THE FOUNDERS' CONSTITUTION

Amendment V

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Document 1

Dr. Bonham's Case

8 Co. Rep. 107a, 114a C.P. 1610

4. The censors cannot be judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, *quia aliquis non debet esse Judex in propria causa, imo iniquum est aliquem suae rei esse judicem;* and one cannot be judge and attorney for any of the parties, Dyer 3 E. 6. 65. 38 E. 3. 15. 8 H. 6. 19 b. 20 a. 21 E. 4. 47 a., &c. And it appears in our books, that in many cases, the common law will controul acts of parliament, and sometimes adjudge them to be utterly void: for when an act of parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such act to be void; and, therefore, in 8 E. 3. 30 a. b. Thomas Tregor's case on the statute of W. 2. c. 38. *et artic' super chartas,* c. 9. Herle saith, some statutes are made against law and right, which those who made them perceiving, would not put them in execution: the stat. of W. 2. c. 21. gives a writ of *Cessavit haeredi petenti super haeredem tenent' et super eos quibus alienatum fuerit hujusmodi tenementum:* and yet it is adjudged in 33 E. 3. *Cessavit* 42. where the case was, two coparceners lords, and tenant by fealty and certain rent, one coparcener had issue and died, the aunt and the niece shall not join in a *Cessavit,* because the heir shall not have a *Cessavit* for the cesser in the time of his ancestor, F. N. B. 209. F. and therewith agrees Plow. Com. 110 a.; and the reason is, because in a *Cessavit* the tenant before judgment may render the arrearages and damages, &c. and retain his land, and that he cannot do when the heir brings a *Cessavit* for the cesser in the time of his ancestor, for the arrearages incurred in the life of the ancestor do not belong to the heir: and because it would be against common right and reason, the common law adjudges the said act of parliament as to that point void. The statute of Carlisle, made *anno* 35 E. 1. enacts, that the order of the Cistercians and Augustines, who have a convent and common seal, that the common seal shall be in the keeping of the prior, who is under the abbot, and four others of the most grave of the house, and that any deed sealed with the common seal, which is not so in keeping shall be void: and the opinion of the Court (*in an.* 27 H. 6. Annuity 41.) was, that this statute was void, for it is impertinent to be observed, for the seal being in their keeping, the abbot cannot seal any thing with it, and when it is in the abbot's hands, it is out of their keeping *ipso facto;* and if the statute should be observed, every common seal shall be defeated upon a simple surmise, which cannot be tried. Note, reader, the words of the said statute at Carlisle, *anno* 35 E. 1. (which is called *Statutum religiosorum*) are, *Et insuper ordinavit dominus Rex et statuit, quod Abbates Cisterc' et Praemonstraten' ordin' religiosorum, &c. de caetero habeant sigillum commune, et illud in custodia Prioris monasterii seu domus, et quatuor de dignioribus et discretioribus ejusdem loci conventus sub privato sigillo Abbatis ipsius loci custod' depo', &c. Et si forsan aliqua scripta obligationum, donationum, emptionum, venditionum, alienationum, seu aliorum quorumcunque, contractuum alio sigillo quam tali sigillo communi sicut praemittit' custodit' inveniant' a modo sigillat', pro nullo penitus habeantur omnique careant firmitate*. So the statute of 1 E. 6. c. 14. gives chauntries, &c. to the King, saving to the donor, &c. all such rents, services, &c. and the common law controuls it, and adjudges it void as to services, and the donor shall have the rent, as a rentseck, distrainable of common right, for it would be against common right and reason that the King should hold of any, or do service to any of his subjects, 14 Eliz. Dyer 313. and so it was adjudged Mich. 16 & 17 Eliz. in *Com' Banco* in Strowd's case. So if any act of parliament gives to any to hold, or to have conusans of all manner of pleas arising before him within his manor of D., yet he shall hold no plea, to which he himself is party; for, as hath been said, *iniquum est aliquem suae rei esse judicem*. 5. If he should forfeit 5*l.* for one month by the first clause, and should be punished for practising at any time by the second clause, two absurdities should follow,--1. That one should be punished not only twice but many times for one and the same offence. And the divine saith, *Quod Deus non agit bis in idipsum;* and the law saith, *Nemo debet bis puniri pro*

