Tenure, there because the Law in that Case would raise a Tenure in *Capite*, such a Grant would have been good, and well warranted by the *Commission*:

2. THIS *Commission* is a *nude Authority*, for the Interest is in the King, and the Commissioners have only a bare Authority to grant, and therefore it ought to be pursued most strictly,
both

both in *matter* and *manner*, and the execution of it is to be expounded strictly.

THIS Answers all the Cases that have been put on the other Side, where an Authority in some sort may be executed *alio modo*, and yet good, as the Case of *Stanton* and *Barnes*, where by Custom the Lord might grant *Copyholds* in Fee, and he grants a lesser Estate simply, or a lesser Estate with a remainder over; and the other Report, that hath been cited between *Downes* and *Hopkins*, where the Custom was to grant *Copies* for two Lives, and he grants to the Husband for Life, and after to the Wife *durante viduitate*; The Case of *Hatt* and *Arrowsmith*, where a *Copy-holder* for Life was licensed to make a Lease for Years *si tam diu vixerit*, and he makes a Lease absolutely, without that limitation. The Case of *Baron & Feme* making a Lease upon the *Statute* of 32 *H.* 8. The Case of 3 *H.* 7. where upon a License to grant an Annuity, he grants it with Clause of *Distress*; and yet for that Case, see the Case of *Sutton's Hospital.* 10 *Coke.*

THE Case of *Priddle* and *Napper*, and all the other Cases that have been put upon this Ground.

FOR

FOR in all those Cases there is an Interest coupled with the Authority, and therefore they are not to be compared to this Case, in which there is only a meer and a bare *Authority*.

THIS Commission is a publick *Authority of Record*, to which the Subjects may resort, and of which they ought to take Notice, to pass according the Commission at their Peril. And therefore if either through Ignorance or Carelesness, or otherwise they neglect to have their Patents drawn pursuant to the Commission, the fault is their own, they cannot transfere the blame of this to the King, as in like Case it is resolved, upon the Commission of *Bankrupts*, 2 *Coke* 26. So at the Common Law, a Patent without recital of a Lease for Years of *Record*, is void, for the Subject may resort to the publick Record; the King intends *Ardua Regni*.

This answers the Objection, touching even that *Honour* of the *King*, that hath been spoken of, and clears his performance of his Part in this Case.

FOR the King in Favour of his Subjects of this *Realm*, hath granted a good and gracious, and effectual *Commission*, upon which many legal and good, and effe-

effectual *Letters Patents* have been made, that have been allowed and approved for good.

BUT if upon this Commission so good, and gracious for the Subject, the Subject shall contrary to the Authority given by the Commission obtain *Letters Patents*, in Fraud, and Deceit of the *Crown*, to defeat the King of his Tenures in *Capite*, a principal Flower of his Crown, if these *Letters Patents* be void, where's the Fault? Certainly in the Subject, that contrary to the Authority of the Commission, obtains this Grant in deceit of the King, to defeat him of his Tenure, which was but an ill return for so great and gracious a Bounty; and that *Objection* of the Operation of Law, answers not the intention of the Party in this Case, for plainly and apparently, the meaning of the Patentee was to suppress the King's Tenure in *Capite*, and to hold by a mean and inferiour Tenure, which was contrary to the Authority of the Commission, and in deceit and prejudice of the King.

Now that *Patents* obtained in deceit and prejudice of the King, are clearly and wholly, and utterly void, to all intents and purposes, is a Ground so obvious, so positive and infalli-

bly

bly true; that they would not cite any Book, or Authority to prove it, for it is marvellous clear, and granted of all sides, that *Patents* obtained in deceit, and prejudice of the King, are altogether void.

IF any desire an Authority, he may have a Cloud of Authorities, in the Case of *Alton Woods. Coke 1 Report.*

This is an Authority appearing within the Body of the Record, of the Letters Patents themselves; for the Letters Patents are ex Assensu of such and such Commissioners virtute & secundum intentionem Commissionis, &c.

Now the Tenure in *Capite* being as strongly implied in the Commission, as if it had been confessed of the other part) for it is upon this *implication*, that they say the Patent is void for the Tenure, it is as much as if the King had given Commission to grant the Land, to hold in *Capite*, and not otherwise.

