THE

CASE

OF

IRELAND's

Being Bound by

ACTS of PARLIAMENT

IN

ENGLAND,

Stated.

By WILLIAM MOLLYNEUX, of *Dublin*, Esq;

To which is added, the

CASE

OF

TENURES

Upon the COMMISSION of

DEFECTIVE TITLES,

Argued by all the JUDGES of *IRELAND*. With their Resolutions, and the Reasons of their Resolutions.

LONDON:

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TO THE

KING.

SIR,

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

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

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 Majeſty will have a Tender Care of Your poor *Subjects of Ireland*, who are *Equally* Your Subjects, as the reſt of Your People.

PARDON, I moſt humbly beſeech Your Majeſty, my Preſumption, in Appealing to You on this 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 Unworthy Author thereof,

(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 Diſcourſe.*

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* Society *of* Derry, *Recover the Land they Contest about.*

So that I think I am as free *from any* Personal Prejudice *in this Cause, as 'tis possible to expect any Man should be, that has an Estate and Property in this Kingdom, and who is a* Member of Parliament *therein.*

I hope

I hope therefore 'tis a Publick Principle *that has moved me to this Undertaking: I am sure I am not Conscious to my self, of any other Intention.*

I have heard it has been said, That perhaps I might run some Hazard *in attempting 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*

Mo-

Modesty *and* Submission *But were it otherwise, it would not in the least affect or discourage me in an Attempt, 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* Protestant Interest *in* Ireland.

The Great and just Council *of* England *freely Allows all Addresses of this sort. To* Receive *and* Hear Grievances, *is a great part of their Business, and to* Redress

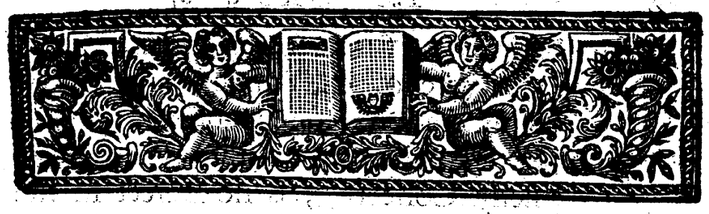
Redress *them, is their chief* Glory. *But this is not to be done, till they are laid before them, and fairly Stated for their Consideration.*

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

Dublin, Febr. 8.
169⅞.

W. MOLLINEUX.

The



THE

CASE

OF

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Being Bound by

Act of PARLIAMENT

IN

ENGLAND, STATED.

HAVE ever been ſo fully perſwaded of the ſtrict Juſtice of the Parliament of ENGLAND, that I could never think that any of their Proceedings, which might ſeem to have the leaſt Tendency to Hardſhip on their Neighbours, could ariſe from any thing

INTRODUCTION and Occaſion of this Diſquiſition.

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 miſ-inform'd, without giving them that Light that might Rectifie 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.

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

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 my ſelf 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.

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 succeding 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.

Britain's first Expedition into *Ireland*.

As to the First, We shall find the History of the First Expedition of the

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 Cambr. Hib. Expug.* Lib. C. 1.

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.

HEN. II. comes into *Ireland*.

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.

Irish 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 submisit. 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 innodarunt & in singulari Rotherico Conactiæ Principe tanquam Insulæ Monarchâ subditi redduntur universi,*

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 Midiæ, & fere omnes Hiberniæ 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 & Juraverunt.*

John Brampton Abbot of *Jornal*, in his *Historia Jornalensi*, 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 & Hæredibus 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.

IRELAND, whether ever Conquer'd.

I come now to enquire into our second Particular proposed, *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 Opposed*, 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 Easie 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 IId's using the Stile of *Conquestor Hiberniæ* *; 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.

'TIS 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.

Suppressing Rebellions, whether a Conquest.

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

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 succeding *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*.

* Bishop of *Salisbury*'s Pastoral Letter.

What Title is obtain'd by Conquest.

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?*

No Title gain'd by an unjust Conquest.

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

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 Proginy 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.

None over the Non-Oppoſers.

And as thoſe that joyned with the Conqueror in a juſt Invaſion, have loſt no Right by the Conqueſt; ſo neither

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.

Just Conqueror intitled to the Lives of the Opposers.

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-

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,

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

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

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*.

Practice of Conquerors otherwiſe.

