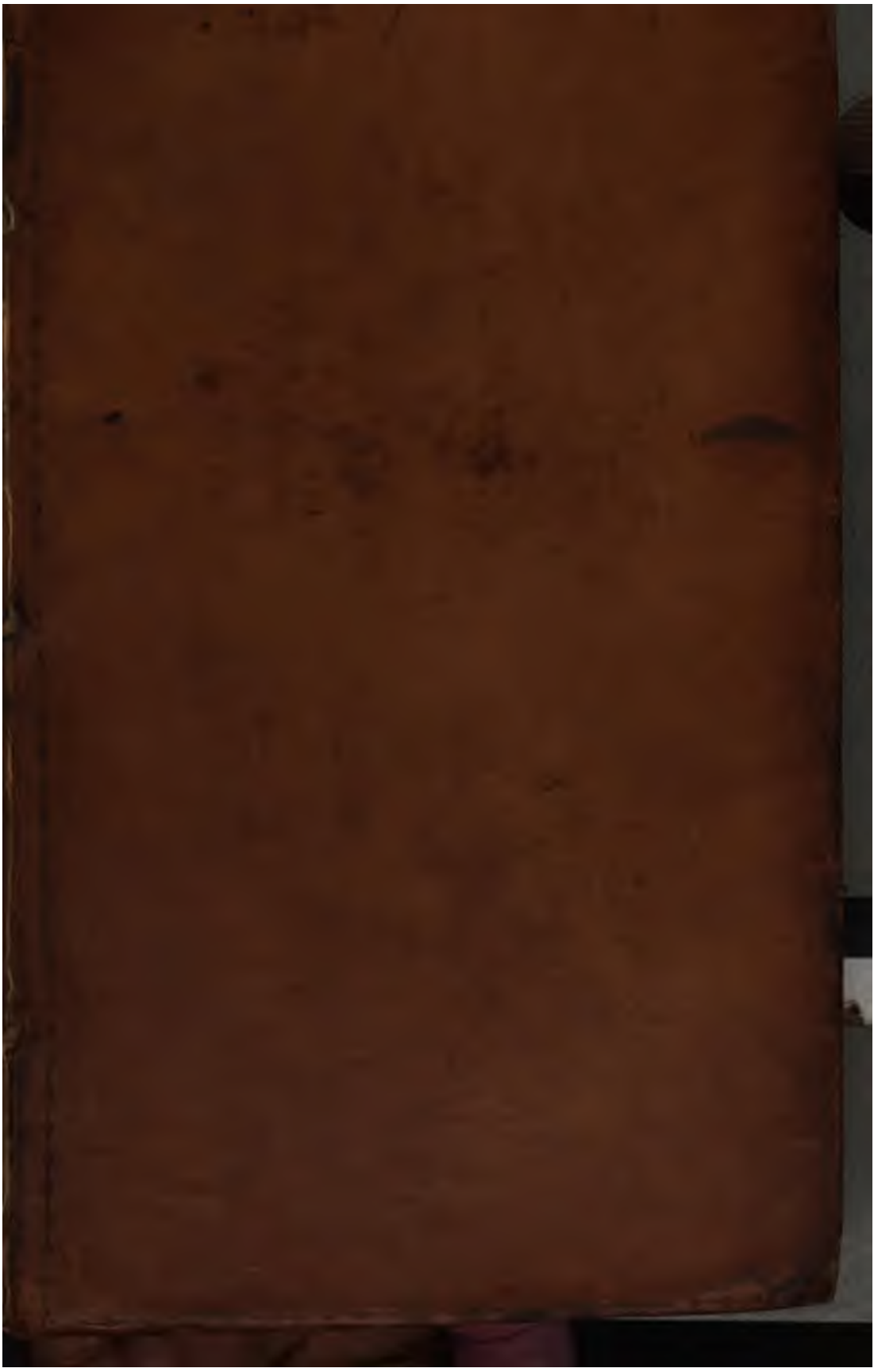

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REPORTS

OF THE

PROCEEDINGS IN COMMITTEES

OF THE

HOUSE OF COMMONS,

UPON

CONTROVERTED ELECTIONS,

HEARD AND DETERMINED DURING THE

PRESENT PARLIAMENT.

VOL. II.

Containing the Proceedings on PETITIONS in the CASES of

LYME,	CRICKLADE,
SALTASH,	BEDFORDSHIRE, (1785)
NEWPORT,	BUCKINGHAMSHIRE.

Together with an INDEX to the CONTENTS of both VOLUMES.

BY ALEXANDER LUDERS, ESQ.
BARRISTER at LAW, of the INNER-TEMPLE.

LONDON;
SOLD BY EDWARD BROOKE, THOMAS WHIELDON,
AND JOHN DEBRETT.
APRIL, MDCCLXXXIX.

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CASE

Of the BOROUGH of

LYME,

In the County of DORSET.

The Committee was choſen on Tueſday the 15th Day of February, 1785, and conſiſted of the following Members:

Hon. John Charles Villiers, *Chairman.*
Penyſtone Portlock Powney, Eſq;
Richard Aldworth Neville, Eſq;
Charles Brandling, Eſq;
Sir John Wodehouſe, Bart.
Sir Robert Saluſbury Cotton, Bart.
Hon. Chapple Norton.
John Call, Eſq;
Jeremiah Crutchley, Eſq;
David Murray, Eſq;
Lord Apſley.
Gabriel Steward, Eſq;
George Sutton, Eſq;

NOMINEES.

Charles Robinſon, Eſq; *Of Petitioners.*

Bamber Gaſcoyne, Eſq; *Of Sitting Members.*

PETITIONERS.

Robert Wood, and John Cator, Eſquires, and certain Freeholders of the Borough; by ſeparate Petitions.

Sitting Members.

Hon. Henry Fane, and Hon. Thomas Fane.

COUNSEL.

For the Candidates Petitioners,
Mr. Wilſon, and Mr. Lawrence.

For the Electors Petitioners,
Mr. Batt. (A)

For the Sitting Members,
Mr. Serj. Rooke, and Mr. Partridge.

THE CASE

Of the BOROUGH of LYME.

THE petition of the candidates ſtated, That at the election, a great majority of legal electors appeared in favour of the petitioners, and that the returning officer acted with great partiality in favour of the ſitting members, and admitted many illegal votes for them, and rejected many legal votes tendered for the petitioners, under colour whereof the ſitting members gained their apparent majority, although the petitioners were duly elected, and ought to have been returned. There was alſo a charge of bribery againſt the ſitting members *.

The petition of the electors alledged, that none but perſons reſident ought to have been admitted to vote, and that the returning officer, by receiving the votes of others, and rejecting thoſe of freeholders who had a right to vote,

* Votes, p. 25, 28th Jan. 1785.

had given an illegal majority to the ſitting members, in violation of the rights of the legal electors of the borough; a majority of whom had choſen the other candidates *.

The preſent conteſt is the ſecond which has occaſioned the right of election in this borough, to be diſcuſſed before a ſelect committee. The firſt happened upon the general election in 1780, the merits of which were tried in february 1781; after a previous determination by a former Committee, upon the merits of a double return, in which the cauſe was at firſt involved †.

The claims of each party were the ſame in both trials: one ſide contending for a right of election in the members of the corporation, generally: the other for a right in the freeholders of the borough as well as in the corporators; ſuperadding to both, the qualification of reſidence. The petitioners in both conteſts were thoſe who ſupported the latter claim. The former Committee determined in favour of the ſitting members, and declared the right of election to be "in the freemen only, as well non-reſident as reſident."

* Votes, p. 26.

† An account of this cauſe is in print, and makes one of the four election caſes publiſhed by Mr. Philips. See 38 Journ. 12, 13, 95, 108, 273.

There

There is no reſolution of the Houſe upon the right of election in this borough; though its conteſted elections have at different periods been determined there. At the laſt election, the returning officer proceeded according to that right which had received the ſanction of the former Committee. The ſtate of the poll was,

For the ſitting members,	31
For the petitioners,	8
Majority	23

Fifty-five perſons claiming to vote as freeholders and inhabitants, had tendered their votes for the petitioners, and were rejected by the mayor.

The counſel for the petitioners in opening their caſe, ſtated it to conſiſt of two propoſitions, to eſtabliſh which their whole evidence would be directed.

Firſt, That the right of voting for Members of Parliament in Lyme, can be exerciſed by none but inhabitants.

Secondly, That freeholders of the borough (ſubject to the former limitation) have alſo that right as well as the freemen.

The eſtabliſhment of either of theſe points would have given ſucceſs to the petitioners; becauſe it was admitted by the ſitting members, that 26 of their votes were not inhabitants: And

if the freeholders ſhould be conſidered to have a right, they would add ſtill more to the petitioners' majority.

The ſitting members did not require proof of the titles of the rejected freeholders, but allowed them *de bene eſſe* till after the deciſion of the Committee upon the queſtions of right. The petitioners ſaid, they had no evidence to offer of bribery, and therefore withdrew that charge.

The evidence on both ſides was drawn principally from the returns to parliament, and from old books, and other inſtruments belonging to the Corporation. On the part of the petitioners it conſiſted of the following articles:

The charter of Edward the firſt to the men of Lyme, (who at that time belonged to the demeſne of the crown) in theſe words *:

"Rex omnibus ad quos, &c. ſalutem, Sciatis quod volumus & conceſſimus pro nobis & heredibus noſtris, quod villa noſtra de Lyme in comitatu Dorſet de cetero liber burgus ſit. Et quod homines ejuſdem villæ liberi ſint bur-

* At the time of Domeſday it did not belong to the crown. It is entered in that book in three different places: one part of it belonging to the biſhopric of Saliſbury, another to the abbey of Glaſtonbury, and the other to an officer of the king's houſhold, who is there named. See *Domeſday* in Dorſet. The charter of Elizabeth recites, that it was of the Antient Demeſne of the crown.

genſes,

genſes, ita quod gildam habeant mercatoriam, cum omnibus ad hujuſmodi gildam ſpectantibus in burgo prædicto. Et alias libertates & liberas conſuetudines per totum regnum & poteſtatem noſtram quas burgenſibus noſtris de Melcumbe per cartam noſtram nuper conceſſimus & quibus cives noſtri de London' per cartas progenitorum noſtrorum quondam regum Angliæ de rebus & mercandiſis ſuis rationabiliter uſi ſunt hucuſq; ſine occaſione vel impedimento juſticiariorum vicecomitum ballivorum ſeu miniſtrorum noſtrorum quorumcunque in perpetuum: Precipientes & firmiter injungentes pro nobis & heredibus noſtris, ne quis ipſos in perſonis vel rebus ſuis contra libertates & liberas conſuetudines predictas gravet aut diſturbet in aliquo vel moleſtet. In cujus, &c. T. R. apud *Kaer in Arvon*, 3° die Aprilis *."

To eſtabliſh the firſt point, the neceſſity of reſidence, they produced the following indentures of returns to parliament.

1°. Mariæ (the oldeſt extant) which is, by " the mayor and burgeſſes, with the inhabitants," witneſſing, that " the ſaid mayor, burgeſſes, and inhabitants aforeſaid, by one aſſent and conſent,

* In the margin of the record of this charter (Pat. 12 Edw. I. m. 14) are theſe words: " Pro hominibus de Lyme quod villa ſua liber burgus ſit, & ipſi liberi burgenſes, &c."

have elected, &c." In witneſs whereof, the ſaid mayor, burgeſſes, and inhabitants, affix the common ſeal.

1 Eliz. By " the mayor and the burgeſſes, inhabitants."

26 Eliz. By " the mayor, the burgeſſes, and inhabitants."

30 Eliz. By " the mayor and the burgeſſes, for and on the behalf of them, and of all the inhabitants and commonalty." In witneſs whereof they ſet their ſeals. But the inſtrument has not now any ſeal extant.

8 Cha. II. By " the mayor, and (*others by name*) burgeſſes, and inhabitants."

10 Will. III. By " the mayor, capital burgeſſes, freemen, and freeholders, *being* † *all* inhatants."

12 Will. III. By " the mayor, capital burgeſſes, and freemen, inhabitants."

13 Will. III. By " the mayor, capital burgeſſes, and freemen, *being* † *all* inhabitants."

1 Anne. By " the mayor, capital burgeſſes, and freemen, inhabiting within the ſaid borough."

4 Anne. In the terms of that next preceding.

7 Anne. In the ſame terms.

† The words in Italics are interlined in the originals. The counſel for the ſitting members ſaid, they did not object to theſe interlineations as being a forgery.

9 Anne.

9 Anne. By "the mayor, capital burgeſſes, freemen, and freeholders, *inhabiting within the ſaid borough* *, who, according to the antient laws and cuſtoms of the ſaid borough, of right claim to chooſe, &c."

12 Anne. By "the mayor, capital burgeſſes, freemen, and freeholders, *inhabiting within the ſaid borough* †."

1 Geo. I. By "the mayor, capital burgeſſes, freemen, and freeholders, being all inhabitants of the ſaid borough, who, according to the cuſtom of the ſaid borough, of right claim to chooſe, &c."

In all the above returns, *inhabitants* are expreſsly deſcribed as voters: In thoſe following, the term is not uſed; but they were produced, in order to ſhew the names ſigned to them, and to connect thoſe names with evidence from the borough books, and other papers, tending to prove, that the perſons bearing them, were at the time of voting, inhabitants of the town. Theſe were,

A return in 1597, 39 Eliz. ſigned by ten perſons.

Four returns by "the mayor and burgeſſes," in the reigns of James I. and Charles I. one of

* Theſe words in Italics are interlined in the original; and notice is taken of it in the execution as being previouſly done.

† See the note in the oppoſite page.

which,

which, dated in 1 James I. was ſigned by ſix perſons; one in 21 James I. by ſeven; one in 1 Charles I. by four; and one in 3 Charles I. by eleven.

Three returns in the reign of Charles II. by "the mayor and burgeſſes, all freemen:" one in the thirtieth year of his reign, ſigned by forty five perſons; one in the thirty-firſt, by eight; and one in the thirty-third, by eight.

A return in 1 James II. in the ſame terms, ſigned by twenty-ſix.

A return in 2 Will. and Mary, by "the mayor, capital burgeſſes, freemen, and freeholders," ſigned by twenty-five.

The names affixed to this ſet of returns, were examined with the contemporary evidence above-mentioned; from whence it appeared, that ſuch perſons had been in ſituations which generally require reſidence; as ſerving upon the leet juries; holding town or parish offices; being preſented at the leet as reſiants; ſworn as decennars; perſons, 12 years old, ſwearing fealty; being deſcribed "*of Lynne*," or buried in the town. But in theſe inſtances the times did not always correſpond: In one, there was a ſpace of 57 years between the two periods, of connection; in another, 25 years; and in a third 21, beſides ſeveral others of a conſiderable number of years.

3 The

The following entries were read from the Corporation books:

An entry in the huſtings book of May 14, 1706, of the election of the members of parliament, by "the mayor, capital burgeſſes, and freemen, commorant and reſident in the ſaid borough, then and there preſent, having right of election."

An entry without date in the ſecond page of the huſtings book, of the period extending from 1698 to 1723, of two proclamations, to be uſed at the election of members of parliament. By the firſt, the officer is to proclaim, "If any more freemen, inhabiting in this borough, have not yet given their voices, let them come in, and their voices ſhall be received." The ſecond, to be uſed at the concluſion, is as follows: "I do, on behalf of Mr. Mayor, and the capital burgeſſes, and in the name of the freemen inhabiting in this borough, proclaim, publiſh, and declare, that A. B. and C. D. are duly elected."

The oath taken by the freemen, at their admiſſion, was read, in order to ſhew that the burgeſsſhip was intended for inhabitants only. The words are, "You ſhall be contributory to all manner of taxes, charges, rates, and impoſitions, within the ſaid town made, and to be made, by the mayor and his brethren, or the moſt

moſt part of them, bearing your part according to your power. You ſhall colour no foreigner's goods: You ſhall know no foreigners to buy or ſell any merchandize with any other foreigners within the ſaid town or liberties thereof, but you ſhall warn the mayor thereof, or his brethren, or ſome of them. You ſhall know no gatherings, conventicles, or conſpiracies, made againſt the king's peace, &c."

This oath was contraſted with another, which one of the books called the *honorary* freemens' oath, which contains only the general terms of "acknowledging to be a freeman, and bearing the love and affection of a freeman to the town." It appeared, that the latter oath had been taken by a lord-lieutenant of the county, (the entry of which was without a date) and by ſome gentlemen not inhabitants of the town, who were made honorary burgeſſes in 1700. The duke of Bolton was one of this number.

An entry in the huſtings book of 1716 was read, ſtating the admiſſion of ſome perſons to be freemen, who "took the oath of honorary freemen."

Parole evidence was alſo given upon this point of reſidence, which I ſhall relate with that of the ſame witneſſes concerning the claim of the freeholders.

Upon

Upon this ſecond point, relating to the right of freeholders, the petitioners produced the following evidence. They endeavoured to ſhew, that the word *burgenſis*, in its application to the corporate privileges of Lyme, was uſed in the antient records of this borough as ſynonimous to *liber tenens*, and diſtinct from a freeman of the corporation. For this purpoſe they read an antient reſiant roll*, dated 29th of Sept. 19 Eliz.† containing a liſt of the inhabitants, deſcribed in three claſſes, in the following terms, viz.

" Burgus de Lyme *Regis*.

" Nomina omnium inhabitantium villæ ibidam tam burgenſium & liberorum hominum quam aliorum ejuſdem villæ renovata, 29 Sept."

In the claſs intitled, " Burgenſes ſive liberi tenentes," are the following names: Elizabetha filia Thomæ Hyatt, Criſpina Bowden vidua, Alicia Toller vidua, Rob. Davie, Will. Elſden, and the names of ſeveral other men.

In the claſs intitled, " Liberi homines," are among others, the names of *Rob. Davie*, *Will. Elſden*, and five more of the names before claſſed, as " Burgenſes."

* It was uſual, at this period, for the officers of a court leet to keep a liſt of all perſons bound to attend there, which, probably, was the occaſion of making this roll.

† 1577.

In

In the claſs intitled, " Inhabitantes generaliter," is a very numerous liſt of names.

A book intitled, " The book of the freemen of Lyme *Regis*," beginning in 1569, contained entries of different dates ſubſequent to 29 Sept. 19 Eliz. 1577, (the date of the roll) of admiſſions of ſix of the perſons named in the firſt claſs, to the freedom of the town; of four of theſe, " by buying the freedom." Hence it was inferred, that they could not have been *freemen* before, although they were *burgenſes*.

Another reſiant roll was read, having the ſame title as the former, dated 18 Dec. 21 Eliz. 1579. This roll ſeemed to have contained, originally, the ſame diviſion of the inhabitants, into three claſſes, as the former; but, at preſent, only two appear to have been expreſſed; of which the firſt are called, " Liberi burgenſes," and the ſecond, " Liberi homines;" the third ſeemed to have been compoſed of the " alii homines."

Two of the names of this roll (not in the former) were traced in the ſame manner as the others, to entries in the freemens' book, of their being admitted freemen ſubſequent to the date of the roll, in which they are deſcribed as *liberi burgenſes*. Theſe two have added to their names the words " jure uxoris."

In

In this roll are ſixteen names (chiefly the ſame as in the former) under the claſs of *liberi burgenſes*, all of which, except that of Alicia Toller, are again entered under the claſs of *liberi homines*.

Having given this evidence to explain the meaning of the terms, they proceeded to ſhew that the right of voting for members of parliament had been exerciſed by freeholders, by

An entry in a corporation book, dated Dec. 30, 1609, containing the names of the voters preſent at an election of that time: The ſtile of the return is "by the mayor and burgeſſes;" the words of the entry are "Voices to the elections of the burgeſſes of parliament." Then follow twenty-four names, each twelve being diſtinguiſhed by a circumflex: Among them are Geo. Pley, Anthony Elſden, W. Legge, and Thomas Samford.

By the reſiant rolls of 1598, and 1611, Geo. Pley appears to have been then a freeholder; by the freemens' book Geo. Plea, *junior*, is firſt admitted a freeman in 1612.

In the ſame reſiant roll of 1598, "the heirs of William Elſden" are named among the freeholders; and in 1610, Anthony Elſden is named as ſuch: He is admitted a freeman in 1611.

In 1579, William Legge appears to be a freeholder, in right of his wife. An agent of the petitioners, who was examined, had looked over all

all the entries extant of admiſſions prior to the date of this election, and could not find any perſon of this name to have been then a freeman. He ſaid the ſame of Thomas Samford, who is named among the freeholders in 1609; and in 1613 his *heirs* are in the liſt.

The ſame gentleman ſaid, that a man might have been a freeman before the year 1569, without any trace of his admiſſion to be found in the books, becauſe the freemens' books, now extant, begin with that year. That the huſtings books often ſhew the names of freemen which are not to be found in the freemens' books, and *vice verſâ*. That the huſtings books, from 1584 to 1591-2 of part of 1602-3, from 1607 to 1614, from 1626 to 1646, and from 1710 to 1713, are miſſing.

The names of three perſons are ſigned to the return of Aug. 11, 1656, 8 Charles II. two of whom appear to have been freeholders in 1660, and all three in 1661. No entry can be found of their being freemen.

In the huſtings book of 21 March, 1613-14, it is entered, that "this day the freemen and freeholders did chooſe Mr. Recorder, and Mr. John Drake, gent. to be burgeſſes of the parliament." On the 22d of February, 1680-1, is the entry of an election to parliament "by the mayor, capital burgeſſes, *and freemen*, with one aſſent and conſent, *without*

without the leaſt contradiction of any other perſons whatſoever within the ſaid borough."

The return to the convention parliament, dated 11th of January 1688-9, after reciting the circular ſummons from the Prince of Orange, for chooſing members according to the antient rights and cuſtoms, certifies, that " the mayor, burgeſſes, freemen, and freeholders, have choſen, &c." To this the mayor ſets his hand and ſeal.

The return, 2 Will. and Mary, 1689, ſtates, " that the mayor, capital burgeſſes, freemen, and freeholders, who, according to antient rights and cuſtoms of the borough, of right claim to chooſe, &c. have elected ———." Signed by the mayor and ſeveral others, with the mayor's ſeal of office affixed.

This election was conteſted by petition to the Houſe; the proceedings upon which were read from the Journal* as follows:

" 21ſt of May. Colonel Birch reports, from the Committee of privileges and elections, to whom the matter touching the election of burgeſſes to ſerve in this preſent parliament for the borough of Lyme *Regis*, in the county of Dorſet, was referred, the ſtate of the caſe, at it appeared to the Committee: Which he produced in writing; and being read at the clerk's table, is as followeth:

* 10 Journ. 140.

" Upon the petition of Sir William Drake, Knight and Bart. againſt John Burridge, Eſq; touching the election of Lyme *Regis*, in the county of Dorſet, came to be heard for the petitioner.

" That the counſel inſiſted, that the right of election was in the mayor, burgeſſes, and freemen at large; and that Lyme *Regis* was made a borough 12 Edw. I. and at the ſame time a corporation; ſo the corporation was co-evous with the borough: And delivered in a copy of a grant

" 12 Edw. I. " Quod villa de Lyme in comitatu Dors' de cetero liber burgus ſit, & quod homines ejuſdem ville ſint liberi burgenſes ita quod habeant gildam mercatoriam."

" 12 Edw. IV. " Sub ſigillo majoris." (Return)

" 30 Eliz. Mayor and burgeſſes elected.—Return, under the ſeal of mayor and burgeſſes."

" 1° and 2° Philippi & Mariæ. Mayor and burgeſſes elected—under the common ſeal.

" 16 Car. I. Major per majorem partem capitalium & aliorum liberorum burgenſium, elegit—ſub ſigillo majoris.

" 13 Car. II. Majorem cum aſſenſu reſiduorum burgenſium liberorum hominum villæ prædictæ—ſub communi ſigillo.

" 31 Car. II. 32 Car. II. Mayor and burgeſſes, with conſent of the whole mind, elected —under the hands of the mayor and burgeſſes, and common ſeal.

" It appeared, upon the poll delivered in, that Sir William Drake had twenty-nine votes with himſelf, and that Mr. Burridge had thirty votes with himſelf; but it was allowed, that of the twenty-nine that voted for Sir William Drake, there were five foreign freemen, viz. Francis Alford, William Bragg, John Fry, Anthony Floyer, and Richard Henvill.

" And they called

" Mr. Gregory Alford, who ſaid, he had been mayor of the town anno 1663, and then came the act of regulation *; and then he called in Sir John Strode, Colonel Biſhop and others, to his aſſiſtance, and they gave their voices; and they have come in ever afterwards into the common council houſe, and voted for mayors and other officers. That Sir John Strode and Colonel Biſhop were out burgeſſes, as theſe five excepted againſt are. That he remembered Sir John Strode and Colonel Biſhop have been at the election of parliament men; and, to the beſt of his remembrance, have voted in the elections of parliament men; and particularly at the elec-

* Stat. 13. Cha. II. ſtat. 2. ch. 1.

tion of the Lord Clarendon*. That ſeveral freeholders have come and claimed their votes, but never were admitted nor returned: That he believed particularly, when the ſitting member, Mr. Burridge, was mayor, the freeholders were rejected; and that Mr. Burridge made a return by the mayor, burgeſſes, and freemen. That whoſoever are free of Lyme, are free from many tolls at Briſtol, and enjoy ſeveral privileges there: But ſays, the foreign freemen take not the ſame oath with the other. That it appeared, that the charter of Lyme *Regis* had been ſurrendered to the king.

"And it was agreed, Thoſe acts that were done under the new charter, to be void; and thereupon the counſel for the petitioner produced the ſurrender of the charter of the 20th of October 1684. And called

"One Bragg, a witneſs, who ſaid, That Thomas Pitts, Thomas Fitzgerrard, and Robert Fowler, who polled for Mr. Burridge, were made free under the new charter, viz. Thomas Pitts, 2d of March, 1684; Thomas Fitzgerrard, 5th of October, 1685; Robert Fowler, 4th of February,

* At that time Mr. Hyde. This happened in the reſtoration year, upon a vacancy occaſioned by Mr. Moore's chooſing to ſerve for Heyteſbury, he having been elected for that place as well as Lyme. 8 Journ. 25.

1687:

1687: That James Pitts, another perſon that voted for Mr. Burridge, was a freeman by the old charter, but disfranchiſed for ſome miſdemeanor, and reſtored by the new charter. He was disfranchiſed in a full corporation, for bringing in ſeveral things contrary to his oath. That John Caſe and Matthew Sprag are freemen of the town of Lyme, but both live out of the town; one ſix miles, the other two.

" For Mr. Burridge: That the counſel inſiſted, that the right of election conſiſted in all freemen of Lyme, being inhabitants, and freeholders of the ſame.

" The counſel for the petitioners granted, if the freeholders had a right, Mr. Burridge was elected.

" Then the counſel for Mr. Burridge produced returns.

" 1 Eliz. Mayor, burgeſſes, and inhabitants, elected—under the ſeal of the mayor and burgeſſes.

" 1 Mariæ. Mayor, burgeſſes, with inhabitants, elected—under the common ſeal.

" 13 Car. II. Produced alſo by the petitioner; and called

" John Davis; who ſaid, he had known Lyme from a child; and that freeholders had given their vote; particularly Thomas Bragg, William Trickey, —— Short, and —— Mincent, gave their vote, as he thinks, at the election of Eſquire

Henley and Sir John Shaw; but ſays, he never knew any freeholders, or freemen, out of the town, admitted to vote.

" Mr. Short being called, exception was taken to him as being a freeholder; but, afterwards, allowed to be a witneſs as to the right of foreign freemen; and ſaid, he never knew any honorary freeman demanded to vote till the laſt election.

" George Brayholt ſaid, he had known ſeveral elections of Mr. Henley and others; and that freemen and freeholders have their votes: That 'Squire Henley made ſeveral freeholders to that purpoſe: That no out-lying freemen had a vote to his knowledge.

" Tytherly ſaid, he had been a freeman twenty years, and that he has known ſome freeholders come and claim their right at elections; and they uſed to cry, " Up with them."

" James Pitts ſaid, he knows Sprag very well; and that Sprag had a houſe in the town that paid to the poors' rate: That John Caſe traded as a merchant in the town; but his mother-in-law dying, he was gone to take poſſeſſion of the eſtate: That Thomas Pitts was made a freeman by the new charter: And it being ſaid he was not a freeman, he came to the corporation and deſired to have his fine, or be re-admitted; and the corporation told him, there was no need; he was a good freeman,

Upon

"Upon the whole matter, the Committee came to ſeveral reſolutions, which he read in his place; and afterwards delivered the ſame in at the clerk's table, where the ſame was read, and is as followeth:

"Reſolved, that it is the opinion of this Committee, That John Burridge, Eſq; is not duly elected a burgeſs to ſerve in this preſent parliament for the borough of Lyme *Regis*, in the county of Dorſet.

"Reſolved, That it is the opinion of this Committee, that Sir William Drake, Knight and Bart. is duly elected a burgeſs to ſerve in this preſent parliament for the borough of Lyme *Regis*, in the county of Dorſet.

The firſt of the ſaid reſolutions being read a ſecond time, the queſtion was put, that the houſe agree with the Committee therein. The houſe divided.

Tellers of the Yeas, { Sir Robert Cotton, / Mr. Brewer, } 82

Tellers for the Noes, { Sir John Guiſe, / Mr. Conninſby, } 121

So it paſſed in the negative."

After the above entry was read, the petitioners called three witneſſes to ſhew the reputation of the inhabitants as to their claim. Their names were Harris, Bowdidge, and Jurdan. The two firſt were 74 years of age, and the other 64.

The counſel ſaid, that four or five old men, who had been examined before the laſt Committee, and whoſe evidence would have confirmed the others, had died ſince.

Theſe witneſſes were inhabitants of Lyme, where they had lived almoſt all their time. They ſaid, it was the common reputation there, that the right to chooſe members was in freeholders having proper land in the town, and freemen; and that they muſt all be inhabitants. When they were young they had heard old men ſay ſo; ſome of whom were capital burgeſſes *. Harris ſaid, that the votes of non-reſidents had often been refuſed; but, however, he believed *ſome* had always voted ever ſince he could remember. The other two witneſſes believed, that no non-reſidents had voted before 1734, at which time Mr. Scroope became member. Jurdan had heard Mr. Scroope himſelf formerly ſay, that non-reſidents had no right; and conformably to this opinion, ſome time before his election, he had deſired the witneſs's father, who was a freeman in his intereſt living a mile out of the town, to remove his family into it before the election; becauſe his vote would otherwiſe be rejected. With this requeſt his father complied ſome months before that election.

* This corporation conſiſts of a mayor and 15 capital burgeſſes, and an indefinite number of freemen.

Theſe

Theſe witneſſes were queſtioned as to particulars of the elections in 1727 and 1747, which were the only two conteſted ſince that in 1722; and gave the following account of them.

Harris and Bowdidge remembered both; but the latter had only lived two years in Lyme in 1727, being then not 17 years old. At the election in that year, Burridge and Drax, and Creſner and Henley, were candidates. Harris ſaid, that freeholders were then canvaſſed, and on the election day went up to the hall; but he could not name any in particular who had been canvaſſed, nor by whom. Bowdidge ſaid, that Burridge canvaſſed the freeholders, and named two in particular; but one of them he knew to be a freeman alſo: He did not know that theſe men had been canvaſſed but by hearſay. Burridge was then mayor, and at the poll rejected the votes of freeholders, and returned himſelf upon the votes of freemen only. Harris's father was then a freeholder. After that election, there was a feaſt for the freeholders' ſons, at which the witneſs was preſent. There were 46 names ſigned to the return of this election, of whom Bowdidge remembered all but ſix to have been inhabitants of Lyme. One of the ſix, a Mr. Oke, he did not remember; but the family reſided at Whitlands, near two miles off. Some of the 46 he knew to be both freemen and free-

holders. Jurdan remembered three of theſe ſix to have been inhabitants of Lyme; but Oke, he ſaid, lived at Whitlands.

In the entry of Oke's admiſſion, it is ſaid he took the oath of *honorary* freemen.

At the election in 1747, Scroope, Henley, and Drax, were candidates. Drax ſtood on the right of freeholders, moſt of whom ſupported him, and met for that purpoſe at the houſe of one Tucker, who acted for him in his canvas. Before the election, Drax declined, and left the town; ſo that there was no effective conteſt: Yet, according to Jurdan's evidence, he would have had a majority if he had ſtood a poll. This witneſs ſaid, there were then about 60 freeholders in Lyme. Bowdidge ſaid, that Henley alſo had canvaſſed the freeholders; and Jurdan had heard him before that time ſay, "they had a better right than freemen." Henley was then recorder, and both a freeholder and freeman. Harris remembered one Hooper's buying a freehold houſe previous to this election, in order to make himſelf of conſequence in it; and upon Drax's going away, his diſappointment became a ſubject of laughter among his acquaintance.

The petitioners produced an antient ſurvey of this borough, in 1594, in which mention is made of a conſiderable number of burgages (about 50 in all) held of the corporation, ſpecifying the tenants

tenants and their rents. The corporation hold of the crown.

The foregoing is a ſtate of the whole evidence produced by the petitioners.

The evidence on the part of the ſitting members was directed, in the firſt place, againſt the claim of the freeholders as following:

Returns in which neither *inhabitants* nor *freeholders* are mentioned, viz.

1 and 2 Phil. and Mary. By "the mayor and burgeſſes." 2 and 3 Phil. and Mary, in the ſame form. So in 4 and 5 Phil. and Mary. 14 Eliz. 28 Eliz. 39 Eliz. 1 James I. 18 James I. 21 James I. 1 Charles I. *April*, 1 Charles I. 3 Charles I. and 15 Charles I. Some of which are under the common ſeal, and ſome ſigned by the mayor and others, who were proved to be capital burgeſſes. A return, 16 Charles I. in theſe words: "Major per majorem partem capitalium & aliorum liberorum burgenſium burgi domini Regis de Lyme *Regis* prædicti ſecundum conſuetudinem burgi prædicti elegit Edm. Prideaux, &c." In 12 Cha. II. 31 Cha. II. 7 Will. III. and 8 Geo. I. by the "mayor and burgeſſes." The returns from 1714 to 1774, are by "the mayor, capital burgeſſes, and freemen, and under the common ſeal, with the ſignature of the mayor only; except that in 1727, ſigned by 46 perſons,

perſons, and that in 1768, ſigned by the mayor and 12 others.

Charles II. in the 36th year of his reign, granted a charter to the corporation, which partook of the prevailing principles of government of that time. It was annulled a little before the Revolution by the proclamation of James II. according to a power reſerved in the charter for that purpoſe *. This charter contained the following clauſe relating to parliamentary elections, for the ſake of which it was now produced for the ſitting members †, viz. "Et ulterius conceſſimus ac perpreſentes pro nobis hæredibus & ſucceſſoribus noſtris concedimus majori & burgenſibus burgi ſive villæ prædictæ & ſucceſſoribus ſuis

* See the note (G) after the Caſe of Saltaſh.

† The counſel for the ſitting members offered this cancelled charter in evidence, as a proof of what was, at the time of granting it, the acknowledged uſage of the borough in electing members. This was objected to on the other ſide: Becauſe it was to be received either as a royal *charter*, or nothing: And as a charter it was annulled and cancelled, and had now no ſeal or other mark of authenticity: It was not what it purported to be, and therefore not to be received. For the ſitting members, it was argued to be competent evidence to the purpoſe for which it was produced; i. e. of *reputation* and *uſage*, becauſe it appeared to be an antient paper of authority, found among the records of the corporation, and as ſuch, entitled to reſpect in theſe queſtions. Hereupon the Committee came to a reſolution to receive it in evidence.

quod

quod burgenſes eligendi & mittendi ad parliamentum noſtrum & hæredum vel ſucceſſorum, noſtrorum de cætero in poſterum electi erunt per majorem capitales burgenſes, & liberos homines burgi ſive villæ prædictæ vel majorem, partem eorundem *prout antehac in temporibus retroactis aſſuetum & conſuetum fuit*, infra burgum ſive villam prædictam."

The charter alſo preſcribes a new mode of electing and ſwearing in the mayor; and in that article does not refer to the antient uſage. In all the other charters, no mention is made of the election of members of parliament; and none of them give any directions about the electing or admitting freemen.

An entry dated the 29th of January 1593-4, 35 Eliz. " ad hanc diem extitit electio burgenſium parliamenti, & Robertus Haſſard electus eſt per majorem burgenſes & liberos homines. Et alter burgenſis, viz. Zacharias Bethel electus eſt per dominum Marchionem de Winton (B)."

An entry of the 7th of February, 1678-9, of an election of the members, by " the mayor and burgeſſes and freemen of the borough," to which is added, " beſides the capital burgeſſes, the freemen preſent were as follow:" After which are 33 names. Here the counſel for the petitioners obſerved, that they were all *inhabitants*; in which they were not contradicted.

An

An entry in the ſame terms as the laſt, of an election, the 30th of September, 1679.

An entry the 11th of January, 1688-9, in the following words: "Then choſen for members to meete and ſitt at Weſtminſter, the 22d inſt. for this burrough, collonell John Pole, Eſq. and Mr. John Burridge, Merchant, by the capital burgeſſes, freemen and *freeholders*, and ſoe the returne was made accordinglie. *by one Mr. Egerton a pretended Councellor.*"

The appearance of the writing of the latter ſentence of this entry, occaſioned obſervation upon its authenticity: The counſel for the petitioners alledging it to be in a different hand from the reſt (which did not ſeem to be the opinion of the Committee) and an addition * made at a different time.

After reading the above entries, the counſel proceeded to others, tending to explain the terms uſed in thoſe read by the petitioners, relative to the character of a *burgeſs* and a *freeman* of Lyme, viz. The following words written by way

* I had an opportunity of examining it minutely: It ſeemed to me plainly added after the entry was thought to have been finiſhed by him that made it; as it came after a mark, which I obſerved to be the common period uſed by the writer of that book, for the concluſion of an entry. The hand writing of the whole had the appearance of uniformity.

of

of title, in the beginning of the book of freemen before mentioned, " The names of them that be made free, viz. Thoſe that are no burgeſſes, they to be called *freemen*; and thoſe that are burgeſſes, they to be called *free-burgeſſes*. All which do pay a fine and take their oaths."

" A Table *, conteyning as well the rates of the accuſtomed duties payable to the ufe and mayntenance of the town and cob † of Lyme *Regis*, as alſo certain other things concerning the fraunchiſes and liberties of the ſame towne. Written 8 July, 35 Eliz. 1583 ‡.

" By the charter of the burrough, the mayor and burgeſſes ought to hold and enjoy, as well all things to them graunted therein by ſpecyall words, as all ſuch other cuſtoms, liberties and privileges, graunted and confirmed therein by general words, as they have uſed, and accuſtomed tyme of mind of man, whereof the freedome of the burrough is parcell.

" By ſpecyall words it is expreſſed in the charter, among other things concerning merchaun-

* The original having been lately loſt, it was read from a printed copy.

† The Pier which ſecures the harbour from the ſea.

‡ Two years before this, the queen had granted them a new and extenſive charter, by which the form of the corporation was in ſome reſpects altered, and its powers enlarged. This probably occaſioned the compoſing of the preſent table.

dize:

dize: 1. That no merchaunt, &c.—(then follow three particular proviſions reſpecting trade.) After which it proceeds thus:

"The cuſtomes and freedomes of the ſaid burrough uſed tyme out of mind, and in generall words confirmed in charter by King Edw. I. and after by his ſucceſſors, kings and quenes of this realme ever ſince, doe partly concerne.

"Free burgeſſes. All thoſe that had freehold within the borrough, and would be free of the freedome, were made free by a fine and by an oath, and then they were called free burgeſſes.

"Free men. *Item*, All others not having any freehold as aforeſaid, and would be free of the freedome, were made free by fine and oath as aforeſaid, and they were called freemen.

"Free women. *Item*, The widowe of a free burgeſs, or of a freeman, hath her freedome during her widowhood."

After this follow ſeven other *Items* of different cuſtoms. Then a liſt of the cob duties paid time out of mind; referring to their being confirmed upon an inquiſition taken under an Exchequer commiſſion in 22 Eliz.