Now in so much as the Commissioners have granted the Lands, in other *Manner* (and all this appears within the Body of the *Record* of the Letters Patents themselves) the Patent is void in the *whole*, for Construction is to be made upon the whole Patent, and not upon any Part of it distinct, as is resolved in *Buckler's Case. 2 Coke*

55.

P

AND

AND this hitherto hath been always the constant Resolution of all the *Judges of Ireland*, our Predecessors, That if upon Letters of *Warrant*, or *Commission*, Letters Patents be made v^rying in any Point material, from the *Warrant*, or *Commission*, (and all this appears within the Body of the Letters Patents themselves) that the Letters Patents are all utterly void. And this hath been ever agreed upon by reason of the difference between the manner of passing of Letters Patents in *England* and *Ireland*.

BUT where the *Warrant* or *Commission*, and the variance do not appear within the Letters Patents, how it shall be aided for the King by *Averment*, or otherwise hath been some doubt, and *Question*.

5. *Although that it be true, that this Commission is of a vast and large extent, yet it is not boundless, for the Law always bounds, and circumscribes these ample Authorities with reasonable and equal constructions, without prejudice to others, as it was resolved upon the Commission of Sewers, upon which we have the reported Cases in 5 Coke 99. Rooke's Case, & 10 Coke 138.*

THIS Commission of *Sewers* gives Power and Authority to the Commissioners

sioners, to proceed according to their *Wisdoms* and *Discretions*, which is a most ample Power, yet the Law does bound and circumscribe it with an equal Construction. S. that their proceedings ought to be bounded with the Rules of *Reason*, *Law* and *Justice*, and that their Taxes be equal, and that all Persons that be Subject to the danger or receive benefit by the Reparation, be contributory to a rateable and equal contribution of the Charge, and if they do otherwise, their Ordinances are void, and they cannot make new inventions, as *Artificial Mills* for casting out of *Water*, &c.

FOR these general *Commissions* are all accompanied in Law with an equal and reasonable construction for the execution of them.

So this *Commission* is a most ample and large *Commission* for the securing of the Estates of the Subjects in their Lands, but yet it ought to be so executed according to Law, Reason, and justice, that they do not prejudice the King in his Tenures, contrary to their *Warrant*.

6. *Because that this reservation of a mean Tenure, is in other manner than the Authority warrants, and to the damage and prejudice of the King.*

IF the Commission were, to grant an Estate for Life, and they grant an Estate for *tail*, or if the Commission were to grant in *tail*, and they grant in *Fee*, all the Patent is void, because they do it in *other manner* than the Authority warrants, for the *habendum* is *Modus Concessionis*.

IF they reserve another Rent than is warranted by the Commission, or parcel an entire Rent, where the Rent in Charge ought to be reserved, although that it be several upon the survey, yet the whole Patent is void; because that they do it in *other manner* than the Authority warrants, for the *Reddendum* is *modus Concessionis*.

WHY then shall it not be the same Reason in this Case, for here they reserve another Tenure than that which is warranted by the Commission, and therefore they have executed their Authority in *other manner* than the Authority warrants, for the *Tenendum* also is *Modus Concessionis*.

IT was granted by them that argued on the other side, that if it be prejudicial to the King, the whole Patent shall be void.

Now it is most apparent, that this implied Tenure (if it be admitted) will be greatly prejudicial to the King, for the

the King shall lose his Tenure, and the Fruit of his Tenure, in most Cases for ever, and in all Cases for a long Time; and neither the *Master*, nor the *Attorney* of the Court of *Wards* can help it.

And for that the course of Patents here in *Ireland* was observed,

FIRST, the Commissioners give Warrant for drawing of the Patent, and the reservation of this mean Tenure, the King's Council draw the Patent accordingly, and so it passes the Signature of the Lord *Deputy*, the privy Signet; and the great Seal, then it is enrolled in the Chancery. All this while it is taken according to the Tenure expressed in the Patent, when it is enrolled, it is transcrib'd into the *Exchequer*, and the transcript delivered into the *Exchequer*, by the *Master of the Rolls*, the Lord Chief *Baron* receives it, and delivers it to the second *Remembrancer*, and he puts it in charge according to the Tenure expressed; the *Escheator*, and *Feodary*, inform themselves of the King's Tenures there, where if they make enquiry, the Patent is produc'd, in which an express Tenure is reserved, they cannot Judge the contrary, and so it passes according to the express Tenure: And so have the Let-

ters: Patents now in Question passed, and the King by colour of them, hath lost the Profits of the Land, and the benefit of the Tenure.