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, compels them with a Sword at their Breaſt to ſtoop to his Conditions, and ſubmit to ſuch

a Government as he pleases to afford them. But we enquire not now, what is the *Practice*, 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.

Concessions granted by a Conqueror, whether Obligatory.

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

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, & Juratoriâ cautione preſtitâ Confirmatæ*, Vid. Matth. Paris, ad An. 1172. Vit. H. 2.

By HENRY II.

Iriſh *Modus, Tenendi Parliamentum.*

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*

nendi 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, Vicecomitibus, Majoribus, Præpoſitis,*
> " *Miniſtris & omnibus Fidelibus*
> " *ſuis Terræ Hiberniæ Tenendi*
> " *Parliamentum.*
>
> *In primis Summonitio Parliamenti præcedere debet per Quadraginta 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 by Mr. *Selden* (*a*) and (*b*) Mr. *Pryn*, who deny alſo the Engliſh *Modus* as well as this. But on the other hand, my Lord Chief Juſtice *Cook*, in the 4th Inſtit. pag. 12. and 349. does ſtrenuouſly 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.

(*a*) *Tit. Hon. Par.* 2. C. 5. *Sect.* 26. *Edit. Lon. An.* 1672.

(*b*) Againſt *Cook's* 4th Inſtit. C. 76.

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*, 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 *Inſpeximus* 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 Inſpeximus Tenorem Diverſorum Articulorum in quodam Rotulo Pergameneo Scriptorum cum* Chriſtophero Preſton, *Milite Tempore Arreſtationis ſuæ apud Villam de* Clare, *per Deputatum Dilecti & Fidelis noſtri Johannes 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 præteriti in hæc verba.

" *Modus Tenendi Parliamenta Henricus Rex Angliæ, Conqueſtor & Dominus Hibernia, Mittit hanc formam Archiepiſcopis*, &c. and ſo as before, " *Et omnibus Fidelibus ſuis Terræ* Hiberniæ " *Tenendi Parliamentum Impriprimis Summonitio*, &c." and then follows the *Modus*, agreeable in moſt Things with that of *England*, only fitted to *Ireland*. Then the Exemplification concludes:

Nos autem tenores Articulorum prædictorum de Aſſenſu præfati Locum tenentis & Concilii prædicti tenore præſentium duximus Exemplificandum & has Literas noſtras fieri fecimus Patentes. Teſte Præfato Locum noſtrum tenente apud Trim. 12. *diæ Januarii Anno Regni noſtri ſexto.*

Per ipſum Locum tenentem & Concilium.

NOW we can hardly think it credible (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 *Trym*, 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 Domvile'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. Domvile*) 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.

PARLIAMENTS very early in *Ireland*.

THIS I am sure of, that whether 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*) King *Hen.* II. after his Conquest of *Ireland*, 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

(*a*) Against the 4*th* Inst. c. 76. p. 249.

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 subjiciunt, omnibus igitur hoc modo Consummatis, in Concilio habito apud Lismore Leges Angliæ ab omnibus sunt gratantur receptæ, & juratoriâ cautione præstitâ Confirmatæ*, says *Matth. Paris*.

(a) *Topograph. Hibern.* l. 3. c. 18. *Hib. Expug.* l. 11. c. 33. 34.

(b) *Hoveden Annal pars-post.* 302. *Bramptoni Chr.* Col. 171. *Knighton de Even. Angl.* l. c. c. 10 col. 2394, 2395. *Pol. Virg. Hist. Angl.* l. 13. *Rudal. de Diceto. Walsingham*, &c.

Original Compact for *Ireland*.

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 Authoritate*, 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*.

King *John* made King of *Ireland*.

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

 he

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 & prolixas* (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 Meritoniæ*. 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, Prehemінence*, 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 sate 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*) 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*:

(*a*) *Selden's Tit. Hon. Par.* 1. *C.* 8. *Sect.* 5. *Usher* Archbishop of *Armagh*, of the Religion of the Ancient *Irish*, *Cap.* 11.

dence: *Satis Constat* (say they) (*a*) *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*.

(*a*) *Act. Concil. Constant. Sess.* 28. MS. *in Bib. Reg.* not in the Printed Acts.

IRELAND in what Sense annex'd to *England*.