An

An entry in the old book of orders, in the page next to that read by the petitioners of the 30th of December 1609, (ſee p. 15) dated the 15th of February following, in theſe words:

"Whereas on the 30th daye of Decr. laſte, wee the mayor and his bretherne, with the better parte of the freemen and free-burgeſſes, which have their voyces in this election, did elect and make choyce of Mr. Geo. Jeffrey for burgeſſe of our parliament of our town of Lyme Regis: It is ſo that nowe again wee the mayor and company, with the free-burgeſſes doe ſtand to and acknowledge, that the ſaid Mr. Geo. Jefferye ſhall ſtand and bee the ſole and onelye man for burgeſſe of the parliament for our towne: Although there be order but for one to be elected (according to our firſt meaning). And for the better aſſurance and certentie hereof, we the mayor and bretherne do ratifye and confirme the ſame under our hands. Yeven the daye and yere firſt above written †."

After

† The date of the entry of this election, does not agree with that of the iſſuing of the writ; which appears by the Commons, journal not to have been ordered by the Houſe till 14th Feb. 1609-10. (1 Journ. 392,3.) The members for Lyme at this period were Sir George Sommers, (whoſe name is mentioned in the ſtate of the evidence, in p. 38) at that

After which follow the names of thoſe preſent.

The following entry dated the 30th of March 1614, was read, to explain, that of the 21ſt of March preceding, read by the petitioners. (See p. 16.)

" Free burgeſſes which have their voices in the election of the burgeſſes for the parliament." After which follow the names of twelve perſons, all of whom were found to have been admitted freemen previous to that time.

time Governor of Virginia,—and . . . . . Haſſard. An attempt had been made to remove the latter for age and ſickneſs, in 1605, (1 Journ. 256,7) but it failed. At the firſt meeting of the Commons in Feb. 1609-10, (no ſeſſion having been held ſince July 1607,) they began to conſider of filling up the vacancies that had happened in the mean while; and the Committee of privileges made a report on the ſubject: Among others, Haſſard was then mentioned, as ſixty-nine years of age, and bedrid; and Sir George Sommers, as incapable, by reaſon of his government. The Houſe ordered a new writ in the room of the former, without debate; but the report reſpecting the latter, occaſioned one, which ended in ordering a new writ for him likewiſe. Five days before, on the 9th of February, there is an entry in the Journal, of " A petition from Lyme *Regis*, touching their burgeſſes, offered by Sir John *Jeffreyes*." The object of it probably was, to have the vacancy declared. The member elected is deſcribed in the corporation book, as the ſon of Sir John *Jeffery*, Knt. who perhaps was the ſame perſon that preſented the petition; very little attention being at this period paid to the manner of ſpelling names. The return itſelf is of George Jefferyes.

In

In the entry of the election of mayor in 1593, the perſons preſent are arranged in three claſſes.

1. The capital burgeſſes.

2. Liberi tenentes.

3. Liberi homines.

At the head of the liberi tenentes are two, Chriſt. Elſden and Richard Davidge, whoſe names are incloſed in a circumflex, with this note in the margin, "*liberi homines tantum.*" From hence it was inferred, that the word *freeholder* was often uſed to deſcribe free burgeſſes, in contradiſtinction to mere *freemen*. There are twenty-one names in the claſs of freeholders, twelve of which were found among the admiſſions to the freedom, previous to that election *. Seven of the remaining nine were upon the reſiant roll of that time as free burgeſſes; but of theſe, five appear to have been admitted freemen after the date of this reſiant roll. The agent for the ſitting member, who had examined the books for this purpoſe, ſaid, he had found ten names of *freemen* upon the reſiant rolls which were among the admiſſions to the freedom *afterwards*. The name of Thomas Samford, mentioned in p. 15, as preſent at an election in 1609, not being then a freeman, was found in

* See in p. 16, the periods in which the books are miſſing.

a liſt of thoſe preſent at an election of mayor in 1605; in which, after the names of thoſe *de concilio*, or capital burgeſſes, "Burgenſes et liberi homines inſimul"*, are claſſed together. From hence the counſel for the ſitting members would have inferred, that he was at that time a freeman. To obviate this, the counſel for the petitioners produced the following inſtances from the books of perſons appearing in thoſe mixed liſts at mayor's elections, who are made freemen afterwards, viz. Robert Haſſard, voting in the election of mayor, the 23d of Auguſt 1581; his name firſt appears as a freeman in the freeman's book in 1598, but it is among the free burgeſſes in a reſiant roll of 1579. In the ſame mayor's election J. Perrott votes; he too is among the free burgeſſes in 1579; but the firſt of that name admitted a freeman, is in 1583. Nic. Dean, preſent in Auguſt 1581, is admitted a freeman in October following; his name is on the reſiant roll as a free burgeſs in 1579. R. Norris, preſent at the ſame election, is admitted a freeman in 1583. R. Davidge, preſent in Auguſt 1580, as a free burgeſs, is admitted a freeman in 1583.

Upon the point of reſidence, the following evidence was given.

* Other entries in the huſtings book of mayor's elections, in the ſame form were produced.

An

An entry in a corporation book, dated the 29th of Auguſt 1580, in theſe words. " All the court, except Mr. William Elſden, do agree, that the free burgeſſes which appear, as well thoſe inhabitant as *not inhabitant*, ought to be ſworn to the election of the mayor: As alſo thoſe that hold any free burgages in the right of their wives (by Mr. Poole). Thereupon Robert Haſſard and Richard Davidge were ſworn."

An entry dated the 2d of November 1584. " This day at a court holden in the Moothall, it is agreed by the mayor and burgeſſes of the town of Lyme Regis, that as well the burgeſſes and freemen of the ſaid town, as well inhabitant as *not inhabitant*, and all other inhabitants, ſhall be contributary to the payment of taxes and impoſitions, to be levied towards the charges of the burgeſſes for the parliament *."

Two perſons of the names of Roſe and Seward, had ſigned the return in 1627; and in order to ſhew the probability of their being at that time non-reſident, an entry in 1631 was read from the books, ſtating, " foraſmuch as they being capital burgeſſes, are gone to live out of the town, and have not of long time been here aſſiſtant to Mr. Mayor, &c." they are therefore hereby

* One of the Committee deſired to ſee the return next following the date of theſe two entries. It was that before ſtated, in p. 8, in 26 Eliz. by burgeſſes and *inhabitants*.

ordered to return by a given day, or that they will be disfranchiſed.

Nicholas Hunt appears to have voted for mayor in 1601; within three months after, on the 23d of November in the ſame year, he is mentioned as living at *Culliford*, ſeveral miles diſtant.

Philometh Dummett, who reſided out of the town, attended at the leets in 1666.

The following are inſtances of gentlemen, whoſe deſcriptions were ſaid to ſhew, that they lived at places in the country, ſome miles diſtant from Lyme.

In 1598, Auguſt the 28th, Mr. Somers, *of Bourn*, is admitted a freeman, and on the ſame day votes for mayor; on the 6th of September, he is ſworn of the town council; in 1601, and 1604, he acts as capital burgeſs. In 1605, (being then Sir George Somers, Knt.) he is choſen mayor. But in the entries ſubſequent to that of his admiſſion, he is not deſcribed of *Bourn* or any other place.

In 1606, Sir John Jeffery, of *Catherſton*, is admitted to the freedom; at the ſame time Sir Robert Strode *of Parnham*.

In 1607, theſe three vote at the election of mayor.

In 1613, John Drake, *of Aſhe*, votes for mayor.

In

In 1611, George Brown, *of Wimburn*, is admitted a freeman and recorder; and in 1616, votes for mayor.

In 1608, Sir John Strangeways, *of Abbotſbury*, is admitted; and in 1619 votes for mayor.

In 1611, Arthur Gregory, *chief ſearcher of the port of Poole*, is admitted; and in 1620, he acts as a capital burgeſs in the election of mayor; his name likewiſe appears in the return to parliament of 1625.

In 1660, John Strode *, *of Parnham*, is admitted; and in 1665, acts as a capital burgeſs in the election of mayor.

The entries in the Journals of the 6th of January 1701-2, (13 Journ. 654.) and of the 26th of November 1708, (16 Journ. 18) were read. The former contains the petition of a Mr. Hallett, againſt the election of one of the ſitting members (Mr. Paice,) expreſsly alledging the right of voting for this borough, to be "in the mayor, capital burgeſſes, freemen and freeholders inhabiting within the borough," and complaining of the mayor for refuſing ſuch votes. This petition was afterwards dropped, for nothing further appears of the petitioner in the Journal. The other entry contains a petition

* The witneſs Alford, mentioned in p. 19, ſpeaks of Strode's voting.

of Mr. Henley, againſt the election of Freke and Burridge in general terms; and alſo a petition on the ſame ſide from the "capital burgeſſes, freemen and freeholders, inhabitants within the borough," ſtating their right to elect, and the mayor's refuſing to receive their votes for Henley. Theſe petitions were likewiſe dropped.

The counſel for the ſitting members alſo produced the minutes of the reſolution of the ſelect Committee in 1781, declaring their judgment of the right of election as before ſtated in p. 4.

The following entry from the Journals of the election in 1727, was not, in point of form, read to the Committee; but it was referred to in the arguments of both ſides and by the Committee, as if it had been.

21 Journal 68, "Mr. Earle, according to order, reported, &c. and the report and the reſolution of the Committee are as follows, viz. Upon the petition of Henry Holt Henley, Eſq; complaining of an undue election and return of John Burridge, junior, Eſq; to ſerve for the borough of Lyme Regis in the county of Dorſet; and alſo the petition of divers inhabitants of the borough, whoſe names are thereunto ſubſcribed in behalf of themſelves and many others, who have a right to vote at the election of burgeſſes,

geſſes, to repreſent the borough in parliament, praying relief againſt the pretenſions of Mr. Henley, to be one of the repreſentatives of this borough.

" That the Committee proceeded to examine the merits of this election, ſo far * as the ſame were referred to them.

" The Houſe having adjudged, that Mr. Burridge, being mayor of this borough at the time of the election, and the proper officer to whom the precept was directed, was not capable of

* Henley's petition (21 Journ. 33.) does not alledge any particular right of election, but objects principally to Burridge's return of himſelf as *mayor*. It alſo charges him with obtaining a majority by illegal practices, and with not having a qualification by eſtate. On the next day after this petition was preſented, (p. 35.) the Houſe entered upon a conſideration of the return; and it appearing that the mayor had returned himſelf, they referred to the Thetford caſe in 1685, (9 Journ. 725,) in which it had been reſolved, that no returning officer of a borough could be elected or returned for that borough. Hereupon it was reſolved, that Burridge was not capable of being elected or returned: And the Committee of elections (to whom the *whole* of Henley's petition had been before referred) was ordered " to examine the matter of that part thereof which relates to the petitioner's complaint, *That he, although duly elected, was not returned.*" Upon which the above report was made to the Houſe. The petition there referred to does not ſtate any right of election, but is expreſſed in general terms. It is called in the Journal (p. 58,) as in the above report, " A Petition of divers inhabitants, &c."

being

being elected, and returned for the ſame borough.

" The counſel for Mr. Henley proceeded to make good the allegation in his petition, that he was duly elected. And they alledged, that the right of elections is in the mayor, capital burgeſſes, and freemen of the borough.

" That the poll as between Mr. Henley and Mr. Burridge was,

" For Mr. Henley, 41

" For Mr. Burridge, 52

" Mr. Henley's counſel called

" Mr. Thomas Cowper and John Bowdidge; who, being examined, gave evidence, that at the time of the election, upon Mr. Burridge's declaring himſelf a candidate, Mr. Henley made a public declaration to the voters, that Mr. Burridge being then mayor, was incapable of being elected for this borough.

" George Buck, being examined, ſaid, that about two or three days before the writs for calling this parliament, came out, ſixteen voters (who he named) were admitted freemen by Mr. Burridge as mayor, upon condition, that they voted for him in the election; which they promiſed and gave notes to perform; and that they all voted for him accordingly, and not one for Mr. Henley.

"That nobody appeared before the Committee to make good the allegations in the ſaid other petition of the inhabitants above-mentioned againſt Mr. Henley.

"That the Committee came to the following reſolution:

"Reſolved, That it is the opinion of this Committee, that Henry Holt Henley, Eſq; is duly elected a burgeſs to ſerve in the preſent parliament for the borough of Lyme Regis, in the county of Dorſet.

"The ſaid reſolution, being read a ſecond time, was, upon the queſtion being put thereupon, agreed unto by the Houſe."

The counſel for the ſitting members alſo examined Mr. Follett, the town clerk of Lyme. He ſaid, he had held that office fifty years. In all his time there had been but one form of oath adminiſtered to freemen of all deſcriptions upon their admiſſion, which was that beforementioned, as the freeman's oath in p. 11; he had always conſidered it as the proper one, nor had he ever known any objection to the adminiſtering it in that form: That the proclamations ſtated in p. 11 have never been uſed in his time; the form now uſed in elections has only general words, calling upon "all who have a right to come and vote."

It is his duty to make out the liſts of juries for the court-leet; and in performing it he has never made out ſummonſes for perſons non-reſident; but he has occaſionally entered the names of by-ſtanders in the court who are not freemen, when jurymen have been wanting to complete the number. In all the elections in his time, he never knew the vote of a non-reſident refuſed, nor a freeholder as ſuch received.

His firſt acquaintance with the borough began after Mr. Scroope's coming there; from which time the borough had been under Mr. Scroope's management, and that of his ſucceſſors, the Fane family. The number of freemen was then about one hundred. Many of the returns in this period have been ſigned generally by the mayor, under the privy ſeal. One he remembered under the common ſeal, and ſigned by the freemen. The only conteſted elections in his time were thoſe of 1747, 1780, and the preſent.

He mentioned the following particulars of that in 1747. He was then in the intereſt of Mr. Scroope and Mr. Henley, and attended the huſtings in the execution of his office of town clerk. Henley and Scroope were joint candidates. The former had known the borough from his infancy. He canvaſſed the freeholders, and before the election wrote a letter to him, (the witneſs) deſiring him to tell a Mr. Davis to be

active in canvaſſing them. (This letter he now produced.) Henley himſelf poſſeſſed ſeveral borough freeholds*; more than any other perſon. Although Drax had left the town in the morning of the election day, yet Burridge and Freke, who ſupported him, inſiſted upon having a poll taken. There were about 60 or more freeholders in the hall; but the mayor would not receive their votes in that right. About 30 or 40 freemen voted, and ſome few for Drax. He himſelf voted as a freeman for Henley and Scroope. Mr. T. Fane, after the mayor left the hall, took a liſt of the freeholders that would have voted for Drax, for future uſe, in caſe of a petition to the Houſe from that party, and in order to know their numbers. While this was doing, Henley and Scroope were on the huſtings. Mr. Follett ſaid, his own opinion at that time was, that the freeholders had the right; he believed he was not aſked his opinion upon the ſubject, and that he did not mention it. Almoſt all the freemen living in the town, and within a ſhort diſtance from it, were in Henley's intereſt; and if the mayor had received the votes of freeholders, Drax would, notwithſtanding, have failed.

* Brayholt, the witneſs, upon the trial in 1689, (ſee before p. 22.) mentions *'Squire Henley's* making ſeveral freeholds for election purpoſes.

Upon

Argument for the Petitioners.

Upon this caſe the counſel for the petitioners argued in the following manner:

Upon the firſt point, the qualification of reſidence, the claims of both parties are founded on a corporate right; and the method of eſtabliſhing both, is either by expreſs grant of the crown, or by preſcription. There is no charter from whence the right is ſaid to be derived to either party; therefore both muſt ſupport their claims by preſcription, which is to be traced through evidence of the uſage and reputation. The petitioners ſhew both theſe to be in their favour from the records of the corporation, the returns to parliament, and the teſtimony of living witneſſes.

With reſpect to the long period of late years, during which the uſage has been in favour of the ſitting members, as perhaps great ſtreſs will be laid upon it on their part, it is neceſſary to explain its real effect and principle. The effect which the law gives to length of poſſeſſion, ought not to be attributed to this period, according to the number of years it conſiſts of, but according to that of the times of *exerciſing the right* in it. Of this there have been only three inſtances within the laſt 70 years, of which they can make any uſe, viz. in 1727, 1747, 1780; for in them only have elections been conteſted. Where elections

elections are not conteſted, as all parties are then agreed as to the end, they are not very attentive to the means of obtaining it. In ſuch caſes, though the mode of electing were not agreeable to one ſet of men, they would not be ready to inſiſt upon another, when their choice would fix upon the ſame perſons: The diſpute would have no object, and could not be decided. There are, beſides, other cauſes that may have operated: Particular perſons or families may have been generally liked in the borough, and then there could be no room for diſcontent. Such inſtances, therefore, of exerting a right, ought to be laid out of this queſtion, and conſidered as a blank in the inquiry. They add no ſtrength to the other ſide in this diſpute, becauſe they were not *adverſe* to the claim of the petitioners. When A and B are contending, A's poſſeſſion will not avail him, unleſs it has been held in oppoſition to B's.

It is a clear and true propoſition, that if the petitioner's right of election was ever, at any time, clearly aſcertained, it muſt exiſt through all time; no agreement of parties, nor any authority, but that of the legiſlature, can take it away: It ſtill exiſts, and the Committee muſt now eſtabliſh it.

The circumſtances of the elections in 1727 and 1747 are ſuch, that the right of non-reſidents derives

derives no ſupport from them. In the former only *one* voter of 46, who ſigned the return, is proved to have lived out of the town, and he was an *honorary* freeman *. Now, certainly, honorary freemen are not bound to reſide; but, without doubt, they have no right to vote: Becauſe, being admitted to the freedom without taking the eſtabliſhed freeman's oath, their admiſſion is bad, and they are not legal freemen; *Oke*, therefore, was clearly a bad vote. The event of the petition to the Houſe, in Henley's favour, rendered it unneceſſary to inquire into the merits of particular votes; therefore it cannot be argued, that this vote would not have been diſputed, if the numbers on the poll had made it material. There were 41 votes for Henley, and 52 for Burridge; of which latter number 16 appear to have been ſtruck off as occaſional; which gave the petitioner a great majority, and concluded the cauſe †.

In the election in 1747, all the freemen were united againſt the freeholders, and the queſtion of *non-reſidence* was not ſtirred.

Thus ſtands the whole evidence of this modern length of poſſeſſion for 54 years; in which only *one* perſon reſiding out of Lyme is *proved* to have voted for a member of parliament in a

* See p. 26. † See p. 42.

diſputed

diſputed election; and other circumſtances made it not neceſſary to object to him; for which reaſon only he paſſed without notice. This, ſurely, is inſufficient evidence of a preſcriptive right. In ſuch caſes not only facts, but the common reputation ſhould be proved. In this view how does the caſe ſtand? It muſt be ſuppoſed, that if any inhabitant of Lyme could contradict the evidence before the Committee, he would have been brought forward now. As it ſtands, the current reputation is all on one ſide. Mr. Scroope's conduct, in 1734, is a ſtrong confirmation of it: This circumſtance ſhews, decidedly, the prevailing opinion of that time of the eſtabliſhed right of election; and proves that if, in any inſtances, non-reſidents have voted, their acts have been a uſurpation.

Tracing backward from this period, the evidence tends ſtrongly to ſupport the claim. The forms and expreſſions of the ſeveral returns, are, it muſt be admitted, different; but not inconſiſtent, unleſs they are taken to ſupport the non-reſidents. Take the whole evidence together, and that method of judging which tends to reconcile the whole, ſhould be the rule by which the Committee ought to form their deciſion; not that which tends to diſtract it.

Now all the returns till the reign of Geo. I. are conſiſtent, and in favour of reſidence. *Inha-*

bitants are mentioned in the earlieſt return; it was therefore a qualification then. It never was contended that *all* the inhabitants might vote; and neither party contends for it now; therefore the expreſſion of this return, " *with the inhabitants,*" cannot be ſaid to have deſcribed a diſtinct ſet of voters, but, in an aukward manner, means ſome quality applicable to the other claſs. If inhabitants as ſuch had voted, no other claſs would have been deſcribed, as it would have included the reſt. This conſtruction is confirmed by the next return, which is by *burgeſſes, inhabitants.* The different form of expreſſion in the next following return is open to the ſame explanation, and ſo is that of 30th Eliz: The words " *on behalf of the inhabitants and commonalty*" can mean, of thoſe only who had the right of voting. It is a tautology in expreſſion, and may be conſtrued to be a return by the perſons making it, *on behalf of themſelves*; but the ſubſtance is right enough. The intervening returns till 1689, compared with the other collateral evidence, appear to have been made in the ſame manner, by *inhabitants.* For a period of 26 years before 1721 *, the returns are all made expreſsly by inhabitants. If this evidence does not convince the Committee, that during this time reſidents

* There was no election between 1714 and 1721.

alone held the right of voting, they muſt either ſay, that the returns are falſe, or that theſe freemen uſurped the privilege. As to the firſt, there is no ſuſpicion of it hinted; and as to uſurpation, it cannot be believed, if the evidence of traditional reputation in the borough is not rejected. Thus, from the earlieſt times to the year 1721, the evidence is uniform in favour of the inhabitants. This ſhews how little effect is to be given to the modern uſage, which, even during its exerciſe, was always contrary to the general opinion of the right. This opinion was not carried into practice, becauſe no proper opportunity occurred in the whole time for inforcing it, and for trying the queſtion.

The returns in which the word *freemen* occurs, do not prove that non-reſidents took part in them. Though that word, uſed indifferently, may mean the whole body corporate, yet, upon this occaſion, the uſage ſhews it to have been limited to inhabitants.

The return to the convention parliament does not expreſsly contain the term *inhabitants*; but there was, on that occaſion, a particular requeſt in the ſummons to conform to eſtabliſhed cuſtoms, with which it is to be preſumed they complied. But this does not reſt on preſumption; for the proceedings upon the trial of that election in the journals, ſhew that the Houſe

then thought this qualification neceſſary. It was ſaid upon the trial of the former petition, that this determination of the Houſe is to be imputed to party motives, and that the queſtion of Whig or Tory was that which guided it. There was no authority for this but aſſertion; unleſs every determination of the Houſe is to lie under the ſame imputation. Without entering further into this indiſcriminate cenſure, it will be more to the purpoſe to examine the evidence itſelf from whence the opinion of the Houſe was formed, and to try if it be poſſible now to think differently. The report in the Journals gives the preſent Committee the ſame means of information as the Houſe at that time had; and it may be obſerved, that the Committee of that day were not likely to have omitted, in their report to the Houſe, any circumſtances tending to ſupport their own opinion. It appears, that of Drake's 29 votes, five were non-reſidents; of Burridge's 30, four were not freemen. *One* witneſs only is called in ſupport of the foreigners; and he †, in the execution of the corporation act in 1663, *called in to his aſſiſtance* ſome gentlemen of the neighbourhood for that particular ſervice of government *in the corporation.* After which

† See p. 19. Gregory Alford is the name of the perſon afterwards named Mayor in the garbling charter in 1684.

time

time they uſed to attend in *corporation* buſineſs; and *once* only (for he can *aſcertain* no more, though he believes it was oftener) two of them voted for a member of parliament; though it does not appear whether that election was conteſted or not. This is the whole ſubſtance of the evidence upon this point, on Drake's part. It is ſuch as no judge in a civil ſuit would even have left to a jury, as evidence of a preſcriptive right. *One* only witneſs, without pretending to ſpeak of the reputation, naming one ſingle inſtance, and that not clearly explained. This evidence, weak as it is, is ſtill more weakened by the circumſtance of *Drake*'s objecting to two votes for Burridge as foreigners. Now if he had relied upon the right of non-reſidents, is it poſſible that he would have made this objection? It is plain he knew his own five could not be maintained, and therefore wiſhed to make Burridge's fall with them. On the other ſide, two witneſſes declare poſitively, that they never knew a non-reſident admitted to vote. The evidence upon the two objected to by Drake, is ſtronger for their reſidence. Upon this caſe the Houſe could not, in juſtice, do otherwiſe than ſeat Burridge. But if they had thought non-reſidents good votes, Drake muſt have been ſucceſsful. By their determination they muſt have adjudged, either that freeholders had the right, or that

non-reſidents had not. This adjudication will admit of no other conſtruction.

Not only the expreſs words of the returns are in favour of the petitioners, but thoſe whoſe form is indifferent to this queſtion, are proved to have been made by *inhabitants*. It is wonderful, conſidering the difficulty of proof, from the great diſtance of time, the mutilated ſtate of the books, and the intricacy of the ſubject, that the petitioners have been able to trace the hiſtory of ſo many obſcure perſons who ſigned thoſe returns. Upwards of 140 names, ſigned at different times, have been found to correſpond with the probable proof of their living in the town. In a few inſtances the attempt has failed of being *quite* ſatisfactory; but even where the ſpace of time has been greateſt between the ſeveral entries of the correſponding names, even in the inſtance of 57 years, it is more reaſonable to preſume in favour of the identity than againſt it, becauſe that is warranted by the general uſage and reputation. It has been proved, on the part of the ſitting members, that perſons not living in the borough have been freemen, and have voted in elections of mayors and other internal buſineſs of the corporation; but one inſtance only is given of ſuch perſons voting for a member of parliament in all this time, and that reſts upon a looſe preſumption: Becauſe Gregory

gory is deſcribed as chief ſearcher of the *port of Poole* *, it is inferred that he lived there: On the other hand, in the entry of his admiſſion to the freedom, he is deſcribed of *Lyme*, is on the reſiant roll in 1611, about that time was mayor, and neceſſarily reſident at leaſt for a year; and in 1625 he ſigns a return to parliament as a capital burgeſs †.

If thoſe country gentlemen, whom they proved to have been freemen, had voted at parliament elections, is it not probable that their appearance would have been recorded? The town would have been proud of ſhewing their names in their books and returns; they would have ſtood foremoſt of the liſt.

The diſuſe of the old election proclamations is a part of that ſyſtem which has prevailed for the laſt 50 years, while the oppoſite party has had the management of the borough; but their authenticity is not thereby diminiſhed. It muſt be preſumed, that at the time of their date, (which muſt have been prior to 1698) the corporation knew the right of election better than they do now; theſe are public acts by their authority, and are founded upon the received

* The Committee were informed, that this office was now always joined with the ſame office in the Port of Lyme.

† Theſe circumſtances were proved from the books.

and ſettled notion of the neceſſity of evidence. In the inveſtigation of antient rights, there cannot be better guides than the forms of public inſtruments, becauſe they are framed according to acknowledged reputation, and known to every body.

If after weighing this evidence, the Committee ſhould decide in favour of the non-reſidents, they muſt adjudge the *antient* uſage (for ſuch it is proved) to have been illegal. But a contrary deciſion would be conſiſtent with that uſage, and with the evidence of the corporation books, and would contradict no indenture of return.

Upon the ſecond point,—the evidence of the freeholder's right does not reſt alone upon the terms uſed in the books, but alſo upon frequent exerciſe and acknowledged reputation. In what manner it was exerted before the reign of Mary is unknown; but the firſt charter of the borough plainly laid the foundation of it. The *men* of Lyme there incorporated, muſt have been the homagers of the king's demeſne, who did ſervice at his court for their lands. Members for boroughs firſt came to parliament in the reign of the ſame prince who granted this charter; and it cannot be doubted, that thoſe to whom the charter was granted, returned the members. The terms uſed in the books, at the time in which this

enquiry begins, retain the appearances of this inſtitution.

The word *burgenſis* has many different meanings according to the ſubject matter; it may mean, the inhabitant of a borough, a burgage tenant *, a borough freeholder, a corporator, or a member of parliament. Its particular application is to be diſcovered by the conſtitution of the place. In the books of this corporation it means *a freeholder of the borough.* The roll of 1577 explains it pointedly: Here, among *burgenſes* SIVE *liberi tenentes*, are three women; therefore theſe *burgenſes* are not members of the corporation. They are alſo contradiſtinguiſhed from *liberi homines.* If the former deſcribed *freemen*, their names would not be repeated among the freemen; but there are ſeven names ſo repeated. The elections made by *burgenſes & liberi homines* INSIMUL, keep up the ſame diſtinction. The two characters, therefore, cannot be the ſame; which is ſtill further confirmed by the *ſubſequent* admiſſion of ſeveral of theſe *burgenſes* to be freemen; therefore *burgenſis* and *liber tenens*, muſt have been uſed to deſcribe the ſame perſon.

The word *burgenſis* having thus been ſhewn in ſeveral entries to deſcribe a *freeholder*, muſt therefore in the returns of the ſame time, be in-

* In this ſenſe it is uſed at Pontefract. See Vol. I. p. 8.

tended

tended of the ſame perſon. It is not contended by this argument, that it excludes freemen but that in returns, the general term is applicable to both; and in this ſenſe the returns by *mayor and burgeſſes* are to be underſtood. But when contradiſtinguiſhed from *liber homo*, *burgenſis* has no corporate ſignification. Even the corporators themſelves, when moſt anxious to exclude the freeholders, in thoſe returns in which they call themſelves "burgeſſes *all freemen*," ſeem to admit this conſtruction of the term; for if *burgeſſes* meant *freemen* only, they would not have added to it an expreſſion of the ſame meaning. Freeholders here have no right to be admitted freemen of this borough. This has been finally determined in the court of King's Bench, after ſome attempts very ſtrenuouſly made on their part to gain that point *.

In

* The following general account of the tranſactions here referred to, may be uſeful to ſome readers. Previous to the election conteſt, in the year 1780, the party of the petitioners claimed to be admitted into the corporation upon two grounds of inchoate right; one as being freeholders, the other as eldeſt ſons of freemen. In this right the mayor, in 1779, admitted about 40 or 50 perſons to be freemen. The oppoſite party immediately obtained *quo warranto* informations againſt the perſons ſo admitted, which came to be tried at the Dorcheſter aſſizes in 1780. At this trial the freemen failed in eſtabliſhing the cuſtom they relied upon, and verdicts paſſed againſt them, upon which judgments of ouſter were ſigned.

In this ſenſe all the returns are conſiſtent with the freehold right till 1678, when an attempt was made to deſtroy it. It ſeems to have been vigorouſly purſued, and ſeveral entries appear in the books in the proſecution of this plan. The entry of the election in February 1680-1, could have no other object. The exceſſive caution uſed to expreſs, that freemen *alone* made that election, argues a conſciouſneſs of a right claimed by others of whom they were afraid. The charter of Charles II. ſeems to have been granted principally with this view.

By the entry of the 21ſt of March, 1613-14, the *corporation* books themſelves ſhew an election to have been made by freemen *and freeholders*. One of the members then choſen is the recorder. Now it can hardly be thought that a recorder, who is naturally of the corporation party, would have allowed a right contrary to theirs to be in-

ſigned. Having been defeated in this ſcheme, the ſame party afterwards endeavoured to disfranchiſe a number of their opponents in the common council of the borough, upon the ground of their non-reſidence. The merits of this cauſe of disfranchiſement never were brought to trial, being ſtopped in their progreſs through the court of King's Bench, by ſome technical objections to the pleadings in the returns to the writs of mandamus. Theſe caſes are reported Doug. Rep. 79, 130, 144, 168; after which this queſtion was not renewed.

forced,

forced, and be preſerved by their own records, unleſs it had been thoroughly eſtabliſhed.

As to the evidence of reputation, that alſo is ſtrongly with the petitioners on this point, as well as on the other. Though the corporation has by ſtrong hand excluded the votes of freeholders, they have not been able to ſtifle the reputation of their right, nor the belief of the borough in their favour; in which belief even ſome principal members of the corporation have concurred. In the conteſted election in 1689, evidence was given to the Houſe to the ſame effect; and though the witneſs *Alford* there ſays, they never were admitted, and had never returned; as having been mayor of the town, he muſt have known the contrary, and that they had ſigned returns. There are two circumſtances proved on the preſent occaſion which ſtrongly corroborate this reputation: One is, the canvaſſing of the freeholders in the elections of 1727 and 1747; the other, Henley's particular application to that intereſt. Every candidate makes it his firſt and principal buſineſs to know the right of election as generally underſtood, and never fails to follow the moſt received notions of it. Henley's particular ſituation as recorder, his family connection, and perſonal acquaintance with the place from his earlieſt days, enable us to draw from his conduct a convincing proof of the

the reputation then eſtabliſhed: And he took great pains to gain the freeholders.

Thus every circumſtance tending to eſtabliſh a preſcriptive right, has been proved by the petitioners. Supported in this manner they have not been afraid to encounter a declared judgment of the former Committee againſt their claim. It is no diſreſpect to the authority of ſuch a tribunal, to ſuppoſe it capable of error, or to obtain a reviſal of its ſentences. This is conformable to the practice in the other courts of juſtice, whoſe authority is the moſt revered. In them, parties may, without offence, obtain a ſecond or a third trial of the ſame queſtion, if diſſatisfied with the firſt. But it is particularly proper to allow of ſuch proceedings in a court from whoſe judgments no appeal can be brought; which may be paſſed by a ſmall majority of the judges, and with many diſſentients; and where the cauſes are often of the greateſt public importance.

Argument for the ſitting members.

The counſel for the ſitting members argued in the following manner:

The petitioners are ſenſible, that they labour under conſiderable difficulties in advancing a claim againſt the continued uſage of ſeventy years, and the ſolemn judgment of a court of juſtice. Their means of ſupporting it conſiſt of

of the looſe evidence of antiquated papers and records, and a vague obſcure tradition of reputation, to which theoretical arguments of antient inſtitution, and much uncertain preſumption are added, to give a colour to the whole. In this manner they endeavour to overturn a long eſtabliſhed right and well founded deciſion.

It might have been expected, that they would not have ventured to queſtion the ſentence of the former committee, without ſome addition of ſtrength to their caſe, or ſome new diſcoveries of evidence; but on the contrary, the evidence in the preſent caſe conſiſts of the ſame particulars as before, except that it is now much abridged, and the method of conducting it reverſed. The claim too is materially changed. Formerly the point of reſidence was of ſecondary and ſmall concern: The freeholders' right was the great queſtion. But now that is placed behind the other, and gives way to the point of reſidence to which the petitioners direct their ſtrength. This ſhews, that they have been ſenſible of confuſion in their opinions, and deficiency in their proofs.

Their theory ſets out with ſuppoſing, that the charter of Edw. I. firſt made a corporation at Lyme, and that this corporation was compoſed of burgage holders. But the charter itſelf is not inconſiſtent with the notion of a pre-exiſting corporation:

poration: And their theory is contrary to a late verdict and judgment in the court of King's Bench, determining the corporation to have been preſcriptive *. But ſuppoſing the perſons deſcribed as the *men of Lyme* to have been freeholders, and incorporated as ſuch, it does not follow that the freeholders of this day have any right of admiſſion into ſuch corporation. The only mode of becoming a member of a corporation, is according to the rules and orders of the body corporate. In this borough the common council have the right and power of admitting only ſuch as they pleaſe to be members.

With reſpect to the claim of the freeholders, the principal arguments for it are derived from a connection between the entries of the corporation books, the reſiant rolls, and the returns. If the inference from the ſeveral terms uſed in

* The caſe here alluded to, was tried before Mr. Baron Eyre, by a ſpecial jury at Dorcheſter, in the ſummer aſſizes of 1784. It was a *quo warranto* information, proſecuted by the party of the petitioners, againſt one of the capital burgeſſes, founded in the ſuppoſed illegality of his election, according to the terms of Queen Elizabeth's charter. The defendant could not prove his election to have been made, as the charter required; but endeavoured to ſupport the legality of it by evidence of a preſcriptive inſtitution in the borough, with which it accorded in ſome meaſure: And the judge and the jury being of this opinion, a verdict was found for the defendant.

them

them is fallacious, their caſe wants its principal ſupport. The manner of making this deduction is very different from that by which the ſitting members maintain the poſitions of their caſe: *They* explain the records by a definition which the ſame records authorize, and not by *ſpeculation* or hypotheſis.

The title of the freemen's book is a very important piece of evidence, becauſe it ſeems to be placed as a public and formal rule or definition, to regulate the terms uſed in the books, and to prevent miſtakes. The expreſſions are preciſe and clear; but the manner in which the counſel on the other ſide explain *their* meaning of the ſame terms, is by connecting a number of circumſtances, which ſeem to lead to it only becauſe they beg the queſtion which is to be determined. *If* freeholders uſed to vote in that right, then their conſtruction may be juſt. But the ſitting members contend, that none but *members of the corporation*, in antient as well as modern times, have elected the members of parliament, and that no freeholder ever voted as ſuch till the time of the revolution; the circumſtances of which caſe are to be explained.

Too much authority has been allowed to the reſiant rolls; for they are not acts of the corporation, but of the officers of the court-leet; but, (without inſiſting upon this objection,) they do

not

not warrant the concluſion drawn from them. It is inferred, that the claſs of *burgenſes ſive liberi tenentes* could not belong to the corporation, becauſe women are enumerated there, and becauſe perſons of the ſame name appear to become freemen afterwards.

Firſt, this title is in the disjunctive; and imports either that they were freeholders admitted freemen, *or* mere freeholders. In this ſenſe there is no impropriety in claſſing women in the liſt; beſides, according to the cuſtom, the widow of a burgeſs has her freedom. The title of the freemen's book defines the word with accuracy; and that gives the conſtruction which the ſitting members contend for: This is likewiſe confirmed by the Table of cuſtoms. By theſe authorities it is ſhewn, that the word *burgenſis*, in the old records, according to its proper conſtruction, ſignifies *a freeholder admitted to the freedom.* Secondly, the inference drawn merely from a reſemblance of names, in ſo few inſtances out of ſo many, is improbable and unjuſt. Becauſe, at the diſtance of 200 years, it cannot be ſhewn that certain perſons were, on certain days, admitted free, though the books of admiſſions of half the time are loſt, and thoſe which exiſt are allowed to be defective, therefore it is concluded that they were never admitted. This general concluſion, unfair as it is, is connected with,

and depends upon, that drawn from the particular inſtances: What theſe are will be beſt ſeen by examining them. They ſelect four names out of ſix times that number, in an entry of an election * in 1609, of perſons who, they ſay, could not have been freemen; becauſe George Pley (one of them) was a freeholder in 1598, and becauſe George *Plea, junior*, firſt became free in 1612. But it is not probable, that a man deſcribed generally in 1598, would be called *junior* 14 years after: But the huſtings book contains the name of George *Pley* a freeman in 1576. The next inſtance requires, that we ſhould believe that there could be no other Anthony Elſden but the heir of one William Elſden, and that he muſt be the ſame perſon who is admitted a freeman by that name. The other two inſtances reſt upon the ſame ſort of doubtful conjecture. Thomas Samford, who is one of them, appears to have voted at an election of mayor before this year, and therefore muſt have belonged to the corporation. Further, it is at this very period that the chaſm in the books is the greateſt. But this is not all; for the entry following, upon the ſame leaf, of this election, ſhews expreſsly, that the perſons preſent were freemen and free burgeſſes. What a free bur-

* See p. 15.

geſs

geſs is, is explained by the title of the freemen's book.

In this manner are made out thoſe examples of connection that are to ſerve as guides through this inquiry, and from which a general rule of evidence is to be formed. Even if the books were not known to be defective, or if no chaſm appeared in them, it would be a bold attempt, at this day, to diſturb a long and quiet poſſeſſion upon no better foundation than ſuch preſumption.

The entry of the election in 1614, by the *freemen and freeholders*, when explained by that following, ſhews that they were all free burgeſſes; and that the term *freeholder*, uſed upon that occaſion, and on many others of the ſame ſort, is inaccurate, and means a freeman who has the freehold quality beſides. None but members of the corporation could partake in theſe acts; and if they conſiſted of two orders of perſons, it was natural to diſtinguiſh them by different names. In this caſe the only name of diſtinction for one claſs was that of freeholders, becauſe in that character alone were they diſtinguiſhed from the other freemen.

The argument before mentioned affords a ſufficient anſwer to all thoſe concluſions, whether drawn from entries or returns, by which the petitioners prove perſons not to have been freemen,

whoſe names cannot be found in the admiſſions. It is now become impoſſible to prove the *times* of their admiſſions; but the other tranſactions of the borough, and the ſituation of thoſe perſons, lead to a fair preſumption that they were freemen, and that if the books had been complete, their particular admiſſions might now be found.

In 35 Eliz. the entry of the election is by the "mayor, burgeſſes, and freemen." If by *burgeſs* was a meant a mere freeholder not of the corporation, it is not probable, that in the acts of the *corporation*, ſuch perſons would be ranked before their own members.

There are three entries of elections by the "mayor, burgeſſes, and freemen," in 1678, 1679, and 1680. The latter is ſaid to be made *without the contradiction of any others.* What benefit the petitioners can derive from this, it is difficult to diſcover. They cannot argue that the words were falſe, and that the freemen's right was contradicted. It muſt be believed, that no freeholder at that time claimed. The caution of the freemen ought not to be imputed to them as a weakneſs: It was a proper ſecurity againſt the innovation which they might then ſee forming. So the returns in the latter part of the reign of Charles II. by *all freemen*, contained

tained a poſitive denial of the alledged exerciſe of the right by freeholders.

