

The Reports

OF

SIR EDWARD COKE, KNT.

IN THIRTEEN PARTS.

A NEW EDITION,

WITH ADDITIONAL NOTES AND REFERENCES,
AND WITH ABSTRACTS OF THE PRINCIPAL POINTS:

THE FIRST THREE PARTS AND THE FOURTH TO FOL. 38 a.

By JOHN HENRY THOMAS, Esq.

THE REST OF THE FOURTH AND THE REMAINING NINE PARTS

By JOHN FARQUHAR FRASER, Esq.

OF LINCOLN'S INN, BARRISTER AT LAW.

IN SIX VOLUMES.

VOL. IV.

PARTS VII—VIII.

LONDON:

JOSEPH BUTTERWORTH AND SON, 43, FLEET-STREET;
AND J. COOKE, ORMOND QUAY, DUBLIN.

1826.

1. The censors had not power to commit the plaintiff for any of the causes in the bar.

The reasons thereof.

(a) Godb. 418.
2 Roll. Rep. 356.
Wing. Max. 239.

(b) 2 Co. 55 a.
[* 117 b.]

3 Co. 59 b.
Godb. 324.
Co. Lit. 381.
5 Co. 99 a.

1st Reason.

(c) Wing. Max. 239.

(d) Wing. Max 239.

years, and cannot be doctor in physic under seven years more in the study of physic; and that is the reason that the plaintiff is named in the declaration doctor of philosophy, and doctor of physic; *quia oportet medicum esse philosophum, ubi enim philosophus desinit, medicus incipit*. As to the two points upon which the Chief Justice, Warburton and Daniel, gave judgment. 1. It was resolved by them, that the said censors had not power to commit the plaintiff for any of the causes mentioned in the bar; and the cause and reason thereof shortly was, that the said clause, which gives power to the said censors to fine and imprison, doth not extend to the said clause, *sc. quod nemo in dicta civitate, &c. exerceat dictam facultatem, &c.* which prohibits every one from practising physic in London, &c. without licence from the president and college: but extends only to punish those who practise physic in London, *pro delictis suis in non bene exequendo, faciendo et utendo facultate medicinae*, by fine and imprisonment (B): so that the censors have not power by the letters patent, and the act, to fine or imprison any for practising physic in London, but only *pro delictis suis in non bene exequendo, &c. sc.* for ill, and not good use and practice of physic. And that was made manifest by five reasons, which were called *vividæ rationes*, because they had their vigour and life from the letters patent, and the act itself; and the best (a) expositor of all letters patent, and acts of parliament, are the letters patent and the acts of parliament themselves, by construction, and conferring (b) all the parts of them *together (c), *optima statuti interpretatrix est (omnibus particulis ejusdem inspectis) ipsum statutum*; and (d) *injustum est nisi tota lege inspecta una aliqua ejus particula proposita judicare vel respondere*. The first reason was, that these two were two absolute, perfect, and distinct clauses, and as parallels, and therefore the one did not extend to the other; for the second begins, *præterea voluit et concessit, &c.* and the branch concerning fine and imprisonment is parcel of the second clause. 2. The first clause prohibiting the practice of physic, &c. comprehends four certainties:—1. Certainty of the thing prohibited, *sc.* practice of physic. 2. Certainty of the time, *sc.* practice for one month. 3. Certainty of penalty, *sc.* 5*l.* 4. Certainty in distribution, *sc.* one moiety to the King, and the other moiety to the college; and this penalty he who practises physic in London incurs, although he practises and uses physic well, and profitable for the body of man; and on this branch the information was exhibited in the King's Bench. But the clause to punish *delicta in non bene exequendo, &c.* on which branch the case at bar stands, is altogether uncertain, for the hurt which may come thereby may be little or great, *leve vel grave*, excessive or small, &c. and therefore the King and the makers of the act could not, for an offence so uncertain, impose a cer-

(B) *Mala praxis* in a physician, surgeon, or apothecary, is a great misdemeanor and offence at common law, whether it be for curiosity or experiment, or by neglect; be-

cause it breaks the trust which the party had placed in his physician, and tends to the patient's destruction. *Dr. Groenveld's case*, *Ld. Raym.* 213. *S. C.* 12 Mod. 119.

tainty of the fine, or time of imprisonment, but leave it to the censors to punish such offences, *secundum quantilatem delicti*, which is included in these words, *per fines, amerciamenta, imprisonamenta corporum suorum, et per alias vias rationabiles et congruas*. 2. The harm which accrues by *non bene exequendo*, &c. concerns the body of man; and, therefore, it is reasonable that the offender should be punished in his body, *sc.* by imprisonment: but he who practises physic in London in a good manner, although he doth it without licence, yet it is not any prejudice to the body of man. 3. He who practises physic in London doth not offend the statute by his practice, unless he practises it by the space of a month. But the clause of *non bene exequendo*, &c. doth not prescribe any certain time, but at what time soever he ministers physic *non bene*, &c. he shall be punished by the said second branch: and the law hath great reason in making this distinction, for divers nobles (a), gentlemen, and others, come upon divers occasions to London; and when they are here they become subject to diseases, and thereupon they send for their physicians in the country, who know their bodies, and the cause of their diseases; now it was never the meaning of the act to bar any one of his own physician; and when he is here he may practise and minister to another by two or three weeks, &c. without any forfeiture; for any one who practises physic *bene*, &c. in London (although he has not taken *any degree in any of the universities) shall forfeit nothing, unless he practises it by the space of a month; and that was the reason that the time of a month was put in the act. 4. The censors cannot be (b) judges, ministers, and parties; judges to give sentence or judgment; ministers to make summons; and parties to have the moiety of the forfeiture, *quia* (c) *aliquis non debet esse Judex in propriu causa, imo iniquum est aliquem suæ 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 (d) 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 (e) saith, some statutes are made against law and right, which those who made them perceiving, would not put them in execution (c): the stat. of W. 2. (f) c. 21. gives a writ of *Cessavit*

2d Reason.