PERHAPS it will be said, That this *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

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*, & *Avenliffee*, 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 the 4th Inst. c. 76. p. 250.

gland, to gratify the *Irish* (says (*a*) *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 forementioned *Magna Charta Hiberniæ*. The Record as recited by Mr. *Pryn*, here follows.

Pa. 1. H. III. m. 13. entus.

" Rex Archiepiscopis, Episcopis, Abbatibus, Comitibus, Baronibus, " Militibus & Libere Tenentibus, " & omnibus Fidelibus suis per " Hiberniam Constitutis, Salutem: Fidelitatem vestram in " Domino Commendantes quam " Domino Patri nostro semper " Exhibuistis & nobis estis diebus " nostris Exhibituri: Volumus " quod in signum Fidelitatis vestræ, " tam præclaræ, tam Insignis Libertatibus Regno nostro Angliæ " a Patre nostro & nobis Concessis, de gratia nostra & Dono " in Regno nostro Hiberniæ gua-

" deatis

" deatis vos & vestri Hæredes in " perpetuum. Quas distincte in " Scriptum Reductas de Communi Consilio omnium Fidelium " nostrorum vobis Mittimus Signatas Sigillis Domini nostri G. " Apostolicæ Sedis Legati & Fidelis nostri Com. W. Maresc. Rectoris nostri & Regni nostri quia " Sigillum nondum habuimus, " easdem 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.*

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

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 49*th* Year of *Henry* the Third: The Learned Mr. *Petyt*, Keeper of the Records in the

Tower

Tower, in his Book on that Subject, pag. 71. deduces his *9th* Argument *From the Comparison of the Ancient* Generale Concilum, *or* Parliament *of Ireland, instanced An.* 38. *Hen.* III. *with the Parliament in* England, *wherein the* Citizens *and* Burgesses *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 Burgesses " were then a part of their (the *Irish*) " great Council or Parliament.

Rot. 38. *H.* III. *in* 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, *Terræ suæ Hiberniæ*; " telling them that, *Mitttimus Fratrem* " *Nicholaum de Sancto Neoto, Fra-* " *trem Hospitij Sancti Johannis Jeru-* " *salem in Anglia ad partes Hiberniæ* " *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 Vasconiæ per ipsus Fortitudi-* " *nem, a manibus nostris Auferre &* " *a Domino Regni Angliæ 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 Concessions 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. Instit. *p.* 252. *Claus.* 12. *H. III. in* 8 *de Legibus & Consuetudinibus Observandis in Hibernia.*

" Rex Dilecto & Fideli suo Richardo
" de Burgo Justic' suo Hibern. Sa-
" lutem. Mandamus vobis firmiter
" præcipientes 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 Commitatus
Hiberniæ

" 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. Teste me ipso apud*
" *Westm'* 8 *die Maij Ann. Reg.*
" *nostri* 12.

By what foregoes, I presume it plainly appears, that by three several Establishments 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 *Parliament* of *England*, but by the free *Consent*, *Allowance* and *Acceptance* of the *People of Ireland.*

Recapitulation. HEN. II. first introduc'd the Laws of *England* into *Ireland*, in a Publick 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 *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 Charta*; 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 Government under one and the same supreme Head, *the King of England*; yet so, as both Kingdoms remain'd Separate and Distinct in their several Jurisdictions 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 Instit.*
(b) Against the 4th. Instit.
(c) *Placita Parliamentaria.*

Matter, but herein refer to Lord Chief Justice *Cook*, (a) *Pryn*, (b) *Reyly*, (c) *&c.*

English Laws Established in *Ireland.*

IF now we enquire, *What were those Laws of England that became thus establish'd in Ireland?* Surely we must first reckon the great *Law of Parliaments*, which *England* so justly challenges, and all *Mankind* have a 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 themselves, or their chosen Representatives.* That this was a main Branch of the English Law establish'd in this Kingdom, and the very Foundation of our Future Legislature, appears manifest from Parliaments being so early convok'd in *Ireland*, as the forementioned Precedents express.

Law of Parliament.

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 Second, because the Acts of that Parliament are the first that are Printed in our *Irish* Statute Book: For so we may argue the Parliaments of *England* to be of later Date than pretended, when we find the first Printed Acts in *Keeble* to be no older than the 9th of *Hen.* III. Whereas 'tis most certain, that Parliaments have been held in *England* some Ages before that.