The true origin of the freehold claim appears by the returns. It began at a time when the whole nation was in a political ferment, and when the change of government and laws had opened the way for innovation in every department. The temper of the times afforded opportunities for advancing new pretenſions with ſucceſs; and many who favoured the new government made uſe of them. The election to the convention parliament is the firſt in which *freeholders* appear; but even that election ſeems to have been brought about by artifice. Egerton perhaps undertook to carry them through, and bullied the corporation to ſubmit to it; but the entry ſhews, that they reſented it. The little that appears in the journals of the evidence, upon the petition againſt this election, is unfavourable to the freeholders. The witneſſes do not prove the exerciſe of the right with any certainty, nor the reputation; one *thinks* they voted at an election, which does not appear to have been diſputed; but another on the ſame ſide ſays, they had been hooted upon coming to the huſtings to vote. But it can hardly be believed that the journals ſtate all the caſe. The deciſion of the Houſe is a remarkable inſtance of the unjuſt manner of determining elections for-

merly. It is natural that the petitioners ſhould wiſh to paſs over this ſubject; but the Committee know too well how little reſpect is due to a deciſion by ſuch a tribunal ſo formed. The Committee of privileges *heard* the evidence and made their report. The Houſe, who *did not* hear the evidence, choſe to think differently, and decided againſt it. But it is giving too much credit to the freeholders, to ſuppoſe that their claim was the foundation of this petition. It plainly had another object.

Before this period, if freeholders had ever claimed, the corporation reſiſted them, and with ſucceſs. But now they contrived to get a temporary credit; and their names appear in ſome of the returns in the courſe of the 26 years following the revolution. After which they return to their former ſtate.

There are 12 returns from 1689 to 1714; but even theſe are not uniform; ſix of them contain the name of freeholders, and ſix are by freemen only. So that as far as the 12 returns go, the ballance is even. Before this time, all of them are adverſe to the petitioners. But in this ſhort period, a continual conteſt was kept up, in which the freemen were always ſucceſsful, and at length forced the freeholders to give up. In 1701, there was a petition to the Houſe, by the freeholders, who could not prevail on

the mayor to receive their votes, which petition they afterwards abandoned. So ſenſible were they of the weakneſs of their claim, that within 12 years after its firſt ſucceſs, they were obliged to renounce it. Again, in 1708, the returning officer rejected them, and they again made a ſhew of petitioning the houſe, but from this attempt likewiſe they receded.

In this favourite period of the freehold right, the returns are as much againſt it as for it; though encouraged by ſucceſs in their firſt pretenſions, they cannot keep the ſtation they have gained; are afraid to bring their claim to a fair deciſion, and are twice obliged to relinquiſh, after two direct attempts to ſecure it.

So conſcious were the party with whom the modern attempts originate, of their little chance of ſucceſs, that they did not venture upon them till urged by deſpair. After having in vain attempted to gain the privilege of the corporation, all their law exertions were at firſt directed to the claim of freeholders to be made freemen; and by the artifice of a mayor in their intereſt, a great number of them were admitted on this footing. But upon a full inquiry into their pretenſions in the court of King's Bench, they were adjudged illegal, and the perſons ſo admitted were all turned out *. The counſel for the pe-

* See the note in page 58.

tutioners, when they mention this circumſtance, are not aware how ſtrongly it turns againſt them. They ſeem to conſider it as an axiom, that freeholders muſt have *ſome* right in the borough; and not having the leſſer right of being freemen, *ergo* they muſt have the greater of chooſing members. From the ſame premiſes it might be concluded as juſtly, that they have none at all.

It is remarkable, that all the returns produced, are either under the common ſeal of the corporation, or the mayor's official ſeal; both which imply a corporate act *. The recital in the charter of Charles the Second, likewiſe adds great weight to the ſame ſide, for it refers to the antient and ſole right in the freemen, as a matter known to every body. The canvaſſing of the freeholders formerly, is not proved with any preciſion; and if it were, it ought to have but little weight under ſuch circumſtances; for in conteſted elections, candidates employ every method of ſecuring votes. It has been ſaid, that Burridge canvaſſed the freeholders in 1727; but it is certain, that as mayor, he refuſed their votes and accepted none but thoſe of freemen: From hence it may be judged, what the canvaſſing was, which it is ſaid, took place then, and alſo in 1747. Henley's conduct in this year

* See note (D) on the caſe of Saltaſh.

only ſhews, that at the time of his letter, he wiſhed to keep things quiet, and to prevent trouble or expence. He could not have any ſerious thoughts of ſupporting the freeholders, becauſe at the election he joined with Scroope in oppoſing them *.

As to the point of reſidence, the evidence to ſupport it conſiſts of ſimilar materials, from which ſimilar deductions are made as in the other caſe. Upon both, it may be obſerved, that the primary propoſition upon which the arguments are founded, is not proved. From a few facts not

* There ſeems to have been much inconſiſtency in the conduct of the candidates at different times, concerning their intereſts in this borough. At the time of the trial of the petition in 1689, it was ſaid by one of the witneſſes, that Henley had made freeholders for an election; and in 1708, we find the ſame perſon, or one of his family, ſtanding upon that intereſt. Yet, in 1727, Mr. Henley's counſel aſſert the right of voting to belong to the corporators only; and again, in 1747, Mr. Henley oppoſed the freeholders, in conjunction with Scroope. In that year, the freeholders were ſupported by Freke and Burridge, (ſee Follett's evidence) whoſe names are thoſe of the members returned in 1708, upon the corporation intereſt; againſt whom Henley then petitioned in behalf of the freeholders. *Burridge* is the name of a mayor, who in two different periods, was complained of, for having refuſed the freeholders' votes. If theſe facts were not well aſcertained, it might be inferred from the repetition of the ſame names in the following liſt, that

not well explained, they ſay, the antient uſage is proved to have been conformable to their claims; and then, ſuppoſing ſuch to have been

that there had been but little diſpute about elections in this town for more than a century paſt. It contains the

Names of the members for Lyme, choſen at the ſeveral general elections, from the year 1660, to the year 1761.

1660	Walter Young,	Thomas Moore.
—61	Sir John Shaw,	Henry Henley.
—78	Sir George Strode,	Henry Henley.
—79	Thomas Moore,	Henry Henley.
—81	Thomas Moore,	Henry Henley.
—85	Sir Winſton Churchill,	John Pole.
—88	John Burridge,	John Pole.
—90	John Burridge,	Henry Henley.
—95	Robert Henley,	Henry Henley.
—98	Robert Henley,	Henry Henley.
1700	Robert Henley,	Joſeph Paice.
—1	John Burridge,	Joſeph Paice.
—2	Henry Henley,	John Burridge.
—5	Thomas Freake,	John Burridge.
—8	Thomas Freake,	John Burridge.
—10	Henry Henley,	John Burridge, jun.
—13	Henry Henley,	John Burridge,
—14	Henry Holt Henley,	John Burridge.
—22	Henry Holt Henley,	John Burridge.
—27	Henry Drax,	John Burridge *.
—34	Henry Holt Henley,	John Scrope.
—41	Henry Holt Henley,	John Scrope.
—47	Henry Holt Henley,	John Scrope.
—54	Thomas Fane,	Henry Fane.
—61	Thomas Fane,	Henry Fane.

* Ouſted upon petition, and Mr. Henley ſeated.

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the ſettled uſage, they take it for granted, and endeavour to reconcile the defects of their caſe to their object, by arguments of preſumption in favour of the uſage. But the fallacy conſiſts in begging the queſtion: Their evidence by no means eſtabliſhes either the original inſtitution, or actual cuſtom of the borough, to have been what they ſtate.

The counſel for the petitioners are much perplexed, in endeavouring to explain the early returns, ſo as to ſuit their purpoſe; but it is impoſſible for any art to reconcile them to it. Taking them all together, (a method which they themſelves offer) they purport in plain terms, that the *inhabitants* therein mentioned were a diſtinct claſs of perſons from the other electors. Whether by right or wrong, they certainly took part in thoſe elections. All rules of grammar muſt be ſet aſide, before the Committee can believe, that the expreſſions, "burgeſſes *and* inhabitants," "burgeſſes *with* inhabitants," or, "*on behalf of* inhabitants" could be employed to deſcribe burgeſſes only. The return in 30 Eliz. which differs from all the reſt, explains the true reaſon of adding the inhabitants in them. This form is moſt probably the trueſt, becauſe it is moſt reconcileable to the legal conſtitution of boroughs, and to the known ſtate of them in thoſe days. According to this return,

return, the *corporation* chooſe the members, "for and on behalf of all the inhabitants and commonalty." If the different forms of theſe ſeveral returns can be reconciled at all, this expreſſion leads the way to it. But it is better perhaps to agree with the obſervation of Serjeant Glanville * and the Committee, in his report of the caſe of Blechingly, "*that the forms of the indentures made in the country by ignorant people, or tranſcripted peradventure from ſome borrowed precedent of another borough, where the election is different, are not concluſive.*"

Thus, as far as the antient returns go, their forms lead to no certain opinion. After this period they are ſilent on this point till 1656, when during the protectorate, the attorney general of Cromwell, is returned under a form

* Glanv. p. 35.—In p. 56, in the caſe of Chippenham, he enlarges upon this obſervation thus—"Such arguments as may be made to conceive the right of election, or who ought to be electors, out of the forms or words of indentures, ought not to be regarded, where the uſage and cuſtom of the elections hath not concurred with the forms of ſuch indentures; for the reaſons delivered in the caſe of Blechingly, and more ſtrongly in this caſe. For in that caſe, the arguments out of the words *Et alii homines*, tending to give a greater number of burgeſſes or inhabitants, intereſt in the election, (which liberty the law favoureth) were not regarded, but rejected, in a caſe where by *conſtant cuſtom and uſage*, the election ſtood reſtrained to a limited and qualified number." See vol. i. p. 15. note D.

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different from thoſe before and after it, by *burgeſſes inhabitants.* Any acts of ſuch a period are unfit to be regarded as precedents. The pains taken by Cromwell to pack a parliament are well known; and the meaſures he purſued for this purpoſe, were as illegal in the conduct of elections, as afterwards in his violence upon the members. His attorney general is not likely to have been backward in the execution of his ſchemes. Yet in the return of the ſame perſon in 1641, there is no mention of *inhabitant* burgeſſes; and that return is made *ſecundum conſuetudinem burgi.*

The nine returns intervening from 1698 to 1714, in the ſhort ſpace of 16 years, in which inhabitants bear a part, are contradicted by almoſt all the preceding, and what is more important, by every one made within the laſt 70 years; by various entries in the corporation books; by the general conſtitution of boroughs, and by the policy of the law.

The only two returns in the whole courſe of time, conſiſtent with thoſe of theſe 16 years, are that of 1656, which has been obſerved upon, and that of 1 Eliz. which is unlike all the reſt of the ſame reign.

By the bye-law of 1580, both inhabitant and not inhabitant burgeſſes, are to elect the mayor. Now if a corporate meeting for the mayor's election

election was attended by the foreign freemen, and at a time when this office, perhaps, raiſed more competition than that of repreſentative, can it be doubted that every other meeting was attended by the ſame perſons? A few years after this they paſs another bye-law, to compel the foreign burgeſſes to contribute to the members' wages. At an election after this reſolution, would they who paſſed it think of refuſing the votes of thoſe, upon whom they had impoſed the duty? It has been urged, as a powerful argument on the other ſide, that a right of election once proved to have exiſted, can never be loſt: Here is plainly a right not only proved to belong to non-reſidents, but actually forced upon them. This right not only exiſted in antient, but has been exerciſed in modern times; and according to the memory of their oldeſt witneſs, has been always ſo.

The books contain the admiſſions of many perſons notoriouſly non-reſident. It is in vain that the counſel for the petitioners would endeavour to draw a diſtinction between the voting in what they call corporation buſineſs, and that of elections to parliament: The right to attend both muſt be the ſame in this borough. It cannot be conceived, that after the corporation had admitted theſe perſons into their community, without reſtriction, they would preſume

ſume to reſtrain their exerciſe of all the privileges they poſſeſſed.

On the other hand, they ſay, the freeman's oath contains articles that neceſſarily imply the reſidence of thoſe who take it; and that it is abſurd to think, that thoſe who are bound to contribute to the charges of a borough, ſhould live elſewhere. In the origin of boroughs it might be natural for their burgeſſes to be inhabitants; but it was by choice, not compulſion. This at beſt is only the ſpeculation of antiquarians; but it can never be uſed as an argument, in a queſtion of poſitive inſtitution, or in the determination of legal rights. The oaths of every borough are framed upon the ſame plan; and this argument would prove the neceſſity of reſidence to every burgeſs, in London, Briſtol, Liverpool, and every great town in the kingdom (C.)

This would be a ſufficient anſwer to the argument, if the authority of this oath had warranted it: But it does not. The oath firſt appears about the time, when the above bye-laws paſſed, which are directly oppoſite to the ſenſe which the petitioners put upon it; and it likewiſe wants that quality which the oaths of a preſcriptive corporation ſhould poſſeſs, of being preſcriptive *. This oath contains a clauſe to

* The reader is deſired to attend to this obſervation in reading the latter part of the Liverpool oath in note (C.)

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prohibit a reſorting to *conventicles*, and therefore muſt have been ſubſequent to the reformation, and moſt probably had its beginning in the reign of Elizabeth. In the ſame manner, their honorary oath wants a legal foundation. It can only be accounted for, by ſuppoſing it introduced on a particular occaſion; perhaps in compliment to the lord lieutenant, with whoſe admiſſion it is firſt mentioned: It is heard of only for a few years, and then ſinks into oblivion, having never been uſed in modern times. The books of this period contain other marks of practices to favour the claim of the reſidents then firſt beginning to ſhew itſelf. Some perſons are admitted freemen *quam diu in villa vixerint*, a form not to be found before or ſince *, and which furniſhes an argument, that without it a general right would have followed of courſe.

The proclamations are open to the ſame argument. Their firſt appearance is very ſuſpicious: It is without date, and in a book beginning with 1698. A little before this time, the claim of the reſidents was firſt ſet up, and in this year the firſt of thoſe nine returns was made, which favour their pretenſions. The

* I believe the counſel for the ſitting members, did not produce any of theſe entries in their evidence.

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temporary and occaſional inſtitution of theſe proclamations, is proved by their never having been uſed within the memory of man.

The reſtriction contended for is contrary to the original inſtitution of boroughs. This may be ſeen in Brady *, who ſays, " A free burgh, in the true ſenſe of the word, was only a town of free trading, with a merchant gild or community, without paying toll, pontage, paſſage, ſtallage, &c. And a free burgeſs was no other than a man that exerciſed free trade, according to the liberties and privileges of his burgh, *whether he reſided in it*, or whether he had liberty to live and trade elſewhere." This paſſage alſo ſhews what the old policy of boroughs was. Antiently ſome ſtatutes paſſed, which required voters to be reſident: but they were found to be ſuch burthenſome reſtrictions, that they were ſoon neglected in practice; and lately the legiſlature, by repealing them all †, has declared its ſenſe of their injuſtice. The uſage of almoſt every conſiderable town is likewiſe contrary to it.

What then ſhould induce the Committee to determine in favour of the petitioners? Where does the ſtrength of their caſe lie? It is not in the returns taken collectively and fully weighed,

* Folio edit. p. 47. Octavo edit. p. 100. † Stat. 14 Geo. III. c. 58.

nor in the books of the corporation, nor in the principles of law, nor in experience.

Their propoſition extends largely to both claſſes of voters, and both are ſupported by the ſame arguments; if therefore they fail in either, they muſt loſe both. If reſidence ſhould be thought neceſſary to *freeholders*, this will be, perhaps, a ſingular inſtance of it, and which no borough in the kingdom requires. It is the ſoil which gives the privilege to freeholders, and the owner carries it with him as long as he poſſeſſes the eſtate. It would be ſtrange if a right, different from every other in the kingdom, and which no man ever knew to be exerciſed, ſhould be eſtabliſhed at this day. The charter of Edw. I. from which the petitioners deduce the claim of freeholders, refers to the cuſtoms of Melcombe and London; and conveys to Lyme the ſame privileges: Yet it is well known, that in thoſe places no reſidence is required of the voters *.

* There is no reſolution of the houſe aſcertaining the right of election in Weymouth and Melcombe; and I do not know enough of the uſage there to ſpeak of it accurately. But upon the trial of the conteſted election in 1730, the counſel on both ſides agreed to the following ſtatement of it, viz. "In the mayor, aldermen, bailiffs, and capital burgeſſes, *inhabiting in the borough*, and in perſons ſeiſed of freeholds within the borough, and not receiving alms." See 21 Journ. 574.

The

The Committee certainly will not, in ſuch a caſe, be guided by the looſe evidence offered to prove the reſidence of thoſe who ſigned the returns in the laſt century. The connection is ſo uncertain, as to be unworthy of any regard. The counſel themſelves are ſo ſenſible of it, that they are obliged to reſort to preſumptions from what they call the general uſage, to ſupport it; which uſage is not otherwiſe proved than by the certainty of this connection. In one inſtance a man deſcribed "of Lyme," 57 years before the ſame name appears in a return, is inferred from thence to be the *ſame* perſon and inhabitant at the time of the return; another ſerving conſtable 25 years before; another deſcribed "of Lyme" 21 years before; with others whoſe connection is not nearer than 16, 14, and 8 years. After putting together many ſuch inſtances, the Committee are told, it is wonderful that their caſe has been ſo clearly made out.

But even admitting the connection with theſe returns has been proved, the concluſion does not follow from it; becauſe, in all the returns to which this reference is made, except three (30 Cha. II. 1 James II. and 2 Will. and Mary) the only perſons ſigning were capital burgeſſes*;

* This fact had been mentioned by the counſel for the ſitting members, while the other party were producing their returns in evidence, and not denied by them.

their number never exceeds 10; and in one inſtance is 4, in another 6. It cannot be believed, that the voters preſent at theſe elections either were ſo few, or conſiſted alone of capital burgeſſes, and of only a part of them. It is only in modern times that a cuſtom was introduced in this town of ſigning returns by a conſiderable number. More antiently none but the principal perſons put their names to them; and frequently the ſeal was affixed without any ſignatures. It is natural that the capital burgeſſes ſhould have been reſident in the town, though it by no means follows that the others who voted in theſe elections were ſo: But even of the capital burgeſſes, not more than two-thirds were ever preſent at the elections, if theſe returns are to be taken according as the neceſſity of the petitioners' caſe requires.

Again, even if theſe obſervations on the returns were not true, it would be unjuſt to give them the effect contended for; becauſe it would be impoſſible for the oppoſite party, at this diſtance of time, to prove negatively that ſuch perſons did not, at the times referred to, live in Lyme. When the caſes of Malden and Winchelſea were agitating in the court of King's Bench, by *quo warranto* informations, the court ſtopped the proceedings of that party, which required the corporators to prove their reſidence only

only 20 years before; yet here the ſitting members are called upon to ſhew where certain burgeſſes of Lyme reſided upwards of 150 years ago.

The evidence of the witneſſes in this cauſe, who are produced to eſtabliſh the uſage and reputation, proves that during all their time the uſage has been contrary to their ideas of the reputation. They cannot produce an inſtance of refuſing the vote of a non-reſident; but, on the contrary, ſpeak of one voter notoriouſly ſo, who uſed to vote. One ſingle inſtance ſo avowedly adverſe to the poſition of the petitioners, would be ſufficient to overturn it, in a caſe ſupported as that of the ſitting members is by uniform and eſtabliſhed poſſeſſion. As to the fact mentioned by Jurdan, of Scroope's tranſaction with his father, *all* the circumſtances of it are probably unknown; but as it ſtands, it may be accounted for by ſuppoſing that the voter's preſence in the town might make him a more active and uſeful friend of the candidate than his ſituation out of it would have allowed. It ſhould alſo be conſidered, that Scroope was then but newly come to Lyme, and of courſe not well informed of its conſtitution.

The counſel on the other ſide wiſh to conſider the tranſactions of the laſt 70 years as a blank in this cauſe; but they will not bear this

conſtruction. If duly conſidered, they would afford ſecurity to a title much leſs reaſonable, and leſs clearly eſtabliſhed, than that of the ſitting members. In this period there have been two conteſted elections, in which the parties have been fully oppoſed to each other, and they have proceeded in both to a poll. In 1727, Henley ſtood upon the right of the freemen; the petition preſented againſt him was abandoned. In 1747, after the freeholders had made ſtrong exertions, they were deſerted by the candidate whom they had collectively ſupported, who was afraid to put their claim to a trial. It may be ſaid, that acts of candidates are not to determine the rights of electors; but ſurely, if Scroope's conduct to Jurdan is to be relied upon, on the other hand, Drax's running away is equally material to the cauſe: But if the freeholders in 1747 had thought their right worth maintaining, they might have petitioned the houſe againſt their opponents. It is plain they conſidered their cauſe as deſperate, and relinquiſhed it: Therefore it cannot, with any propriety, be urged on the other ſide, that *no proper opportunity* has occurred within theſe 70 years for bringing the queſtion to iſſue *.

Thus

* The following proceedings in the Journals were not produced to the Committee, nor mentioned in the arguments: They ſhew, that the claim of the freeholders was again brought

Thus from 1714 to the preſent day, the party of the ſitting members has held the ſole exerciſe of the privilege contended for; which has been confirmed by a ſelect Committee of elections, after a full and laboured inveſtigation. When

brought forward, and again relinquiſhed, in more modern times. In 20 Journ. 17, are three petitions from Lyme after the general election in 1722, when Henley and Burridge were returned: One from William Smith, Eſq; complaining of the election of Burridge, and of his want of qualification; another from a Mr. Pariſh, objecting to the votes for Burridge and Smith, to the former's want of eſtate, and to the irregularity of the election, as being had without due notice. Neither of theſe ſtates any right of election; but the third is from *ſeveral freeholders, inhabitants*, in ſupport of Pariſh, complaining of Robert Burridge, the mayor, for having refuſed their votes. In the ſame volume, p. 159, 2d of March, 1722-3, Pariſh has leave to withdraw his petition. The other two petitions were not heard in that ſeſſion. In the next, Smith renewed his petition, (p. 346) but the freeholders did not renew theirs. Smith, ſoon afterwards, had leave to withdraw his petition. (p. 383.)

After the general election in 1727, beſides the petition of Henley and that againſt him, as before mentioned, William Smith, Eſq; *one of the freeholders* of Lyme, petitioned the Houſe in behalf of the freeholders, complaining of the mayor for having refuſed their votes. 21 Journ. 35. The Committee of elections was not inſtructed to conſider of this petition, at the ſame time with the others, relating to Burridge and Henley; and therefore took no notice of it in their report to the Houſe. It does not appear that proceedings were had upon it; and I can find nothing further relating to the petitioner in the Journal.

the counſel for the petitioners venture to juſtify their attempt in queſtioning this judgment, by the practice of the courts in Weſtminſter hall, they ſhould at the ſame time bring with them, into this judicature, the rule of limitation, by which all cauſes there are governed. A claim, dormant 60 years, could not make its appearance in the ordinary courts of law.

Another argument offered for this attempt is drawn from the conſtitution of election committees, by which many members may differ from the majority: But this notion would pervert every political inſtitution made up of numbers. It is the judgment of the *court*, not of the *majority*, by which a cauſe is determined.

It is of the utmoſt importance, and a fundamental principle in judicature, to regard former determinations of courts of juſtice. If not proved to be wrong, or even if the queſtion were doubtful, they ought to have authority as precedents. The deciſions of this modern tribunal ought not to be treated with diſreſpect; for if its authority is not vigorouſly maintained, the national benefit expected from its inſtitution will be loſt.

Reply. The counſel for the petitioners obſerved in reply,

That it was fallacious, in any caſe where rights of election to parliament are depending, to rely upon

upon the argument of length of poſſeſſion. Theſe rights are not of a private nature, nor cognizable in the ordinary courts of juſtice; and therefore not to be governed by the technical principle of length of poſſeſſion, and terms of limitation, which are peculiar to thoſe courts, and to the claims determined there. In queſtions of private rights, there is not only a period of limitation to inquiry, but the law has alſo eſtabliſhed rules of preſumption in aid of long poſſeſſion. Thus from long acquieſcence, it may be preſumed, that a party has either ſold, or renounced his property; but ſuch preſumption cannot have place where the ſubject in diſpute is a *public* right, which the poſſeſſor cannot alienate. The caſe of Pontefract is an illuſtration of the truth of this principle: There the uniform practice of the laſt 150 years, agreements of contending parties in ſupport of it recorded in the journals, and deciſions in parliament on the ſame ſide, were held inſufficient to overthrow the fundamental conſtitution of the borough *. So in the caſe of Agmondeſham, and three other boroughs reported by Glanville †, though the right was ſuſpended from the reign of Edw. I. to that of Cha. I. it was held not to be aboliſhed, and was again brought into uſe.

* See Vol. I. and 1 Doug. elect. 379. † Glanv. 87.

The

The chief evidence by which the ſitting members controvert the neceſſity of reſidence, conſiſts of the two entries of 1580 and 1584. By the firſt, burgeſſes, *not inhabitant*, are allowed to vote for mayors; in the ſame entry, thoſe who have *free burgages in right of their wives*, are likewiſe to have that privilege. Now the counſel on the other ſide, if they rely on this authority, muſt take its whole effect; but they will not be willing to admit, that freeholders may vote even for a mayor: Beſides, this regulation was oppoſed by one of the old members; and even allowing it full weight, it relates only to the elections of mayors. Corporations have power to regulate their own internal œconomy, and may preſcribe the terms of the elections in their own body; but they cannot controll the right of voting for members of parliament. That muſt remain according to its original inſtitution.

The other entry ſubjects to the burthen of paying the members' wages *all* the inhabitants, as well as the foreign freemen. This, like the former, proves too much, and eſtabliſhes the ſame right in the inhabitants at large, as in the freemen. This bye-law, therefore, plainly lays the charge on a ſet of perſons who never exerciſed the right of election. At moſt, it is only an act of the corporation, and an attempt by them to make others contribute to diſcharge their

their burthen. It is evidently a *new* conſtitution; for if all the inhabitants voted, this bye-law was not neceſſary; they were compellable by law to have paid the duty.

It has been endeavoured to do away the effect of Mr. Scroope's conduct in 1734, by alledging, that he was then a ſtranger to the borough, and ignorant of the ſtate of its conſtitution: But this does not affect the argument drawn from it; becauſe, though *he* might be uninformed, his agents and friends, by whoſe advice he acted, muſt have known and reſpected that general opinion which he followed.

The word *burgenſis* in the books, has been ſaid to mean "a freeholder *admitted to the freedom.*" If ſo, what poſſible reaſon could exiſt for diſtinguiſhing the two claſſes in the rolls and entries? The word *freemen*, in that caſe, would include all the electors. The contradiſtinction of the two claſſes can only be explained by ſuppoſing, that *freeholders* in that character alone, did the acts in queſtion; and this made it both neceſſary and juſt to preſerve memorials of them in this form. The entry of the election in 1613-14 is abſurd, and without meaning, if the terms of it are to be explained in their ſenſe of the words. "*Freemen and freeholders*" could not have been uſed to deſcribe freemen only.

At the time of Charles the Second's charter, the freemen had begun their practices to exclude the freeholders; the ſupport of their ſchemes might have been a principal object in granting it. But even that does not venture to give the privilege to freemen excluſively, without colouring it with the appearance of antiquity and preſcription. The recital *ſicut antea*, &c. muſt have been known to be falſe by thoſe who ſuggeſted it: But it was alſo known, that the charter could not be effectual to this purpoſe, without referring to antient uſage; becauſe the crown cannot alter the eſtabliſhed right of election. It was alſo made at a time when the government of Cha. II. was garbling corporations, and therefore to be ſuſpected, if it were ſtill in force. But no part of this charter ought to have any force, becauſe it was completely annulled by the king's proclamation; and at this day ſhould be rejected with indignation. It is remarkable, that the election next after the cancelling of the charter was made expreſsly by *freemen and freeholders*.

No argument of weight can be drawn from the non-proſecution of the petitions in 1701 and 1708. In the former caſe there was no abandonment: The petition could not be heard in the firſt ſeſſion; and before the next, the death of the king occaſioned a new parliament. The ſame delay attended the petition in 1708: At this

this time parliaments were triennial; and parties who had only two ſeſſions to gain by petitioning, and perhaps only a ſmall portion of one of them, may be ſuppoſed to have declined the ſtruggle from prudence, and not from a diffidence in their claims. Their views might have been better directed to the approaching new election.

The counſel for the ſitting members are much miſtaken in ſuppoſing that the claim of reſidence to freeholders is peculiar to the preſent conteſt. In Haſlemere, Cricklade, Taviſtock, and Guildford, and perhaps in other boroughs *, the right of voting is ſo qualified. The cuſtoms of theſe places ſhew the claim not to be unconſtitutional.

Their argument drawn from the uſe of the common ſeal in the returns is equally ill founded. There are many boroughs where the right of voting is not in members of the corporation, or not alone in them, where the returns are executed under the common ſeal of the corporation. Indeed it is the general practice, where the mayor is the returning officer. In Reading †, where the right of voting is in the inhabitants, paying ſcot and lot, and the corporators, *as ſuch*, have no right; and in Bridport ‡, where there is the ſame right, the returns have been always made with the ſeal of the corporation.

* Weſtbury is another. 18 Journ. 154. † Prynne *Brevia Parl. rediv.* 284. ‡ 29 Journ. 204.

The

The Committee having deliberated on the caſe, determined, " *That the right of election for the borough of Lyme is in the freemen only, as well non-reſident as reſident.*"

This reſolution was communicated to the parties. In conſequence of it, the Committee declared

The ſitting members duly elected.

Of which the chairman informed the Houſe on the ſame day, February 21 *.

* Votes, p. 174.

NOTES

NOTES

ON THE CASE OF

LYME.

PAGE 1. (A.) Mr. N. Bond alſo appeared as counſel for the electors; but it being intimated, that ſome members diſapproved of hearing *two* counſel for the electors, Mr. Bond deſired to know the opinion of the Committee on the propriety of his attending there on behalf of his clients. Hereupon the Committee came to a reſolution to hear only two counſel for the candidates on each ſide, and one counſel for the electors petitioning: In conſequence of which, Mr. Bond did not appear in the cauſe.

Committees, in theſe matters, act according to their own diſcretion upon particular circumſtances. In the former caſe of Lyme, two counſel were heard for the electors, as well as for the candidates; and *three* alſo were heard on the part of the ſitting members; one of the three being nominally counſel for the electors in their intereſt. The ſame has been done in other caſes.

By a ſtanding order of the Houſe, the old election Committees were directed to admit but two counſel of a ſide to be heard; (13 Journ. 648) but the preſent Election Court is not ſubject to the former orders of the

the Houſe; though it is found convenient on many occaſions to comply with them.

P. 29. (B.) If the real ſtate of the elections of Members of Parliament, in this and the preceding period, had been faithfully entered on record in the ſimplicity which directed this, we ſhould probably find many others like it in the regiſters of corporations. In ſome counties the Lords Lieutenants pretended to have a controll over the elections, in the ſeveral towns, as to one member; which character, perhaps, the Marquis of Wincheſter held at this time in Dorſetſhire. In the election next preceding that in queſtion, one of the members returned was of the *Paulett* family.

Sir Nicholas Throckmorton, and *Francis Walſingham*, Eſq; the names of well known courtiers, having no connection with the borough or county, likewiſe repreſented Lyme in the reign of Elizabeth.

I have obſerved, that the name of the ſecond member in the old returns, has generally been one of a family well known in the town, occurring frequently in the liſts of freemen, as *Haſſard*, *Elliſdon*, &c. with the addition of *merchant*, or without any addition. The name of the other member is generally that of a ſtranger, with the addition of *Eſquire*.

Even ſo late as the revolution, it was thought neceſſary to aboliſh, by act of parliament, the cuſtom, by which the Lord Warden of the Cinque Ports claimed a right to name one of the members for each port. The preamble of the act recites their pretending and claiming of right this power of nomination; and enacts, "That all ſuch nominations, or recommendations,

mendations, were, and are, contrary to the laws, &c." Stat. 2. Will. and Mary, ſeſſ. 1. ch. 7. A bill for the ſame purpoſe had been prepared in the preceding parliament, in 1689; but it was diſſolved before the bill was ready for paſſing.

Brady, in the appendix to his Treatiſe on Boroughs, (N° 23 and 24) has preſerved two curious inſtruments upon this ſubject; in one of which the lord, in the other the lady, of the town of Ayleſbury, actually execute indentures of the return of members, in their own names and right, in a form ſimilar to that of a power of attorney. Brady cites them from the bundle of writs in the rolls chapel, in the 14th and 28th years of Elizabeth. In the latter inſtance, the lord of the borough condeſcends to name the corporation as a party to the return, together with himſelf; but in the former, the lady alone appoints the members.

The firſt caſe upon record of an election petition, which happened in the reign of Edw. II, ſtates one of the knights for Devonſhire to have been returned by the *biſhop of Exeter*. It is remarkable, that the *petitioning* candidate alledges himſelf to have been ſo elected—"the ſaid Matthew, by the biſhop of Exeter, and Sir William Martin by the aſſent of the good men of the county, were elected, and to the ſheriff in full county preſented, &c." This petition is preſerved in the preface to Glanville's Reports. It is addreſſed "To the council of our lord the king," and is not likely to have founded the petitioner's claim upon a practice contrary to the then received notions of right.

P. 79. (C.) The liverymen of London, before the year 1725, uſed to take the following oath upon their admiſſion to the freedom: "Ye ſhall ſwear that ye ſhall be good and true to our ſovereign lord king George, and to the heirs of our ſaid ſovereign lord the king. Obeiſant and obedient ye ſhall be to the mayor and miniſters of this city. The franchiſes and cuſtoms thereof ye ſhall maintain; and this city keep harmleſs in that that in you is. Ye ſhall be contributory to all manner of charges within this city, as ſummons, watches, contributions, taxes, talliages, lot and ſcot, and to all other charges, bearing your part as a freeman ought to do. Ye ſhall colour no foreign goods, under or in your name, whereby the king or this city, might or may loſe their cuſtoms or advantage. *Ye ſhall know no foreigner to buy or ſell any merchandize with any other foreigner within this city or franchiſe thereof, but ye ſhall warn the chamberlain thereof, or ſome miniſter of the chamber. Ye ſhall implead, or ſue no freeman out of this city, whilſt ye may have right and law within the ſame city.* Ye ſhall take no apprentice; *but if he be freeborn, that is to ſay, no bondman's ſon, nor the child of any alien, and for no* (for any *) leſs term than for ſeven years, without fraud or deceit; and within the firſt year ye ſhall cauſe him to be inrolled, or elſe pay ſuch fine as ſhall be reaſonably impoſed upon you for omitting the ſame. And after his' term's end, within convenient time (being required) ye ſhall make him free of this city, if he have well and truly ſerved you. Ye ſhall alſo keep the

* Words ſubſtituted for thoſe in Italic *now* omitted.

king's

king's peace in your own perſon. Ye ſhall know no gatherings, conventicles, nor conſpiracies, made againſt the king's peace; but ye ſhall warn the mayor thereof, or lett it to your power. All theſe points and articles ye ſhall well and truly keep, according to the laws and cuſtoms of this city, to your power.

So God you help."

By ſtat. 11 Geo. I. ch. 18. made for altering the conſtitution of the city in elections, and regulating them, a particular proviſion was made (in ſect. 19,) for omitting the words in Italic from this oath.

I believe there is much uniformity in corporation oaths: As their privileges were chiefly intended for thoſe who reſided within their juriſdiction, it was natural to preſcribe their duties to them in terms adapted to this ſituation. In Briſtol and Liverpool, where likewiſe reſidence is no qualification of the right of voting, the oaths of the freemen are of the ſame tenor. As theſe places were particularly referred to in the arguments, I have procured copies of the oaths taken in them by their freemen upon admiſſion; which are as follows:

The Oath of a Burgeſs of Briſtol.

"You ſhall be good and true unto his majeſty king George .... and to the heirs and ſucceſſors of the ſaid king: And to the lieutenant, maſter mayor of the city of Briſtol, and the miniſters of the ſame, in all cauſes reaſonable, you ſhall be obedient and aſſiſtant. You ſhall keep the franchiſes and cuſtoms of this city; and alſo the king's peace here you ſhall endeavour yourſelf to keep and maintain. You ſhall be contri-

butary to all manner of ſummons, as watches, taxes, lots, ſcots, and other charges within this city, to your power. You ſhall know none unlawful aſſemblies, riots, or routs, purpoſed to be made againſt the king's laws or peace; but you ſhall withſtand them to your power, or warn maſter mayor for the time being thereof, or ſome of the head officers of this city, as ſpeedily as you can. You ſhall not colour the goods of any foreigner or ſtranger, or know any foreigner or ſtranger to buy and ſell with another foreigner within the precincts of this city, but you ſhall give knowledge thereof to the chamberlain, or his deputy, without delay. You ſhall not implead, or ſue any burgeſs of this city in any court out of this city, for any matter whereof you have ſufficient remedy within this city. You ſhall not take any apprentice that is bond of blood, and none other, except he be born under the king's obeiſance, and for no leſs term than ſeven terms; and that he be bound by indentures, to be made by the town clerk of this city, for the time being, or his clerk; and at the end of his term, if he have truly ſerved you all his term, you ſhall, if he require you to it, preſent him to maſter mayor, or to the chamberlain, to be made a burgeſs. You ſhall not wear, or take the livery or cloathing of any lord, gentleman, or other perſon, but only your own, or your crafts, or of maſter mayor, or of the lord high ſteward of this city, or of the ſheriffs of the ſame, ſo long as you ſhall be dwelling within this city. You ſhall make no oath or promiſe, by way of confederacy, contrary to the king's laws.

So help you God by the holy contents of this book."

The

The Oath of a Freeman of Liverpool.

"You ſhall be a true and faithful ſubject to our ſovereign lord the king's majeſty, his heirs, and ſucceſſors; and no treaſon do procure or commit, or cauſe to be done procured or committed within this town and liberties thereof. You ſhall alſo, from time to time, (as occaſion ſhall require) aid, aſſiſt, and obey, as well the mayor of this town, as alſo all other his majeſty's officers within the ſame, under the ſaid mayor, in the due and lawful execution of their ſeveral offices; and eſpecially concerning the preſervation of his majeſty's peace, the obſervation of good orders, and the antient and laudable privileges, franchiſes, liberties, and cuſtoms of the ſame, which ſaid liberties and cuſtoms you ſhall further and increaſe, to your knowledge and beſt endeavours. You ſhall likewiſe by no covin, colour, or deceit, free any foreigner, or the goods, chattels, or merchandize, of any foreigner or other perſon whatſoever, not free within this town, in the name of your own proper goods, chattels, or merchandize, whereby the cuſtoms of this town may be impaired, hindered, impeached, delayed, or embezzled. You ſhall be liable and contributory, at all times neceſſary and convenient, to all reaſonable taxations and payments, which ſhall be aſſeſſed upon you amongſt other burgeſſes, freemen, and inhabitants of this town, as well for the maintenance and furtherance of the franchiſes and liberties of this town of Liverpool, and other neceſſaries thereunto incident and appertaining; as alſo for the reparation * of the pariſh church of St. Peter and the parochial chapel of our Lady and St. Nicholas within the ſame.

* See the note in p. 79.

" And further, you ſhall not implead or ſue any freeman of this town, inhabiting within the ſame, for any matter, cauſe, or thing whatſoever whereof the ſaid mayor's court may hold plea, out of the juriſdiction of this court, unleſs it be for want of juſtice or right there to be adminiſtered.

" And if you ſhall know or hear of any unlawful congregations, conventicles, riots, routs, unlawful aſſemblies, or other diſorderly tumults to be had or made, or like to be had, made, or procured, by day or by night, within this town and liberties of the ſame, to the diſturbance of the peace of our ſovereign lord the king's majeſty, his heirs and ſucceſſors, you ſhall give warning and notice thereof to the mayor, his deputy or bailiffs, with all ſpeed. And all and every other thing or things, which ſhall either touch or concern the advancement or preferment of the commonwealth and ſtate of this town, or ſhall appertain and belong to be done by good and honeſt burgeſſes freemen and inhabitants of the ſame, you ſhall for your part do, accompliſh, fulfil, perform, and obſerve, to the beſt of your ability, power, knowledge, and wit.