7. *The express reservation in the Letters Patents excludes the reservation, and implication of Law*, although (as in the Case in question) it tend to make void the whole Grant, it is a sure Rule in Law, *expressum facit cessari tacitum*. If the King upon his Letters Patents reserve no Tenure, it shall be a *Capite* Tenure, but if another Tenure be expressed, that shall prevail. 33. H. 6. 7. per prifot.

IN *Wheeler's Case*. 6 Coke. 6. Where in a Patent the Words of the *Tenendum* were, *Tenendum de nobis per servitium unius Rosæ, pro omnibus servitijs*.

It was objected, that the Tenure as it is expressed cannot stand, for that no Tenure can be without fealty, and the Words are *per servitium unius Rosæ, pro omnibus servitijs*.

2. It was objected, that in Case where no Tenure is reserved, or in Case where it is expressed to be *absque aliquo inde Reddendo*, the Tenure shall be *Knights service in Capite*.

AND therefore it was argued, that the Tenure in the principal Case, must needs be a *Capite Tenure by Knights service*,

service, and that the Tenure expressed, should be void, and give place to the better Tenure for the *King*.

THESE are strong objections, yet resolved in respect of that favour that is given to express Reservations, that in the said Case, fealty (that is an incident to all services) shall be admitted to stand with the Words, and then the Tenure expressly reserved was so common that it might well exclude the *Knights-service* Tenure, which otherwise the Law would have implied.

HEREBY may appear the Favour that is given to express Reservations, and Tenures, that thereby a Tenure *in Capite* by *Knights service* shall be excluded, a Tenure which shall arise where nothing is Reserved, which shall arise, though the Words be, *absque aliquo inde reddendo*. vid. Sir John Molins Case. 6. Coke 5.

It is agreed on the other side, that where the express Tenure is good, there it controuls the implied Tenure, but in our Case it is void.

AND where a Tenure is expressed void, a Tenure by *implication* of Law may arise.

BUT it was resolved, that *although the express Tenure be void, yet no Tenure by Implication of Law, shall arise against*

against the express Reservation; and so in the Case of a void *Habendum*, which stands upon the same Reason, it was adjudged in *B. R.* between one *Hegge* and *Crosse*, 33 & 34 *Eliz.* which you may see in *Buckler's Case*, 2 *Coke* 55. where the Case was.

TENANT for Life makes a Lease for Years, and after grants the Reversion to *A. Habendum* from a Day to come for Life; after the Day the Lessee for Years attorns, in that Case the *Habendum* is void, yet that void *Habendum* makes void the whole Grant, and excludes the Implication of Law in the Premises, and no Estate shall pass by Implication of Law in the Premises, against the express Limitation of the Party in the *Habendum*: See the Cases cited before.

So our *Tenendum* although it be void, yet the express Reservation in the *Tenendum* shall exclude the Implication of Law.

FOR that Opinion of *Martyn*, in 4 *H.* 6. 22. that was cited on the other Part, that if Land be given in *Frank-marriage*, reserving a Rent, the Reservation of the Rent is void, by Reason of the implied Tenure in *Frank-marriage*; that Opinion (as was said) may well be doubted of, for we find as good

Au-

Authority against it, in *the Old Tenures*, fol. 211. That the Reservation of the Rent is good, and destroys the *Frank-marriage*, and makes it a common *Estate taile*: But the best Opinion is, that both of them shall stand together, S. the Gift in *Frank-marriage*, and also the Reservation of the Rent, S. that the Donee in *Frank-marriage* shall hold quit of the Rent, until the Fourth Degree be past, and then the Rent shall take effect, and so was the Opinion of the Judges, in *Webb* and *Potter's Case* in 24 *Eliz.* and so are the Books to be understood; 13 *E. 1. Formedon.* 63. 31 *E. 1. Taile* 31. 26 *E. 3. Grants* 75 & 26. *Aff.* 66.

FOR the Case of *Littleton* 140. a Man seized of certain Tenements, which he held of his Lord by *Knights service*, at this Day grants by License the same Tenements to an *Abbot*, in *Frank-almoigne*, the *Abbot* shall hold immediately by *Knights service*, of the same Lord, of whom his Grantor held, and shall not hold of his Grantor in *Frank-almoigne*.