Common Law.

AFTER this great Law of *Parliaments*, we may reckon the *Common 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 Process 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.

Statute Law.

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

Statute Law of *England* from the *Norman* Conquest to *Hen.* III.

AND here we shall find, that in those Times, *viz.* from the *Norman* Conquest to *Henry* the Third's Time inclusive, the Statute Laws of *England* were very few and slender. 'Tis 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 Usitatæ & Comprobatæ 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 corroboratæ & confirmatæ prius inventæ & constitutæ fuerunt Tempore Regis* Edgari *Avi sui. Verum tamen post mortem ipsius Regis* Edgari, *usque ad Coronationem Sancti Regis* Edwardi (which was 67 Years) *præ-*

prædictæ Leges Sopitæ sunt & penitus intermissæ. Sed postquam Rex Edwardus *in Regno sublimatus fuit consilio Baronum Angliæ Legem illam sopitam, Excitavit, Excitam Reparavit, Reparatam Decoravit, Decoratam Confirmavit; & confirmatæ vocantur* Lex Sancti Regis *Edwardi, non quod* ipse primus eam ad invenisset; sed quod Reparavit, Restituitque, (*a*) as the said *Litchfield's* Chronicle has it. These Laws of *Edward the Confessor* were Transcribed by *Ingulphus Abbot of Croyland* under *William the Conqueror,* and are annex'd to his History.

(*a*) *Selden Notæ & specileg. ad eadmerum,* pag. 171.

Of *Will.* Conq.

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 præcipimus ut omnes habeant & teneant Leges* Edwardi Regis *in omnibus Rebus adauctis his quas constituimus ad Utilitatem Anglorum.*

(*b*) *Leges W.* 1. *Cap.* 63. *apud Selden in notis ad eadmerum,* p. 192.

Of *Hen.* I.

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 First as the Charter it self expresses it, (c) *Lagam Regis* Edwardi *vobis reddo cum illis emendationibus quibus Pater meus emendavit Consilio Baronum suorum.*

(c) *Vid. Selden ut supra.*

Of *Hen.* II.

THE Laws of *Henry* II. called *Constitutiones Clarendoniæ*, and the *Assize of Clarendon* in the 2*d.* 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. Gervasij. Doroborn* 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. *Anno Regis* Johannes 17. *venientes ad Regem magnates petierunt quasdam Libertates & Leges Regis* Edwardi *cum alijs libertatibus sibi & Regno Angliæ & Ecclesiæ Anglicanæ concessis confirmari prout in Charta Regis* Hen. I. *ascriptæ continentur.* The same Historian gives us also at large both *Charta Libertatum*, and *Charta de*

(d) Mat. Paris. *adan.* 1215. pag. 253, &c.

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*.

Of *Hen.* III.

THE Laws of *Henry* III. contain'd in *Magna Charta* and *Charta de Foresta*, both which are called *Magnæ Chartæ Libertatis Angliæ*, and were establish'd about the 9th Year of *Henry* III. are for the most part but *declaratory* of the common municipal Laws of *England*, and that to no new declaration 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 English Statute 25 *Ed.* 1. *c.* 1. it is Enacted, That the great *Charter*, and the *Charter of the Forrest* be taken as the *Common Law of England.*

(a) *Cook's* Pref. to the 2d. Inst.

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 *Confirmations* 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. Secondly,

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's* 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* Merton,

Statutes of *Merton. Marlebr. Westm. Glouceſt.*

Merton, *made the* 20*th of* Hen. II. *and the Statutes of* Marlbridge, *made the* 52*d of* Henry *the Third*; *The Statute of* Westminster *the first, made the* 3*d of* Edward *the First*; *The Statute of* Gloucester, *made the* 6*th of* Edward *the First*; *And the Statute of* Westminster *the Second, made the* 13*th 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* 10*th 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* 29*th 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 wonder

Vid. Lib. Rubr. Scaccar. Dubl.

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 *Ann.* 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 Secodn's coming into *Ireland*, *Anno* 1172. to the third Year of *Edward* the Second, *Anno* 1310. about 138 Years.