So help you God."

In 1 Keb. 690, a caſe in which the Briſtol oath came under the conſideration of the court of King's Bench, the judges held that clauſe of it which confines the proſecution of ſuits to the city courts, to be illegal. This happened in the year 1664; yet that clauſe has been regularly preſerved in the oath ever ſince. A ſimilar one is in the Liverpool oath, and in others; and made part of the London oath till taken out

out of it by the ſtatute as abovementioned; for reaſons which ought to have extended the ſame alteration to every other.

By comparing the above oaths with that of Lyme, in the article of unlawful aſſemblies, it is plain that the word *conventicles* there uſed, has not the meaning which the counſel aſcribe to it in p. 80, by which modern times appropriate it to religious meetings. Before the reformation, it made part of the London oath in its more enlarged ſenſe of *unlawful gathering of people without tumult*.

IX.

THE

CASE

Of the BOROUGH of

SALTASH,

In the County of CORNWALL.

The Committee was choſen on Thurſday the 14th Day of April, 1785, and conſiſted of the following Members:

Lord Viſcount Beauchamp, *Chairman.*
Dalhouſie Watherſtone, Eſq;
Sir Philip Hales, Bart.
Hon. William Grimſtone.
William Southeron, Eſq;
William Middleton, Eſq;
William Jolliffe, Eſq;
John William Egerton, Eſq;
Henry Beaufoy, Eſq;
Philip Metcalfe, Eſq;
John Galley Knight, Eſq;
Iſaac Hawkins Browne, Eſq;
Thomas Samuel Jolliffe, Eſq;

NOMINEES.

John Pollexfen Baſtard, Eſq; *Of the Petitioners.*
John Strutt, Eſq; *Of the Sitting Members.*

PETITIONERS.

Lord Strathaven, and John Curtis, Eſq;

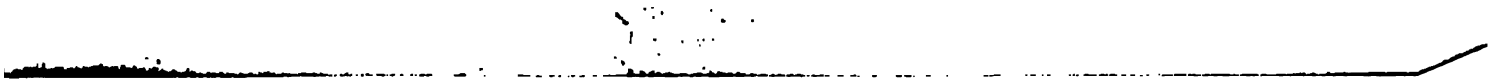
Sitting Members.

Rt. Hon. Charles Jenkinſon, and Charles Ambler, Eſq;

COUNSEL.

For the Petitioners,
Hon. Mr. Erſkine, and Mr. Lawrence.

For the Sitting Members,
Mr. Wilſon, and Mr. Douglas.



THE

CASE

Of the BOROUGH of

SALTASH.

THE petition alledged in general terms, that the mayor of the borough had illegally received the votes of perſons who had no right to vote, in favour of the ſitting members; and had rejected a greater number of good votes, tendered for the petitioners, whom he ought to have returned *.

The queſtion between the parties was, whether the right of election belonged to the members of the corporation, or to the freeholders of antient houſes or their ſcites within the borough, held by burgage tenure. The petitioners ſupported the latter ſett of voters; the ſitting members were choſen by the former.

The poll contained only the votes for Mr. Jenkinſon and Mr. Ambler, of which there were eleven for each; but 45 perſons had tendered their votes as freeholders, for the petitioners, and had been rejected. It was agreed,

* See 40 Journ. 19.

that

that if the freeholders had the right, the petitioners would be intitled to the ſeat; and that if not, the ſitting members muſt be declared duly elected.

There is no reſolution of the Houſe of Commons, upon the right of election in this borough. The preſent conteſt is the third, in which it has been diſputed before a ſelect Committee, ſince the year 1780. The firſt aroſe upon the general election in that year; after which two petitions were preſented to the houſe from the unſucceſsful party: One by the candidates, in general terms: Another by certain freeholders of the borough, ſtating their right to elect. They were tried in the ſecond ſeſſion of that parliament, and the Committee determined in favour of the ſitting members, but did not declare any expreſs reſolution upon the rights of the electors *. The ſecond conteſt aroſe upon an occaſional vacancy of one of the members, in the ſpring of 1783. Two petitions were alſo preſented to the houſe, againſt this election; that of the candidate, as before, was framed in general terms; but that of the electors in his intereſt, ſtated the right of election to be in *freeholders and free burgeſſes, holding by burgage tenure.* This trial ended like the former, unfavorably to the petitioners †.

* 38 Journ. 595, 663. † 39 Journ. 385, 427.

The

The evidence ſtated in ſupport of the preſent petition, was ſaid to conſiſt of the ſame written particulars as upon the former trials; with the addition of one article, which (as will be ſeen in the courſe of this report) the petitioners conſidered as very important. Some witneſſes were alſo examined, who did not give evidence to the former Committees.

The counſel for the petitioners in opening their caſe to the court, related the circumſtance of the two former trials having ended unfavourably to their ſide; and that the ſame queſtion, as was then agitated, was to be determined now for the third time. The counſel for the ſitting members, endeavoured to take advantage of this declaration, on the ſecond day of the trial, while the petitioners were proceeding in their evidence; which they interrupted by an objection, ſupported by the following arguments, viz.

That after two trials had upon the ſame queſtion before two former Committees, and two concurring judgments by them, in favour of the right aſſerted by the ſitting members, it would be improper, in the preſent Committee, to ſuffer the queſtion to be again agitated. That the ſtate of the caſe, as now opened for the petitioners, did not in ſubſtance vary from the former. That the maxim *ſit finis litium*, was always

always inforced in ſuits in Weſtminſter hall, after two concurring verdicts; although the juriſdiction of a jury extended only to matters of fact, and a verdict was not recorded as a judgment; but in this caſe, there had been two judgments of a court which united the authorities both of judge and jury.

That certainty was a fundamental principle of juſtice, which could never be eſtabliſhed without placing implicit confidence in preceding judicial deciſions. Upon this principle, the judges revered many doctrines as unalterable, which would not be followed, if they were to ariſe in the preſent day out of new caſes. That in a great conveyancing queſtion, determined ſome years ago in the King's Bench, the judgment had not given entire ſatisfaction to the profeſſion; and a few years afterwards, the ſame queſtion ariſing again in another cauſe, one of the parties was about to oppoſe the doctrine of the former caſe: But the judges of the King's Bench would not ſuffer it to be argued; becauſe the former deciſion had been received and acted upon as law *.

That if this principle were not inforced in the ſame manner in committees of election, there

* The caſes alluded to were thoſe of Coulſon and Coulſon, Stra. 1125, and Hodgſon and Ambroſe, Doug. Rep. 323.

would

would be no end to litigation, becauſe twelve deciſions might be as diſſatisfactory to the loſing party as two; and the benefit expected from Grenville's act, would by this means be, in a great meaſure, loſt: Becauſe, inſtead of introducing order into the law of elections, it would open the way for all thoſe inconveniences which the fourth ſection of 2 Geo. II. c. 24, intended to prevent.

That fortunately for the ſitting members, there had been inſtances in election committees of their following the doctrine now contended for. In the Shrewſbury caſe, in 1775, 1 Doug. elect. 464, two verdicts upon mandamuſes had eſtabliſhed a right in the freemen of that town as preſcriptive, which the petitioner there contended for; and the ſitting member wanted to eſtabliſh the contrary, by evidence ſhewing that the ſuppoſed preſcription began in 1642, by a bye-law that had been ſince repealed: But the Committee conſidered themſelves bound by the verdicts, and would not receive the ſitting member's evidence. Yet one of theſe verdicts had not been agreeable to the opinion of the judge who tried the cauſe.

That the preſent caſe was much ſtronger than that, inaſmuch as the judgments whoſe authority is contending for, paſſed in the *ſame* tribunal which now tries the queſtion for the third

time. It was ſaid, in the Shrewſbury caſe, that the verdicts were not concluſive, becauſe between different parties; as it might be argued here, that the preſent petitioners are not the *ſame parties* as contended before; but the Committee thought the *queſtion* the ſame, and determined accordingly. In the Downton caſe, tried in 1781 *, the queſtion was, Whether a certain claſs of votes were occaſional and void: The ſame queſtion had before been diſcuſſed and determined by a Committee upon the Downton election, in 1779; and upon that authority the Committee in 1781 came to the ſame opinion. Upon that occaſion the chairman †, whoſe parliamentary knowledge is well known, informed the counſel who brought forward the queſtion, "that though the Committee had not reported their petition to be frivolous, they had thought it very improper, after one Committee had decided the point, to agitate it a ſecond time."

That it was particularly neceſſary to ſupport this doctrine in diſcuſſing the rights of maiden boroughs, which offered ſo many opportunities for conteſt. In the caſe of Pontefract, indeed, there had been a third petition in oppoſition to two former deciſions: But one of theſe had

* See Vol. I. p. 113.

† The right hon. Frederick Montague.

paſſed

paſſed *in the houſe*, and the queſtion turned on the entry of a laſt determination in the Journals; which, if really exiſting, is made concluſive by the law of the land, and could not be ſhaken by a multitude of deciſions. Such a caſe can hardly ever happen again, and affords no precedent to this caſe.

In anſwer to the above arguments, the counſel for the petitioners ſaid,

That the time of taking this objection was very extraordinary; the only proper opportunity for it being previous to entering upon the merits; that by ſuffering the inquiry to proceed, the counſel on the other ſide had admitted, as far as in them lay, the competency and propriety of it.

That there was no principle in the law which led judges to conſider two verdicts as concluſive, merely becauſe they might have concurred: That this related to the ſubject matter of them; for if any number of verdicts were to be given concurrently againſt law, they would always be ſet aſide, and new trials granted; but where two verdicts may have aſcertained a *point of fact* the ſame way, the courts juſtly ſuppoſe it vain to expect that another jury would think differently, and therefore eſtabliſh that opinion in which 24 perſons have been unanimous.

That the deciſions of Committees were formed by a majority only of the members; upon a view of the whole merits of a cauſe, involving law and fact, and conſequently a variety of conſiderations together: That the foundation of ſuch deciſions was often not aſcertained, and therefore could not always have the authority of precedents: But according to the poſitions on the other ſide, even though they were wrong, they muſt be implicitly followed.

That it had been currently ſaid, that both the former deciſions had been made by a majority of *one* member only in each Committee; which, if true, ſhewed the point to be very difficult and doubtful, and that ſome more decided judgment was neceſſary to aſcertain it.

That if by the law and conſtitution of England, the borough of Saltaſh were a borough repreſented in parliament in right of burgage tenure, no determination of a Committee could deprive it of this legal right; therefore ſuppoſing the preſent cauſe to contain exactly the ſame evidence, and no more than the laſt, the Committee would be bound to hear it. But that on the preſent trial, further and ſtronger evidence would be produced in addition to the former.

That the caſe of Shrewſbury was very different from this: There the queſtion upon a corporation

poration cuſtom had been determined in the court which had the proper juriſdiction, and came incidentally before the election Committee; who could do no otherwiſe, in ſuch a caſe, than receive the deciſion as final, becauſe it was peculiar to the court of law. But the only proper place for trying queſtions of election rights was the ſelect Committee; and the preſent had the ſame authority as the preceding. Again, the verdicts in that caſe had been ſubmitted to, and the party againſt whom they were found did not attempt a third trial.

That the caſe alluded to in the King's Bench had determined a point of great importance to all the landed property in the kingdom; and many years had paſſed, in which many family ſettlements had been made, eſtates ſold, and all the conſequences attending the transfer of land had taken place conformably to that opinion. It was owing to theſe peculiar circumſtances, and to avoid general confuſion, that the judges reſolved to conſider the point as ſettled; not merely from regard to a ſingle precedent. That theſe reaſons were not applicable to the preſent caſe; no length of time having elapſed, no family ſettlements having been founded on it, and no general conſequences being likely to reſult from it; in ſhort, no ſymptom of acquieſcence having

been held forth, and the firſt opportunity having been taken of renewing the cauſe.

That this attempt by no means militated againſt the principle of Mr. Grenville's bill; which purpoſely avoids making the deciſions of this court final, leaving them to their own intrinſic merit to obtain that effect; and holding out to frivolous petitions the peril of the diſpleaſure of the Houſe, upon a report for this purpoſe, where the caſe may require it *.

That the former Committees did not declare any opinion of the right of election, but ſimply declared the ſitting members duly elected; that therefore it may be inferred, they had ſome doubts upon it. The preſent petitioners were not concerned in the trial, and could not infer that *they* have no right, becauſe a petitioner in a former caſe had failed.

That in the caſe of Pontefract, there had been two concurring deciſions, one in the Houſe, another before this tribunal; yet this did not prevent a third attempt, which ſucceeded contrary to them; has been confirmed in a fourth, and will, probably, for ever eſtabliſh the right in Pontefract. That the determination of the *Houſe*

* See on this ſubject the judicious obſervations of Mr. Douglas in Sect. II. of his Introduction. Doug. Elect. Vol. I.

upon

upon this caſe was, at that time, a judgment of the only competent authority, and intitled to reſpect as ſuch.

That the diſtinction alledged between queſtions upon the effect of a laſt determination, and any general queſtion of right, had no real difference in it; in both caſes, the right of election is in iſſue.

The Committee, after deliberating upon this point, directed the counſel for the petitioners to proceed with their evidence.

The following is a ſtate of the evidence produced in ſupport of the petition.

A charter of king Richard II. in the fifth year of his reign, (A. D. 1381) confirming one before granted to this town by Reginald de Valle tortâ, lord of the honour of Trematon within which Saltaſh ſtands, in the following words:

"—— *Inſpeximus cartam quam Reginaldus de Valle tortâ dudum fecit liberis burgenſibus de Eſſâ in hæc verba,* SCIANT preſentes & futuri quod Ego Reginaldus de Valle tortâ dedi conceſſi, & hac preſenti chartâ meâ confirmavi liberis burgenſibus meis de *Eſſâ,* omnes libertates & liberas conſuetudines ſuas hîc ſubſcriptas quas habuerunt tempore anteceſſorum meorum, viz.

" De pleno burgagio reddent ſex denarios ad duos anni terminos, ſcilicet in vigiliâ natalis Domini tres denarios & in vigiliâ paſche ſequenti tres denarios; & de dimidio burgagii reddent tres denarios ad predictos terminos. Et de forinſecâ terrâ reddent ad feſtum Sancti Michaelis quantum ad forinſecam terram pertinet.

" Conceſſi eciam quod nullus predictorum burgenſium implacitetur nec judicetur niſi in Hundredâ ejuſdem villæ coram paribus ſuis. Et ſi ad judicium perficiendum per ſe plenarié non ſufficiant, per auxilium meum & meorum in eâdem Hundredâ perficiatur. Et nullus predictorum burgenſium ex conſuetudine ſequatur hundredam niſi ter in anno, ſcilicet, die lune proximo poſt feſtum ſancti Hillarii, & die lune proximo poſt clauſum paſche & die lune proximo poſt feſtum ſancte Fidei; niſi contra preceptum Domini Regis, vel pro efforciamento judicii ſi in placito fuerit; et tunc habeat ſummonicionem die ſabbati, quod die lune ſequenti veniat ad hundredam de placito in quo eſt reſponſurus. Et ſi aliqua ſummonicio de Domino Rege vel ejus ballivis evenerit, per ſummonitorem caſtri mei fiat illa ſummonicio prepoſito ejuſdem villæ & poſtea per prepoſitum burgenſibus.

" Conceſſi eciam quod habeant prepoſitum ſuum per propriam electionem ſuam; & quod idem habeat

habeat totum theolonium panis in eâdem villâ & redditum domûs ſuæ quietum pro ſervicio ſuo. Et quod nihil capiatur ad opus meum in eâdem villâ niſi per voluntatem mercatorum. Et ſi quis de predictis burgenſibus meis in emendam meam acciderit, per ſex denarios illud emendabit ad plus. Et quiſquis illorum obierit de quâcunque morte fuerit, heres ejus catalla ipſius in pace habebit & terram ſuam per triginta denarios releviabit ad plus; et tamen emendabit vel releviabit burgenſis de dimidio burgagii ſicut burgenſis de pleno burgagio.

" Conceſſi eciam quod quieti ſint ab omni tallagio & auxilio conſuetudinario, niſi ad filium meum primogenitum militem faciendum, & ad filiam meam primogenitam maritandam *. Et habeant paſturam meam illis continuam quietam a feſto ſancti Michaelis uſq. ad purificationem beate Marie. Si quis vero illorum predictam paſturam deinde exercere voluerit, det pro quolibet equo vel animali, unum denarium, & pro

* In the articles upon which Magna Charta was framed, the following ſtands the fifth: " *Rex non concedit alicui Baroni quod capiat auxilium de liberis hominibus ſuis niſi ad caput ſuum redimendum & ad faciendum primogenitum filium ſuum militem & ad primogenitam filiam ſuam maritandam; & hoc faciet per rationabile auxilium.*" The lord who granted this charter lived in the reigns of King John and his ſon Henry III. and from the clauſe referred to here, I ſhould conjecture it to have been ſubſequent to, but nearly coeval with, the great charter.

decem bidentibus unum denarium, ſalvis bladis & pratis & rationabilibus defenſis meis.

" Conceſſi eciam quod nullus de predictis burgenſibus meis capiatur aut ad caſtrum meum ducatur, ſi de tranſgreſſione quam fecerit ſufficientes plegios poterit invenire de paribus ſuis.

" Et quod nulla navis contra libertatem ejuſdem villæ tranſeat rupem de Eſſâ & rupem de la Hen' in Linario, ad aliquam mercaturam ad emendum vel vendendum. Et quod feria ejuſdem villæ in mediâ villâ teneatur ubi conſueverat tempore anteceſſorum meorum. Et quod nullus burgenſis per mare vel per terram itinerans impediatur de aliquo rationabili negotio ſuo quod cum vicinis ſuis facturus fuerit, ſi in eadem villâ catalla habuerit per quæ in eventu ſuo poſſit juſticiari.

" Has autem libertates & liberas conſuetudines preſcriptas Ego & heredes mei predictis burgenſibus meis & heredibus ſuis contra omnes homines & feminas warrantizare debemus. Quod ut ratum & inconcuſſum permaneat preſentem Cartam meam ſigilli mei impreſſione confirmavi. Hiis teſtibus, Johanne de Valle tortâ, &c."

The words in which Richard II.* confirms this charter are, " præfatis burgenſibus ac heredibus

* In the reign of Richard II. the honour of Trematon was become part of the Dutchy of Cornwall; and as ſuch, at

dibus & ſucceſſoribus ſuis burgenſibus villæ prædictæ."

A charter of Queen Elizabeth, in the 27th year of her reign, reciting that of Valle tortâ, and three confirmations of it by Richard II. Edward IV. and Henry VIII. confirms them all in like manner; and adds, beſides the form before recited from the confirmation of Richard II. " prout iidem burgenſes & anteceſſores ſui libertates & quietancias prædictas & earum quamlibet ſive aliquam a tempore confectionis cartæ & literarum predictarum rationabiliter uſi ſunt & gaviſi." The charter then recites, that the ſaid burgeſſes, from time whereof the memory of man is not to the contrary, had held the aforeſaid rights and privileges, as well by preſcription as by the ſaid charters; and that, from the ſituation of the town, great inconvenience would ariſe for want of the privileges propoſed to be granted by this charter; whereupon the ſaid burgeſſes had petitioned her majeſty, for the better government of the ſaid town, to create them into another* body corporate: She therefore, for the purpoſes mentioned, conſtituted the ſaid town a free borough, and the burgeſſes of the ſame to be a body corporate, by the name of

at that time, veſted in the crown. Willis, in *Not. Parl.* cites *Dugd. Baron.* for this fact.

* " *In aliud corpus corporatum,*" in the original.

the

the "Mayor and freeburgeſſes of Saltaſh." The charter preſcribes ſeveral particular regulations: Among others, that there ſhall be 10 aldermen, one of whom is annually to be choſen mayor, by the mayor, aldermen, and free burgeſſes; and when an alderman dies or is removed, one of the borough is to be elected by them in his room. It grants to the corporation the town of Saltaſh, with all its members and appurtenances; the ferry of the river, rents of aſſize, tolls, &c. together with all other profits and privileges which they had before held, yielding to her majeſty, and her heirs and ſucceſſors, Dukes of Cornwall, 18l. Alſo, "that there ſhould be, in the ſame borough, two burgeſſes of the parliament; and that the ſaid mayor and freeburgeſſes for the time being, as often as a parliament ſhould be ſummoned, ſhould have power and authority to chooſe two diſcreet and honeſt men to be burgeſſes of the parliament for the ſame borough." The charter is ſilent as to the mode of election, or the qualification of free burgeſſes.

A ſurvey, made in 1650, under a commiſſion from the commonwealth, intitled, "Survey of the Borough of Saltaſh, with the rights, members, and appurtenances thereof, ſituate, lying, and being in the county of Cornwall, part of the antient dutchy there, and parcel of the poſ-

ſeſſions

ſeſſions of Charles Stuart, late Duke of Cornwall, but now ſettled on truſtees for the uſe of the commonwealth. Held as of the manor of Eaſt Greenwich in free and common ſocage, by fealty only. Taken by (*E. H. &c. the five commiſſioners.*)

The particulars are ſtated as following:

" The high rents, or rents of aſſize, of the ſaid borough

" High Street—The heirs of Hutchin hold freely to them and their heirs for ever, three burgages and four half burgages, for which they pay per annum — 2s. 6d.

" Sir Richard Buller, Knt. holdeth (ut ſupra) three burgages and three half burgages, for which he payeth per annum — 2s. 3d."

The Survey, in the ſame manner, enumerates all the other burgages, amounting to 165, making together the ſum of 3l. in high rents.

The earlieſt return extant, and which is ſuppoſed to be their firſt, of members to parliament, in A. D. 1552, 6 Edw. VI. the ſtyle of which is, " Major & communitas."

The next, of may 1, 1553, " Major & burgenſes." To both the common ſeal is affixed.

The following entries were read from an old corporation book, indorſed in a modern hand " Antient

" Antient Conſtitution book, N° III." beginning with the fourth year of Queen Elizabeth. It is the only record of this town now extant of an earlier date than 1742; all the other books having been loſt or deſtroyed in a manner not accounted for; in conſequence (it was ſuppoſed) of the modern diſſentions in the borough, viz.

" The borough town of Saltaſhe

" Auncyent & laudable Actes conſtitutions & ordinances time out off mynd there made uſed & approved for the good govm.t & order of the people inhabitinge wthin the ſaid borough towne Examined tryed & confirm'd at the lawe Courte there holden the Monday next after the Feaſt of Saint Hilary in the yeare of the reign off o.r moſt gratio.s ſoveign Lady Elizabeth by the Grace of God Quēn off England France & Ireland Defend.r of the Faith &c the fourth *—Before John Hearing merch.t then Mayor of the ſame Borough towne Edmonde Birth Deputy to Thoms Willms Eſq.r hed steward of the ſame Willm Hutchins Eſq.r John Wells Gentlem.n Thomas Fynch m.chan.t & John Cofin yeom late mayor of the ſame Borough town upon the othes of John Lovell &c"——

—" And yt ys ordeyned that all Forreyn Burgeſſes ſhall & ought to be contributaries to all reaſonable charge done or to be done for the mayntenance & defence of thy.r libties & fran-

* A. D. 1562.

chyſes

thyſes of this Towne & for the repayring & mayn-tence of the paſſage boats & the ſtreet of the ſame Towne as ſhal be ceſſed and taxed by the Mayor and his Brethren for the time being; or elſe they & evre of them utterly to be disfranchiſed of paſſage & other lybtyes of the ſame Towne; and that evrie ſuch freeholder ſhall yerely at Michaelmas enter his fine for his ſuyte to the Courtes or ells to pay the comon amercyaments for the ſame."

" Saltayſh—At a Lawe Court there holden the Monday next after Saint Faythes day to weit the x^th^ day of October & in the 17^th^ yeere * of the reign off o^r^ moſt gratious ſoveign Ladie Eliz. the Queens Ma^tie^ that nowe ys It was then & at that time by the othes of Richard Rawe (*and others to the number of* 24) ordered & ynacted as follows ——"

" Alſo yt ys inacted that no pſon or pſons ſhall enjoy any of the libtyes of the Towne Except he have lande or tenem^t^ w^th^in this Towne in fee to him & hys Heyers for ev.^r^ And that they and evre of them beare yerely off heigh rent to this Towne 3^d^ at the leaſt & alſo to paye unto the Towne all ſuch cuſtomes ſwytes & ſerviſe as to the ſame app'teyneth And alwayes to paye toward the newe making of the paſſage bote as of old time hath ben accuſtomed to

* A. D. 1575,

be

be paid or ells not to be paſſage free; & to pay for a releeſe o. 2. 6^{d} wheth^{r} yt be a wholle burgage or half a burgage; & to ſerve at three Lawe Courts there by the yere; & to doe his fealty at the next Court next after he is fownde tennte & to pay for his fealty o.,.viii^{d} wheroff to the Steward iiii^{d} and to the Comon Box iiii^{d}"

" The eighth of November 1675 John Hoſkin one of the Aldermen of this Borough did then in open Court declare that he had aliened his Land unto his Sonne, and thereupon deſired to be diſmiſſed of his Place of Aldermanſhip; which was then conſented unto by the then Mayor & Aldermen there preſent, & was diſcharged accordingly."

" The 22^{d} day of November 1675 Peter Harris one of the Aldermen of this Borough did then in open Court deſire to be diſmiſſed of his Aldermanſhip, wh: was then conſented by the then Mayor for that the Land by which he was made burgeſs was only a Truſt

" 12 June 1676 Peter Teage then entered his deed & was ſworn &c"—Peter Moulton juratus liber burgenſis &c

" 27^{o} die Januarii 1678 Tho^{s} Luſkey his Deed of Feoffm.^{t} entered &c et tunc juratus fuit liber burgenſis burgi prædicti

" 4^{o} die Auguſti 1679 John Preſton Ower Teage & Robert Martin Jun.^{r} their ſeverall Deeds

Deeds of feoffm.t were entered & they admitted & ſworn freeburgeſſes of the Borough aſores[d].

" 1st September, 1679 (*The ſame of Henry Lobb*)

" 5.th July 1680 Ed'rus Leane calcearius fecit fidelitatem pro terris quas tenet de majore hujus burgi et tunc apud Guildhall' burgi prædicti juratus fuit liber burgenſis Burgi prædicti et præſtitit omnia alia juramenta proviſa per Statutum hujuſmodi caſu

" 12.th July 1680 Ed'rus Leane yeoman &c (*as in the preceding entry*)

" Memorandum quod ſexto die ſeptembris anno Dñi 1680 in plenâ Curiâ apud Gildhaldam burgi prædicti Andreas Willoughby Antonius Preſton Ric'us Hill Ric'us Dingle et quilibet eorum fecerunt fidelitatem pro terris quos tenuerunt de majore hujus burgi et jurati fuerunt liberi burgenſes burgi p'dicti; et tunc et ibidem p'dicti Andreas Willoughby et Antonius Preſton electi et jurati fuerunt Aldermanni burgi p'dicti & preſtiterunt reſpectivé omnia alia juramenta et ſubſcriptiones per Statutum proviſa in hujuſmodi caſu

" The 13 day of October 1690 Benedict Cruſt entered his Deed of feofment of the lands lately by him purchaſed from Sr Ja[s] Tille lying

&

& being adjoyning to the ſtreet at the foote of the Towne

" 23ᵈ May 1698 John Ambroſe entered his Deed of feofm.ᵗ for the land lately bought of Joſeph Williams & did his fealty

" 23 May 1698 Francis Pollard entered his deed for land bought of Mr. Cook in the back lane, & hath done his fealty

" 6ᵗʰ day of July 1698 Larance Brent entered his deed of feofment for Land purchaſed of John Cook

" At a Court held for ſaid Borough, 22ᵈ April 1706 Richard Gawde of the ſaid borough Shipwright entered his deed of feofment, & was purſuant to the ſame ſworn a freeburgeſs of the ſaid Borough

" At a Court held for ſaid borough 16 January 1709 Stephen Williams of the ſaid borough Glazier entered his conveyance deed of his purchaſe of one meſſuage or tenement & garden in Saltaſh afores.ᵈ lately purchaſed by the ſaid Stephen Williams of Thoˢ Luce Gent.of Hitter in the pariſh of Saint Stephens

" At a Court for ſaid Borough 28 July 1712 before John Ford Gent. Mayor, Edward Lean Juſtice & others there preſent Memorandum That Nath.ˡ Sweetnam entered his deeds of leaſe & releaſe of one meſſuage or dwelling houſe

houſe & garden lying in Saltaſh which he lately purchaſed of Robert Beete Gent. & thereon did his fealty

" At a Court 15 June 1713 (the like entry of John Hicks Gent. for a meſſuage &c purchaſed of Philip Eare Gent.)

" At a Court 6.[th] September 1714 (the like entry of John Tucker Eſq.[r] of a meſſuage &c bought of Sarah Eare Widow)

" At a Court 10 Jan.[y] 1714. (the like entry of Edw.[d] Leane Jun.[r] for lands belonging to his Father) & he then was admitted & ſworn one of the free burgeſſes of the ſaid borough

" At the ſame Court Jeffery Connell & John Johnſon (are in like manner by entring their deeds admitted & ſworn free burgeſſes of the ſaid bor.[h])

" At the ſame Court Will.[m] Porter of this borough (was ſworn & admitted a free burgeſs of this borough)

" At a Court 10 October 1715 John Wynnell Gent. entred his deeds (&c) and was then ſworn a free burgeſs of the borough & did his fealty."

At the ſame Court the like entry of Benjamin Wadge

" At a Court 13 December 1715 Richard Herring of the ſaid borough was then ſworn

one of the freemen of this borough for his lands within the ſaid borough & then did his fealty.

" At a Court 27 January 1717 Tho^{s} Hurrell Clerk entered his deeds of leaſe & releaſe of one new erected dwelling houſe together with a garden thereunto belonging, theretofore a brew-houſe in Saltaſh late in the poſſion of Tho.^{s} Luſkey, & then was admitted & ſworn one of the freeburgeſſes of the ſaid borough."

At the ſame Court the like entry of Tho^{s} Dennis

" At a Court 2.^{d} September 1723 John Hill was ſworn & admitted one of the free burgeſſes of the ſaid borough & did his fealty.

" At the ſame Court Tho^{s} Leane was admitted & ſworn a free burgeſs of the ſaid borough and did his fealty.

" Memorandum That on the ſecond day of January 1723 Edw.^{d} Hughes * Eſq.^{r} *was elected & choſen* a free burgeſs of the ſaid borough & was ſworn *& did his fealty.*"

On the day following there are four entries of the admiſſion of Edgcomb Pethen and three others, in the ſame terms as the laſt; which, after this period, became the uſual form of admiſſion.

* The name of the member choſen in 1722.

It

It is neceſſary to ſtate in this place, (though the ſubject was part of the evidence produced by the ſitting members) that the charter of Queen Elizabeth was ſurrendered by the corporation to King Charles II. in January 1682-3, who thereupon granted another to them, dated 27 Nov. 1683, which intirely changed their inſtitution. The corporation created by this charter conſiſted of a mayor and ſix aldermen, and an indefinite number of freeburgeſſes; of whom 33 are therein appointed. The mayor and aldermen are hereby impowered to elect ſuch and ſo many as they pleaſe, to be freeburgeſſes: The mayor of the preceding year is to be juſtice of the peace for the next. The burgage rents above-mentioned, are granted to the corporation, upon paying to the crown a quit rent of 18l. a year. There is alſo a clauſe like that in the charter of Elizabeth (A), reſpecting the election of members of parliament.

The counſel for the petitioners ſtated, that this charter, as far as it regulates elections of members of parliament, was never accepted or followed in practice. For which purpoſe they produced the following evidence, to ſhew that none but freeholders of the borough made the elections *after* that charter; and herein acted without regard to it: Proving alſo, that thoſe members of the corporation appointed by Charles II.

whoſe names are ſigned to the returns, after th charter, were poſſeſſed of freeholds in the bo rough *before* it; viz.

The return of March 1689-90, ſigned by th mayor and ſeven others. Three of theſe ar named in the charter, and they were ſhewn t have had borough lands previous to it*. Of th other five, nothing is to be found in any of th borough records.

The return of October 1691 ſigned by 2 names. Six† are in the charter, and were free holders before it: Of the other 15 nothing ap pears.

To the return of November 1692, 16 names Six in the charter qualified as above. Five o theſe are in the former return. Of the othe 10 nothing appears.

The returns following were traced through i the ſame manner:—of October 1695, ſigned b 21, of whom ſeven ‡, in the charter.—Marc 1697-8, by 18, of whom five in the charter.— Auguſt 1698, by 17, of whom four in the char ter.—January 1698-9, by 23, of whom ſix § i the charter.—February 1701-2, by 24, of whon

* On the next trial in 1787, *four* of the eight appeare to have been in this ſituation. † *Eight* in 1787.

‡ *Eight* in 1787. § *Seven* in 1787,

ſeve

ſeven in the charter *.—The names to theſe returns are moſtly the ſame.—Thoſe named in the charter, were proved by entries in the conſtitution book, to have been freeholders previous to it, and ſworn freeburgeſſes; and nothing can be found reſpecting the reſt.

The form of all the above returns is the ſame; by "the mayor and burgeſſes" and under the common ſeal.

The returns of 1714 and 1718 are different; being in the words following, viz. "in cujus, &c. Major & liberi burgenſes commune ſigillum burgi prædicti appoſuerunt; *nec non liberi tenentes per tenuram burgi ſeparalia ſigilla ſua appoſuerunt* †.

To

* In 1787, this further evidence—Returns of March 1701-2, by 20, of whom, ſeven in the charter;—December 1701, in which eight of the charter—in 1702, by 26, of whom eight in the charter—1705, by 14, of whom five in the charter—1708, by 24, of whom ſeven in the charter—another in the ſame year, by 27, of whom ſeven in the charter—October 1710, by 21, of whom five in the charter—December 1710, by 18, of whom four in the charter—September 1713, by 15, of whom three in the charter, proved as above.

† A petition was preſented againſt the election in 1714, by Trevor Hill and Martin Bladen, Eſqrs. the unſucceſsful candidates (ſee 18 Journ. 27). It does not ſtate any right of election, but complains of irregularities and partialities ſhewn by the mayor and recorder in procuring votes for Mr. Shippen and Mr. Calmady, the ſitting members. This petition was not heard in the firſt ſeſſion of this parliament, though it laſted from 17th of March, 1714-15, to 26th of

To both theſe returns there are 28 names, including the mayor's; and a ſeal to each, beſides the common ſeal. The names are almoſt all the ſame in both. Among them is *William Baſtard*, who was named in the charter of Charles II. and ſigned the return in 1701-2, in which his name firſt appears. By entries in the conſtitution book it appeared, that two of thoſe who ſigned the return in 1714, were not admitted into the corporation till long after; one in 1717, and the other in 1723. And one who ſigned that in 1718, was admitted into the corporation in 1723.

The return of April, 1722, is ſigned by 36 perſons: Of theſe, the petitioners endeavoured to ſhew that 31 were freeholders. Eleven were proved ſo either by entries in the conſtitution book, or by their having ſigned the return of 1714, or 1718; and as to 20, a witneſs of the name of Reed, aged 75 years, who had

June, 1716. In the next ſeſſion it was renewed, (18 Journ. 494) but with ſome alterations. In the renewed petition, the *recorder*'s name (who was then dead) is not mentioned; and a new charge is added of *bribery, and illegal practices*, againſt the ſitting members. Nothing further appears in the Journal relating to this petition. The alteration in the charges of this ſecond petition was contrary to the rules and practice of the Houſe, which require that a renewed petition ſhould be the ſame in ſubſtance as the original.

known

known them all, gave ſome account to that effect: But he failed as to ſeveral, in aſcertaining the *time* of their poſſeſſing freeholds to have been prior to 1722, at which time he was only 12 years old. With reſpect to the other five, no account was given. Reed knew ſeveral of the 20 not to have been members of the corporation, or (as he called them) *ſworn freemen.*

The return of February, 1722-23, is ſigned by 35 perſons, all of whom except one or two, the petitioners endeavoured to prove, by the ſame means as in the laſt, to have had tenements in the borough. The two laſt mentioned returns have the form following: "Major & liberi burgenſes commune ſigillum & ſigilla ſua appoſuerunt." About this time the change took place in the form of entering the admiſſions into the corporation, before mentioned in p. 130.

The return of Auguſt, 1727, is ſigned by 14 perſons who had ſigned former returns, and were accounted for as having borough lands.

The return of February, 1733-34, is ſigned by 32 perſons, all of whom were accounted for as having lands in the ſame manner as before, except ſix.

The return of May, 1734, is ſigned by 32; of theſe, 11 were not accounted for.

All the above returns were under the common ſeal, and by "the Mayor and freeburgeſſes." As far as Reed's teſtimony applied to the three laſt returns, he was more certain. In the two laſt returns he was confirmed by a witneſs of the name of Dunn, aged 62 years. Reed left the town in 1734.

The return of May, 1741, is ſigned by 49 perſons, of whom 32 were accounted for as before. There was no conteſt at this election; and Dunn ſaid, ſome ſigned it who were neither freeholders nor ſworn freemen: In this he was confirmed by another witneſs. Some of thoſe whom he knew to have been freeholders were not ſworn freemen.

The return of April, 1743, is ſigned by 38, of whom 35 were accounted for as before. This return was under the ſame circumſtances as the laſt. Mr. Clevland, one of the members then choſen, who was alſo choſen in 1741, bought a freehold tenement in the borough, in order to be ſworn a freeman.

The return of July, 1747, is ſigned by 45, of whom 30 were accounted for as in the former inſtances. That of May, 1751, is ſigned by 37: At the head of whom, after the mayor's name, is that of *John Harriſon, inhabitant and freeholder*; near it is *Benjamin Young, ditto.* The other

other names have no addition. Harriſon's name appears in two or three returns preceding.

The circumſtances of this return were thus related by two gentlemen (Mr. Gaborian and Mr. Lyne) who were preſent. There was no conteſt in this election; and while the return was preparing, Harriſon, who was a gentleman of fortune in the town, deſired to ſign it. Mr. Trevanion and Mr. Hickes, two aldermen who were leading men and conducted the election, told him there was no occaſion for more ſignatures, and withheld the return from him. Upon this, Harriſon became more earneſt; ſaid he was a freeholder, and had a right to ſign; and aſked the other very poſitively, whether he choſe to refuſe him. Trevanion then threw the return over the table to him, and he and Hickes bade the town ſerjeant call in any body elſe to ſign it. Harriſon ſaid, that would not invalidate his ſigning, and then wrote his name as above; after which Young ſigned, and then ſeveral others. Harriſon was not of the corporation. Gaborian knew four others, who then ſigned, to be freeholders, and not of the corporation; and four whom he believed to be neither *. Lyne named another, one *Evelyn* †, who was called upon to

* One of theſe was *Peter Jagoe*, the town-ſerjeant, whoſe name is alſo ſigned to the return of July, 1747.

† His name is not on the indenture.

ſign

ſign it. They had never known any perſon be ſides Harriſon demand to ſign a return as a free holder.

There was no conteſted election from the ye 1723 till 1772. In or about the year 1773, th corporation became nearly diſſolved in conſe quence of diſputes among themſelves, by whic a great number of freemen, illegally elected, ha been disfranchiſed. The remaining member applied to the crown for a new charter, whic was granted by his preſent majeſty, in June 1774 The terms of it are, in general, like thoſe i the charter of Charles II. and the clauſe re lating to the election of members of parlia ment, is repeated in it.

Nine witneſſes were examined to prove th general reputation of the borough as to the righ of voting, viz. John Reed and James Dunn be fore mentioned, Jane Reanes aged 81, Mr. Jame Gaborian a lieutenant in the navy aged 54, John Thompſon aged 65, Rev. J. Lyne, Nichola Hoare aged 59, Joan Dunn aged 54, and Mr Clevland the preſent member for Barnſtaple The examinations of two witneſſes upon the tria before the laſt Committee, who had died ſince were likewiſe read from the clerk's minutes o their proceedings. Theſe were the Rev. Joſhua Howell then aged 84, and John Darton.

The

The accounts given by theſe witneſſes were ſomewhat different.