IN that Case (they say) the express Tenure being void, a Tenure by Implication of Law does arise.

IT was answered, There is a difference between the King's Case, which is

is the Case in Question, and the Case of a *common Person*.

FOR the Grants of a common Person, the Rule of Law is, that *the Grant shall be taken most strongly against the Grantor*.

FOR the King's Grants, the Rule is, that *they shall be taken most beneficially for the King, and most strong against the Patentees*.

AND we have another Rule, that *the Grant of the King shall not be extended to pass any thing, contrary to the Intent of the King expressed in his Grant; and if the Grant cannot take effect, according to his Intent expressed in his Grant, the Grant is void*.

AND therefore, for the Rules put by them that argued on the other side, that *the Patents of the King shall be taken in such Sense, and in such Intent, that they shall be good, &c.*

It may be answered, that there is another Ground in our Law, that *when the King is deceived in his Grant, so that it cannot take effect, according to his Intent expressed in his Grant, the Grant is void*; so the best Exposition is, to make all these Rules to agree together.

AND

AND therefore the Rules put on the other side, are true with this Limitation, *S. Except the King be deceived, so that his Grant cannot take such Effect, as he intends by his express Grant*.

IN the Lord Lovel's Case, 18 H. 8. B. Pat. 104. The King *ex certa scientia, & mero motu*, grants Lands to one, and to his *Heirs Males*, if a common Person had made such a Grant, the Law would say, that the Word *Males* were void, and the *fee simple* should pass: But will the Law make such a Construction in the King's Grant? No, there the Grant shall be void, for he was deceived in his Grant, in that it cannot take Effect according to his Intent expressed in his Letters Patents.

AND so in the Case of 7 H. 4. 42. & 21 E. 3. 47. The *Earl of Kent's Case*; if the King hath a Ward of Land, or Lease of Land for Years, and by his *Letters Patents* grants the Land to another and his Heirs, the Grant is void, and it shall not amount by Construction, to a Grant of his Estate, or Interest. *Vid. 21 Ass. 15.* And the other Books cited in the Case of *Alton Woods* upon this Ground.

29 Eliz.

29 *Eliz.* in the *Exchequer*, the Case was, King *H. 7.* was seized of two Mannors, *S. de Ryton & Condor*, he grants *ex certa scientia & mero motu totum illud manerium de Ryton & Condor*, adjudged that the Grant was void.

THE like Case was resolved 39 *Eliz.* where the Queen was seized of the Mannors of *Millborne and Saperton*, in the County of *Lincoln*; and the Queen grants *ex certa scientia, & mero motu, totum illud Manerium de Millborne, cum Saperton in Com. Linc.* and it was held that neither of the Mannors did pass; and if a common Person had made such Grants, the *Grantee* in both the said Cases should have had both the Mannors.

So in our Case, the King is deceived in his Grant, in that his Grant cannot take effect, according to his Intention therein expressed; for the King's Intention is to make a Grant agreeable in all things, to the Authority given to the Commissioners, by the said Commission.

AND that appears plainly by the very Words of the Letters Patents, for the Words are, *Sciatis quod nos &c. virtute ac secundum intentionem & effectum of the said Commission, Dedi-*
m. 15

mus & Concessimus, &c. as in the Patent; and he conceived that the Warrant made by the Commissioners, for passing the Patent (which here we call the *Fiant*) had been according to the Intent, and Effect of the said Commission: And upon that *Warrant*, which exceeded the *Authority* given to the *Commissioners*, this *Patent* was past, yet still with reference to the Intention and Effect of the *Commission*.

Now this Grant cannot by any Possibility take effect according to the King's Intention therein expressed, for the King's Intention in the Beginning of the Grant is, that it shall be according to the Intention, and Effect of the Commission, which must be a Tenure by *Knights service in Capite*, either by express Reservation, or by Implication, and Operation of Law. And the Tenure reserved in the Patent, is a Tenure by *Common Knights service*, as of the Castle of *Dublin*, differing altogether from the Intention, and Effect of the Commission, so as it is not possible, that this Tenure expressly reserved, can be according to the Intention and Effect of the Commission; or that the Intent and Effect of the Commission can any ways accord

cord with the Tenure expressly reserved in the Patent.