(*a*) Annals of *Ireland* at the End of *Camden's Britan.* Edit. 1637. page 196, 197, *&c.*

(*b*) *Ibid.* p. 160. *Pryn* against the 4th Instit. Chap. 76.

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

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

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 *Pretence* of *Ireland's Subordination* proceeded in thoſe Days, it did not ariſe from the *Parliament* of *England* it ſelf: For we have not one ſingle Inſtance of an Engliſh Act of Parliament *expreſly Claiming* this Right of binding us: But we have ſeveral Inſtances of Iriſh Acts of Parliament, *Expreſly Denying* this *Subordination*, as appears by what foregoes.

AFTERWARDS by a Statute made in *Ireland* the 18th of *Hen.* VI. *Cap.* 1. 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 commmon 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.

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

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

(*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 Miſdemeanors; or for Puniſhment of *Merchants* or *Factors*, be of Force here in *Ireland*,

(*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.

English Acts introductive of a New Law, not of Force in *Ireland*.

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. Sef. 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. Sef. 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. Sef. 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 Fradulent Conveyance; but it was not in Force in *Ireland* 'till Enacted here the 10th of *Charles*, c. 3. Sef. 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.

AND in the first Year of *William* and *Mary*, Ses. 2. c. 9. an Act passed in *England*, declaring all *Attainders and other Acts made in the late pretended Parliament under King* James *at* Dublin *void*: But was not Enacted here in *Ireland* 'till the 7th Year of King *William*, c. 3. And this was thought requisite to be done upon mature Consideration thereon before the King and Council of *England*, * notwithstanding that the *English* Acts does *particularly name Ireland*, and was wholly design'd for, and relates thereto.

* For we had two several Acts transmitted to us at different 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, 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 *En-*

glish 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

Object. *English* Statutes comprehending *Ireland* by general Words.

FIRST therefore, As to such *English* Statutes as seem to comprehend *Ireland*, and to bind it, under the *general Words of all his Majesty's Dominions* or *Subjects*, whatever has been 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 *Poyning*'s Act in *Ireland*, the 10th of *Henry* the 7th, no Act can pass in our Parliament here, 'till it be first Assented to by the King and Privy Council of *England*, and transmitted hither under 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 transmitting to *Ireland*, to be pass'd into Laws here, *English* Statutes, wherein the *general Words of all the King's Dominions* 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.

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 Faculties.

IN like manner the Statutes made in *England* concerning *First Fruits*, 26 *Hen.* 8. *c.* 3. and the Act of *Faculties*, (*a*) 25 *Hen.* 8. *c.* 21. though each of them by express Words comprize *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 13 *Car.* 2. *c.* 12. And the late Bill of Rights, 1 *W.* and *M. Ses.* 2. c. 2. in *England*, has damn'd all such Courts. Yet the Act in *Ireland*, 2 *Eliz.* c. 1. 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 deprivd 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*.

(*a*) Title in the *English* Statutes is, *No Imposition shall be paid to the Bishop of* Rome.

High-Commission-Court.

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 Issue.

By the same Reason *Scotland* may be bound.

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 Hiberniæ*, 14. H. 3.
2. *Ordinatio pro Statu Hiberniæ*, 17. Edw. 1.
3. And the Act, that all *Staple* Commodities passing out of *England* or *Ireland*, shall be carried to *Callis*, as long as the *Staple* is at *Callis*, 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 Hiberniæ*, 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 Hiberniæ*, meerly 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 Hiberniæ* 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 Hiberniæ*, made at *Nottingham* 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.

Ordinatio pro Statu Hiberniæ.

MOREOVER this *Ordinatio pro Statu Hiberniæ*, is really in it self *No Act of Parliament*, but meerly 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 Hiberniæ*, 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 expresly 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 Thwaits*, 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 Subject. Regis & tanquam Subjecti erunt Obligati ad aliquam rem extra Terram illam faciend. contra Statut. sicut habitantes in Calesia Gascoignie, Guien, &c. dum fueri Subjecti; & 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 Parliaments 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 t'other 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 *England*

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 Burgesses were Elected in the Shires, Cities and Boroughs 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 Burgess 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 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. 164, 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.*

Modern Acts of the Parliament of *England*, naming *Ireland*.

I have said before, pag. 85. that I would only consider the *more Ancient 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.

Acts in Favour of Adventurers. 1641.