Reed lived in Saltaſh till 1734, at which time he was 24 years old; was abſent from it from thence to 1749, ſince which time he has regularly lived there. He had always underſtood, that the right of voting for members of parliament belonged only to ſuch as poſſeſſed *a houſe of land* in the borough; which he explained to mean, land on which a houſe ſtands, or had antiently ſtood. He had formerly known perſons, whom he named, buy ſuch property for the ſake of a vote. He had received this notion of the right from old perſons, long ſince dead; ſome of whom were freeholders, and others not ſo: Had heard of *faggots* in the borough, (perſons with ſham votes, who had only colourable title deeds given to them) and named three ſuch who voted at the election (which he called the Duke of Wharton's) in 1723*; he believed them to be ſo by their having paſſed for ſuch at the time.

In his examination before the laſt Committee, he ſaid nothing of what he had heard from old perſons reſpecting the right: On being now aſked why he did not, he ſaid he was not queſtioned about it. He did not know whether this right

* Mr. Lloyd was then elected on the Duke's intereſt.

had

had been always put in practice or not. Said there had been no ſworn freemen formerly who had not a houſe of land; and that none could be admitted without it; but freeholders could not be made aldermen without being firſt ſworn freemen. Two of his relations had poſſeſſed ſuch lands in fee, but were not ſworn freemen. He had heard of *burgages* in Saltaſh, but not before the preſent diſputes began; and did not know the meaning of the word.

Dunn had heard his father and grandfather ſay, that thoſe who had *free land in the borough*, had the right. Both of them had lands in the borough, and were not ſworn freemen. His father, and father-in-law (who was alſo a freeholder) had ſigned returns. The witneſs underſtood the right to be in thoſe who had free land.

Jane Reanes, had lived in Saltaſh ſince ſhe was ten years old; ſhe underſtood the right to be in *freeholders, if they lived in houſes of their own, and in ſworn freemen alſo*—deſcribed a freeholder to be one who had *a houſe of land*; had heard ſuch perſons called by the name of *freeholders*, and by no other;—diſtinguiſhed the two claſſes by the names of freeholders and ſworn freemen; the word *freeburgeſs* was not familiar to her—had always heard that freeholders had the right; and in her younger days they had always voted for members.

Mr.

Mr. *Gaborian* ſaid, he was a member of the corporation under the new Charter, in which he had been appointed ſuch; and had alſo been a member of the old corporation from the year 1751. He had likewiſe a freehold in the borough, deſcended to him from his father. He ſaid, it had been the common repute of the town, that *freeholders and members of the corporation*, ought to chooſe the members of parliament. His father, and Mr. Joſeph Swetnam, who were both freeholders and corporators, and the latter an alderman, had told him ſo; and he believed that to be the right. He diſtinguiſhed the two claſſes by the names of *freeburgeſſes* and *ſworn freeburgeſſes*. — — Said, that a freeburgeſs was one who had a houſe of land, i. e. a houſe of old ſtanding, or land where one had ſtood formerly; and a ſworn freeburgeſs was ſuch perſon admitted of the corporation;—that free burgeſſes (whom the other witneſſes called freeholders) could only vote for members, and not for mayor or aldermen.

Swetnam, formerly an alderman, had told him, that it was neceſſary to have a houſe, in order to become a ſworn free burgeſs, and that he had been obliged to buy one of the witneſs's father for that purpoſe. Gaborian's father had alſo bought a houſe, in order to give it to the witneſs's brother, to make him a vote. In 1753, after

after the death of Trevanion, there were 12 ſworn freeburgeſſes made at once. Previous to their election, Trehearne, one of the 12, applied to Gaborian's mother, to make him over a title to a houſe for the purpoſe; which ſhe complied with. But the day before he was to be admitted, one of the aldermen bade the witneſs tell Trehearne, not to bring his deeds to the hall, "for they could not raiſe deeds enough for 'em all, and ſhould drive through without them as well as they could."—Trehearne married the witneſs's ſiſter.

To ſhew that it was neceſſary, that the qualification ſhould be derived from an *old* houſe or its ſcite, he related the following circumſtance of Edgecumbe Pethen, whoſe name has been before mentioned, in p. 130. This man, in order to be ſworn a freeman, produced the title deeds of a meadow conveyed to him by the witneſs's father; but when the mayor and aldermen had examined them, they told him he could not be ſworn in on thoſe deeds, becauſe they did not prove that there had been a houſe on the land; and he was not then ſworn. He afterwards got *a houſe of land*, and was ſworn.

This witneſs had endeavoured to be choſen an alderman of Saltaſh in 1783, and had been diſappointed in his application for it. He had not been examined before the former Committees.

John

John Thompſon was born and had ſerved his time in Saltaſh, and lived there till he was 25 years old. Had been told by old people of the town, long ſince dead, that *freeholders of a houſe of land* had a right to vote *as well as ſworn freemen*. That old ruins, where a houſe had ſtood, would do as well as a houſe: That they muſt live upon *their own*, for a leaſe would not do. An old man of the name of John Wills, had told him ſo 50 years ago. Wills was then 70 years old, had always lived in the town, and was neither freeholder nor ſworn freeman. Wills often told him he had ſeen freeholders vote at elections. The witneſs had never heard otherwiſe of the right till of late years. He had been examined before the laſt Committee, but ſaid nothing then of what he had heard from Wills. He now gave as a reaſon for it, that he had not been then queſtioned upon the ſubject. That nobody had been preſent at the times when he had the converſations with Wills. He had not mentioned his opinion of the freeholders' right before 1780; and ſaid it was becauſe it had never come into his diſcourſe before. He never knew a conteſted election; and had never been in the hall at election time. Had never heard the word *freeburgeſs* applied to freeholders: Had formerly heard ſay, it was neceſſary to carry deeds into court to be ſworn a freeman.

Mr.

Mr. *Lyne* was a member of the corporation, and appointed ſuch in the laſt charter: Had alſo belonged to the old corporation under the charter of Charles II. He had known the borough 39 years, having reſided there from 1746 to 1754, but not ſince. Was made a corporator two or three years after he came there, at which time it was thought neceſſary to have the previous qualification of a freehold. About ten others were made at the ſame time with him; all of whom, as well as himſelf, produced conveyances of freehold lands to the court when they were ſworn in. The mayor and aldermen told him it was neceſſary. The witneſs's conveyance was given him for the purpoſe, and only colourable.

Many reſpectable people, now dead, (two of whom he named) had told him that *freeholders*, or *freeburgeſſes*, had the right of voting; and it had been the general report of the town. By *freeburgeſſes*, he meant freeholders of the burgage tenures, deſcribed in the charter of Cha. II. He and his acquaintance uſed to call them ſo. Members of the corporation were called *ſworn* freeburgeſſes. At the time of his election they acted under the charter of Charles II.

The witneſs had never known a freeholder vote *as ſuch*, or claim to vote, or ſay he had voted or been canvaſſed.

There

There had been no conteſt in his time till 1772. In that election he himſelf voted as a ſworn freeburgeſs: He had alſo voted in all the elections while he reſided in Saltaſh. Many inhabitants uſed to be in the hall; for none were refuſed admiſſion upon thoſe occaſions.

He had heard freeholders frequently complain of the uſurpation of their antient right.

Nicholas Hoare had known the town from a boy, and had always heard that *freeholders* had the right; that *ſworn freeburgeſſes* might vote for members, and for mayor and aldermen both. He had never been preſent at an election; had never known freeholders deſcribed by any other name than that of *freeholders*; neither as freeburgeſſes, nor as burgage tenants: Had never heard of the latter phraſe in Saltaſh till the trial in 1780. The two claſſes were, *freeholders* and *ſworn freeburgeſſes*. Had never heard a freeholder ſay he had voted; but remembered ſeveral being canvaſſed by Mr. Clevland in 1741, and his own father in particular.

He went with his father to the court in 1742, or 1743, when the father was to be made a ſworn freeburgeſs. Hickes, who was then mayor or acting alderman, aſked him for the deeds of his land, and told him he muſt produce them before he could be ſworn; the witneſs was hereupon ordered by his father to go home for

them, and went and returned with them to the court. Upon their being ſhewn at the table before the aldermen, his father was then ſworn in.

Joan Dunn had frequently heard it ſaid, that the *freeholders* had a right to vote *as well as the ſworn freemen*, (perſons who had a houſe, or the ruins of a houſe); but not if there had been no houſe on the land. Her father was a freeholder. She had heard of *faggots* formerly, (perſons who had other people's deeds to vote on); and if a man produced another's deeds, he would be called a faggot, whether it were to vote or be ſworn. Had never heard of burgage tenants till lately. Had heard freeholders generally called *freemen*; never *freeburgeſſes*; and the others *ſworn freemen*. That it was neceſſary to produce deeds in court in order to be a freeman.

Mr. *Cleveland* ſaid he was now an alderman of Saltaſh, appointed in the new charter, and had been a freeman under the old one. His father was member for the borough in 1741, and had the entire management of it till his death in 1763; though not member for it in the latter part of his life. He had a perfect knowledge of its conſtitution; and had often told him (the witneſs) that "freeholders had a right of voting; and that if it were ever tried, he had no doubt that they would recover their right: That they had a *concurrent right* with the corporation: That, however,

however, it was not likely to be tried in his time, on account of the friendſhip ſubſiſting between him and Mr. Buller." He had purchaſed a freehold in the borough of old Mr. Hickes, in order to leave it to his ſon, (the witneſs) that he might be poſſeſſed of both rights. His father's aunt had, at his requeſt, deſired Mr. Buller not to oppoſe him in his firſt election. Many of the freeholds belonged to the members of the corporation, and a conſiderable number to Mr. Buller. He did not know where the majority lay; they were in a great many hands. Hickes had formerly poſſeſſed ſeveral. He had never, to his knowledge, paid any burgage rent for his own (which he had ſold) while it was in his poſſeſſion; at leaſt, never under that name. By *freeholder* he did not underſtand a burgage tenant.

His father had never told him the reaſon upon which he founded his opinion; nor did the witneſs know by what means in particular he had acquired his knowledge of the borough: Had never mentioned to him that he canvaſſed freeholders in 1741; nor that it was neceſſary to have a freehold in order to become a corporator. Nor did he himſelf know that any pains had been taken to ſuppreſs the claim of the freeholders, except in the inſtance of the application to Mr. Buller reſpecting his father. He

had never ſeen any corporation books more antient than the year 1752.

Mr. Clevland ſaid, he entertained no doubt himſelf of the right of the freeholders, and had often ſaid ſo before the year 1780: Had heard others in the borough, now deceaſed, beſides his father, ſay the ſame. He never heard complaints among them of their not being permitted to vote. There had been no poll in his time.

There were only nine freemen of the old corporation left at the time of their obtaining the new charter.

Mr. *Howell*'s evidence before the laſt Committee, as ſtated in the minutes, was to this effect:

He had been preſented with a living within three miles of Saltaſh, by Mr. Buller (grandfather of the preſent) in 1725. In 1726, the witneſs had frequent converſations with N. Swetnam, an alderman of Saltaſh. Had often heard him ſpeak of the right of election in the borough. Swetnam ſtated it to be *in all the freeholders, or burgage tenants, whether they were ſworn for corporation acts or not, and in no other.* The witneſs was intimately acquainted with the borough after 1732; and had heard many others, ſome who were aldermen, (Herring and Mayo) ſpeak of it in the ſame manner.

Swetnam

Swetnam did not ſay who had the right to be ſworn of the corporation; but the witneſs apprehended it was matter of favour in the aldermen, though none were admitted without having a burgage freehold. Had heard from Swetnam, and from Herring who had ſeveral houſes in the town, that whole burgages paid 6d. and half burgages 3d. to the town receiver. They ſaid they themſelves had paid it; and ſpoke of it as a common thing.

Here he produced a paper in the hand writing of one Lyne, who had been ſteward to the Buller family, which had been then lately found in the record room at Morval, (Mr. Buller's houſe) containing Lyne's bill of charges in his ſtewardſhip, to Sir Walter Moyle Mr. Buller's truſtee, in 1697. It contained the following *Item:*

" October—Paid three years rent and fees to the audit, for the burgages in Saltaſh and Trematon — £.3 16 6"

This Mr. Buller died in 1710; Lyne in 1740.

Mr. Howell never heard of any other right of election than that abovementioned; till about 40 years ago, Trevanion (whom he well knew) introduced the mode of confining it to the ſworn freemen.

John Darton's evidence on the minutes was to the effect following. He was examined before the laſt Committee, chiefly to give an account

of the election in 1741, hereafter mentioned; but he ſaid likewiſe, that it had been always thought neceſſary for a man *to have a houſe* before he could be a ſworn freeman; but about 30 or 40 years ago, they began to ſwear freemen who had no houſes; it was then generally ſaid they had no right to do ſo.

There were particular circumſtances related by the witneſſes of the elections in 1722, 1741, 1751, and 1772, which I have reſerved for this place, that the reader may view the whole together.

Reed and Jane Reanes remembered the election in 1722. Swanton and Hughes, and Buller and Carew, made the two parties. The two firſt were returned. Reanes (then 18 years old) ſaid ſhe was in the hall at that election, and that the freeholders voted. There was a great crowd, and ſhe could not actually *ſee* them vote; but heard the gentlemen aſk for their deeds, and they ſaid they had them in their pockets. She did not ſee them produced, and did not know who it was that called for them: Could not ſay it was the mayor. She ſtaid above an hour in the hall. Named ſix freeholders, who were not ſworn freemen, whom ſhe ſaw there at this time. She lived ſervant with a Mr. Gaborian, (a freeholder, and not then a ſworn freeman) who after the polling, gave liquor to ſome freeholders who

who voted for Swanton and Hughes. A Mrs. Eares had made five or ſix faggots at that election. The mayor, Edward Leane, was a friend to Swanton and Hughes. This witneſs had not been examined before the former Committees. Being aſked if ſhe had heard of the preſent diſputes, or had mentioned the above circumſtances to any one, ſaid ſhe had heard that Mr. Buller had oppoſed the corporation four or five years paſt; but had not related what ſhe knew of the above election till about a year and a half ago, to Captain Gaborian (brother to the witneſs in this cauſe). Being aſked how this happened, ſaid ſhe had not been talked to about it.

Reed had a brother and brother-in-law, who were freeholders and not ſworn freemen, that voted in this election. He named two perſons, who, he ſaid, bought lands then, in order to have votes. Was not preſent in the hall. His reaſon for ſaying his two relations *voted*, was, that he and they lived all in one family at that time, and he ſaw them go out to the hall to vote; and when they returned, they ſaid they had voted. The perſons who, he ſaid, bought freeholds for the ſake of voting, lived afterwards in the houſes they had purchaſed; he only knew by hearſay that they got them for election purpoſes.

Howell's evidence referred to on this ſubject was, that Mr. Buller was only tenant for life of his eſtate, and ſo could make no faggots in this election (B). When he was aſked, if the freeholders had not been rejected, he ſaid he had never dreamt of ſuch a thing.

In the election in 1741, Clevland and Corbett were choſen without any oppoſition: But the former had at firſt expected it; and Gaborian ſaid, he then canvaſſed the freeholders. A ſhort time before this, Gaborian and his father (who was then a freeholder and ſworn freeman) called on Mr. Clevland at Plymouth; when the latter ſaid, he was going to aſk the *freeburgeſſes* * for their votes. His father told him he was right, for they were as good votes as himſelf; and though he (Mr. Clevland) might not want them then, he might at another time. Mr. Gaborian afterwards ſaw Clevland go about Saltaſh, in company with ſome aldermen and Hickes the town clerk, who was an alderman too, canvaſſing freeburgeſſes or freeholders.

Hoare ſaid, he and his father (who was then a freeholder, and afterwards of the corporation) went about the town with Clevland canvaſſing freeholders, (of whom he named two) who pro-

* See his evidence in p. 141.

miſed

miſed him their votes if there ſhould be any oppoſition. The witneſs's father alſo promiſed him his vote, which the other had ſolicited.

Joan Dunn remembered Clevland and Hickes canvaſſing her father, who was a freeholder (and never a ſworn freeman). Hickes, ſhe ſaid, introduced her father to him in the words, "here is one of our freemen."

The election of 1751 has been already mentioned *. The preſent Lord Rodney was then elected without oppoſition, in the room of Mr. Corbett deceaſed. Gaborian ſaid, that this was the firſt time of refuſing a freeholder's vote [*which he muſt have meant of* ſigning the return, *as there was no poll*]. That this was Trevanion's ſcheme. There were then about 12 ſworn freeburgeſſes, and about 150 freeholders, reckoning all that could be made, and including thoſe in the poſſeſſion of women or infants. Being aſked how it happened that ſo great a body of perſons ſubmitted quietly to this refuſal, he ſaid, they did not remain quiet; they were very angry upon the occaſion, but nobody would ſtand forth; without ſome one to ſupport them, their oppoſition would have been vain.

This witneſs knew of nobody's having ſigned this return who had not land in the town.

The election of 1772 happened upon an accidental vacancy. The candidates were Williams

* In p. 137.

and

and Bradſhaw; the former of whom was returned: But upon a petition to the Houſe by the latter, heard before a ſelect Committee, he loſt his ſeat, which was transferred to the petitioner. It was a conteſt entirely between two parties of the *corporation*, in which the freeholders did not interfere at all. Williams was a ſtranger to the place, and ſupported by Hickes and Mayo, two aldermen *.

Gaborian ſaid, it was a very warm conteſt. He was engaged in it on Bradſhaw's ſide, and did not then claim to vote as a freeholder. Being aſked, Why the freeholders in general did not claim, ſaid, It would have been uſeleſs, as nobody ſupported them. Being aſked if they had applied to either of the parties for that pur-

* It appears by the minutes of the ſelect Committee, before whom the merits of this election were heard, that the poll contained nine votes for Williams, and eight for Bradſhaw. The petitioner objected to five votes for the ſitting member, viz. three as not having been a year qualified as burgeſſes, according to 3 Geo. III. c. 15, and two as no burgeſſes at all. The ſitting member objected to two votes for the petitioner as no burgeſſes; and endeavoured to juſtify the three objected to by the other party, as not within the meaning of the act: Both ſides proceeding upon an admiſſion of the right of election in the mayor, aldermen, and burgeſſes, as deſcribed in the charter of Cha. II.

The Committee determined in favour of the petitioner on the ſecond day of their ſitting. 33 Journ. 764, 956.

poſe,

poſe, ſaid, he believed not, though ſome had talked of it, and had expreſſed a wiſh to this effect. That it had been ſaid in the town, the reaſon was, becauſe the late Mr. Buller had been ſo circumſtanced with reſpect to his eſtate, that he could not make votes. The candidates had not, as far as he knew, come to any agreement not to poll freeholders. The witneſs then thought, (and ſaid to Sir Fred. Rogers) that if Buller had joined Williams, the latter would have ſucceeded. The attempt to carry the freeholders was ſtarted in 1780. All the corporators in 1772, did not amount to 20.

Mr. Mill, the town clerk, who was alſo mayor at the laſt election, was examined in the beginning of the cauſe, when he produced the poll. The material part of his evidence was as follows:—That he had known the borough particularly about 16 years, and had reſided in its neighbourhood about 30; had never heard till the preſent diſpute commenced, of a right in freeholders or burgage tenants; nor the expreſſion *burgage tenure* applied to tenements in Saltaſh, till within the ſame period. In the election in 1772, there was no idea of a claim by freeholders.

The counſel for the petitioners went through a long examination of this witneſs; endeavouring to ſhew a contradiction in his ſentiments, and

and that in or about the year 1772, he had entertained a different opinion upon this ſubject.—He had then purchaſed ſome land in the town of Mr. Buller, and his letter upon that occaſion was produced for this purpoſe; in which he had uſed the word *franchiſe*, with reſpect to the circumſtances of this property in the borough. It would be impoſſible to ſtate the effect of this examination in writing; nor is it neceſſary to the caſe, for it ended vaguely as it began.

About the year 1772, Mr. Buller offered ſeveral of his houſes in Saltaſh for ſale, but none were then ſold. At that time there was no proſpect of advantage held out to purchaſers, from any ſuppoſed probability of their conferring a right of voting.

The petitioners produced a copy of a poll taken at the general election in September 1713, which had been lately diſcovered. The circumſtances of this paper led the counſel for the ſitting members to object to its being received in evidence; but the committee over-ruled the objection. The particulars of the argument on it, the reader will find at the end of this report. This inſtrument made the addition which I have before mentioned *, to the written evidence in the cauſe upon the preſent trial.

* See p. 109.

There

There were three candidates at the above election; Elford, Shippen, and Bladen. The two firſt of whom were returned. The paper in queſtion contains the names of the voters for the ſeveral parties written by one Pound, at that time clerk to an anceſtor of the preſent Mr. Buller; who was then Recorder of Saltaſh, and died in 1714. It was indorſed in the ſame hand thus, "8 *Sept.* 13 *A coppy of the poll at Saltaſh.*" The agent for the petitioners found it among other papers, of that Mr. Buller ſince the laſt election; and in company with it, a letter dated 12 Auguſt 1713, from Mr. John Hickes, one of the corporation, to the recorder, relating to that election; in which he tells him, "Pound could give a full account of the affairs; that Col. Bladen was to ſtand in the room of Sir John Jennings, who had given up," and adds in a note, "*Some of the deeds are ready, and the reſt ſhall be ready in two days.*"

This writing is copied on the paper hereto annexed. The words "*New voters,*" written oppoſite the four names in a circumflex at the bottom, and thoſe four names, were in the recorder's hand writing; as was the note reſpecting Benjamin Wadge. Four of the perſons named in this copy of the poll, were admitted members of the corporation afterwards.

The

The following is a ſtate of the evidence produced for the ſitting members.

The returns of 26 Eliz. 30 Eliz. 3 Chas. I. (none intervening from 30 Eliz. having been found) 16 Chas. I. 31 Chas. II. being all under the common ſeal; ſtating an election by the *mayor and freeburgeſſes*, and ſigned by the mayor only.

The return of 29 April 1660, 12 Chas. II. in the ſame form as the foregoing, but ſigned alſo by 17 perſons beſides the mayor—of 32 Chas. II. ſigned by ſix perſons—of 33 Chas. II. ſigned by the mayor only; having an indorſement in theſe words, "Sigillatum & deliberatum in præſentiâ horum quorum nomina conſcribuntur;" after which follow ſix names—of 1 James II. by the mayor only—27 Geo. II. 1754, ſigned by 16 perſons—1756 by 19 perſons—1761 by the mayor and 14 others—1763 by the mayor and eight others, and witneſſed by three who are not electors—1768 not ſubſcribed—1774 and 1780, by the mayor only. In all of them the form is the ſame, and all have the common ſeal affixed.

It was admitted on the part of the petitioners, that all thoſe who have ſigned the returns ſince 1754, have been ſworn freeburgeſſes of the corporation.

An entry in the conſtitution book, dated 22d January 1682-3, being an order for the ſurrender of the charter of Eliz. to the crown, by the majority of the burgeſſes; ſtating it to be done, "to the end nevertheleſs, that his majeſty would reincorporate the ſaid borough, and regrant the premiſes to ſuch new corporation as his majeſty ſhould think meet."

A copy of the act of ſurrender itſelf, under the common ſeal, bearing the ſame date; on which a memorandum is indorſed, that it was ſurrendered February 22, by the Earl of Bath and others, whom the burgeſſes had appointed their attornies for the purpoſe (I).

The charter of Charles the IId, as before ſtated, dated the 27th Nov. 1683. (35 Charles II.) which, after providing that freeburgeſſes ſhall be choſen by the mayor aldermen and juſtice, as often as they ſhall think fit, has the following clauſe: "Et quod nullus alius impoſterum habebitur vel reputabitur fore & eſſe liber burgenſis burgi prædicti, niſi liberi burgenſes in his præſentibus preantea expreſſis nominati, & ipſe vel ipſi qui per ſuffragium majoris juſtitiarii ad pacem & cæterorum aldermanorum vel majoris partis eorundem, tali modo & formâ ut præfertur electus admiſſus & juratus, vel electi admiſſi & jurati fuerint."

The

The proclamation of James the IId, for reſtoring to corporations their charters and privileges, dated 17 Oct. 1688; by which the king reſtores to their former ſtate all thoſe corporations, whoſe ſurrenders had not been entered of record; but excepts thoſe whoſe ſurrenders had been ſo entered: To which laſt he promiſes a reſtitution of their rights by new charters, upon their applying to him for that purpoſe. Among the latter claſs is Saltaſh. No application was ever made by this borough, for the benefit of the reſtitution offered in the proclamation (K.)

The petition of the members of the corporation to his preſent majeſty, dated 31 May 1773, ſtating the diſſolution of the corporation, and the incapacity of the petitioners to continue it: Signed by ſix perſons.

The charter of his preſent majeſty as before ſtated, dated 7th June 1774. It has a recital in theſe words: "Whereas it appears to us, that by ſeveral diſputes and accidents, the corporation aforeſaid is become diſſolved and incapable of doing any act to continue itſelf——"

The poll of the election in 1772, containing no names but thoſe of corporators.

In order to ſhew further, that the charter of Charles the IId, was completely accepted and uniformly acted under, a clauſe was read from that

that of Elizabeth, which directs the mayor to be elected on the Monday next before Michaelmas; another in which the number of the aldermen is fixed at ten, and no mention made of any *Juſtice* of the borough among them. With reſpect to theſe points, thoſe parts of Charles the IId's charter were particularly referred to, in which the day appointed for electing the mayor, is the Saturday after St. Matthew; the number of aldermen is limited to ſix, and a new officer is created to be called the *Juſtice* *; which office is there directed to be held by the Mayor, in the year after his mayoralty. It was admitted by the petitioners, that ſince this charter, the mayor has always been elected on the day it preſcribes; that the number of aldermen has been ſix; and that there has always been one of them in the place of Juſtice: Upon which laſt article the counſel for the ſitting members adverted to ſeveral corporation acts, in which the name of a perſon ſigning himſelf *Juſtice*, appears ſubſcribed next to the Mayor's.

Upon this caſe the counſel for the petitioners contended, Argument for the Petitioners.

* The counſel for the petitioners *ſaid*, that a previous charter of Charles the IId, had created this office; but this charter was not produced in evidence.

That Saltaſh was a borough conſiſting of burgage tenures: That the right of election had originally been exerciſed by none but the freeholders of ſuch tenements, conſiſting of houſes or the ſcites of houſes, and ſtill belonged to them alone. They argued in the following manner:

In order to diſcover what the conſtitution of this borough was, at the period of its firſt ſending repreſentatives to parliament, in the reign of Edward VI. we muſt inquire into its more antient ſtate. According to the earlieſt evidence, the burgage tenants poſſeſſed the only privilege, that could belong to the borough. The charter of Valle tortâ, was a feudal grant to thoſe only, who held the tenements for which a rent was paid to him as lord, and were the *liberi burgenſes* on whom he confirms the privileges therein enumerated. It is immaterial to inquire, whether this was an original charter of incorporation; or whether the borough is now to be conſidered as poſſeſſing that privilege earlier, and deriving it from preſcription. In either caſe, it was in right of *land* that the burgeſſes enjoyed their franchiſes, whether as individuals, or as members of a community.

In this charter *freeburgeſſes* are deſcribed as then exiſting, and every clauſe relating to them, is applicable only to their tenure; their *rent*, and

and *relief* upon deſcent, their election of portreve or bailiff, (who was the lord's receiver) their *talliage for knighthood*, *common of paſture*, &c. ſhew that they were the tenants of his ſeignory, to whom he remitted the arbitrary ſervices of villenage, and ſecured their lands, upon receiving in lieu of thoſe ſervices a rent certain.

It is therefore clear, that they could not receive this grant in any corporate capacity; but merely in right of individual tenure, which was that of burgage; according as it is deſcribed in Litt. ſect. 162 *. They held their tenements as individuals, though for the general regulation of the town, they met together in a body to elect their *prepoſitus*, and poſſeſſed ſome rights of community.

This was the ſtate of the borough, when it came into the hands of the crown in right of the dutchy of Cornwall †. The charter of Richard II. made no alteration whatever in that of Valle tortâ, but ſimply recited and confirmed it; juſt ſo did the ſubſequent charters of Edward IV. and Henry VIII. Thus it exiſted according to its original conſtitution, when firſt repreſented in parliament, which happened long before the charter of Elizabeth; except that the meſne holding had been extinguiſhed, by the acceſſion

* See vol. i. p. 180. † See 2 Willis. Not. Parl. p. 77, 78.

of the honour of Trematon to the crown, and the borough then held *in capite*.

There can be no queſtion who were the free burgeſſes of Saltaſh, or what was the ſtate of their borough, during all the time intervening, from the reign of king John, to the reign of king Edward VI. They were the holders of lands, to whom and *their heirs* Valle tortâ granted his charter, i. e. *the freeholders of the borough*, in the modern acceptation of it. For the *name* is in itſelf indifferent; the ſubſtantial quality continued as before. The town was a tenure in burgage, according to the definition which Blackſtone gives of it (2 Comment. p. 82.) "Where houſes, or lands which were formerly the ſcites of houſes, in an antient borough, are held of ſome lord in common ſocage, by a certain eſtabliſhed rent."—The right itſelf cannot be affected by the name given to it; and it ſignifies little to inquire, by what name it has been called by its inhabitants.

Without reſorting to experience, and to the evidence of actual uſage, which the caſe furniſhes, if we inquire who elected the firſt repreſentatives for Saltaſh, upon the foundation of Valle tortâ's charter and thoſe which confirmed it; and upon the principles of the antient conſtitution of England, or feudal repreſentation, we muſt be convinced that they were the burgage tenants

tenants that inherited the lands deſcribed in the antient charter, and were called the freeburgeſſes. The only two returns extant of elections prior to the charter of Elizabeth, are quite conſiſtent with this mode of election. The word *community* deſcribes thoſe perſons collectively who elected; it is uſed in the ſame ſenſe, in the election writ, to deſcribe the freeholders of a county *: Juſt ſo, the phraſe *Mayor and burgeſſes* is to be underſtood, according to the uſage and conſtitution of the place it is applied to.

The right of voting by tenure is, according to lord Holt's doctrine in the caſe of Aſhby and White, a *real* right annexed to the burgage land: It derives nothing from a corporate quality. That learned judge diſtinguiſhes the rights of election into *two* claſſes only: Firſt, where the election is made in right of tenure; and, Secondly, where it is derived from the rights

* In Madox's Hiſt. Exch. p. 153, 177, 178, in the notes, are paſſages in which the phraſe *communia* and *communitas judæorum*, is currently uſed in antient records, to deſcribe the Jews reſiding in England, paying talliage to the king. "*Communia totius terræ*," is a phraſe in the articles for Magna Charta. The title of the ſtat. 8 Hen. VI. ch. 27. is, to give remedy to the inhabitants of Tewkeſbury, againſt *the commonalty of the foreſt of Dean*, for robberies committed by them. In the body of the act are the expreſſions "commonalty of the hundred and foreſt;" and, "although the ſaid commonalty be not a commonalty corporate."

of a corporation *; but a *mixed* right, partly territorial, and partly perſonal or corporate, he does not even ſuppoſe capable of exiſting, according to our original conſtitution.

The firſt change theſe burgeſſes underwent, was by the charter of Elizabeth; which it is neceſſary to examine attentively. It may be called the firſt effectual incorporation of the borough; was granted upon the petition of the *freeburgeſſes*, was addreſſed to *them*, created *them* a new body corporate, and was intended ſolely for *their* benefit. It is remarkable, that though the method of electing their mayor and aldermen, is particularly marked out, the charter provides none for the electing of *burgeſſes*. This is a very ſingular omiſſion, and furniſhes a ſtrong argument for the petitioners; for it demonſtrates, that thoſe perſons derived their exiſtence from ſomething *intrinſic*, without requiring the aid of a creation under the charter. Whether, notwithſtanding this ſilence of the charter, it did not impliedly convey a power to the corporation, to make whom they pleaſed burgeſſes; or whether it did not refer to ſome known conſtitution of the borough on this ſubject, are queſtions of no moment in the cauſe; for in fact there never was a common burgeſs

* 2 Lord Raym. 952.

election

election under that charter. But every burgage tenant in the borough, by producing the title deeds of his tenement, was *admitted* a member of the corporation. He was then called a *sworn* freeburgeſs, in contradiſtinction to thoſe who were not ſo admitted; which diſtinction ſtill exiſts in the memory of the witneſſes. This method of continuing the corporation, ſhews a conſiſtency with the ordinance * paſſed in the year 1575, by which the poſſeſſion of land is made neceſſary to the enjoyment of the town privileges.

The charter recites and confirms that of Valle tortâ, and eſtabliſhes all the privileges derived from it; therefore whatever right of election to parliament had exiſted before, the ſame is ratified by the Queen's charter. Although the borough had ſent members to former parliaments, yet the charter has a clauſe, containing a grant of this privilege: Admitting (for argument's ſake) the effect of this clauſe, the mode of electing the members was not thereby altered; for it is given to the *mayor and freeburgeſſes*, who, as the petitioners contend, elected them before. If theſe perſons were of a different deſcription from the burgage tenants, who derived their rights from Valle tortâ's charter, and not by any corporate election, it is incumbent on the ſit-

* See p. 125.

ting members to ſhew, from what authority they derived their exiſtence. If the charter had directed, who in particular ſhould chooſe the members; as for inſtance, if it had given the choice to the mayor and aldermen, it would have been void in this reſpect. This is the doctrine of Coke, Holt, Glanville, and every other great lawyer. The words of the former in his 4 Inſt. p. 48, declare this doctrine fully: "*If the king doth newly incorporate an antient borough (which ſent burgeſſes to the parliament) and granteth that certain ſelect burgeſſes ſhall make elections of the burgeſſes of parliament, where* all *the burgeſſes elected before, this charter taketh not away the election of the other burgeſſes. And ſo if a city, &c. hath power to make ordinances, they cannot make an ordinance, that a leſſer number ſhall elect burgeſſes for the parliament, than made the election before. For free elections of members of the high court of parliament, are* pro bono publico; *and not to be compared to other caſes of elections of Mayor, Bailiffs, &c. of Corporations.*"

But neither did the Queen intend to alter or qualify this part of their conſtitution, nor could her charter have been effectual, if ſhe had intended it. The preamble, as well as the particular clauſes of grant, ſhew, that the chief object of the charter was the commercial benefit of the town; and the fact of its having ſent mem-

members to parliament from the reign of Edw. VI. ſhews alſo, that the charter could have had no particular view to its parliamentary ſtate. And it is addreſſed to thoſe who derived their rights from the former charters, which were the burgage tenants.

This abſurdity would alſo follow, from ſuppoſing, that the charter of Elizabeth had aboliſhed any ſuch right belonging to the freeburgeſſes, viz. *They* applied for the charter; but it muſt be argued, that they deſired to have their own privileges deſtroyed, if the charter were to receive ſuch a conſtruction.

Ten years before this charter, the freeburgeſſes appear to have been jealous of the encroachments of the other inhabitants, upon their burgage rights; and to prevent them, they enact a byelaw of qualification, ſecuring the holders of land in the ſole poſſeſſion of their privileges. This ſhews them to have been attentive to their intereſts in right of tenure, and that they had a juſt notion of their ſituation under their original charter. Although the expreſſion *land in fee*, in this ordinance, may ſeem to contradict the claim of mere freeholders, yet, duly conſidered, it does not affect the caſe; becauſe upon legal principles, a *freehold* was always a ſufficient eſtate to give the right of election; and beſides, it is no more than a regulation

upon the right of election. The king could not alter it in any case. The resolution of the Committee and the House, in the case of Chippenham in Glanville, (p. 54) expresses the reason and authority of the law upon this subject. It was resolved in that case, that a charter of Queen Mary, giving the election to a select number, "*did not, nor could alter the form and right of election for burgesses to the parliament, from the course there before, time out of mind, held. The charter, although it may incorporate this town, which was not incorporate before; or may alter the name or form of the corporation, in matters concerning only themselves and their government, rights and privileges; yet it cannot alter and abridge the general freedom and form of election for burgesses to the parliament, wherein, as aforesaid, the commonwealth is interested. For then, by the like reason that it might be brought from the whole commonalty, or from all the burgesses of a town, to a bailiff and 12, so might it be brought to a bailiff and one or two burgesses, or to the bailiff alone, which is against the general liberty of the realm.*" Besides, this charter was one of the garbling charters of Cha. II. originating in his wicked designs against the constitution; and therefore ought not to be received favourably in courts of justice, especially on a constitutional question; according to the opinion which Lord Hardwicke has been known

known to declare with regard to theſe charters in general *.

But the evidence affords another argument againſt this charter, viz. that it was not accepted, further than was neceſſary for the internal government of the corporation, and not in reſpect of parliamentary elections. This is to be inferred from the uninterrupted practice after the time of the charter: None but freeholders elected, and no man ſigned returns, upon any other right than that of land in the borough. All thoſe names of which any trace exiſts, are proved to be thoſe of perſons having this title, before they became

* I have not been able to find the opinion here referred to in the book of Reports of the time of Lord Hardwicke. I ſuppoſe the caſe from whence it was cited, is that of the King againſt Johnſon, concerning the city of Cheſter, in 1733; which has been lately printed from a manuſcript note of the late Mr. Maſterman of the Crown Office, in an account of the Cheſter cauſe, tried in 1786. In Johnſon's caſe, upon the defendant's ſhewing cauſe why the *quo warranto* information ſhould not iſſue, ſome attempt was made on his part to found his title on the charter of Charles II. granted to the city of Cheſter in 1684. Lord Hardwicke, in giving his opinion, ſays of the charters of Charles II. "Theſe charters have never been countenanced in Weſtminſter hall; and I will not give an opinion in ſupport of them, unleſs the *ſtrongeſt* evidence in the world be laid before the court, of their being accepted and uniformly acted under ever ſince."

corpo-

cumſtances gave them no reaſonable proſpect of ſucceſs. The candidates alſo were ſtrangers, who derived their whole ſupport and information from members of the corporation, on each ſide. But theſe public rights are not to be determined by the conduct of individuals; nor do they depend upon any private ſupport. They are not the ſubject of alienation or reſignation. Even rights of private property, in which the public has an intereſt, as a peerage *, or an office, if proved to have exiſted in the moſt remote antiquity, would be adjudged now to the true deſcendant of the firſt poſſeſſor, without his proving any intermediate poſſeſſion of it. Much more, ought this principle to be inforced in a queſtion of merely public concern. In ſuch caſes men ought not to look for proof of mathematical certainty; reaſonable evidence is ſufficient in the conduct of all human affairs.

The true queſtion to be conſidered is, whether there was not a period, in which the freeholders of the borough alone, had the right to elect the members. If there ever was, what has happened to change the right? Is it, that the burgage rents are gone? Theſe ſtill exiſt in contemplation of law: Beſides, the non-claim or releaſe of rents and ſervices, by the lord of a

* See Lord Purbeck's caſe in Shower's Parl. Caſes.

manor

manor or borough, cannot deſtroy the effect of the tenure, or the right of the tenants. Is it, that the number of burgages is not aſcertained? As many tenements as can be proved to be *ancient*, and no others, can claim it. Was there any renunciation? There neither has been, nor can be. Is the right loſt by length of time? That alſo is impoſſible from the nature of the caſe. But, in fact, the exerciſe of their franchiſe is brought as low down as the year 1753; for, from that period only, can it be proved that any perſons have voted in elections who were not freeholders of Saltaſh. The great anxiety, about this time, ſhewn by the leading men in the corporation, to ſuppreſs the freeholders, argues them to have been ſenſible of their privileges. But if the Committee ſhould eſtabliſh the right derived from the modern charters, they will decide that the tenure of land confers no privilege in Saltaſh, and that all the evidence of antiquity relating to it, is either falſe or futile.

If the deciſions of the former Committees are to determine that of the preſent members, the judgment will not be theirs. In ſuch caſe they would ſurrender their own underſtandings to the diſcretion of others. But the Committee, by having reſolved to hear the caſe through,

will, no doubt, form an opinion of their own upon it.

Argument for the Sitting Members.

The counſel for the ſitting members, in anſwer to the above arguments, contended, That Saltaſh was a corporation by preſcription: That its repreſentatives had always been elected by the members of this corporation; and, conſequently, that theſe alone had the right of election. They ſaid,

The principal ſubject of inquiry upon the evidence produced, is, by whom the members for this town were elected, at the period of their firſt appearance in parliamentary hiſtory, in the 6th year of the reign of Edward VI. If there were then no corporation in Saltaſh, the members of the modern corporation can have no right to elect. On the other hand, if there were a corporation at that time exiſting, and if the repreſentatives were elected by its members, the right cannot now belong to perſons of another deſcription.