So as it is very plain and manifest that the King is deceived in this Grant, and that it cannot take effect according to his Intention therein expressed.

FOR *the Authorities* on which their Resolution was grounded.

THE principal Case was that of 12 *Aff.* 24. which (as it was said) was a *Judgment* in effect in the Point; a *Judgment* in time, when the Law was as flourishing, and the *Judges* as learned, as in any time either before, or since; a Judgment approved in all Ages subsequent, 26 *Aff.* 39. 11 *H.* 4. 3. &c. and no *Authority* in all our *Books* against it, for the material *Cases* that have been put on the other side, are of *Authorities* accoupled with an Interest, and by Consequence do not come to the Point in Question.

AND we see that the *Authority* of this *Judgment* is so great and clear, that it is confessed by them that argued on the other part; but the reason of the Judgment given by the *Judge*, that gives the *Judgment* is deny'd; S. *pur ceo que il fait ceo en autre manner*, and a new Reason is invented; S. *because he does not pursue his Authority*.

HERE

HERE we find them put to a Straight; S. to confess the Judgment, and deny the Reason; for who better knew the Reason of the *Judgment*, than the *Judge* that gave it? This new Reason, S. *That he hath not pursued his Authority* if he be examined, will come to the first Reason; for if it be demanded, why it hath not pursued his Authority, it must be answered, *Pur ceo que il ad fait ceo en autre manner que le authority soy garrant*, which is the Reason of 12 *Aff.*

BUT we have other Authorities in the Point, upon the same Reason, that of 10 *H.* 7. 15. which hath been remembered, *per Keble*, the most Learned Lawyer of that time, *Quant home ad authority de faire ascun fait a un autre, il doit pursuer son authority, en matter, & en forme*, there is *Modus concessionis*, and by the Case that he there puts, if he does it in other Form, *alio modo* it is void.

IF I *enfeoffe* a Man, to *enfeoffe* another, and he levies a *fine*, this is void, yet the matter in *substance* is the same, for a *fine* is but a *feoffment* of *Record*; but because that he hath done it *in other manner*, all is void.

11 *H.* 7. 13. A Letter of *Attorney* to make *Livery* to *I. S.* or *I. N.* and the

the Attorney makes Livery to both, the Livery is void in all, and it is not good as to the one, and void as to the other, but void in the whole, *because* that he hath done it in *another manner, than the Authority warrants.*

8 Coke 85. In Sir Richard Pexhall's Case, If the the King licenses his *Tenants*, to alien two Parts of his *Mannor* of *Dale*, which is held *in Capite*, and he aliens all the Mannor, it is void in the whole; and it is not good for two Parts, and void for the third; and the *Reason* is, *because he doth it in other manner than the License Warrants.* Vid. 10 H. 7, 13, 38 H. 8. Dyer 62. 40 Aff. 38. 10 H. 7, 15.

THERE was a *Report* cited by the Chief Justice of the *Common Pleas*, and the Chief Baron; the Case was in *C. B.* in *England*, *T. M.* 2 *Caroli*, between *George Bishop* of *Chichester*, Plaintiff, and *John Freeman*, Defendant. *Intr. Pasch.* 1 *Caroli.* Rot. 207. and the Case was this:

THE Bishop of *Chichester* was seized in Fee (in the Right of his Bishoprick) of *Allingburne-Park*, in the County of *Sussex*; and he, and his Predecessors have anciently granted the Office of Keeper of his Park for Life, with the Fee of five Marks.

Anthony,

Anthony, Bishop of *Chichester*, 2d *February*, 44 *Eliz.* by his Deed, granted the Office of Keeper of the Park to one *Freeman*, for Life, *Et ulterius concessit pro executione officij predicti*, the ancient Fee of five Marks, *una cum*, a Livery-Coat, or thirteen Shillings four Pence for it, *Nec non pasturam pro duobus equis, una cum* the Wind-falls, which *Grant* was confirmed by the *Dean* and *Chapter*.

AND *whether* this *Grant* was good against the Successor, or void, upon the *Statute* of *Anno.* 1 *Eliz.* *Cap.* 25. was the *Question*.

IN which the doubt was, whether this Addition of a livery Coat, Pasturage and Windfalls will make the whole *Grant* utterly void, or if the Law shall make such a Construction, that for this *addition* it shall be only void, and shall stand good for the other; which was the ancient fee, and well granted.