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 incouraging 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

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

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 *Cromwel'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 sate 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

Cattle Act.

THE First is an *Act against Importing 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*.

Tobacco Act.

SECONDLY, the Acts against 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 *Shelela*, were there an Act made in *England*

 against

against our Planting or having *Timber*.

Navigation Act.

THIRDLY, The *Act for encourageing 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.

Engliſh Acts Binding *Ireland* ſince King *William*'s Reign.

I am now arriv'd at our Preſent Days, under the Happy Government of His Majeſty King *William* the Third; and I am ſorry to reflect, That ſince the 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 pleaſed 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 Penalty

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.

Act against Commerce with *France*.

AFTERWARDS in the same Year, and same Session, Chap. 34. there passed an Act in *England*, *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 adviseable, 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.

Act for Security of the Protestants of *Ireland*.

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

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 Poynings 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 Councellors, 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*. 1693. 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 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 absur'd 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 Weakning 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 offered on the Fourth Head; The Opinions of the Lawyers thereon.

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.

Lord Chief Justice *Cook's* Opinion discuss'd.

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 subjecti 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,

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

cused, 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 plain-

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?*

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.

Opinions of other Judges, in Favour of *Ireland.*

THUS I have done with this Reverend Judge; and, in him, with the only *positive Opinion against us.* I 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 Assembled, 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

(*a*) 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.

fice 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, *Yelverton*, *Fortescue*, *Portington*, *Markham*, and *Ascough*, whether the said Prescription in Relation to the State and Government of *Ireland*, be *good* or *void* in Law. *Yelverton* 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*, *Yelverton*, 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 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.

(*a*) *Rot. Parl. An.* 8 *H.* 6. *in ult.*

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.

Argument from Acts of Succession and Recognition pass'd in *Ireland*.

IT has ever been acknowledged that the Kingdom of *Ireland* is inseparably 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*.

Ireland's State Ecclesiastical Independent.

As the *Civil* State of *Ireland* is thus *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*.

Argument from a Record in *Reyley*.

ANOTHER Argument against the Parliament of *England's* Jurisdiction 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 Patents to the Lord Justice of *Ireland*, letting

(*a*) 14 *Ed.* 2. *Par.* 2. *Memb.* 21 *Int.*

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:

1. 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

 those

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, where-ever 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 *Praeeminence* 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 King's Bench did; and that as he tells us out of the Lord Chief Justice *Scroope*, the Chancery and the King's Bench were once but one Place. But if this be the Ground of the Jurisdiction of the King's Bench in *England* over the King's 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* Sence 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 with a memorable Paſſage out of our *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.

Declaration in the *Iriſh* Act of Faculties.

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*.

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.*

England's Title to *Ireland* by Purchase.

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 Re-

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-imbursement 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 re-pay'd them: It would have look'd odly for *Holland* to have insisted on Disposing of Lord *Powis*'s and other Estates,

Estates, by their own Laws, to re-imburse themselves.

'TIS an ungenerous Thing to villifie 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?

Object. *Ireland* prejudicial to *England*'s Trade, therefore to be Bound.

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 Piece 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.

Object. *Ireland* a *Colony*.

THE laſt Thing I ſhall take Notice of, that ſome raiſe againſt us, is, That *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 *Mary-Land?* 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.*

Againſt the Rights of Mankind.

ALL Men are by Nature in a State 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 entring into Civil Societies for the common Benefit of all the Members thereof. And on this *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. *Hooker's Eccleſ.*

Conſent only gives Law force.

cles. Polity, Book 1. 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 sithence, 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 several Laws and Ordinances, more than a Man by his private Resolutions the Law of the whole Commonwealth or State wherein he liveth;*

 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*.

Against the Common Laws of *England*.

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 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 Justiciæ *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 *Westminst.* 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 Milites hic in Parliamento*; 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

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 Parliamenta* 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 expresly declared, That all the *Lords Spiritual and Temporal, and the Knights, Citizens, and Burgesses 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, Abbates, 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 I 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 befor 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 *Freemen of the Land.* The like Liberties are specially Confirm'd to the Clergy, (*d*) the 14th of *Edward* the 3d. And were these Statutes, and all other Statutes and Acts of the Parliament of *England* Ratify'd, Confirmed and Adjudged 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 Priviledge 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 Priviledge 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 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

(*d*) *Ibid* page 113.