The charter of Valle tortâ, in itſelf contains proof of a corporate exiſtence, in the burgeſſes to whom it is addreſſed: For though it is now underſtood as a ſettled rule of law, that the king alone can grant a corporate privilege; in antient times, under the feudal ſyſtem, this power,

power, to a certain extent, was not conſidered to be peculiar to the ſovereign, but was exerciſed by every feudal lord *. Though this charter contains the expreſſions, from whence the petitioners infer it to relate to the landed rights of the burgeſſes, as individuals, yet it has others likewiſe, that peculiarly import a corporate ſenſe. Thus they are to have a *præpoſitus* of their own *election*: Now, ſuch election cannot be made by any but a *corporate body*. No impoſition for the lord's uſe is to be laid on the burgeſſes *niſi per voluntatem mercatorum*. This expreſſion implies the exiſtence of a guild of merchants, and emphatically deſcribes a corporation, according to the authority of Lord Chief Juſtice Rolle, in his abridgment; who there mentions the phraſe *Gilda mercatoria*, as in itſelf containing the grant of corporate privileges, when uſed in a charter †. It appears in the ſame author, that a grant of lands to the inhabitants of a vill, reſerving rent, incorporates them for all the purpoſes of enjoying their land, according to the grant (D). So the charter prohibits any trading ſhip from paſſing certain bounds *contra libertatem ejuſdem villæ*. Now ſuch *liberties* as are there alluded to, are altogether of a corporate kind; and this ſhews, likewiſe, that the benefit of trade, which was a

* See Vol. I. p. 102, note A.

† 1 Ro. ab. tit. *Corporation* F, p. 513.

leading motive to the firſt creation of corporations in Europe, was one of the objects of this charter.

The legal accuracy of expreſſion of modern times was unknown at the time of this grant. It is ſufficient for the preſent purpoſe, that at that period, the above terms were underſtood to make a corporate inſtitution. The uſe of the word *heirs*, and the proviſions reſpecting the land of the burgeſſes, will not prevent this operation of the charter, any more than the holding lands aggregately, will prove the perſons to be a corporation. Madox, in his *Firma Burgi*, chap. 2 and 3, and in the notes ſubjoined to them, ſhews ſeveral inſtances where *corporations* have held lands, under grants to them and their *heirs*; and where lands antiently were held by the inhabitants of towns not corporate.

Here is, therefore, ample authority for contending, that the burgeſſes of Eſſa were *incorporated* by the above charter (C). But if it were otherwiſe, the recital in Queen Elizabeth's charter proves it to have been a corporation earlier, (if it was a corporation at all, before her time); for that eſtabliſhes it by *preſcription*. Again, the charter of Richard II. confirms the privileges to them and their *ſucceſſors*. This alone implies a body corporate. So that with-

out queſtion they were a corporation from that time at leaſt.

Further, the charter of Elizabeth creates the freeburgeſſes of Saltaſh, "*in* aliud *corpus corporatum*;" and grants to them all the privileges held under any former right of incorporation. The ſtile of the firſt ordinances in the conſtitution book, previous to that charter, and particularly of the ordinance firſt read by the petitioners, is in the uſual form of the bye-laws of a corporation. This particular ordinance is alone ſufficient proof of a corporate authority. Beſides, it is poſſible that there may have been other charters from the crown, though not now extant: And there have been inſtances in which the evidence of long uſage, has induced the courts to preſume a royal grant or charter. The caſes of Eldridge and Nott, in Cowp. 215, the mayor of Hull and Horner ib. 102, and Powell and Milbank there cited, are of this ſort. The corporation, therefore, exiſted long before the town was repreſented in parliament.

The charter of Valle tortâ proves, that at the time of its date, Saltaſh was not a royal borough; and therefore, if a parliament had then exiſted, it would have made no conſtituent part of it. Repreſentation muſt derive its origin from the crown: Therefore this charter neither did, nor could give that privilege; and, conſequently,

did not give the means of exerciſing it. By an original charter of incorporation, the crown might have conferred the right of electing members of parliament, upon the members of the corporation, as a perſonal privilege. There is not, indeed, expreſs proof of ſuch a grant to this borough; but when it firſt appears to have ſent repreſentatives, it appears in a corporate character. If the queſtion reſted on preſumption, therefore, it would be *preſumed* that the members were elected by a corporate body. But the returns previous to the charter of Elizabeth, actually *prove* the elections to have been made by the corporators before that charter. They are under the *common ſeal*, and made by the *mayor and community*, or the *mayor and burgeſſes*; a form and ſtile neceſſarily deſcriptive of a corporation. For though the word *burgeſſes*, ſtanding alone, is open to other conſtructions, yet when joined to a *mayor*, it is a corporate name. Every ſubſequent return is likewiſe under the *common ſeal*. A common ſeal is one of the diſtinguiſhing badges of a corporation (D.) And though modern inſtances might, perhaps, be produced of its being ſeen in other hands, it will be found, on examination, that thoſe inſtances are an abuſe only in practice, and proceed on an acknowledgment of the above general rule. In the ſame manner, the word *community*

Community is a word implying a corporation, when applied to places in which a corporation exiſts; and when joined to a mayor, it is a corporate name.

The clauſe of Queen Elizabeth's charter, by which ſhe impowers them to ſend burgeſſes to parliament, is not an original grant, but of confirmation only; for the town had been regularly repreſented in former parliaments *. The charter being only confirmative, in reſpect of the repreſentation, it is to be inferred from hence, that it is equally ſo in reſpect of the right of election, which is appointed to be by the *mayor and freeburgeſſes*. It is to be preſumed, that the crown acts according to law in its charters; and therefore this clauſe of the charter confirmed a ſubſiſting uſage in the borough.

The uniform ſtile and execution of the returns, demonſtrate that the corporation had a part in the elections, both before and after the charter of Elizabeth; this is fact, not ſpeculation. Is it not more juſt to ſuppoſe, from hence, that the corporation *alone* elected, than that they formally

* The town of Chippenham (whoſe charter was the ſubject of the reſolution, cited in p. 172) had ſent members from the beginning of parliaments: Yet there too, the charter of Mary contained a grant of the right of ſending repreſentatives, in the ſame manner as this of Elizabeth to Saltaſh. See note (A.)

authenticated an act performed by others? The burgage tenants, as ſuch, could neither have a mayor, nor a common ſeal. It has been ſaid, that though they might have been freemen at the ſame time, yet they acted as freeholders; but this ſuppoſes, that the electors themſelves knew not in what right they voted. The return itſelf affords the beſt evidence of the authority by which it was made, which is manifeſtly a corporate act.

In order to avoid the deciſive advantage which the members of the corporation derive in this queſtion, from the charter of Charles II. the counſel have contended, that it was only accepted *in part*, and that ſuch acceptance may be lawfully made. It has been ſaid, indeed, by a great lawyer, that in certain caſes there may be a partial acceptance of a charter: But this relates only to exiſting corporations receiving additional privileges; and even this point has never been judicially determined. But it never has been ſaid by any authority, that an *original* charter of incorporation could be accepted *in part*. The new creation muſt be conformed to entirely, or entirely rejected *.

The

* The opinion alluded to here, is one of Lord Mansfield's upon the Cambridge Univerſity Caſe, reported by Sir James Burrow, 3 vol. p. 1656, intheſe words: "There is a vaſt deal

The charter of Charles II. was of this ſort: The old corporation was extinct by the ſurrender to the king, as ſoon as it was accepted

deal of difference between a new charter granted to a *new* corporation, (who muſt take it as it is given) and a new charter granted to a corporation already *in being*, and acting either under a former charter, or preſcriptive uſage. The latter are not obliged to accept the new charter *in toto*, and to receive either all or none of it: They may act *partly* under it, and partly under their old charter or preſcription." This opinion ſeems to be given with reference to a ſuppoſed caſe of two charters, inconſiſtent with each other. In the caſe of the city of Cheſter, argued in the court of King's Bench, in Hillary Term, 1787, this queſtion having been raiſed in argument at the bar, Mr. Juſtice Buller ſpoke upon it to the effect following: He ſaid "he knew of no authority that warranted a notion, that a corporation might accept a charter in part, and reject it in part: That the only poſſible caſe for it, might be, where a charter granting two diſtinct benefits to the body, one might be accepted without the other; though even of this he doubted. But that certainly, if a charter were to contain a grant to a corporation, ſuch as to have a mayor, 12 aldermen, and 24 common councilmen, in ſuch caſe the body could not chooſe for themſelves, and retain part of them: As, for inſtance, reject the common council, and retain the aldermen."

This queſtion has been, on former occaſions, treated in ſuch a manner as to be left in doubt. It ſeems to me, that the cauſe of this confuſion may have been, that a ſubſequent charter has been inconſiſtent with a former one. In this caſe only, it may be competent to the grantees, becauſe *neceſſary*, to accept it partially: For otherwiſe there muſt be a partial ſurrender by implication, or a repeal of part of the ſubſiſting charter.

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of record; and the new grant was, in the legal ſenſe of the word, *original*.

But even admitting for the ſake of argument, the doctrine of the oppoſite counſel, the evidence does not warrant their application of it. For this charter is proved to have been acted under in every part; in the reduced number of aldermen, in the inſtitution of a new officer in the corporation called the juſtice, in the conſtant obſervance of the day appointed for the mayor's election, different from that named by Elizabeth's charter, and in the election of free burgeſſes, at the pleaſure of the corporation. But on the other ſide, they rely upon ſpeculative arguments drawn from the uncertain ſtate of the antient conſtitution, to found an excluſive right of voting in the freeholders.

Two modes of election have been pointed out by Lord Holt, either by burgage tenure, or by corporate right; and theſe he mentions as the *only* modes, and that the burgage tenure is the moſt general. But he muſt have been miſrepreſented here *; becauſe the number of burgage tenure boroughs, is very inferior to that of the corporate boroughs; (there not being

* His obſervation, in the ſubſequent part of his ſpeech here alluded to is, "as to the manner of election, every burgh ſubſiſts on its own foundation." 2 L^d. Raymond, 952, in the caſe of Aſhby and White.

more

more than 29 of them) and there are many of mixed and concurrent rights. In ſhort, no general principle can be laid down upon the ſubject. And even Lord Holt, whoſe authority they ſo much rely upon, in the ſame caſe lays it down, that a right of repreſentation granted *within time of memory*, muſt be to a *corporation*, as no others are capable of receiving it. Yet in Saltaſh, the repreſentation commenced within time of memory.

Burgage tenures mean no more than ſocage land in a borough; and exiſt in many places without giving a right of election †. But wherefoever they give that right, the term *burgage* is perfectly familiar in the town; and every inhabitant knows which are the burgages poſſeſſing the franchiſe, and can deſcribe them by their boundaries. Yet according to moſt of the witneſſes in this cauſe, and the oldeſt, the people of Saltaſh had not heard the expreſſion, till the beginning of the preſent litigation. An eſtate *in fee* makes no part of the qualification of burgage tenures; yet the ordinance read from the old book, makes it neceſſary to have ſuch eſtate, before a man can enjoy the privileges of Saltaſh.

† As in London, York, &c. See Madox Firma Burgi, chap. i. ſect. 8.

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The evidence of the reputation which has been ſaid to be *clear*, is quite otherwiſe; it is quite contradictory. Some witneſſes ſuppoſe it to be a right in freeholders; ſome in freeholders and the corporation concurrently; ſome, in holders of old houſes or ſcites; and ſome in freeholders reſiding in their own houſes; only one witneſs ſpeaks of burgage tenants. But Mr. Clevland, though once a freeholder, never knew them by that name, and never paid a burgage rent for his tenement. How is it poſſible to reconcile theſe traditions to any certain concluſion? In the firſt petition preſented to the houſe in 1780, they had ſo little thought of eſtabliſhing a right in burgage tenures, that they alledged it to belong to *freeholders* generally. Even Harriſon, upon that occaſion which the petitioners conſider as ſo important, in 1751, deſcribed himſelf as a *freeholder and inhabitant*. Where then is the period of this reputation to be fixed? This circumſtance proves it to have been as unſettled formerly as now.—On the other hand, the evidence of the charters and returns in favour of the corporation, is uniform and certain. If the reputation aroſe from the abovementioned bye-law, as is moſt probable, it is inconſiſtent with the claim of the petitioners; for that requires land *in fee*. But the authority that made that regulation was compe-

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tent to repeal it. This was done *in fact* as ſoon as the corporation began to admit perſons among them who had no land. The ordinance was plainly an *innovation* at the time it paſſed, and might be departed from, whenſoever the corporation who made it, might think proper. Previous to it, no qualification by land was neceſſary: While it exiſted, the right of admiſſion to the corporation, and conſequently the right of voting, depended on land. The period of its exiſtence, was long enough to eſtabliſh thoſe forms of practice in the corporation, of *doing fealty* and *entring deeds* upon admiſſions, from whence it is eaſy to trace the origin of that traditional evidence now brought forward. After the corporation had annulled the bye-law, they had a general right of admitting all perſons burgeſſes indiſcriminately, and the old forms became uſeleſs.

A corporation has neceſſarily incident to it, a power of continuing its members by election; and where no particular mode of election is pointed out in the firſt inſtitution, this power reſides in the whole body. There being no evidence of any particular inſtitution of this ſort in Saltaſh, before the charter of Elizabeth, and none being given therein, the corporation poſſeſſed this incidental power after that charter, juſt as before. A corporation may limit itſelf

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in the exerciſe of this power; and ſuch limitation appears to have been made here by the above ordinance. But the acceptance of the charter of Charles II. abſolutely repealed any limitation of that ſort; and the ſubſequent continuance of the old forms in practice, could not alter the *right*. If there is no mode of obtaining repreſentation but by charter, then the corporation manifeſtly poſſeſſes it by the charter of Elizabeth; the acceptance of which was concluſive upon all who received it, and the rights and powers of which were continued by the charter of Charles II. The right of electing repreſentatives, no doubt, cannot be altered, or affected by any bye-law; and therefore this ordinance, however it might reſtrain the enjoyment of the *liberties of the town*, could not include among them, that of voting at elections. If the freemen only had it before, it remained to them in the ſame manner afterwards.

Mr. Gaborian ſtands alone in his evidence, in applying the term *freeburgeſs* to the freeholders, and in this is contradicted by the other witneſſes; nor is the circumſtance in itſelf probable. It is alſo contrary to the terms uſed in the returns of 1714 and 1718, in which theſe words are contradiſtinguiſhed from each other. The witneſs ſpeaks under diſappointment in his expectations

pectations in the borough, and on that account his evidence ſhould be received with diſtruſt.

Mr. Clevland's expreſſion of *recovering* the right, ſhews at leaſt that *he* conſidered it to have been loſt. If it had been thought eſtabliſhed according to the returns of 1714 and 1718, is it probable that it would ever have been abandoned? The number of freeholders is ſtated to have been 150: Yet that of the corporators ſeldom exceeded 20; except for a ſhort time, during the diſſentions which occaſioned the new charter. They could at all times have trebled the whole number of the freemen, and yet never offered to diſturb their repeated exerciſe of the right. In 1772, when the witneſſes ſay there was a ſtrong conteſt, all the freemen together did not amount to 20; yet no freeholder thought of ſuggeſting their pretenſions to either candidate. Even admitting the excuſe reſpecting Mr. Buller's intereſt, there was more than enough without him. The reaſon given for the former acquieſcence, in complaiſance to Mr. Clevland, cannot, in the nature of things, have been the real cauſe of it. It is not credible, that a man would allow another to deprive him of ſuch great advantages of his property, out of friendſhip; or that a man's *friend* would be inſtrumental in ſuch an act. Nor is it credible, that ſuch a valuable privilege as is con-

contended for, would have been paſſed by, in a public ſurvey and ſale of the lands to which it is now ſuppoſed to appertain, ſo lately as ſince 1772; if there had been any ſincere belief of the exiſtence of the right, or of the means of eſtabliſhing it, in the minds of thoſe whom it concerned. All theſe circumſtances, connected with the length of poſſeſſion on the ſame ſide, much outweigh the vague account of reputation.

It is remarkable, that the returns in 1714 and 1718, are under the common ſeal, like all the reſt. The particular form uſed upon thoſe occaſions, differs from every other; and being found only in two inſtances out of ſo many, muſt be conſidered as irregular exceptions to the general courſe. The body of the return is the material part of it; and that like all the reſt, declares the election in theſe inſtances, to have been made by the *mayor and burgeſſes*, i. e. by the corporation. The perſons who ſign their names, do it in the form of atteſtation, "In witneſs whereof, &c." i. e. in witneſs of the ſaid election by *the mayor and burgeſſes*; and do not ſtate the election to have been made in any other right, than that which the form deſcribes. The *time* of the firſt appearance of theſe returns is very material; it was at the beginning of the Hanover ſucceſſion, and when the kingdom was

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in a very unſettled ſtate. This may have given encouragement to new ſchemes in politics. Perhaps Mr. Buller, the Recorder, may have entertained a notion of converting this into a burgage tenure borough, with a view of aggrandizing his fortune and family under the new government *. Something of this ſort muſt be recurred to, in order to account for the ſingular and temporary diſtinctions of theſe two returns.

The new evidence upon the preſent trial, called the *Copy of a poll*, comes out in a very ſuſpicious manner, and deſerves but little credit. Though two trials have been had upon the queſtion, it has never been heard of before. But when attentively examined, it will be found

* This method of explaining the circumſtances of the returns, is not very probable. Mr. Buller is ſaid to have oppoſed the court meaſures at this time; and the friend whom he ſupported, Mr. Shippen, was a determined enemy to them. It was not long after this election, that he was ſent to the Tower by a vote of the Houſe, for ſpeaking diſreſpectfully of the king and his family. See 18 Journ. 653. 4 Dec. 1717. Hill and Bladen the petitioners againſt the election in 1714-15, in which the Buller intereſt prevailed, (as mentioned in p. 133 in the note) were for the court; as may be inferred from the promotion of the firſt of them to an Iriſh peerage, and a ſeat in the privy council of Ireland; and of the other to a ſeat at the board of trade, about two years afterwards. See *Chronological Regiſter* of the year 1717, in July and September.

to add nothing to the caſe of the petitioners, and rather tends to ſhew, that the right of freeholders was not then eſtabliſhed. It is more likely to have been a paper of one of the candidates, containing a ſtate of the votes, than a copy of the poll. It has four names ſet down, which do not appear to have voted, though they might have turned the election; they are no part of the poll, and inſerted only as a private obſervation of the writer. But admitting it to be a ſtate of the poll, how does the caſe ſtand? There are only thirty-one votes in all, though the borough is ſaid to contain five times that number of freeholders; (and it ſhould be remembered, that the being received on a poll, is not proof of the validity of a vote.) Fifteen voted for Elford, 12 of whom were corporators: Bladen, the loſing candidate, had 12, of whom only ſix were corporators *. So that if he could have ſet aſide the three who were not ſo, upon Elford's poll, there would have been ſtill a majority againſt him, and that probably was the reaſon why he did not petition. It is not to be believed, that the numbers in a conteſted election, would have been ſo few, if the freeholders had at this time been allowed to vote. Further, the return of this election is ſigned by only two or three who are not corporators.

* This was proved from the books.

Much

Much ſtreſs has been laid on the names ſigned to the returns; but the ſigning is not proof of voting, nor part of the election. None of the returns before the time of Charles I. have any names ſigned to them. Several perſons are proved to have ſigned, who had no pretence to be called voters, and many more may have ſigned in the ſame way. In 1741, this was the caſe; therefore the trick, as it is called, to avoid the effect of Harriſon's ſigning, was certainly not peculiar to the election in 1751.

All that can be collected from the evidence relating to the election in 1722, ſuppoſing it to be true, only proves, that freeholders at that time *claimed* to vote; for there is no evidence of *voting*, or even of the production of deeds, or of the returning officer's having aſked for them: And the event renders it probable, that they did not vote; for Buller and Carew, who were moſt likely to have ſucceeded upon that intereſt, were defeated and did not petition.

From this period, to the year 1780, they have not endeavoured to enforce the claim. If after having lain ſo long dormant, it ſhould be countenanced now for the firſt time, encouragement would be offered for endleſs queſtions in almoſt every antient borough in the kingdom. In 1714, when this queſtion was firſt ſtirred, many were living who could have remembered the pro-

ceedings of the laſt century, and perhaps all the records of the borough were then in exiſtence. If the right had been ſuch as the petitioner contends for, they muſt have contained abundant evidence of it. The firſt and ſecond numbers of the conſtitution book *, probably exiſted then, and their contents could not have been unknown. Therefore the neglecting to proſecute this claim at that time, affords a very ſtrong argument againſt it, and gives reaſon to believe, that the freeholders of that day were afraid to riſk a trial, from a ſenſe of the weakneſs of their cauſe.

The counſel concluded, with warning the Committee againſt the dangerous precedent they would eſtabliſh, if after two concurring deciſions upon the caſe, they ſhould open a new ſcene for litigation, by deciding contrary to them.—That the weight of two ſolemn judgments of an impartial court of juſtice, ought not eaſily to be moved.—That on this third trial, the petitioners had not in the leaſt ſtrengthened their caſe, but that on the part of the ſitting members, the argument had acquired additional force.

Reply. The counſel for the petitioners obſerved in reply, That if the privilege in queſ-

* See p. 124.

tion

tion had ever been annexed to land, or tenure, it was immaterial by what name it might have been called; whether the perſons might have been called burgage tenants, owners of antient houſes, or ſimply freeholders; in either caſe it means the ſame thing. It would be in vain to endeavour to raiſe a puzzle about names, if the ſubſtance of the right were eſtabliſhed: If it did not antiently belong to the corporation, it cannot at this day, and muſt be adjudged to the owner of land.

Without diſcuſſing here the poſition, that the right of repreſentation could not be derived from the original charter of Valle tortâ, (which might perhaps be denied) the truth of it may be admitted in this argument; becauſe when the borough became the property of the crown, the tenants held of the crown in the ſame right as they had before held of their lord. This is implied in the firſt royal charter of confirmation. The alteration of the ſeignory made no change in the ſtate of the tenures. The confirmation is made to them *and their heirs* as well as *ſucceſſors*; therefore if the tenure conferred any privilege before it became a royal borough, that privilege remained as before. This argument therefore leaves the caſe in the ſame ſtate as it found it.

It is not neceſſary for the petitioners to contend, that this was not a corporation antecedent to the charter of Elizabeth; becauſe, whether it were or were not, the evidence leads to the ſame concluſion, viz. That it conſiſted of the ſame perſons as compoſed it afterwards, and till 1753, i. e. of burgage tenants. Queen Elizabeth found them a feudal corporation ſo compoſed, and neceſſarily erected them in ALIUD *corpus corporatum*, and ſubſtituted this body corporate as lord of the borough inſtead of the crown: But this could not affect the preceding right of election in theſe burgage tenants.

It has been ſaid, there may have been ſome other charter, beſides thoſe which appear; but there is no uſage in this caſe that can lead to any ſuch preſumption.

It is impoſſible to have other proof of voting, where there is no conteſt, than that of attending the election, and ſigning the return; the ſignature is even more effectual than the voting, for it is the act of election complete.

The obſervations of Glanville * on the forms of returns, diminiſhes the effect which the counſel on the other ſide would attribute to the form and atteſtation of the early returns for this borough. There are many inſtances in which the

* P. 35 and 36 of his reports, before recited in the Lyme Caſe, p. 76.

returns

returns are made under the common ſeal, or by the corporation, though the election is made in a different right; as in the caſe of Aldborough * in Yorkſhire, when the inhabitants at large elected, 10 Journ. 418.—Of Preſton *, before the Select Committee, in 1781, in the ſame circumſtances.—Of Windſor *, where paying ſcot and lot gives the right.—Of Bridport †, 12 April, 4 Chas. I. 1 Journ. 882. and 29 Journ. 204. and Shafteſbury, 11 Journ. 478. which are the ſame. In the latter caſe, there were 22 returns under the common ſeal, and in the corporate name. St. Germains has no corporation, yet there is a common ſeal to its returns ‡.

Where there happens to be a corporation, what is more natural, than that the mayor, as returning officer, ſhould affix the common ſeal to a public act? In the returns of Saltaſh in 1714 and 1718, at which time, it is not denied on the part of the ſitting members, many ſigned who were not corporators, the common ſeal was uſed. The argument that theſe perſons ſigned

* * * See vol. i. p. 16.

† See p. 93 in the caſe of Lyme.

‡ The return for St. Germains in 1768, is in the following form. "In witneſs whereof the Portreve and Bailiffs have put their hands and the *common ſeal* of the borough." It is ſigned by the Portreve and 14 others; and has a ſeal which, as I have been informed, contains the arms of the Eliot family. See Note D.

their names only to *atteſt* the election, and not as having made it, is a mere play upon words. It is impoſſible to read theſe returns without being convinced, that the burgage tenants in this act, made a direct and poſitive declaration of their right, and of their exerting it upon that occaſion.

They would infer on the other ſide, that it had been a practice, to admit ſtrangers to ſign their names to the returns; but the only poll extant carries convincing proof of the contrary. None ſigned the returns of 1713, who are not on the poll as voters for the ſucceſsful party; but ſeveral voted who did not ſign the return. Beſides, the ſame names continually occur in theſe returns. The indorſement on this copy of the poll, dated the day after the election, proves alſo, that it could have been no other than a copy of the real poll, and not a paper of calculation. This paper affords poſitive proof, of what without it, reſted on preſumption; namely, the actual voting of freeholders in that right. If it had been diſcovered before the trial of the firſt petition, it is probable that trial would have had a different concluſion. It cannot be ſuppoſed that it would have been ſuppreſſed on the part of the petitioners, being ſo ſtrong a confirmation of their caſe. If any imputation falls upon either party on account of the

the want of written evidence, the corporation ſhould ſuffer for the deſtruction of their own books. Supported as the petitioners have been by the partial remnants of the corporation records, they would ſearch every other with confidence.

What would be the event, if on a trial of this ſort in Weſtminſter-hall, the defendant (as is the caſe here) ſhould call no witneſſes? The judge would direct the jury to believe, that every inhabitant of the town would ſay the ſame as the reſt, becauſe the defendant does not venture to examine one of them. Here then, the ſitting members may be ſaid to have the unanimous evidence of the whole borough in their favour. It is ſcarce poſſible that ſuch opinion ſhould not have been founded in fact. If eleven witneſſes, in a private ſuit, had proved ſuch a reputation of a preſcriptive right, without any others ſpeaking to the contrary, a judge would hardly take the pains to ſum up the evidence to the jury: He would conſider the caſe as eſtabliſhed beyond a doubt.

The petitioners abſolutely deny *any* right in the members of the corporation; but even if that point could be determined otherwiſe, it ought not to deprive the freeholders of the right belonging to their tenure. Upon a ſuppoſition of ſuch concurrent right, the majority would ſtill be for the petitioners in this election.

The

purported to be a copy of the poll, and corre-ſponded with the return of the election †. That there could be no juſt cauſe of ſuſpecting it, as its preſent uſe could never have been foreſeen by the writer; and it had been preſerved among the family papers of thoſe moſt likely to poſſeſs it rightfully. That the objection came very unfavourably from the corporation, who could give no account of the loſs of their records.

The Committee reſolved to admit the evidence.

On the ſame day the petitioners offered another paper, as a copy of a poll, in December 1718; but it was not properly authenticated by evidence, like the former, and on that account, not received by the Committee.

offered in evidence, a copy of a deed that was burnt by the fire. The copy was taken by one Mr. Gardner, of the Temple, who ſaid, he did not examine it by the original, but he writ it, and it always lay by him as a true copy. And the court agreed to have it read, the original deed being proved to be burnt." In the Report of the ſame Caſe, in 2 Keb. 546, it is ſaid, the court held it to be good evidence, "as well as teſtimony of a witneſs of the contents of a deed burnt; which was allowed to my Lord Cooke, who witneſſed a conveyance in Sir Chriſtopher Haydon's Caſe; and in one Douſe's Caſe at the Oxford Aſſizes, the like evidence: And *per Twiſden*, in Thin's Caſe, ſuch a copy was allowed without examining."

† This was produced in evidence.

The

The CASE of the BOROUGH of SALTASH in 1787.

A WRIT having iſſued in the month of Oct. 1786, for electing a member for Saltaſh, in the room of the preſent Lord Hawkeſbury, upon his promotion to a peerage, a conteſt enſued between the ſame parties in the borough who had contended before. Lord Mornington was elected by the members of the corporation, and returned. Major Lemon, who oppoſed him, was ſupported by the burgage tenants. There were nine votes on the poll for the ſitting member; but 41 perſons tendered their votes as burgage tenants for Major Lemon, who petitioned againſt the election and return of Lord Mornington. His petition ſtated generally, "That the mayor and returning officer behaved with partiality in favour of Lord Mornington, by rejecting the votes of ſeveral perſons who had an undoubted right of voting, and who tendered their votes for the petitioner; and by admitting on the poll for Lord Mornington the votes of ſeveral perſons who had no right to vote, whereby he was improperly returned as duly elected *."

* See Votes, p. 72, Feb. 7, 1787.

The

The Committee appointed to try the merits of this election met April 25, 1787, and conſiſted of the following members:

Sir John Trevelyan, Bart. *Chairman.*

Francis John Browne, Eſq;	John Kynaſton, Eſq;
Henry James Pye, Eſq;	Lord Duncannon.
John Scott, Eſq; *of Weſtloe.*	Edward Ruſhworth, Eſq;
Joſhua Grigby, Eſq;	Hon. Chapple Norton.
Charles Alex. Crickitt, Eſq;	Thos. Edwards Freeman, Eſq;
Jeremiah Crutchley, Eſq;	John Fenton Cawthorne, Eſq;

Lord Viſcount Maitland, petitioner's nominee.
William Young, Eſq; ſitting member's nominee.

The hon. Mr. Erſkine and Mr. Serjeant Lawrence were counſel for the petitioner; Mr. Graham and Mr. Douglas for the ſitting member.

The general ſtate of the caſe in evidence and argument, upon this trial, being the ſame as before, except in ſome points which I ſhall mention, I have thought it better to publiſh my report of the former trial, as it ſtood before the preſent; and only to note the particulars in which this caſe differs from that.

The counſel for the ſitting member did not think proper now to repeat their objection, raiſed upon the authority of the former deciſions, to the petitioner's right of proceeding in the cauſe*.

* See before, p. 109.

On

On the part of the petitioner the ſame evidence was produced as before, except that his counſel did not read the ordinance from the conſtitution book, recited in p. 125 *; but the ſitting member read it, as making for him.

The additional evidence of the returns has been already noticed in thoſe places to which they related †. Some doubt was intimated by a member of the Committee as to the propriety of producing the conſtitution book in evidence, without giving an account of the perſons or place from whence it came. This occaſioned a reference to the minutes of the firſt Committee of 1781, for the evidence of a Mr. Vial, ſince deceaſed. This gentleman was ſteward to Mr. Buller; and when the latter reſolved to bring forward the queſtion of the right of election, previous to 1780, went by the direction of Mr. Mayhow, formerly town clerk of Saltaſh and then reſiding abroad, to a houſe of his, in which ſeveral papers belonging to him were depoſited, to ſearch for ſuch as contained any information relating to the affairs of the borough. There Mr. Vial found this book, in the ſtate in which it was produced to the Committee: Many leaves had been cut or torn out, but it was then regularly paged; which muſt have been done ſubſequent to the mutilation of it.

* The laſt in that page. † P. 132, 3.

When

When the copy of the poll of 1713 was offered in evidence, the counſel for the ſitting member objected to its admiſſibility; and ſupported their objection by the ſame arguments as I have related in the former report; which received a ſimilar anſwer from the other ſide, and the ſame deciſion from the Committee.

The moſt material difference in the petitioner's caſe conſiſted in a paper diſcovered ſince the former trial, containing inſtructions for a poll previous to an election in 1722. The counſel for the petitioner offered it as a paper, ſhewing the reputation then received of the right of election, which they would prove to be in the hand writing of Mr. Hickes, at that time town clerk of Saltaſh, and long ſince dead, containing his opinion upon the point. Hickes was an active partizan of the party that oppoſed the Buller intereſt in that election.

The counſel for the ſitting member objected to this paper's being received in evidence. They ſaid, That the ſituation of Hickes on this occaſion, was ſuch as to render any opinion of his upon the ſubject, conveyed in ſuch a manner, and at ſuch a time, nugatory. That no opinions of men could be conſidered as containing evidence of reputed uſages, but ſuch as were *impartial* and ſoberly given; but this paper would

ſhew the conduct of an *agent* in a conteſted election; who neceſſarily ſtrains every point, and uſes every means in his power, of gaining his object. That Hickes was known to have been an attorney, and probably acted in that character here: It is the duty of ſuch men ſo employed, to prepare for every difficulty; and if this paper really were, what it purports to be, inſtructions for a poll previous to the election, of courſe it would be contrived ſo as beſt to ſerve the purpoſe of the party, for whoſe uſe it was made. Objections might have been expected that were never actually made, and a ſtate of votes given that never took place. That, in ſhort, it did not appear that the paper was ever made uſe of at an election, or ever left the deſk of him who made it; and under theſe circumſtances could not be relied on, as containing evidence of reputation of the right of election.

On the other ſide it was contended to be admiſſible and proper evidence, to ſhew that the town clerk, a member of the corporation, entertained the opinion to be diſcovered from the contents of this paper, of what the right of election was; particularly, when in favour of a right making againſt the corporation. That if any perſon had heard him declare his opinion to the ſame effect, it might be given in evidence

by ſuch perſon now; and much more is it to be received, in its preſent ſtate, when reduced into writing, and ſo far, more certain than when delivered from the memory of a converſation had long ago. That even if Hickes had been an attorney for the party, (though that was not the caſe for aught that appears) the contents of the paper were ſuch, that this circumſtance would not prevent their operation, to ſhew his indifferent and impartial opinion upon the ſubject; becauſe it ſhews, that both parties muſt have acted upon an acknowledgment of the ſame right of election. That the paper was not produced as evidence of any *fact* relating to the election; as, that A. had a vote, or B. had not; that C. was a freeholder, or D. a freeman; but merely that the town clerk *thought* that burgage tenants had the right of election in Saltaſh: That in this view it ſignified little upon what occaſion, or for what purpoſe, the paper might have been framed; becauſe theſe circumſtances could not in the leaſt affect the concluſion to be neceſſarily drawn from it, of the writer's ſentiments, in regard to the conſtitution of the borough.

The Committee were of opinion, that the paper was admiſſible evidence.

A perſon who had been Hickes's clerk, proved it to be in his hand writing; and ſaid Hickes was an attorney. No queſtion was aſked as to the time

time or place of its diſcovery. The adjoining page contains an exact copy of this paper; to which I have added the two explanatory notes, which the reader will obſerve at the bottom of it.

Another piece of evidence produced for the firſt time upon this trial, was a letter dated 24th of March, 1754, from Mr. Rogers, a member of the corporation of Saltaſh, father of the preſent Sir Frederick Rogers, to Mr. Clevland, who was then member for Saltaſh, and for whom he was an active friend in the borough; in which, diſcourſing of the election then approaching, he informs Mr. Clevland "of a report that Mr. Buller intended to make freehold votes; and conſiders whether it might not be proper to be prepared on their ſide with ſuch *made* votes too, if he ſhould take that ſtep; but he concludes for taking no meaſures in this way then, leſt it might alarm them unneceſſarily, till he ſhould learn with certainty whether Mr. Buller really had ſuch a deſign or not."

The above new evidence afforded matter for obſervation in the ſpeeches of the counſel; which I ſtate in this place ſeparately, becauſe it makes the only material difference between the arguments, by which thoſe of each ſide ſupported their reſpective caſes on the preſent, and on the former trial.

The counſel for the petitioner obſerved on it, That Hickes, when he prepared theſe inſtructions for a poll, evidently believed that freeholders could vote, whether corporators or not, and that he acted upon this principle, as eſtabliſhed without doubt, by the conſtitution of Saltaſh. In diſcuſſing the poſſible objections to the ſeveral voters, he proceeds throughout, upon the foundation of their ariſing from landed property. Thus Major Tucker, if alledged by the oppoſite party to have *ſold his lands*, is to be maintained as duly qualified, becauſe he has made a *new purchaſe, and hath the deeds.* What has this obſervation to do with the election, if the right were in freemen? for then it would ſignify nothing whether he had ſold his land or not. This Major Tucker is deſcribed as a corporator, for he is in the liſt of thoſe who are *ſworn*; but the town clerk does not ſuggeſt the means of ſupporting his vote on that ground, but from his *new purchaſe.* In his deſcribing the firſt liſt as *ſworn* freeburgeſſes, he gives credit to the diſtinction which ſome of the witneſſes have made, as if theſe were contradiſtinguiſhed from other perſons called *freeburgeſſes* only; a name given to the burgage tenants.

Six are noted to have actually polled, though *not ſworn* of the corporation. He does not

ſuppoſe the poſſibility of an objection's ariſing on that ground: Yet he is not backward with any that were at all likely; as appears by his mentioning that of reſidence, which certainly could raiſe no legal objection in Saltaſh.

Theſe obſervations he makes on the electors on the ſide of his own friends. In going through thoſe oppoſed to him, he obſerves of one who had been polled, though not of the corporation, that his *title* was not good. Not that his vote was bad becauſe no freeman; but that his *title*, which muſt mean to his *land*, was defective. He ſays of another, that he is a good vote, though he can't *ſhew his old deeds*. Theſe deeds can relate only to his voting in right of his burgage. He too is not of the corporation; yet the town clerk admits him to be a good vote, though on the oppoſite ſide. Two are queried as deriving titles by inheritance, one *as heir* to his father, the other to his aunt. It will not be pretended that a right to vote as a corporator was ever ſo derived. Theſe queries, probably, were intended for an inquiry into the facts, whether they were ſuch heirs or not. He admits they may be good votes; nor does he think of objecting to theſe or the others, for not being freemen. The other votes are deſcribed as *old faggots* and new ones. This hackney phraſe is peculiar to the abuſes practiſed in boroughs,

where the right of voting is derived from land, and is applied to no other.

It is impoſſible, after reading this paper, to doubt of Hickes's opinion, of an aſcertained right of election in the freeholders. Hickes was, from his ſituation, the beſt qualified to ſpeak upon the ſubject; he was familiarly acquainted with the conſtitution of the borough; he was likewiſe a native of it, and had always reſided in it. In a queſtion of this ſort, the practical opinion of ſuch a man ought to have the moſt deciſive weight.

An inference of the ſame ſort is to be made from Mr. Rogers's letter. In conſidering of the means, by which they might be enabled to defeat the expected ſcheme of making faggots, on Buller's part, he does not propoſe to deny the right of freeholders to vote: That does not enter his head: But to oppoſe him in his own way, by faggots on their ſide. This happened at a much later period than the date of the town clerk's paper, and ſhews the prevailing reputation of the right in burgage tenures, in actual practice, ſo late as 1754.

The counſel for the ſitting member anſwered theſe obſervations by the following: They ſaid,

There is ſomething ſuſpicious in the conduct of the petitioners, in bringing forward detached pieces of new evidence, upon every new trial.

trial. It leads to a belief, that there is on that ſide, a variety of other papers ſtill remaining to be produced, as circumſtances may raiſe hopes of advantage from them; and of others alſo that are withheld for ſimilar reaſons. On the laſt trial the copy of the poll was produced, from a place that had been ſearched before for papers relating to this cauſe *, where it was not then found; and now this paper is brought forward, without any account given of it. It is, no doubt, a deſirable object to the party to give his cauſe the appearance of more ſtrength of evidence, upon every new trial; but the Committee will not be deceived by appearances; they will give effect to the intrinſic weight of the evidence: *Ponderanda ſunt teſtimonia, non numeranda.*

When duly conſidered, this new evidence does not carry the caſe further than before; for it does not prove who *voted*, which is the only proper evidence of the right. It is merely a calculation of probabilities; and we are left in the dark, as to the real uſe it was intended for, or whether it was uſed at all. We know not now, what ſcheme of election might then have been in contemplation. It is a ſort of brief drawn up for the poll, by an attorney engaged

* See the Minutes of Howell's evidence to the ſecond Committee in 1783.

on a ſide, and therefore cannot be ſaid to contain an indifferent opinion on the ſubject. But if his opinion is to be relied upon as it ſtands, it muſt be taken throughout; and then it would make *reſidence* and *payment of rates*, a qualification to the right of voting. This ſhews that he did not think it a burgage tenure right, as is now contended for. The ſame concluſion may be drawn from his objecting to ſome as *faggots*; which have been held not to be objectionable votes, where that right prevails.