uno delicto. 2. It would be absurd, by the first clause, to punish practising for a month, and not for a lesser time, and by the second to punish practising not only for a day, but at any time, so he shall be punished by the first branch for one month by the forfeit of 5*l.* and by the second by fine and imprisonment, without limitation for every time of the month in which he practises physic. And all these reasons were proved by two grounds, or maxims in law; 1. *Generalis clausula non porrigitur ad ea quae specialiter sunt comprehensa:* and the case between Carter and Ringstead, Hil. 34 Eliz. Rot. 120. *in Communi Banco,* was cited to this purpose, where the case in effect was, that A. seised of the manor of Staple, in Odiham, in the county of Southampton in fee, and also of other lands in Odiham aforesaid in fee, suffered a common recovery of all, and declared the use by indenture, that the recoverer should stand seised of all the lands and tenements in Odiham, to the use of A. and his wife, and to the heirs of his body begotten; and further, that the recoveror should stand seised to the use of him, and to the heirs of his body, and died, and the wife survived, and entered into the said manor by force of the said general words: but it was adjudged, that they did not extend to the said manor which was specially named: and if it be so in deed, *a fortiori,* it shall be so in an act of parliament, which (as a will) is to be expounded according to the intention of the makers. 2. *Verba posteriora propter certitudinem addita ad priora quae certitudine indigent sunt referenda*. 6 E. 3. 12 a. b. Sir Adam de Clydrow, Knight, brought a *praecipe quod reddat* against John de Clydrow; and the writ was, *quod juste, &c. reddat manerium de Wicomb et duas carucatas terrae cum pertinentiis in Clydrow,* in that case the town of Clydrow shall not relate to the manor, *quia non indiget,* for a manor may be demanded without mentioning that it lies in any town, but *cum pertinentiis,* although it comes after the town, shall relate to the manor, *quia indiget. Vide* 3 E. [Volume 5, Page 304] 4. 10. the like case. But it was objected, that where by the second clause it was granted, that the censors should have *supervisum et scrutinium, correctionem et gubernationem omnium et singulorum medicorum, &c.* they had power to fine and imprison.

To that it was answered,--1. That *this* is but part of the sentence, for by the entire sentence it appears in what manner they shall have power to punish, for the words are, *ac punitionem eorum pro delictis suis in non bene exequendo, faciendo, vel utendo illa facultate;* so that without question all their power to correct and punish the physicians by this clause is only limited to these three cases, *sc. in non bene exequendo, faciendo, vel utendo, &c.* Also this word *punitionem* is limited and restrained by these words, *ita quod punitio eorundem medicorum, &c. sic in praemissis delinquentium, &c.* which words, *sic in praemissis delinquentium,* limit the former words in the first part of this sentence, *ac punitionem eorum pro delictis suis in non bene exequendo, &c.* 2. It would be absurd, that in one and the same sentence the makers of the act should give them a general power to punish without limitation; and a special manner how they shall punish, in one and the same sentence. 3. Hil. 38 Eliz. in a *quo warranto* against the Mayor and Commonalty of London, it was held, that where a grant is made to the Mayor and Commonalty, that the Mayor for the time being should have *plenum et integrum scrutinium, gubernationem, et correctionem omnium et singulorum mysteriorum, &c.* without granting them any court, in which should be legal proceedings, that it is good for search, whereby a discovery may be made of offences and defects, which may be punished by the law in any court; but it doth not give, nor can give them any irregular or absolute power to correct or punish any of the subjects of the kingdom at their pleasure.

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