(*e*) 10 *H.* 7. *c.* 22.

of Constitutions of Kingdoms, 'tis *Dangerous* to those who *do it*, 'tis *Grievvous* 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 *Doctrine* was hardly so much as *Surmised in those Days*, however we come to have it raised in these *Latter Times*.

(*a*) 28 *H.* 8. *c.* 4. 28 *H.* 8. *c.* 20. 3 & 4. Ph. & M. *c.* 4. 11 *Eliz.* Sess. 2. *c.* 1. 11 *Eliz.* Sess. 3. *c.* 8.

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 Domvile*, 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 no-"stris tam Majoribus quam Minoribus, "& quibuscunque aliis de Terra nostra "Hiberniæ fidelibus nostris ad quos "Præ-

Against several Concessions made to *Ireland*.

" 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-
" ſas habeat, & eis Libere gaudeat &
" Utatur. Item volumus & præcipi-
" mus quod noſtra & ipſius Terræ Ne-
" gotia preſertim Majora & Ardua in
" Conſiliis per Peritos Conſiliaros 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 Conciliaros noſtros ac Pre-
" latos & Proceres alioſque de terra
" predicta 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 Acceptа-
" 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 *Royalties* and *Præeminence* of a *ſeparate* and *diſtinct Kingdom*. That we 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 Peerage of *England*, the Priviledges of the one, extend not into the other Kingdom; a Lord of *Ireland* may be Arreſted 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 *England*, made a *Voyage-Royal* into *Ireland*; 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

Inconſiſtent with the Royalties of a Kingdom.

was imposed *super Prælatis & 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 *compleat 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* meerly 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 Præeminencies 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*. 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*

Againſt the Practice of former Ages.

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 Priviledges 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

thony's Case, *&c.* But I shall not here inlarge farther thereon.

Destroys Property.

Ninthly, THE Obligation of all Laws having the same Foundation, if *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.

Creates Confusion.

Lastly, THE People of *Ireland* are left by this Doctrine in the greatest *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*,

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*,

nour, 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

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

IRELAND.

With their RESOLUTION, and the REASONS of their RESOLUTION.

To the Right Honourable

JOHN,

Viſcount WENTWORTH,

Lord Deputy-General of

IRELAND.

My LORD,

THIS WORK *is Yours, by more than one Intereſt, and therefore it returns* naturally *unto* You, *for to lay aſide my particular Reſpects (it being by Your* Lordſhip's *Favour, that I*

ſerve his Majeſty *in this Place*) You *are* Pater Patræ, *and not more by Your* Office, *than by your* Love *to this* Nation, *and Your moſt equal, 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-*

publick by Your *Commandment; ſo that in all the Paſſages of it, it carries* Your Image, *Your* Superſcription, *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*

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 Encrease of* Honour, *and* Revenue *to his* Majesty, *of* Peace, *and* Prosperity *to this* Kingdom, *and to* Your own *Immortal* Glory,

Your LORDSHIP's

Most humble Servant,

James Barry.

THE

CASE

OF

TENURES

Upon the Commission of

Defective Titles.

Trin. 13. Caroli Regis.

AT the late enquiry concerning his Majestys 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 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, 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 Polexfen* 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 entreth 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 *tayle*, or but for *Life*, this is good, *Stanton* and *Barnes*'s Case *Hill.* 36. *Eliz. Rot.* 492. in *B. R.* *Cokes inst. Sect.* 66. Co. Lit. 52. b.

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. *Eliz. B. R.* 3 Cro. 323. The Statute of 32. *Henry* 8. doth enable Tenant in *tayle*, 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, *Hill.* 35. *Eliz. B. R.* Poph. Lion.

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 *Arrowſmith*'s Caſe *Hillar* 38. *Elizabeth. B. R.* 5 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 *tayle*, 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: *Shepheards* Caſe; But if Tenant in *tayle* 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. *Eliz. B. R.* 3 Cro. 401.

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 *Mortmaine*, and he grants the Annuity with Clauſe of Diſtreſs, by *Huſſey*, and *Bryan* Chief Juſtices, and *Starky* 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 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 vitiatur.* 3. *Coke* 10. *Dowties* Caſe.