It is remarkable, that he places the ſworn freeburgeſſes firſt upon the liſt; and accounts them free from all objection, except in the inſtance of Tucker, which proves too much. His note that ſome have polled, though not ſworn, does not warrant the concluſion drawn from it on the other ſide; it is an obſervation of the *fact* only, very conſiſtent with his entertaining a doubt of the *right*. This tallies with the evidence of the election in 1713, when likewiſe it appears that ſome got on the poll who were not freemen. Perhaps their numbers might have been ſo ballanced on each ſide, that it was not worth while to conteſt their right. Botters, who is noted as a good vote, though not able to ſhew his old deeds, was probably of the corporation; for he is ſaid to have done offices. It ſhould be obſerved, that at the period when this paper

was

was written, it was the practice to produce deeds upon admiſſions into the corporation; and that eaſily accounts for the town clerk's obſervations about deeds: And the expreſſion of *faggots* was applied to thoſe who obtained colourable titles for ſuch admiſſion.

Thus taking the whole of theſe obſervations together, they will not be found inconſiſtent with the right of the ſworn freeburgeſſes; when connected with the next following election in 1727, at which it is proved, from the return *, that none but ſworn freemen voted. So that whatever notion might have been entertained of a claim by freeholders in 1722, it appears to have vaniſhed before 1727.

Mr. Rogers's letter is uſed in order to ſhew the prevailing opinion of the right of freeholders; But it cannot in juſt reaſoning be made to prove more, than that they were *expected* to make a claim. In fact they did not, and therefore muſt be taken to have abandoned it. Mr. Rogers's not denying their right, may well be accounted for, by his opinion that they might be outnumbered by thoſe on his ſide; which method he might think wiſer than taking the expenſive and uncertain iſſue of a conteſt in parliament."

* See hereafter, p. 222.

On

On the part of the ſitting member, the following addition was made, to the evidence offered on the ſame ſide at the former trial.

They read that entry in the conſtitution book, before ſtated in p. 125, which on the former occaſion made part of the evidence produced by the petitioners, but which the ſame party now omitted to read, relating to land *in fee*.

It was likewiſe proved, that all thoſe who voted for the *ſucceſsful* candidates, whoſe names appear on the copy of the poll in 1713, were corporators; except two, whom the petitioner proved to have been admitted into the corporation *after* that year. This appeared in part by ſome affidavits ſworn in the King's Bench, by members of the corporation in 1720, relating to law ſuits among them then depending; which were likewiſe produced, to ſhew their acting under the charter of Charles II, and were read by the conſent of the petitioner's counſel. One of theſe affidavits was made by John Hickes the town clerk. It ſtated, that he had been town clerk for ten years: That it appeared by the charter of Charles II. that there were 33 modern freeburgeſſes: That within 10 years laſt paſt, the number had never exceeded 25: That at Herring's election for alderman, (about which the diſpute then was) there were 24 voters inhabi-

tants

tants of the ſaid borough; whom he named in the affidavit. The counſel for the petitioner ſaid, that 18 of theſe, appeared by the old book to have *entered their deeds*, or to have been ſworn freeburgeſſes before the charter, and that all but ſix of them ſigned the returns of 1714 and 1718, as burgage freeholders.

They read the affidavits likewiſe of Mathew Veale, Thomas Luſkey and Joſ. Willyams. The former ſaid that he had been ſworn into the corporation 43 years; and the other two that they had been ſo for 40 years.

The counſel for the petitioner obſerved, that neither of theſe three were named in the above charter of Charles II, and that they did not diſtinguiſh themſelves from the others, in reſpect of rights and privileges; although they certainly had not been admitted under that charter. They alſo obſerved, that of the 29 who ſigned the return in 1718, only 17 appeared in the liſt ſtated in Hickes's affidavit: And that it was probable that many more than 29 voted; ſince thoſe who voted for the unſucceſsful candidate were not likely to ſign the return of their opponent. And further, that only 13 of the 36 who ſigned the return in 1722, were mentioned in the above affidavit.

In the following ſtatement are contraſted, the proofs for the ſitting member, tending to eſtabliſh the

the fact, that the perſons named in the poll of 1713 were corporators, as abovementioned, and the remarks made on the part of the petitioner upon thoſe proofs; the whole being brought into one point of view.

Sitting Member's Proofs.	Petitioner's Remarks.
John Ford, ſen. By being *Mayor* on the return.	
John Ford, jun. By being *Juſtice* on the return.	
Edward Leane——Named in the charter.	Was ſworn upon entering his deeds in 1680, before the charter.
Chriſt. Hill—Mayor in 1708.	
Matthew Veale—By his own affidavit.	It proves him to have been ſo before the charter, and to have derived no right whatever under it.
William Roberts—By having ſigned returns from 1702 to 1713.	That is *all* the proof about him.
Nich. Stephens——Sworn in 1699.	Upon entering his deeds.
Peter Mill—Signed returns from 1708 to 1710 inclu-ſive.	That is *all* the proof.
Joſeph Williams—By his own affidavit.	(*As above of Matthew Veale*)
Owen Teage—Named in the charter.	Sworn before in, upon entering his deed in 1679.
Francis Pollard——Sworn in 1698.	Upon entering his deeds.

John

Number's Proofs.	Petitioner's Remarks.
—Signed the re- 1714 as Mayor.	Sworn upon entering his deed.
Sweetnam—Sworn	Upon entering his deed.
ilkey—By his own	(*As above of Matthew Veale*)
bb—Signed returns om to 1710.	That is *all* the proof.
mallet—By his own	Made in 1720, and only ſtates that he had been of the corporation *many* years; not naming how many.
—Named in the	He had a previous title.
ſton—By his own : in 1720, that he n ſworn 20 years.	He ſigned returns in 1681 and after; therefore long before he was ſworn.
ruſt—Sworn before	Upon entering his deed.
Villiams—Ditto;	Ditto.
Gawde—Ditto.	Ditto.
Baſtard—Named in ter.	Signed the return of 1714 as a burgage tenant.
Villiams—Signed re- om 1691 to 1714.	That is *all* the proof.
yes——By Hickes's t.	It only proves him to have been *then* a corporator, i. e. in 1720.
Hunkin—Signed re- om 1691 to 1710.	That is *all* the proof.
	So that as to ſeven of the above number, viz. Roberts, Mills, Parnell, Thomas Williams, Davye and Hunkin,

Sitting Member's Proofs.	Petitioner's Remarks.
	Hunkin, the proof is very inconclusive: And as to the remaining ſix, viz.
	Richard Herring, he was ſworn in 1715,
	Edward Leane, *junior*, in 1714,
	Lark and Pyper,—the ſitting member offered no proof at all about them.
	Mr. Porter was ſworn in 1714, and
	Benjamin Wadge in 1715.

The return of 1727 (which was the next after that of 1722-23) was produced, in order to ſhew the names ſubſcribed to it; all of whom, the counſel for the ſitting member offered to prove, to have been then members of the corporation. On the part of the petitioner this was admitted.

It was likewiſe admitted on the ſame ſide, that there were no entries in the conſtitution book, relative to the producing deeds and admiſſion of freeburgeſſes, before 1675.

Mr. Colton the mayor of Saltaſh, was examined for the ſitting member. He ſaid he had lived in the town about 25 years, and had never heard of the right of freeholders to vote till about 1780; or at leaſt not till after 1772; nor any doubt ſuggeſted by old people concerning the right of the corporation to elect. This witneſs, in his account

of

of the election proceedings in 1772, and ſome tranſactions in the corporation ſubſequent to it, and other matters not immediately relating to the preſent queſtion, contradicted Mr. Gaborian the witneſs mentioned in p. 141. Mr. Colton was poſſeſſed of a burgage houſe in the town, which he bought before the year 1772, without then knowing it to be a burgage houſe. He ſaid, that at the election in 1783, where he acted as returning officer, Mr. Gaborian voted as a corporator, and diſclaimed his right as a burgage freeholder, upon a queſtion's being put to him for the purpoſe.

Mr. H. Hickes, upwards of 70 years old, an alderman of Saltaſh, which place he had held more than 40 years, ſpoke to the ſame purpoſe as to the right of the corporation; but he had heard the right of the freeholders to vote, ſpoken of as an old claim, before 1780. His father was the town clerk, mentioned in p. 208; but the witneſs did not remember ever to have heard him ſpeak particularly of the right of election, nor any other old perſon now dead. He remembered when it was the practice to admit no members of the corporation, without ſeeing the title deeds of their houſes; and when colourable titles uſed to be made out, for the purpoſe of getting people admitted. He ſaid the corporation had always acted under the charter of Charles II.

before

before that of the preſent king was granted. He alſo contradicted a part of Mr. Gaborian's evidence (who was his brother-in-law) relating to his conduct before mentioned in the election of an alderman.

Another witneſs was alſo called to contradict an aſſertion of Mr. Gaborian upon the ſame ſubject; and afterwards perſons of rank and reſpect were called on the petitioner's ſide, in ſupport of his honour and credit. The ſubject of theſe examinations was indifferent to the queſtions of the cauſe; on which account, I avoid a particular recital of them.

Towards the cloſe of the petitioner's evidence, his counſel were required by the other ſide, to prove the titles of the ſeveral perſons, who tendered their votes for him. The deeds were accordingly produced, and the ſitting member's counſel required evidence to prove the property deſcribed in them, to be antient burgages, according to the deſcriptions in the deeds. This was accordingly done with reſpect to four: And then, after ſome little diſpute, they admitted (as was done before the laſt Committee) that more than nine perſons (the number of the ſitting member's votes) intitled to burgage houſes, had tendered their votes for the petitioner. Only 16 or 17 of the whole number live in Saltaſh.

On the part of the petitioner, the counſel did not ſeem to me, to argue ſo pointedly againſt the fact

fact of the acceptance of Charles II's charter as they did before (G). They were alſo more explicit on the ſubject of the antiquity of the corporation; expreſsly admitting it to have exiſted long before members of parliament were ſent from this town; and contending that this queſtion was quite immaterial, as they denied that the corporation, *as ſuch*, had a right to elect repreſentatives.

On the part of the ſitting member all the arguments uſed on the former trial, upon the effect of the preceding deciſions, were again repeated and ſtrenuouſly urged (F).

On Saturday, May 5, after the counſel had concluded, the Committee determined

That the petitioner was duly elected, and ought to have been returned; of which the Houſe was informed by the chairman on Monday, May 7 *.

In the courſe of the above trial, two of the members were taken ill and unable to attend; Mr. Kynaſton May 2, and Mr. Pye May 3. The chairman was informed of it by a letter from each of theſe gentlemen; and upon his motion in the Houſe, their attendance on the Committee was diſpenſed with. Neither of them attended afterwards (H).

* See Votes, p. 565-6.

NOTES

ON THE CASE OF

SALTASH.

PAGE 131. (A.) The ſtile of the royal charters, conferring upon boroughs the privilege of ſending members to parliament, or (as it was expreſſed in the earlier period) requiring their attendance there, ſhews, that this power of the crown was exerciſed as of courſe and without diſpute. In the reign of Jas. I. as has been ſeen in the paſſage cited from Serjeant Glanville, in p. 172, the commons began to oppoſe the unlimited exerciſe of this prerogative, and denied the king's power to change or reſtrain the right and manner of election. After the reſtoration, the royal power of granting to a borough the right of repreſentation in parliament, was denied abſolutely by ſome members in the Houſe of Commons; and the queſtion produced a conſiderable debate, which ended in favour of the prerogative by a large majority. This happened in the caſe of Newark, an account of which is given in 1 Doug. elect. 68, &c. It appears from Grey's debates, vol. iv. p. 297, that Serjeant Crooke and Serjeant Maynard ſpoke in favour of the crown in this caſe. But in the reign of Elizabeth, and leſs than a century before, the Houſe of Commons ſeems

to have been very indifferent about the increaſe of repreſentatives, and of parliamentary boroughs; and rather anxious to preſerve the rights of the crown reſpecting them, than willing to oppoſe them. In 1571 (1 Journ. 83.) they appointed a committee "to confer with the *Attorney* and *Solicitor General*, about the return of burgeſſes" for eight boroughs, which had then returned members for the firſt time. Three days after (ib.) the houſe receives a "report of the validity of the burgeſſes; and ordered, by *Mr. Attorney's aſſent*, that the burgeſſes ſhall remain according to the returns, for that the validity of the charters of their towns is *elſewhere* to be examined, if cauſe be." See Glanv. 94. The houſe in this caſe, ſeems to have acted upon a notion, that the crown was intereſted to oppoſe the claims of the boroughs; and juſtly conſidered an addition to their own numbers, as ſo much gained in the political ſcale, on the ſide of the people. In the ſame manner, the addition of members from the Univerſities, in the beginning of king James's reign, was an act of ſtate, ſo far from raiſing any doubt againſt the prerogative, that it gave general ſatisfaction.

But however the legal *power* of the prerogative may have been thought to be eſtabliſhed in the caſe of Newark, on the part of the crown it was thought dangerous, to venture upon a ſecond attempt to maintain the exerciſe of it, againſt the principles then prevailing in the nation. And from that time, though the theory of the right might have been upheld, it was relinquiſhed in fact: Nor did the miniſters of Chas. II. recur to it afterwards, when in the full execution of their ſcheme upon corporations, at the end of his

reign, and when the power of the crown was higheſt. It may be ſaid indeed, that the means they did take, were fully equal to their ends: And this may be thought a ſufficient reaſon for their not purſuing any other.

Weſt, in his inquiry into the manner of creating peers, written in 1719, in ſupport of the Peerage bill then depending, ſays *, "——and now the commons (juſt as the lords did with relation to peerages, while the barons were feudal) begin openly to diſpute the power of creating burroughs; and I believe every reader will agree, that if a burrough was now to be erected, its members would find it pretty hard to gain admiſſion into the Houſe of Commons." It is plain, he ſuppoſes the caſe of an addition to the number of members; and that (in his opinion at leaſt) this prerogative had not been *eſtabliſhed* by the caſe of Newark.

Mr. Douglas obſerves upon that determination, and the prevailing opinion of that day, that "ſince the Union, a different opinion has prevailed; it being now underſtood, that the king cannot beſtow a *new* right of ſending members to parliament; becauſe it would alter the mutual proportion of Engliſh and Scotch members eſtabliſhed in the act of Union;" upon the principles of which, the commiſſioners on each ſide acceded to the treaty.

It is not impoſſible that this queſtion may ariſe within a ſhort compaſs of time; at leaſt, there will be materials for it; but without interfering with the principles of the Union.

* P. 73.

The

The members for the town of Helſton, repreſent a corporation, that is tending faſt to its entire diſſolution; having been long incapable of continuing itſelf, and conſiſting at preſent of two or three perſons only, upon whoſe death it will be extinct *. His preſent majeſty erected a new corporation in the town, in the year 1774, and named the remaining members of the old corporation, who were then nine in number, as part of it; but a great majority of them refuſed to accept it, and adhered to their old privilege; by virtue of which they choſe the members in the election of that year, and in thoſe which have happened ſince; in which a ſelect committee has repeatedly confirmed them.

If upon the future extinguiſhment of the old corporation, the members of the new one ſhould elect the members of parliament for Helſton, the crown in this caſe will have granted a *new* right of ſending members to parliament; for there is no more mutual relation between the two ſets of conſtituents, than between the corporations of two different towns. They have the ſame names, it is true, and are deſcribed of the ſame town; but the new corporation has no repreſentative quality. The parliamentary privilege, whatever it is, is poſſeſſed ſolely by the antient corporators: And it will be a matter of curious inquiry, to find the means of communicating it, upon their deceaſe, to a new ſet of perſons who had it not before.

In the beginning of repreſentation, it was the *town* that was repreſented, and not the *corporation* of the

* This note was written in 1786, before the Helſton cauſe, now depending in the court of King's Bench, was inſtituted.

town. Where a corporation ſent the members, it was in right of their lordſhip of the town. But we have long loſt ſight of this principle; and conſider the corporations, in places where they elect, as the body repreſented.

If the deciſion of the Houſe of Commons, in the Newark caſe, ſhould be conſidered to have eſtabliſhed this prerogative of the crown, the principles of the Union will not ſtand in its way in the caſe of Helſton. And I know of no caſe, the circumſtances of which have been ſo defined, and open to the queſtion of right, if it ſhould be thought proper or neceſſary, in a conſtitutional view, to introduce it. In the caſes of Banbury, Tiverton, Maidſtone, Colcheſter, and others, the new charters were ſooner or later accepted by the old corporations, and therefore made no *new* incorporation, and created no *new* repreſentation. In that of Caermarthen, the diſſenting members of the old corporation, had been inconſiſtent in their conduct; and the real effective queſtion, in that election in which they endeavoured to avail themſelves of their old charter, ſeems to have been, whether they had not accepted or acquieſced under the new one; a queſtion of fact, which, in the determination of the houſe, was decided againſt them, as a fact; and in this manner the matter of law was excluded from it. (See 32 Journ. 763) So that in this caſe alſo, the new charter was conſidered to have been accepted by the members of the old body corporate.

The circumſtances of the Bewdley caſe, in 1708, were at one time exactly ſuch as thoſe of Helſton are at preſent. The queſtion of prerogative right, in the creation of new repreſentatives, under a new charter, does

does not ſeem to have occurred, in any part of the litigation which this charter produced, in the Houſe of Commons, or in the King's Bench. For the commons, by a forced and unjuſt conſtruction of law, conſidered the old and new corporations as *one* body; and that the former was bound to ſubmit to the new charter: Which in their firſt determination they eſtabliſhed, with the rights of the members elected under it. If this judgment could have been conſidered, at that time, as an admiſſion of the abovementioned legal right in the crown, yet as it was reſcinded two years after, no ſuch argument can be drawn from it now: For after the next following election, a judgment directly contrary paſſed. The houſe voted the new charter to be illegal and void; addreſſed the queen to take proper meaſures for repealing it; and upon the trial of the *Scire facias*, a verdict was found againſt it *. This verdict, however, was not ſatisfactory to the court, who directed a new trial of the cauſe, upon which there was a ſpecial verdict found; and here the matter reſted. The parties afterwards ſeem to have made up their differences, and acquieſced under the new charter; by virtue of which the member for Bewdley has been ever ſince elected. Therefore in a parliamentary view, this new charter likewiſe has only continued the old body corporate, and its repreſentation, without creating a *new* one.

According to the manner in which our kings exerciſed this prerogative, before the reſtoration, the Houſe of Commons ſeems to have been as ſubject to

* See 16 Journ. 11, 97, 408, 438, 9. 18 Journ. 32, 135. and 1 Peere Will. 207, &c.

alteration by the crown, as the houſe of peers: Boroughs being added to, and ſometimes even omitted from the repreſentative body, at pleaſure. In times more remote, we find the peers alſo, as well as the boroughs, ſummoned or omitted arbitrarily; though I believe the omiſſion of peers, happened only in times of violence. But in modern times, and particularly within the happy century (now almoſt accompliſhed) of public liberty, ſince the revolution, our conſtitution has been more regularly adminiſtered; and the ſeveral orders of the ſtate have ſupported their reſpective privileges, with more regard to each other, and to the conſtitution. Within this period, the royal prerogative has been limited, in each of the other legiſlative bodies, according to thoſe rules upon which both have founded their own privileges, and of which each of them claims to be the ſupreme and ſole judge. Theſe privileges may be called *their* prerogative; and in them conſiſts their independency. Thus the lords have thought themſelves competent to judge of the creation of a peerage; and in the caſes of the dukes of Dover and Brandon, excluded from their houſe, peers regularly made by the crown. This judgment was abſolute upon the queſtion; and the late admiſſion of the Brandon peerage, did not paſs upon a notion of the *incompetency* of the houſe to decide againſt it. Juſt ſo in the Newark caſe, in the Houſe of Commons, all thoſe who argued, ſeemed to admit the right and competency of the commons, to *judge* of the exerciſe of the royal prerogative in ſuch inſtances.

Conſidering it as a queſtion of prerogative ſimply, the power of creating parliamentary boroughs, ſeems to have implied a power of exempting others; which, in

in fact, has been frequently exerted formerly. Therefore, without recurring to the uſeful principles of the Union, it ſeems reaſonable to have ſome check upon this power; which, if poſſeſſed by any, muſt be by the Commons.

But there is one mode of altering the number of repreſentatives, in which the king would take no part: As, ſuppoſe a corporation having right of repreſentation, altogether extinct, by the death of every member, and no renewing charter; as might have been the caſe of Helſton and other places,—what is to be done? The proportion fixed in the Union would be broken without any man's default.

P. 152. (B.) This circumſtance requires explanation; for, as *tenant for life*, Mr. Buller could certainly have granted freehold eſtates. It was not explained in the courſe of the cauſe, but I have heard the following account of it ſince. At this time one Hickes, the ſteward of the family, was gained over by the oppoſite party; and, to Mr. Buller's ſurpriſe, when at the poll, objected to the votes offered to be brought up on his ſide; telling him, that as tenant for life, he could not legally make them. Whether Mr. Buller was ignorant of his power, and impoſed on by his ſteward; or whether the parties conceived that the qualification of freeholders, conformably to the bye-law ſtated in p. 125, required an eſtate *in fee*, is not now to be known. But the notion of Mr. Buller's diſability is ſaid to have been credited in the family, and to have directed their conduct with reſpect to this borough.

From

From the following liſt of the members for this town, from the firſt return, it appears probable that the Buller family uſed to have a conſiderable influence in the elections there.

Liſt of the Members for Saltaſh, from the firſt return extant, to the year 1750.

1552.	6 Edw. VI.	George Keſtwicke—Edward Saunders.
1583.	26 Eliz.	Richard Carew, Eſq;—Wm. Clark.
1661.	13 Cha. II.	Francis Buller—John Butler.
1679.	31 Cha. II.	John Davie, Bart.—William Jennens, Eſq;
1681.	33 Cha. II.	Hon. Barnard Grenville, Eſq; John Davy, Bart.
1685.	1 James II.	Cecil Weeke, Knt.—Edmond Walter, Eſq;
1688.	Convent. Parl.	Hon. Barnard Grenville, Eſq; John Wardon.
1689.	1 Wm. & Mary.	John Carew, Bart.—Richard Carew, Eſq;
1691.	3 Wm. & Mary.	Narciſſo Luttrell, Eſq;
1692.	4 Wm. & Mary.	Michael Hill, Eſq; *
1695.	7 Wm. III.	Fran. Buller—Walter Moyle
1698.	10 Wm. III.	James Buller, Eſq;
	10 Wm. III.	John Speccott, Eſq;—John Morice, Eſq;
1700.	12 Wm. III.	James Buller, Eſq;—Alexander Pendarves, Eſq;

* This was the name of the father of Trevor Hill, mentioned in p. 133; and, moſt probably, the ſame perſon.

1700.	12 Wm. III.	Thomas Carew, Esq;
1701.	13 Wm. III.	James Buller, Esq;—Thomas Carew, Esq;
1702.	1 Anne.	John Rolle, Esq;
	1 Anne.	Thomas Carew, Esq;—Benjamin Buller, Esq;
1705.	4 Anne.	James Buller, Esq;—Joseph Moyle, Esq;
1708.	7 Anne.	James Buller, Esq;—Alexander Pendarves, Esq;
	7 Anne.	Cholmeley Dering, Bart.
1710.	9 Anne.	William Carew of Antoney, Bart.
	9 Anne.	Cholmeley Dering, Bart.—Charles Pendarves, Esq;
	9 Anne.	Jonathan Elford, Esq;
1713.	12 Anne.	Wm. Shippen, Esq;—Jonathan Elford, Esq;
1714.	1 Geo. I.	Wm. Shippen, Esq;—Shilston Calmady, Esq;
1718.	5 Geo. I.	John Francis Buller, Esq;
1722.	8 Geo. I.	Thomas Swanton—Edward Hughes, Esqrs.
1723.	9 Geo. I.	Philip Loyd, Esq;
1727.	1 Geo. II.	Lord Glenorchy—Edward Hughes, Esq;
1734.	7 Geo. II.	Lord Glenorchy—Thomas Corbett, Esq;
1741.	14 Geo. II.	Thos. Corbett—John Cleveland, Esqrs.
1743.	16 Geo. II.	Stamp Brooksbank, Esq;

1747.

1747.	21 Geo. II.	Hon. Edward Boſcawen—
		Thomas Corbett, Eſq;
	21 Geo. II.	Stamp Brookſhank, Eſq;
1750.	24 Geo. II.	Geo. Bridges Rodney, Eſq;

P. 179, 180. (C.) Rolle, in his abridgment, tit. *Corporation* F. ſays, "If the king grants lands to the men, or inhabitants of D. and their heirs and ſucceſſors, rendring rent, this eſtabliſhes them as a corporation *with reſpect to this land*, but to no other purpoſe." He cites for his authority 21 Edw. IV. 56, a caſe in which the point ſeems only to have been laid down *arguendo*, and makes no part of the determination. Rolle alſo relies upon the ſame caſe, for the poſition, that ſuch grant as before mentioned would be void, *if no rent were reſerved to the crown*. This poſition, like the former, is only the argument of counſel. But in that caſe, fol. 59, one of the Judges ſays, that if the king grant to the men of I. to be diſcharged of toll, it makes them a corporation *for this purpoſe*, but does not give them a capacity to purchaſe. In 7 Edw. IV. 14, a. it was held in C. B. that if the king give land in fee farm *probis hominibus villæ de D*, the incorporation is good; and ſo it is where it is given *burgenſibus, civibus & communitati*; and they, by ſuch names of corporation, may have actions of things concerning their farm, &c. And the writ ſhall be "reddendum hominibus villæ de D." vel "civibus, &c." Coke, in the caſe of Sutton's hoſpital, 10 Rep. 27, recites a caſe in which it was determined in 2 Hen. VII. Fitz. abr. tit. *Grant*. 36. That a grant of Henry IV. licenſing the foundation of a Chauntry,

by

by the words "habendum & tenendum redditum prædictum eidem Capellano & ſucceſſoribus ſuis," made a ſufficient incorporation and perpetual ſucceſſion, for the chaplains of the Chauntry. The reader may receive further inſtruction on this ſubject, by referring to Mr. Douglas's obſervations upon it, in his ſecond volume, p. 296, *note* E.

If thoſe requiſites which Lord Coke, in the above caſe, lays down as eſſential to the creation of bodies corporate, were carried back to the times of the antient incorporations, in order to try the validity of their charters or inſtitutions by them, there are few that would hold the examination. Theſe eſſential points are, 1ſt. A lawful authority of incorporation, viz. by the common law, by ſtatute, by charter, or by preſcription: 2d. Proper perſons to be incorporated: 3d. A proper name by which they are incorporated: 4th. A place to be deſcribed of: 5th. Sufficient legal words of incorporation.

Of the favouring principle of the law on this ſubject, there is a remarkable inſtance in Serjeant Glanville's report of the Chippenham caſe, in the following words, ſtated by him as the opinion of the Committee—"Rather than the right of ſuch boroughs, wherein the commonwealth hath intereſt, ſhould be void or deſtroyed, for the want of being corporate, they ſhould and ought to be taken for lawful corporations, *to this particular purpoſe*; though to other purpoſes of taking and making grants of lands or goods, or the like, they are no corporation."

P. 182. (D.) Du Cange, in his Gloſſary, under the words *Communia & Communantia*, ſays, "Inter Com-

miæ jura præcipua recenſantur *Scabinatus, Colla-*
m, Majoratus, Sigillum, Campana, Barfredus, & Juriſ-
dictio—De *Sigillo* hæc habentur in chartâ S. Ludovici
gis anno 1235 pro Epiſcopo Remenſi; dicebat enim,
uod non debebant (Cives Remenſes) *habere Sigillum,*
um non habeant Communiam." If with us in England,
common ſeal were a proof of incorporation, it
would raiſe many ſocieties to a ſtation they do not
aſpire to. The ſeveral law ſocieties of the inns of
court, are known not to be regular corporations *;
yet they have always uſed a common ſeal in their pub-
lic acts: And there are many other inſtances, in which
common ſeals are uſed by bodies not corporate. But
the caſe of a *corporation* without a common ſeal, ſeems
extraordinary: However, ſuch a caſe is ſaid to have
exiſted. The attorney general, in his argument upon
the *Quo warranto* againſt the city of London, in 1683,
having occaſion to refer to the caſe of Cambridge in
5° Ric. 2. ſtates it thus: "The burgeſſes who ap-
peared on behalf of the commonalty, before the king
and lords, were aſked if they had authority under the
common ſeal of the town? They anſwer, the town
had no common ſeal; but that they were choſen at a
common aſſembly of the town, ſummoned for the
purpoſe, &c."

P. 202. (E.) I have placed the two caſes of Lyme and
Saltaſh together, on account of the great reſemblance
they bear to each other. The hiſtory and preſent
ſtate of theſe boroughs exhibit to our view, in differ-
ent ſtages, the progreſs of corporations (the new race

* Sty. 457. Skin. 684.

in

in repreſentation) in ſupplanting the antient feudal conſtituents and rulers of towns. I have endeavoured to ſhew, in a note in my firſt volume *, in what manner, according to the original feudal ſtate of boroughs in this country, their inhabitants obtained their privileges, in the firſt degree, by infranchiſement; and, in the ſecond, by incorporation: Both being derived, under the feudal ſyſtem, from their tenures. In the beginning, as well as after the corporate rights had been eſtabliſhed, the immunity and the tenure were united in the ſame perſons; the former, inſtead of raiſing the perſon bearing it, to an independent character, being conſidered only as a ſecondary quality of the burgeſs, or borough tenant. When their numbers, or their trade, had enabled them to eſtabliſh, or to obtain grants of guilds or fraternities, for the purpoſes of trade, then began the practice of admitting members for theſe purpoſes, who were either ſtrangers to the borough, or unconnected with its tenure, or feudal relations.

Theſe guilds often began by voluntary aſſociation; and having ſtrengthened into right by length of time, gave beginning to many of thoſe corporations, which, at this day, found their titles in preſcription. Royal charters were afterwards obtained, containing additional privileges, or confirming antient cuſtoms. Many of theſe inſtitutions likewiſe *commenced* by the authority of charters from the ſovereign. Of this ſort, I conceive the charter of Edw. I. to the town of Lyme to have been; which has no expreſſions of reference to former uſage, or to the times of anceſtors, as is very often the caſe in theſe charters.

* Vol. I. p. 98.

inſtances

inſtances of which may be ſeen, in the charter of *Valle tortâ*, and in one of an earlier period, granted to Pontefract, mentioned in p. 18, of Vol. I. The freedom of the borough was enjoyed by all the members of the guild; but the government of it belonged to the burghers only, or thoſe who held the lands and tenements. The earlieſt records of Lyme ſhew plainly, how much more reſpected the burgage-tenant-freeman was, than a mere freeman or guild-brother: They had the precedence in all corporation acts, were diſtinguiſhed by a particular name, and ſometimes called *burgeſſes κατ' ἐξοχην*. But by the gradual increaſe of the wealth and numbers of the guild freemen, and by the undiſtinguiſhing uſe of the corporate name and authority, in all the proceedings of the borough; by the equality of all the members at public meetings, and by the decline of the feudal tenures, the reaſon for preſerving a diſtinction of perſons declined too. All the advantages and authority of the borough, being exerciſed in the guildhall, were in time ſuppoſed to belong to its members only, and thus all privileges gradually became veſted in the members of the corporation.

While the concerns of a borough were confined to its own inhabitants, and before the greater intereſts of government had penetrated among them, ſo as to give political importance to their elections, they beſtowed freely, and for a ſmall conſideration, their corporate or guild privileges, upon all who applied for them; for then they could be uſeful only to thoſe, who by exerciſing them, could in their turn be uſeful to the town. And it is natural to believe, that the land or burgage holders, were admitted as of courſe among their

their number. But when long uſage had eſtabliſhed the corporate authority of the guild, as the ruling authority of the borough, every public act of the borough was tranſacted in the name of the corporation. It became a matter of diſcretion in the members, to admit whom they pleaſed, to partake of their privileges; and when new political principles took place among them, they exerciſed this diſcretion with ſome diſtinction and reſerve. It was now too late for the holders of the antient burgages to *demand* their antient privilege; becauſe, by long acquieſcence, they had acknowledged and ſubmitted to a different inſtitution, and, perhaps, had loſt the evidence of their former eſtabliſhment.

I have ſaid above, that guilds or fraternities often began by voluntary aſſociation. The *fact*, I know, is contrary to a maxim of our modern law, but is well warranted by the hiſtory of this country, and of other nations of Europe, in the 11th, 12th, 13th, and 14th centuries. We now underſtand the word *guild* to have a corporate ſenſe; and Lord Coke lays it down with authority, (10 Rep. 30) that of old time, the burgeſſes of a town or borough were *incorporated* when the king granted them *gildam mercatoriam*; which expreſſion, Rolle, in his abridgment *, adopts as one mode of conferring a royal incorporation. But it appears from Du Cange's gloſſary on this word, that in the beginning it had no ſuch ſenſe. *Gilda*, or *Ghilda*, is there defined *Fraternitas*, *Sodalitium*, *Contubernium*, *Curia*, *Societas*, *Collegium*. The author cites the following paſſage from S. Anſelmus, lib. 2,

* 1 Abr. 513. *Corporation* F.

epiſt. 7. "De domino Henrico qui Camerarius fuit, audio, quia in multis inordinaté ſe-geſſit & maximé in bibendo, ita ut in *gildas* cum ebrioſis bibat & cum eis inebrietur—prohibeo ne amplius in gildâ aut in conventu eorum qui ad inebriandum ſolum conveniunt, bibere audeat." Here the word is uſed for club, or ſociety. In the ſame author, *Guildhalla* is defined, "locus in quo exponuntur merces nundinariæ." He alſo * cites from a charter of an Earl of Flanders, in 1211, theſe words: "Omnes qui ghildam habent & ad illam pertinent, & infra cingulum villæ ſuæ manent, *liberos* omnes facio," where burgeſſes are mentioned as having a *guild*, previous to their acquiring infranchiſement.

A modern French author, (M. *Houard*) intimately acquainted with the laws of the middle ages, who has publiſhed in France, the antient laws of this iſland under the Saxon and Norman princes, and the writings of our firſt lawyers, as an illuſtration of the laws of France, conſiders the *Friborga* among the Saxons, and *Franc-plege* among the Normans (*Vicinia* and *Gyldonia*), as ſynonimous with *Gilda*. Theſe are well known to mean ſocieties of perſons and families in towns or hamlets, for mutual convenience and protection, who were anſwerable to the king or lord, for the good behaviour of all the individual members. In the 75th chapter of the laws of Henry I. theſe perſons are called *Congildones*. M. *Houard* ſays of them, "Ces Sociétés ne s'établirent d'abord, qu'entre quelques familles de laboureurs; *eorum olla ſimul bulliabant* (Wilkins *Gloſſar.*) enſuite entre des marchands:

* Du Cange Supplement.

Enfin

Enfin tous les habitans de chaque bourg firent en commun leur commerce ; de là leurs habitations voiſines les unes des autres ; les taxes que le Souverain ou les ſeigneurs lui impoſerent, ſous le nom de *gylde* au *gelde*, par compenſation des privilèges qu'ils leurs accorderent ; & dont l'affranchiſſement du vaſſelage ou de l'eſclavage, c'eſt a dire, la *bourgeoiſie* fut le principal *." This obſervation is made by the author, upon the following paſſage in our antient Glanville †: " Si quis *Nativus* quieté per unum annum & unum diem, in aliquâ *villâ privilegiatâ* manſerit, ita quod in, eorum *communem gyldam* tanquam civis receptus fuerit, eo ipſo a villenagio liberabitur." It will hardly be imagined, that Glanville, writing this in the reign of Henry II. can be ſuppoſed to deſcribe every infranchiſed town or vill, as a body corporate, as we now underſtand the term.

In the ſtatute 32 Henry VIII. c. 42, for uniting the companies of Barbers and Surgeons, one of theſe bodies is deſcribed as a *company* having *freemen*, but not to be incorporate. The words are, " For as much as within the ſaid city, there be now two ſeveral and diſtinct companies of Surgeons, the one company being called the Barbers of London, and the other company called the Surgeons of London, which company of Barbers be incorporated to ſue and to be ſued, &c. by letters patent; *and the other company called the Surgeons be not incorporate, nor have any manner of incorporation.*" The act proceeds to unite the *freemen* of both companies into one body.

* Houard, Traités ſur les Cout. Anglo-Norm. vol. I. p. 444.
† Tract. de Legibus, lib. 5. c. 5.

In a caſe in the year book, 49 Edw. III. fol. 3, an *eſtabliſhed* guild or fraternity of tradeſmen in London, is ſpoken of as having commenced by voluntary aſſociation; and it was not pretended by their counſel, that they derived the privilege from charter or preſcriptive right: But the latter endeavoured to maintain their right as a body corporate, by the cuſtom of London, which, he ſaid, allowed of *voluntary* corporations. The words of the counſel for the crown are, "Ceſt Fraternitie & touts tiels, ne ſont my perpetuels, mes comenſent per l'aſſent de gents d'un art de lour frank volunté; iſſint, meſque un de la fraternity voile relinquere la fraternity, il poet bien quant lui pleaſt. Mes ceſtuy que eſt un de la Comminalty de Londres eſt perpetuelment un de la Commenalty, per ceo que la City eſt perpetuel." One of the judges hereupon obſerved, that *fraternity* was not a term of the law. Unluckily for the guild, in this caſe, they were diſputing with the *Crown*, for an eſtate deviſed to them; and the queſtion was, whether they had capacity to take lands &c; for, as to other purpoſes, the counſel for the crown did not deny the lawfulneſs of their inſtitution. The caſe was decided, as queſtions of forfeiture in former days commonly were.

This is the earlieſt caſe I have met with, eſtabliſhing the maxim, that the king alone can incorporate; and is referred to by Lord Coke, Rolle and Hale, as laying the foundation of that doctrine.

Madox, in a note in p. 24 of his Firma Burgi, recites a charter of Richard II. to a fraternity in Norwich, in theſe words: "Sciatis quod cum, ut acce pimus, quædam *fraternitas* & *gilda* glorioſi Martiris Sancti Georgii in civitate noſtrâ Norwici, per 30 annos elapſos

elapſos & amplius, continuè bene & honeſtè gubernatæ fuerint & ad huc exiſtant—Nos Fraternitatem & Gildam prædictas pro nobis & hæredibus noſtris *acceptamus* ratificamus & confirmamus. Ac conceſſimus quod—ſint perpetuæ & Communitas perpetua, &c."

P. 225. (F.) In the ſpeeches of the counſel, no mention was made on either ſide of the action previouſly brought againſt the mayor, as returning officer, for refuſing the vote of one of the burgage freeholders at the laſt election. The event of it was indifferent to the queſtion before the Committee; but an account of it may be uſeful in the hiſtory of Saltaſh.

The action was brought by a Mr. Drewe, who tendered his vote as a freeholder for Major Lemon. The declaration ſtated the plaintiff's right as a freeholder of a burgage tenement in the borough, and that the defendant knowing, &c. and wrongfully intending to deprive him, &c. refuſed his vote. The defendant pleaded the general iſſue, and the cauſe came on to be tried by a ſpecial jury, before Mr. Juſtice Wilſon, at the laſt Lent aſſizes for Cornwall, held at Launceſton, March 27, 1787. Mr. Serjeant Lawrence, counſel for the plaintiff, ſtated the caſe at length to the jury, to ſhew the hiſtory and conſtitution of the borough, deducing from thence the plaintiff's right to vote; but declared that he did not mean to charge the defendant with any thing *malicious* in his refuſal of the vote, only for the *refuſal*. Hereupon, as ſoon as he ſate down, the counſel for the defendant, in ſtudied arguments, objected to the competency of the plaintiff's proceeding with his evidence, upon the ground of the admiſſion on his part, that

the defendant had done nothing wilfully wrong; alledging, (as the plaintiff's counſel admitted) that he had acted conformably to the uſage of the laſt 30 years, and to three concurring deciſions of the election committees; and contending, that the foundation of this action, and of all others againſt officers of the law in the execution of their duty, was a *wilful* and *malicious* miſfeaſance.