3d Reason.

(a) Cart. 115.

[* 118 a.]

4th Reason.

(b) Co. Lit. 141 a. Bridg. 11. Dyer 220. pl. 14.

(c) Co. Lit. 141 a.

When an act of parliament is against common right and reason, or repugnant or impossible to be performed, the common law will adjudge such act to be void.

Examples.

(d) 7 Co. 14 a. Calvin's case.

(e) 2 Inst. 401, 402.

(f) 2 Inst. 401, 402.

(c) Lord Ellesmere observes, (Observations on the Reports, p. 21.) "And for novelty in *Dr. Bonham's case*, the Chief Justice having no precedent for him, but many judgments against him, yet doth he strike in sunder the bars of government of the College of Physicians; and, without any paus-

ing on the matter, frustrate the patent of King Henry VIII., whereby the college was erected, and tramples upon the act of parliament, 14 & 15 H. 8. whereby that patent was confirmed, blowing them both away as vain, and of no value, and this in triumph of himself being accompanied

(a) 2 Brownl.
265. 2 Inst. 402.
F. N. B. 209 f.

(b) 2 Brownl.
265. Vet. N. B.
138 b. 2 Inst.
442. Com. Dig.
Parl. R. 27.

(c) 2 Inst. 580,
581, 582, &c.
Skinner 464.

hæredi petenti super hæredem tenent' et super eos quibus alienatum fuerit hujusmodi tenementum: and yet it is adjudged in 33 E. 3. (a) *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 (b) 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 (c) Car-

“ but with the opinion of one Judge only
“ for the matter in law where three other
“ Judges were against him, which case pos-
“ sesseth a better room in the press than is
“ deserved.”

In Serjt. Hill's copy of the observations in Lincoln's Inn Library, there is the following manuscript observation on the strictures of Lord Ellesmere. “ In page 117 of the Report of *Dr. Bonham's case*, in 8 Co. it appears that two of the other Judges agreed with Coke as to the two points of which they gave judgment. The second point is in 117 b. and the matter of law in support of it, which is condemned here, is in page 118, viz. that a statute against reason is void, and is supported by many authorities then, and by others before, and since in our Courts; and the antiquity of it is still more ancient. Just. Inst. Lib. Tit. 2. Text 1. *Dr. Bonham's case* is reported in 2 Brownl. 255 to 266; and in p. 260, it appears that the case was argued by all the Justices of C. B., and at two several days it was argued by Foster, Daniel, and Warburton, against the plaintiff, and the second day by Walmsley, J. and Coke, C. J.: but the argument of Foster, Daniel, and Warburton, are not reported by Brownlow; but he reports fully, 1st, the argument of Walmsley for the plaintiff, and afterwards that of Coke against him. And in page 265, the like reasons and authorities are given by Coke, for his opinion, as appears in his Reports; and then Brownlow mentions only at the end, that ‘so he (Coke) concluded that judgment shall be entered for the plaintiff, which was done accordingly.’ This last report is, I think, a confirmation of Lord Coke's report, though Lord Coke only reports the effect of the arguments of the Justices, who were of opinion against the plaintiff, fol. 116. There is, it is true, in some parts of the argument

“ some things that savour of the pedantry
“ and quaintness peculiar to the time, but
“ nothing to impeach that part of it which
“ is the part objected to by Lord Egerton;
“ and, as above observed, Coke's opinion as
“ to that part at least, is confirmed by many
“ authorities before that case.”

In the *City of London v. Wood*, 12 Mod. 669., debt was brought in the Mayor's Court, (a court holden before the mayor and aldermen) on a bye law, to recover a forfeiture for refusing to serve the office of sheriff, and such action was brought in the name of the mayor and commonalty, and it was held to be error; and per Holt, C. J., “ What my Lord Coke says in *Bonham's case*, in his 8 Co., is far from any extravagancy, for it is a very reasonable and true saying, that if an act of parliament should ordain that the same person should be party and judge, or which is the same thing, judge in his own cause, it would be a void act of parliament; for it is impossible that one should be judge and party, for the judge is to determine between party and party, or between the government and the party; and an act of parliament can do no wrong, though it may do several things that look pretty odd; for it may discharge one from his allegiance to the government he lives under, and restore him to the state of nature: but it cannot make one who lives under a government judge and party. An act of parliament may not make adultery lawful, that is, it cannot make it lawful for A. to lie with the wife of B.: but it may make the wife of A. to be the wife of B., and dissolve her marriage with A.” Vid. Doctor and Stud. p. 154, 146. *Day v. Savadge*, Hob. 87. *Stewart v. Lawton*, 1 Bing. 374. S. C. 8 B. Moore. 414.

Serjt Hill, in his copy of the reports, refers to *Forbe's Parliam. Deb.* Vol. VII. p. 84, 85, as mentioning several void acts.