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

in *Bewleys* 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 præſenti*, but *in futuro*, by ſpecial Words to take ef-

fect, after the Death of the present Incumbent; and therefore the License ought to have been special, otherwise the King was deceived in his Grant, and so the Appropriation void, which by colour of that License, 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 License, 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 Missive 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 Missive, 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 Reservation of a Tenure is *modus Concessionis*, that it is not *aliud*, or a distinct thing from the Grant, that *Tenures* had their *Original* 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. 2.

FOR *Authorities* these Differences were agreed for Law.

ALL *Authorities* are either Authorities in *Law* or Authorities in *Fait*, 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 cloathed 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 cloathed 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.

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 fine 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 judice, 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 *Ass. 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.

 5. *Autho-*

5. *Authority* given by Parliament must be purſued.

THE Statute of *Merton Cap.* 3 ordains, That in a *Rediſſeiſin*, the Sheriff *aſſumptis ſecum cuſtodibus placitorum Coronæ, &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 *Aſſ.* 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 Authoriz'd to do, *& aliud*, and another thing diſtinct from that for which he hath Authority. And where he doth the ſame thing which he is Authoriſed 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 otherſide, 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 Aſs. 24. 26 Aſs. 39, 40 Aſs. 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 expresly given in the Book of 12 Ass. 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. 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 Concessionis*, 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.

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 *Tarham'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 expresly 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? 4.

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.

1. 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.

1. IT

1. 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 atturns, 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 Subjects, 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 2. 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.*

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 & hæredibus 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 Ferne'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 Feesimple 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 ancienter 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 *Bracton 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 *Bracton*, 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*. *Hæc 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*.

'TIS 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 sæculari*.

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 *Trinoda 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.

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 *Alenzon* 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 Barkshire*, *Selden in Eadmer*, 154.

THAT *Wardships* were then in use, and not brought in by the *Normans*, as *Camden* in his *Brit.* 179. Nor by *Hen.* 3. as *Randolph Higden* in his *Polichronicon*, 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 perambulac.* 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*, *een le Conquest*.

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

Boet. lib. 11 *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 Glossar. 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.*

1. THE

1. 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 infallibly

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.

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 varying 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 contributary 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 *tayle*, or if the Commiſſion were to grant in *tayle*, 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 implyed 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 Letters

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 prisot.*

IN *Wheelers* 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 expresly 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 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. *Aſſ.* 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, Dedimus*

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 expresly 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 expresly 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 *Ass.* 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 *Ass.* 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 Judgement given by the *Judge*, that gives the *Judgment* is deny'd; S. *pur ceo que il fait ceo en auter 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 auter manner que le authority soy garrant*, which is the *Reason of* 12 Ass.

BUT we have other Authorities in the Point, upon the same Reason, that of 10 *H.* 7. 15. which hath been remembred, *per Keble*, the most *Learned Lawyer* of that time, *Quant home ad authority de faire ascun fait a un auter, 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 Ass. 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

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 express 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.

5. *Although it be a most ample and large* Commission, *yet it is bounded and circumscribed by the* Law, *with an equal* Construction, *S. 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

Councel - Board,

Upon this Resolution of the

JUDGES.

BY THE

Lord Deputy and Council.

WENTWORTH,

WHereas 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 Hæreditaments in the Country 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-

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 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 *Councel*, 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 *Councel* were made at this Board, for the several Counties of *Slygo*, *Mayo*, and *Gallway*, and the County of the *Town* of *Gallway*; and whereas several *Letters Patents* past under his *Majesty's Great Seal*, of divers Lands, Tenements, and Hereditaments in the said several 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 *Costillogallen*, whom we appointed to attend us with his Learned *Councel* therein, which he did accordingly; whereupon his *Majesty's* Learned *Councel*, and the *Councel* 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*

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 *Councel*, and the Learned *Councel* 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 *Roſcoman*, *Slygo*, *Mayo*, *Gallway*, or the *County* of the *Town* of *Gallway*. *Given* at his *Majeſty's Caſtle* of *Dublin*, 13 *July*, 1637.

R. Dillon,	*Chr. Wandesford*,
Ad. Loftus,	*Ph. Mainwaring*,
W. Parſons,	*Cha. Coote*,
Gerr. Lowther,	*Geo. Radcliffe*.
R. Bolton,	

FINIS.