AND by Justice *Crooke* and *Harvy*, against *Yelverton*, the *Grant* is void in the whole, *because*, that the *Bishop* hath not pursued the *Authority* given him by the *Statute*, by reason of this express and new addition, and yet they profess, that they rather had given *Opinion* for the defendant, for that he was a Poor Man, and an ancient Servant

Q
to

to the *Bishop*; and yet in this Case, the *Addition* and new *Augmentation* is a several, and distinct *Clause* in the Grant, and the things added *de novo*, are also several and distinct *in specie* from the ancient Fee of five *Marks*.

AND in the Argument of this Case, Justice *Crooke* cited a far stronger Case to be adjudged in the Case of the *Archbishop* of *Canterbury*. 43 *Eliz.* And the Case was this.

Parker Archbishop of *Canterbury* granted the Office of *surveyorship*, with the ancient Fee, to one *Parker*, *Et ulterius* he granted unto him *pasturam pro duobus equis* in the Park, and the whole Grant was adjudged void, and yet here was a several Grant, by a several and distinct *Clause*, and of another thing, several and distinct *in specie, aliud & aliud*.

AND these Cases are far stronger than the Case in *Question*, for here there is not a bare *Authority*, but an Interest accoupled with an *Authority*.

AND in this Case Justice *Crooke* cited *Scambler's Case*, 41 *Eliz.* to be adjudged, that the whole Grant was void and not good as to the Man of full Age and void as to the *Infant*, as it hath been cited by some that argued on the other side.

AND

And so upon the whole matter they did resolve.

1. THAT the Commissioners by this Commission, have a good, and legal, and sufficient Power and Authority to grant.

2. THAT all Letters Patents made upon this Commission, in which they have pursued their Authority, are good and effectual in Law. *S. where they have either reserved an expresse Tenure by Knights service in Capite, or no Tenure, for there the Law implies a Tenure in Capite.*

3. BUT where the Commissioners reserve a mean *Tenure*, the whole Patent is void.

1. *Because, that the Commissioners have but an Authority.*

2. *Because, that this is but a Nude Authority, and not accoupled with any Interest.*

3. *Because, it is a publick Authority of Record, whereof the Subjects ought to take notice, to pass according at their Peril, otherwise the Patent shall be in deceit of the King.*

4. *Because, that the Authority appears within the Letters Patents themselves, and exposition shall be made upon the whole Patent.* Q 2 Al.

5. *Although it be a most ample and large Commission, yet it is bounded and circumscribed by the Law, with an equal Construction; So that nothing shall be done in other manner than the Authority warrants in prejudice of the King.*

6. *Because that this reservation of a mean Tenure, is in other manner than the Authority warrants, and is in damage and prejudice of the King.*

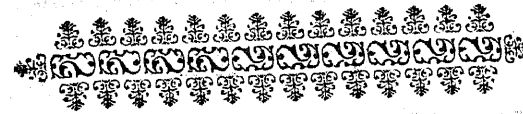
7. *And lastly, because that this express reservation controuls the implication of Law; and for that the King was deceived in his Grant, in that it cannot take Effect according to his intention therein expressed.*

For these Reasons they did resolve.

That this express Reservation of a mean Tenure, tends to the destruction of the whole Patent, and makes it void in Law, both to the Lands and to the Tenure.



THE



The ORDER of the

Council - Board,

Upon this Resolution of the

JUDGES.





BY THE

Lord Deputy and Council.

WENTWORTH,

W Hereas there was an *Act of Council* made at this *Board*, and dated at the *Abbey of Boyle*, the Eleventh Day of *July*, 1635, Ordaining, and Establishing, that the Lords, Knights, Gentlemen and Inhabitants, their Heirs, and Assignes holding any Castles, Mannors, Lands, Tenements, or other Hereditaments in the Countrey of *Roscoman*, by or under any effectual *Letters Patents* from his *Majesty*, or any of his Royal Predecessors, *Kings*, or *Queens* of *England*, should have, hold, possess, and enjoy all the said Castles, Mannors, Lands, Tenements, and
Here-

The Order, &c.

231

Hereditaments of what Kind or Nature soever they be, to them, and to every of them, and to those who hold any Estates under them, against his *Majesty*, his Heirs and Successors; in as full, large, ample, free, and beneficial Manner to all Intents, Purposes, and Constructions, as if the Truth of their several Cases, and their several *Letters Patents* passed thereupon, had been specially found in the *Great Office* then to be taken, for finding his *Majesty's* Title to the said *County*, and their *Letters Patents* accordingly entred, *in hæc verba*, in the said Office, so that they did produce their said several *Letters Patents*, or the Enrollments thereof, before us the *Lord Deputy*, and *Council*, at this *Board*, before the *first Day* of the then next *Easter Term*, and that no Possession should be taken from any such Patentees, or their
Assignes,

Assignes, or Tenants, whose *Patents* should be at this Board allowed to be good, and effectual in Law: And whereas the like *Acts of Council* were made at this Board, for the severall Counties of *Slygo, Mayo, and Gallway*, and the County of the *Town of Gallway*; and whereas severall *Letters Patents* past under his *Majesty's Great Seal*, of divers Lands, Tenements, and Hereditaments in the said severall Counties, by Colour of a *Commission* under the Great Seal, dated the second Day of *March*, in the fourth Year of the Reign of his *Majesty's Royal Father King James*, of blessed Memory, were presented unto us at this Board, which being taken into Consideration by us, we thought fit for our better Information of the Validity of the said *Letters Patents*, to call before us some of those who claimed by those *Letters Patents*, as
namely,

namely, our very good Lord the *Viscount Dillon* of *Costilogallen*, whom we appointed to attend us with his Learned *Council* therein, which he did accordingly; whereupon his *Majesty's Learned Council*, and the *Council* Learned of the said *Lord Dillon*, agreed upon a *Case* drawn up by them, to be argued by them on both sides before us, which *Case* followeth *in hæc verba*, *King James* by *Commission* under the *Great Seal*, dated the second Day of *March*, in the fourth Year of his *Reign*, did authorize certain *Commissioners*, to grant the *Mannor* of *Dale*, by *Letters Patents* under the *Great Seal* of this *Kingdom*, to *A. and his Heirs*, and there is no *Direction* given in the said *Commission*, touching the *Tenure* to be reserved; there are *Letters Patents* by Colour of the said *Commission* passed unto *A. and his Heirs*, to hold by *Knights Service*, that is to say by the twentieth Part
R of,

of, &c. as of his Majesty's Castle of Dublin, the Question is, whether the said Letters Patents be void in the whole, or only to the Tenure? Upon which Case his Majesty's Learned Council, and the Learned Council on the Part of the said Viscount Dillon, argued before us several Days, and we (desirous to take such a Resolution in the Matter as might be equal and just) held fit to advise therein with all his Majesty's Judges, who not agreeing unanimously in Opinion, we adjudged it fit, that every of them should argue it, and deliver his Judgment and Opinion therein, before us, which they did accordingly. Wherein five of them, viz. the Lord Chief Justice of his Majesty's Court of King's-Bench, the Lord Chief Justice of his Majesty's Court of Common Pleas, the Lord Chief Baron of his Majesty's Court of Exchequer, Baron Barry, and Justice

Rives,

Rives, concurred in Opinion clearly, that the Letters Patents were void in the whole; and two only, viz. Justice Mayrt, and Justice Cressy differed from those five in Opinion, holding that the Letters Patents were only void, as to the Tenure; we thereupon taking the same into Consideration at this Board, do hereby Adjudge, Order, and Declare, that the said Letters Patents are wholly void in Law; and consequently that all such Letters Patents passed under colour of the said Commission, and that mention the Parcels granted to be held by Knights Service, as of his Majesty's Castle of Dublin, or by any Tenure other than by Knights Service in Capite, generally, are not good, effectual, or valid in Law, but void in the Whole; and therefore we do at this Board disallow all such Letters Patents so granted, as aforesaid, of any Lands, Tenements, or Hereditaments in any

any of the said Counties of Rosco-
man, Slygo, Mayo, Gallway, or
 the County of the Town of Gall-
way. Given at his Majesty's Castle
 of Dublin, 13 July, 1637.

R. Dillon,
Ad. Loftus,
W. Parsons,
Gerr. Lowther,
R. Bolton,

Chr. Wandesford,
Ph. Mainwaring,
Cha. Cooze,
Geo. Radcliffe.

F I N I S.