The learned Judge, at firſt, inclined to let the plaintiff proceed with his evidence; ſaying, there were two queſtions for the jury to conſider; firſt, Whether the plaintiff had a right to vote; and, ſecondly, Whether the defendant had acted maliciouſly in refuſing the vote; and that it might be neceſſary to go through the whole caſe, in order to aſcertain theſe points. But after a full hearing of all the counſel on both ſides, his lordſhip was of opinion, that he ought to direct a verdict to be taken for the defendant, or the plaintiff to be non-ſuited, without proceeding further. He ſaid, the ſtat. 7 and 8 Will. III. c. 7, which was made to prevent falſe returns, and gives an action to the party grieved, does not allow it to the candidate himſelf, unleſs the return be *wilfully falſe*; and it would be very inconſiſtent to ſuppoſe, when the party who is the moſt intereſted in the act, and moſt injured by it, cannot recover damages, except it be wilful; that one much leſs aggrieved, and who has leſs intereſt in the ſame tranſaction, ſhould yet be more favoured in the recovery of damages.

His lordſhip mentioned the caſe of General Burgoyne againſt Moſs the mayor of Preſton, which he ſtated thus. Sir Henry Hoghton and General Burgoyne were candidates for Preſton, at the election

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in 1768, upon a right of voting which had not been exerciſed at the late elections within memory; and the mayor returned the members choſen in oppoſition to them, according to that conſtitution which had prevailed in modern times. Upon a petition to the houſe, Sir Henry Hoghton and General Burgoyne were determined to be duly elected, and the right of voting, which they contended for, was eſtabliſhed by the ſame deciſion. Afterwards, General Burgoyne brought an action againſt the mayor for this falſe return: Upon the trial of which, it appeared that the mayor (who had acted by Mr. Dunning's advice upon that election) had conducted himſelf in the ſame manner as his predeceſſors had done; and that the claſs of voters, then ſupported by the reſolution of the Houſe, had never been received at any former election. Lord Bathurſt, who tried the cauſe, upon this evidence directed the jury to find for the defendant, if they ſhould think, that in the execution of his duty, he had acted according to the beſt of his judgment, and not maliciouſly: And they gave a verdict for the defendant, to the ſatisfaction of the court.

Mr. Juſtice Wilſon alſo obſerved, that Lord Chief Juſtice Holt, in the report of the caſe of Aſhby and White, in the King's Bench, endeavours to eſtabliſh a different opinion, viz. That an action lies, *generally*, for the mere obſtruction of the right; but that the deciſion of the Houſe of Lords upon that caſe, was founded on a different principle, viz. the wilfulneſs of the act; and that the ſame principle was inforced in the juſtification which the Houſe of Lords publiſhed of their conduct; which, it was ſuppoſed, was drawn up by the Chief Juſtice himſelf. He ſaid,

that Holt ſtood ſingle in this particular opinion; but, however, as the plaintiff was earneſt in deſiring a ſpecial verdict, he would, in compliance to the authority of ſo great a name, direct the queſtion to be put upon the record in that form, in order to have it ſolemnly argued and determined, if the leading counſel for the plaintiff would declare his own aſſent to this opinion of Lord Holt.

This mode of ſettling the cauſe was declined, and hereupon the plaintiff was non-ſuited. No ſtep was afterwards taken, in the courſe of the following term, to renew the queſtion, by moving to ſet aſide the non-ſuit. In the mean time, the Committee met for the trial of the preſent petition, and ſate upon it during the firſt part of Eaſter term, 1787.

An action of the ſame ſort, in which the declaration was the ſame, was brought againſt the mayor of Haſtings, after the laſt general election, and the plaintiff had a verdict for 200l. damages. There the defendant's malice made part of the plaintiff's caſe. The action being brought in the court of Common-Pleas, and judgment ſigned there for the plaintiff, a writ of error was brought into the court of King's Bench; which was appointed for argument there in Eaſter term, 1786. But, upon its coming on, the court prevented the counſel for the plaintiff in error from diſcuſſing their objections to the action, by telling them, that the caſe of Aſhby and White, in the Houſe of Lords, was in point, and ſo concluſive upon the ſubject, that it would be in vain to agitate the queſtion. The name of this cauſe was *Sargent* and *Millward*.

P. 225.

P. 225 and 160. (G.) There was a doubt intimated at the bar, whether the charter of his preſent majeſty, contained the ſame clauſe as that of Charles the Second, impowering the king *at pleaſure*, to remove the mayor or any of the aldermen, from their offices; it being aſſerted on one ſide, that this clauſe was in the charter, and on the other, that it was not. I was not willing to believe, that a power, originating in the wicked deſigns of a Stuart prince, againſt the liberties of this nation, when the garbling of corporations began, would have been ſuffered to continue under a prince of the Houſe of Hanover. To ſatisfy my curioſity on this point, I read the original charter through, and had the ſatisfaction to find the garbling clauſe of Chas. IId's charter, omitted in that of his preſent majeſty.

It is as follows in the charter of Chas. II. as I tranſlate it.

" Provided always & we do hereby reſerve to us our heirs and ſucceſſors full power & authority to amove reſpectively from their ſevral offices, by letters under the ſign manual and ſignet of us our heirs and ſucceſſors, any Mayor Recorder Alderman & Town Clerk of the ſaid Boro' for the time being, or any of them, at the will & pleaſure of us our heirs & ſucceſſors, & to declare him or them amoved from his or their ſaid offices. And as often as we our heirs & ſucceſſors by any ſuch Letters under the ſign manual & ſignet of us our heirs & ſucceſſors, ſhall declare ſuch Mayor Recorder Alderman & Town Clerk of the ſaid Boro' for the time being, or any of them, to be amoved from his or their ſaid reſpective offices, that then & from that time ſuch Mayor Recorder Alderman

man & Town Clerk ſo amoved or declared to be amoved from his or their reſpective offices ſhall *ipſo facto* without any further proceeding be really & to all intents & purpoſes amoved; & this as often as it ſhall ſo happen; any thing in theſe preſents contained to the contrary notwithſtanding. And then in ſuch caſe from time to time, as often as the caſe ſhall ſo happen, within a convenient time after ſuch amovement or amovements, ſome other perſon or perſons may & ſhall be elected appointed & ſworn into the place or places, office or offices, of him or them ſo amoved, by the Mayor Aldermen and freeburgeſſes of the ſaid Borough for the time being, or the major part of them who ſhall remain within the ſaid Borough, in the form before in theſe preſents mentioned."

There is, however, in the charter of his preſent majeſty, a clauſe reſpecting the mayor, in theſe words: "Which ſaid Mayor, as well preſent as future, for any neglect or default, or any other reaſonable cauſe, we will ſhall be amoveable by us our heirs or ſucceſſors.". This clauſe is tranſcribed from a ſimilar one in the charter of Chas. II. but ſoftened by the omiſſion of the *ad bene-placitum*, which the former charter bears.

The above clauſe became the ſubject of debate in the Houſe of Commons, in the ſeſſion next after the grant of the charter. On the 3d of April 1775, the preſent Earl of Radnor (then Lord Folkſtone) moved, "That the reſervation contained in the ſaid charter, and expreſſed in theſe words, (*ſtating them*) is unconſtitutional, as it tends to reſtrain the freedom of elections, and of returns of members to ſerve in parliament for the ſaid borough; and eſtabliſhes a prece-

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dent dangerous to the commons of Great Britain, and to the public liberty of the realm." This motion was negatived. In the debate upon it (as related in the printed debates) the then attorney and ſolicitor general appear to have argued, That the clauſe in queſtion gave no *new* power to the crown, and that it expreſſed no more than the law implies, namely, the power of the king legally exerciſed in his court of King's Bench, i. e. the king, as the law and conſtitution behold him *In Curiâ*. On the other hand, the mover of the queſtion was ſupported by Mr. Dunning, in contending, That, whether ſuch might be the legal effect and conſtruction of this clauſe or not, ſtill it *tended*, as far as it could, to give the king an unconſtitutional and dangerous power; and that the crown lawyers of Charles II. who firſt adviſed it, would not have inſerted it, if they had thought it nugatory: And as a confirmation of this, they ſaid, that the reſervation of this power to the crown in charters, *originated* in the reign of Charles II.

In conſequence of the above declaration, in the ſpeeches of the attorney and ſolicitor general, Lord Folkſtone, after the concluſion of the firſt debate, moved, "That the ſaid words contained in the ſaid charter, do not reſerve to the crown any power of amotion, except by the method of a judicial proceeding, in the due courſe of law." Thoſe who oppoſed the former motion, wiſhed to prevent the houſe from declaring any opinion upon this ſubject; and therefore when the latter was propoſed, a motion was made on their part to adjourn. Upon this there was a diviſion, and it was carried for the adjournment, by 127 to 46 *.

* 35 Journ. 254, 255.

On the next day the ſubject was reſumed, by Lord Folkſtone's repeating his laſt motion; and then the others moved the previous queſtion, which paſſed in the negative, by 118 to 46 *; and there the matter ended.

The charter has a clauſe reſpecting the amotion of the aldermen, expreſſed in ſimilar terms to thoſe before recited: The words are thus, "Which aldermen, or any of them, for any neglect or default, or any reaſonable cauſe at the diſcretion of the mayor, juſtice of the peace, and the reſt of the aldermen for the time being, or the major part of them, we will ſhall be amoveable"—This is likewiſe copied from the charter of Charles II, and, I preſume, it could not be contended, that the power thereby given, could be exerciſed in any other manner, than ſuch as could be legally juſtified in the court of King's Bench.

In the caſe of the corporation of Cheſter, lately determined in the court of King's Bench †, the merits of the above garbling clauſe underwent a judicial conſideration. In the Cheſter charter, granted after that of Saltaſh, in the laſt year of Charles the Second's reign, there was a clauſe like that above recited; but directing the amoval of the members to be by order of the king *in council*, and to be ſignified under the ſeal of the council. And, in fact, in the ſucceeding reign, an amoval of *all* the members of this corporation was made by James II. conformably to the power herein reſerved to the crown. One of the points of argument, maintained in the above cauſe was, That this clauſe of the charter was illegal, as tending to give the

* 35 Journ. 256. † In Trinity Term, 1788.

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king an arbitrary and unconſtitutional power; that it ſo vitiated, and was ſo repugnant to the charter, as to render it altogether *void*. The particulars of the argument, and the anſwer it received from the counſel on the other ſide, may be ſeen in the printed report of the cauſe. It was not, however, fully diſcuſſed; as the judges thought it did not *immediately* affect the queſtion then before them; which was, whether the cauſe, as it was then circumſtanced, required a new trial. Upon the opening of this argument, Mr. Juſtice Buller ſaid, "he thought the effect of ſuch a clauſe could relate only to the individual members of the corporation, and not to the body itſelf." And afterwards, when the opinion of the court was formally given upon the caſe, the judges held, "that upon a ſound conſtruction of the whole charter, according to its *general* effect, this clauſe was not repugnant to it: Becauſe, there being a proviſion in it, that upon every amotion, the *remaining members* ſhould elect ſucceſſors to the perſons removed, the power of amotion muſt be underſtood, *ſub modo*, viz. ſo as not enabling the crown to deſtroy the whole body at once, and to make ſuch election impoſſible; but only to remove in ſuch manner, as that the vacancies thereby made, might be from time to time ſupplied by the corporation. And conſequently, that the amotion of *all* the members at once, by James II. was arbitrary, illegal, and void." The judgment paſſed in the King's Bench, in the above cauſe, is not yet to be conſidered as *final*; as a writ of error upon it is now pending, and expected to be determined in the Houſe of Lords, in the courſe of the preſent ſeſſion.

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When the queſtion aroſe in the caſe of Lyme, upon the charter of Charles II. (as mentioned in p. 28.) it was ſaid to have contained this garbling clauſe; and was underſtood to be annulled, conformably to it, by the proclamation of James II. Nothing in that cauſe led to a particular examination of the charter; neither was the odious clauſe, nor any other part of it than that upon which the queſtion of evidence (in p. 28.) was made, read to the Committee. But according to the doctrine in the Cheſter caſe, if the terms of the charter are ſimilar to that, it may be doubtful, whether the corporation of Lyme has not been miſtaken, in ſuppoſing their charter of Charles II. annulled by the proclamation. And there are ſome other boroughs, in which great confuſion might be raiſed upon the ſame account. Note (K.) contains a copy of the proclamation abovementioned.

P. 225. (H.) The words of the order for giving leave of abſence to Mr. Kynaſton are, "That he be *diſcharged* from any further attendance on the ſaid Committee *."

I do not know whether this form has been frequently practiſed on theſe occaſions: I ſhould think not; becauſe the ſtatute 10 Geo. 3. chap. 16. ſ. 21. uſes the words, *leave obtained* by the houſe, and *excuſe allowed*; and (in ſect. 28.) leaves the members ſo excuſed, at full liberty to attend the Committee again: Though they are not intitled to vote, if they have been abſent from one ſitting. Therefore, regularly,

* Votes, May 2, p. 533.

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the houſe cannot *diſcharge* a member from the attendance, when the act impowers him to be preſent.

The above order was made from a precedent in the Bedfordſhire Committee, 14 April 1785, which is in the ſame words. Afterwards, when Mr. Pye's illneſs made it neceſſary to apply again to the houſe, the impropriety of this expreſſion occurred to ſome gentlemen; and the chairman, in order to avoid it,* when he reported his abſence to the houſe, moved for a different order, which is entered on the Journals in theſe words: "That the ſaid Select Committee have leave to proceed to-morrow morning, purſuant to their adjournment, although Mr. Pye ſhould not be able to attend *." In the caſe of Mr. Brand, in the Glouceſterſhire Committee, March 3, 1777, an order of the ſame ſort was made.

If any accident had prevented a third member from attending, on the day following Mr. Pye's illneſs, the proceedings of that Committee muſt have been ſtopped, unleſs one of the two, firſt excuſed, could have attended again. And it might have been doubted, perhaps, whether under the above order, Mr. Kynaſton could have attended again.—Yet under an order of *excuſe* only, he might on the next day, with a capacity of voting; as there would have been no *ſitting* of the Committee intervening. For ſo I ſhould underſtand this word in Sect. 28. of the act, *i. e.* a ſitting *for trial*, and not a meeting merely to adjourn. See alſo Sect. 23 and 24. The act muſt be underſtood, to exclude from voting, only *ſuch* members as have loſt any part of the hearing of the

* Votes, May 3, p. 548.

cauſe

cauſe by their abſence; as being thereby rendered incompetent to decide on the whole merits. Thus in Sect. 21. the act directs, that the Committee *ſhall never ſit*, until all the members not excuſed are met.

The common form of late uſed in the houſe upon theſe occaſions, expreſſes the *leave of the houſe* to the Committee, or a *direction* to them to proceed on their buſineſs, notwithſtanding the member's abſence. This ſeems to imply, that the Committee could not proceed without ſuch leave or direction: But I know of nothing in the ſtatute, that makes ſuch order neceſſary. All that is wanting, is an order of the houſe for *excuſing* the particular member from attending; and if that were not to be had, the members of the Committee muſt, by the direction of the act, in Sect. 21. meet from day to day, without making any progreſs.

A caſe *might* occur, in which the houſe would be unwilling to excuſe a member; as, ſuppoſe one to refuſe attendance, in contempt of the houſe, without any juſt cauſe: And yet there is nothing in the act, even in this caſe, to authoriſe the Committee to meet without him; for the houſe is not impowered ſo to direct their proceedings. Yet the form of the order uſed in ſome caſes of this ſort, would ſuit ſuch a caſe. As in this of Mr. Pye, he is not *excuſed* in expreſs terms; the only order of the houſe being, "that the Committee may proceed without him." So it is in the caſe of Mr. Walter, 35 Journ. 687.

I have ſeen but one precedent of an order made to excuſe the member from attending, without any thing further; but this form is moſt conſiſtent with the proviſion of the law. It is in the Worceſter caſe, 35 Journ. 516. Sir Walden Hanmer, a member of the

Committee, being taken ill, deſires leave of abſence, if his health ſhould require it; upon which the houſe make the following order, "That Sir Walden Hanmer, Bart. have leave to abſent himſelf from any further attendance on the ſaid Committee, if his health ſhall require it." I obſerve in the entry of the application for this leave of abſence, that the cauſe of it was not verified *upon oath*.—But this ought to have been done; for the houſe are impowered, by the act, to grant the leave required, only where *ſpecial cauſe is ſhewn and verified upon oath*. There is the ſame omiſſion in the caſe of Mr. Walter, abovementioned, on the ſame Committee.

The caution with which the ſtatute proceeds, in requiring ſo much formality in this point of excuſing a member's attendance, is the occaſion of much unneceſſary delay and expence to the parties. At the time when this law was propoſed, the minds of men, acting under the experience of much foul play in the management of elections *in the houſe*, were well diſpoſed to every regulation, that ſeemed to put checks or guards upon the future determination of them. Perhaps a ſuſpicion that ſimilar practices might prevail in the propoſed new tribunal, was then entertained by ſome men; and therefore they wiſhed that every thing to be done there, even relating to forms of proceeding, and all ſecondary matters, ſhould be attended with much open formality, for the ſake of being obſerved by the houſe at large. The regulation in queſtion ſeems to have been contrived for ſuch a purpoſe. But after the experience we have had of the ſpirit prevailing in this inſtitution, it would not be amiſs to throw off ſuch reſtraints upon it, as may have been intended for the above purpoſes, and ſerve no other. Why

ſhould not the Committee itſelf, an independent and dignified court of Juſtice, be enabled to judge of a diſability in one of its members to attend his duty there, in the ſame manner as the Houſe of Commons? A whole day is loſt to the members and the parties, by this regulation, even when the houſe is ſitting; to the great inconvenience of both, as well as conſiderable expence to the latter; and if the houſe ſhould have been adjourned to a future day, the whole intervening time is loſt in the ſame manner. Whereas by allowing the ſame power to the Committee, as is given to the houſe, the proceedings might be continued without interruption, upon all occaſions of this ſort.

Perhaps this ſubject and others in which the ſame principle will be found to have operated, in the original ſcheme of the new tribunal, may deſerve conſideration, when an alteration of the Grenville act ſhall come before parliament.

☞ The reader may perceive, that this note was written in the view of being publiſhed before the ſtat. 28 Geo. III. Ch. 52. was propoſed in parliament.

P. 159. * (I.) The following is a copy of the act of ſurrender. "To all to whom theſe preſents ſhall come The Mayor & Freeburgeſſes of the burrough of Saltaſh, which ſaid burrough is ſcituate & being in the county of Cornwall, ſend greating, KNOW yee that the ſaid Mayor & freeburgeſſes upon good conſiderations them hereunto moveing, have granted & by theſe preſents doe grant unto our ſoveraigne lord the king & to his heirs & ſucceſſors ALL and ſingular the mans

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nors meſſuages lands rents tenemts & hereditamts with the appurtences whatſoever, whereof or wherein the ſaid mayor & freeburgeſſes are nowe or att any time heretofore have beene any way ſeized poſſeſſed or intereſted, in right of their corporation or in their corporated capacity by any means howſoever And alſoe ALL and all manner of chattels as well reall as perſonall & all termes of years truſt uſes and confidences of chattels & termes for years whatſoever, whereof or wherein the ſaid mayor & freeburgeſſes are at preſent any way intereſted or poſſeſſed And further the ſaid mayor and freeburgeſſes for the conſideracons aforeſaid doe hereby grant unto our ſaid ſoveraigne Lord the King his heires & ſucceſſors ALL & ſingular debts and dutyes now due or owing to the ſaid mayor & freeburgeſſes by judgment ſpecialty or otherwiſe howſoever. And further for the conſideracons aforeſaid the ſaid mayor & freeburgeſſes have granted ſurrenderd & yielded up and by theſe preſents doe grant ſurrender & yield up unto our ſaid ſoveraigne lord the king's moſt excellent majeſty ALL franchiſes charters letters patent of incorporacon powers privileges libertyes & immunityes whatſoever at any time or times heretofore granted to or held or enjoyd by the ſaid mayor & freeburgeſſes or their or any of their predeceſſors, by any wayes or meanes or by what name or names ſoever, To the intent and purpoſe nevertheleſſe that his majeſty would be graciouſly pleaſed to reincorporate the ſaid burrough & to regrant all and ſingular the premiſes aforeſaid to ſuch new corporation in ſuch manner & form as to his majeſtie ſhall ſeem meet AND laſtly the ſaid mayor & freeburgeſſes do hereby conſtitute & appoint & in their place & ſtead putt the right

honble John Earl of Bathe Anthony Beſt Henry Wyme & James Fuller gent$. their attornies jointly & ſeverally to acknowledge theſe preſents & the ſame to deliver unto the high court of Chancery there to be inrolled of record And further to act and doe whatſoever ſhall be neceſſary for the making of theſe effectual in law according to the true intent & meaning thereof In witneſs whereof the ſaid mayor & freeburgeſſes have hereunto affixed their comon ſeale this 22 Jan^{y}. in the 34th year of the raigne of our moſt gratious ſoveraigne Lord Cha^{s}. the Second by the grace of God King of England Scotland France and Ireland Defender of the Faith and in the year of our Lord God 1682."

This is a true copy from the original record remaining in the chapel of the Rolls, having been examined.

John Kipling,
Clerk of the Rolls.

P. 160. ** (K.) The following is a copy of the proclamation; which being a ſtate paper frequently mentioned in caſes of this nature, may be likewiſe found uſeful for reference upon other occaſions; as I have not ſeen it any where in print.

" Anno Regni Regis JACOBI ſecundi Quarto.

" A Proclamation for reſtoring corporacons to their antient charters libertyes rights and franchiſes.

" WHERRAS WEE are informed that ſeverall deeds of ſurrender which have been lately made by ſeverall corporacons and bodyes corporate of & in our cityes and

and townes within our Kingdome of England and dominion of Wales, of their charters franchizes & privileges, are not recorded or enrolled And that upon the proceedings and rules for judgment which have lately been had upon the *Quo Warrantos* or informations in nature of a *Quo Warranto* judgments are not yett entred upon record: Whereupon notwithſtanding, new charters have been granted in the reigne of our late deare Brother and in our reigne—Which ſaid deeds (being not enrolled or recorded) doe not amount unto, or in lawe make any ſurrender of the charters franchiſes or libertyes therein mencõned. And ſuch of the ſaid corporacõns or bodyes politiq, againſt which rules for judgments have been made in the life time of our late deare Brother, or ſince, in our court of King's Bench (but noe judgments entered upon record) are not diſcorporate or diſſolved: And that itt is in our power to leave ſuch corporacõns in the ſame eſtate and condicõn they were in, and to diſcharge all further proceedings and effects that may be, of ſuch rules for judgments and deeds of ſurrender WEE doe hereby publiſh and declare That upon due ſearch and examinacõn made Wee have ſatiſfaccõn that the deeds of ſurrender made by the corporacõns and bodies politiq. of the ſaid cities and townes, except the corporacõns following (that is to ſay) *Thetford Nottingham Bridgewater Ludlow Bewdley Beverly Tewkeſbury Exeter Doncaſter Colcheſter Wincheſter Launceſton Liſkerd Plumpton Tregoney Plymouth Dunwich St. Ives Fowy Eaſt Looe Camelford Weſt Looe Tintagell Penryn Truro Bod-*

min Hadleigh Leſtwythell and *Saltaſh* are not enrolled or recorded in any of our courts: And that tho rules for judgments have paſſed upon informacons in nature of a *Quo Warranto* againſt the corporacons and bodies politiq. of ſeverall cities and townes in our ſaid kingdome and dominion; yet noe judgments have been or are entered upon record upon any ſuch informacons, except againſt the city of *London Cheſter Calne St. Ives Poole York Thaxted Langhour & Malmeſbury:* AND WEE of our meer grace and favour, being reſolved to reſtore and putt all our cities townes & burroughs in England & Wales & alſoe our town of Barwick upon Tweede into the ſame ſtate and condicon they were & was, in our late deare brother's reigne, before any deed of ſurrender was made of their charters or franchizes, or proceedings againſt them or the corporacons or bodies politiq. in or of the ſaid cities townes or burroughs, upon any *Quo Warranto* or informacons in nature of a *Quo Warranto* had WEE do hereby therefore publiſh declare direct and require, that the ſaid corporacons bodies politiq. and corporate of all the ſaid cities townes and burroughes, whoſe deeds of ſurrender are not inrolled nor judgments entered againſt them, as aforeſaid, And the mayors bayliffs ſheriffs aldermen common-councilmen aſſiſtants recorder town clerkes magiſtrates miniſters officers freemen & all & every others the members of or in every of them, reſpectively, upon the publication of this our proclamation take on them & proceed to act as a corporacon or body politiq. And where places are vacant by death

or

or otherwiſe, to make elecc̄ons, conſtitute & fill up the ſame, notwithſtanding the uſuall dayes & tymes of elecc̄ons by the antient charters and conſtitucōns ſhall happen to be paſt: And to doe execute & performe all & every matter and thing as they lawfully might & ought to have done, if no ſuch deeds of ſurrender, rules for judgment, or other proceedings upon any ſuch *Quo Warranto* or informacōns had been had or made.

And for the better effecting our ſaid intencōn Wee have by order made by us in council & under our ſigne manuall And Wee doe alſoe by this our proclamacōn made with the advice of our ſaid counſil, Diſcharge and remove & diſmiſſe all & every perſon & perſons of & from all offices & places of mayors bayliffs ſheriffs aldermen comōn-councilmen aſſiſtants recorder towne clerke & all & every office & place, which they or any of them have or clayme only by charter patent or grant from our deare brother or from ourſelfe, ſince the dates of the reſpective deeds of ſurrender or rules for judgment EXCEPT ſuch corporaçōns whoſe deeds of ſurrender are inrolled, or againſt whom judgment is entered And that all & every ſuch perſon & perſons, deliver up into the hands & cuſtody of the ſaid perſons hereby appointed & intended to act & execute the ſaid offices & places, all & every y^e charters records books evidences & matters concerning the ſaid reſpective corporacōns

And Wee hereby further publiſh & declare that we have cauſed all & every the ſaid deeds of ſurrender which can be found, to be delivered & put

into the hands of our attorny generall, to be by him cancelled & returned to the corporacons & bodies politiq. of the reſpective cities & townes whom they concerne, And have alſoe given to our ſaid attorney, authority & doe hereby warrant & comand him, not onely not to proceed or enter judgment upon the ſaid *Quo Warrantos* or informacons in nature of a *Quo Warranto* or any of them, but to enter upon the reſpective records *Nolli prosequis* & legall diſcharges thereof.

And Wee doe hereby publiſh & declare our further grace & favour to the ſaid cities corporacons & burroughs, at any time hereafter by any further act, to grant confirme or reſtore unto them all their charters liberties franchizes & privileges that att the reſpective times of ſuch deeds of ſurrender or rules for judgment made or given, they held or enjoy[d] And in order to the perfecting our ſaid gratious intencons, wee doe hereby likewiſe publiſh & declare our royall will & pleaſure as for & concerning the reſtoreing to ſuch of our cities corporacons and burroughs within our ſaid kingdome & dominion, which have made deeds of ſurrender, or have had judgment given againſt them, which ſurrenders & judgments are entered of record, that our chancellor attorney generall & ſolicitor generall without fees to any officer or officers whatſoever upon application to them made, ſhall & they are hereby required to prepare & paſſe charters inſtruments grants & letters patents for the incorporateinge regranting confirmeing & reſtoreing to all & every the ſaid cities corporacons & burroughs their reſpec-

reſpective charters liberties rights franchizes & privileges, and for reſtoreing the reſpective mayors bayliffs recorders ſheriffes towne clerkes aldermen comon-councillmen aſſiſtants officers magiſtrates miniſters & freemen as were of ſuch cities corporacons or burroughs, at the time of ſuch deeds of ſurrender or judgments reſpectively given or had; and for the putting them into the ſame ſtate condicon & plight they were in at y^e time of ſuch deeds of ſurrender or judgments made or given.

And Whereas diverſe burroughs that were not heretofore corporacons, have ſince the yeare 1679 had charters of incorporacon granted & paſſed unto them, Wee hereby further expreſſe & declare our royall pleaſure, to determine & annull the ſaid laſt mencond charters and corporacons, And to that end wee have, in purſueance to the power reſerved in the ſaid charters, by our order in councill & under our ſigne manuall, removed & diſcharged And Wee doe alſoe by this our proclamation made with the advice of our ſaid councill, Remove all & every perſon of or in the ſaid laſt meneond corporacons, of & from all offices & places of mayors bayliffs recorders ſheriffs comon-councilmen aſſiſtants & of & from every other office & place from which wee have power reſerved by the ſaid charters reſpectively to remove or diſcharge them. And Wee doe hereby promiſe & declare, that we will doe and conſent to all ſuch acts matters & things as ſhall be neceſſary to render theſe our gratious intencons & purpoſes effectuall. It being our gracious intencon to call a parliament, as ſoone as the generall diſturbance of

our

our kingdome by the intended invaſion will admit thereof. Given at our court at Whitehall the 17th day of October."

This is a true copy from the original record remaining in the chapel of the Rolls, having been examined.

John Kipling,
Clerk of the Rolls.

THE

X.

THE

CASE

Of the BOROUGH of

NEWPORT,

In the County of SOUTHAMPTON.

The Committee was chosen on Tuesday the 22d of February, 1785, and consisted of the following Members:

Henry Duncombe, Esq; *Chairman.*
Benjamin Bond Hopkins, Esq;
Watkin Williams, Esq;
John Hill, Esq;
George Vansittart, Esq;
David Howell, Esq;
William Morton Pitt, Esq;
Thomas Fitzherbert, Esq;
William Lygon, Esq;
George Jennings, Esq;
Thomas Kempe, Esq;
William M'Cormack, Esq;
William Pearce Ash A'Court, Esq;

NOMINEES.
Lord Arden, *Of the Petitioner.*
Henry James Pye, Esq; *Of the Sitting Member.*

PETITIONER.
John Barrington, Esq;

Sitting Member.
Edward Rushworth, Esq;

COUNSEL.
For the Petitioner,
Mr. Wilson, and Mr. Jekyll.

For the Sitting Member,
Mr. Piggot, and Mr. Chambre.

THE

CASE

Of the BOROUGH of

NEWPORT.

THE petition alledged, that the ſitting member had been admitted into the holy orders of Deacon, in April 1780, and licenſed to ſerve a curacy; that by virtue of this ordination, he had exerciſed the function of a clerk in holy orders, in the pariſh church of *Newport* and other churches; that being, at the time of his election, a clerk in holy orders, he was not capable of being elected to ſerve in parliament; of which incapacity the electors were informed, before the election took place, and alſo that their votes for him would be thereby loſt. That, notwithſtanding, ſeveral did vote for him, and were received by the returning officer, who returned him as duly elected, although the petitioner was duly elected, and ought to have been returned in his ſtead *.

* See 40 Journ. 31.

The

The poll at the election for this borough ſtood thus:

For Edward Ruſhworth, Eſq;	15
Hon. Hugh Seymour Conway	13
John Barrington, Eſq;	3

There was no objection to the election of Mr. Conway.

The allegations of the petition were ſatisfactorily proved. Mr. Ruſhworth had been ordained a deacon by the biſhop of Wincheſter, and had preached in the church of Newport in 1780. When the electors were aſſembled for the laſt election, they were told by the petitioner's counſel, that Mr. Ruſhworth was in deacon's orders, and ineligible; and that any votes for him would be thrown away. Since the year 1780, Mr. Ruſhworth had not been ſeen in the office or habit of a clergyman, but always in a lay habit. In the general election in the ſame year, he was elected member for Yarmouth in the Iſle of Wight, and ſate in parliament upon that election.

In the courſe of the cauſe, the counſel for the petitioner were aſked by one of the Committee, whether it was admitted that Mr. Ruſhworth had, for ſome years, ceaſed his eccleſiaſtical function; to which they anſwered, they were not informed upon the ſubject.

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The petitioner's caſe conſiſted of two points; his counſel contending,

1ſt. That Mr. Ruſhworth, being a clerk in orders, was not capable of being elected a member of parliament.

2d. That the electors, who voted for him, after notice of his incapacity and its conſequences, threw away their votes; and that therefore the petititioner muſt be declared duly elected.

I ſhall confine my account of this caſe to the arguments upon the firſt point; becauſe, the opinion of the Committee having rendered it unneceſſary to conſider the ſecond queſtion, the arguments upon it would ſeem, in this place, an incumbrance to the firſt; although, in their delivery, they were full of uſeful knowledge and ingenious obſervation *.

The counſel for the petitioner argued thus:

According to the conſtitution of parliament, a clerk in orders is incapable to ſit in the Houſe

* As the arguments and authorities upon this queſtion of votes thrown away, have been uſed upon other elections, and may be often recurred to in future, I propoſe to arrange them altogether, and preſent them in a body to the reader by themſelves; to prevent a repetition of them in the ſeveral caſes. If the materials I have in readineſs, ſhould not make this volume too bulky, they will be annexed at the end of it.

of

of Commons. The deſcription of *a clerk in orders* includes the characters both of *prieſt* and *deacon*. This incapacity will appear by a conſideration of the law of parliament, and of the eccleſiaſtical law.

There are but few inſtances in the Journals of the Houſe of Commons, in which this law of parliament is recognized; thoſe few, however, expreſsly ſupport the poſition contended for. The firſt caſe happened in the reign of Queen Mary, 13th of October, 1553. The words of the Journal (Vol. I. p. 26) are as follow: "It is declared by the commiſſioners, that Alexander Newell, being prebendary in Weſtminſter, and thereby having voice in the convocation houſe, cannot be a member of this Houſe; and ſo agreed by the Houſe; and the Queen's writ to be directed for another burgeſs in that place *."

The next caſe was in the reign of James I. 7th of February, 1620-1, 1 Journ. 511. It is in theſe words: "All of opinion againſt .... a *clerk* returned; becauſe—had or might have a voice in the convocation houſe; therefore not fit to be admitted here: And would have fined the

* On the preceding day the Houſe had appointed ſix members to be a committee, (whom the Journal here calls *commiſſioners*) to inquire into the right. The ſecretary of ſtate was one of the ſix.

town

town but for their poverty." This was the unanimous opinion of the Committee of privileges. The conſideration of the point being deferred by the Houſe till the next day, the reſolution of the Committee was, on that day, confirmed by the Houſe, as appears in p. 513 of the Journal *. The return was adjudged to be void, and a new writ ordered. The Journal ſtates Sir Edward Coke to have obſerved, in the debate, " that when he was ſpeaker, one was put out; and that he ſaw † Alexander Nowell put out, (though he had not *curam animarum*) becauſe of the convocation houſe."

The third caſe was in 1661, Jan. 17, 8 Journ. 341, 346. Dr. Cradock being in holy orders, was returned for Richmond, and was petitioned againſt. The Houſe directed the Committee to inquire " whether he was in holy orders, and ſo diſabled to ſit." The chairman reported, " That it appeared to them, that Dr. Cradock was in holy orders; and that Mr. Wandesford (the petitioner) had the majority of voices preſent at the election; and the opinion of the Committee, that Dr. Cradock was uncapable of

* Here he is deſcribed " a miniſter returned for *Morpeth* in Northumberland."

† Mr. Hatſell, in 2 Preced. p. 8, obſerves, that here muſt be ſome miſtake, as Sir Edward Coke was born in 1550, and the caſe happened in 1553.

being elected a burgeſs for the borough, and that Mr. Wandesford was duly elected, and ought to ſit." On which the Houſe reſolved "to agree with the Committee, that Dr. Cradock was a perſon uncapable to be elected, and his election void; and that Mr. Wandesford was duly elected, and ought to ſit in the Houſe."

The true principle that governed theſe caſes was, the being in *holy orders*. The ſame doctrine was mentioned as eſtabliſhed, in the debate upon the attorney general's ſeat in the Houſe, on the 11th of April, 1614 *. Mr. Finch, in that debate, names "ſheriffs, *in orders*, and judges" (A) as perſons lying under known diſqualifications for a ſeat in the Houſe of Commons. Mr. Hackwill, ſpeaking in the ſame debate, gave the example of the Maſter of the rolls, in former times, as another exception, "becauſe then all maſters of the rolls were in *holy orders*, and ſo could not be of this Houſe."

Thus, as far as examples go, they appear to have been uniform in the excluſion of clerks in orders. They have been confirmed by a long experience in modern times. The road of preferment offered to ambitious men, through the Houſe of Commons, is ſo ſure, that it is not to be queſtioned but the clergy would have taken

* 1 Journ. 460.

it,

it, if it had been open to them. Yet no inſtance occurs of any clergyman, known to bear that character, who has ever attempted to become a member, ſince the times from whence the above examples are taken.

The reaſon of the doctrine is founded, not only in the conſtitutional ſeparation of the two orders of the laity and clergy, but alſo in the legiſlative conſtitution of this kingdom.

Originally the clergy had ſeparate rights of ſociety, and a ſeparate legiſlation from the laity. They were repreſented in convocation; and by the authority of that aſſembly, all laws affecting them, either in perſon or eſtate, were paſſed. Taxes were levied upon them by acts of convocation, and not by acts of parliament.

Blackſtone, in enumerating the claſſes of perſons who cannot ſit in the Houſe of Commons, mentions *the clergy*, "becauſe they ſit in convocation *."

In 4 inſt. 47, Coke eſtabliſhes the ſame doctrine: He ſays, "None of the clergy, though they be of the loweſt order, are eligible, becauſe they are of another body, viz. the convocation †."

This

* 1 Blackſt. Com. 175.

† On the ſame day in which this queſtion was conſidered, the Committee reported the caſe of a Scotch peer, (Lord Falkland) returned for Hertfordſhire, as a caſe of difficulty

This argument is open to two obſervations, which it is neceſſary to anticipate. It may be ſaid, that deacons are not members of the convocation, or not repreſented there: And likewiſe, that the convocation has not, in modern times, exerciſed the right of taxation or legiſlation.

As to the firſt, the convocation is the repreſentation of the whole body * of the clergy. It is aſſembled by the authority of the king's writ to each of the archbiſhops, to call together "univerſos & ſingulos epiſcopos, nec non archidiaconos decanos & omnes alias perſonas eccleſiaſticas cujuslibet dioceſeos, &c." †

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for the Houſe to determine. In the debate upon the queſtion, whether Lord Falkland might ſit or not, Mr. Hackwill and Sir Edward Coke ſpeak for receiving him; and diſtinguiſh his caſe from that of peers of England, who are rejected "becauſe they ſerve in another houſe of parliament; as clerks in the ſame manner, *becauſe of the convocation.*" See 1 Journ. 512.

* See 12 Co. 73.

† In a copy of the writ for proroguing the convocation, which Gibſon has publiſhed, (2 Cod. Append. 65.) together with the writ of ſummons, both from precedents in the reign of Henry VIII. the words are, "Epiſcopos, &c. ac Decanos eccleſiarum cathedralium, nec non Archidiaconos, Capitula, & Collegia totumque clerum cujuslibet dioceſeos, &c." The king's writ is general; but the archbiſhop, in his ſummons, preſcribes the *manner* of aſſembling, viz. biſhops, deans, and archdeacons, (and abbots and priors formerly) in their proper perſons; and the chapters of the ſeveral

The acts of the convocation bind the clergy in *re eccleſiaſticâ*, as much as an act of parliament. This has always been the language of our judges, as may be ſeen in Salk. 412. Carth. 485. 1 Atkins, 665. Even thoſe canons which do not *proprio vigore* bind the laity, are yet binding on the clergy.

There are many caſes in which perſons are conſidered by our conſtitution, as parties to the making of laws, though they have no votes in electing members of parliament; as minors, women, tenants in antient demeſne, and thoſe who have no freeholds. In the ſame manner as theſe are a part of the commonalty of the realm, ſo are deacons a part of that body repreſented in convocation.

Secondly, although ſince the year 1664, there has been a change, *in fact*, in this part of our conſtitution, the principle continues the ſame; and the convocation poſſeſſes ſtill, whenever it may chooſe to exert it, the full and ſole authority to impoſe taxes upon the clergy. This appears from the manner in which this change was brought about; an account of which is related in the ſecond volume of Mr. Hatſell's Prece-

ſeveral dioceſes by one, and the clergy by two proctors, with full powers; as is directed by the *Præmunientes* clauſe. See the manner of aſſembling the convocation, deſcribed at length in Cowell's Interpreter, tit. *Proctors*.

dents, p. 10, in a note of the ſpeaker Onſlow's, in the following words:

" This was firſt ſettled by a verbal agreement between Archbiſhop Sheldon and the Lord Chancellor Clarendon, and tacitly given into by the clergy in general, as a great eaſe to them in taxations. The firſt public act of any kind relating to it, was an act of parliament paſſed in 1664-5 *, by which the clergy, in common with the laity, were charged with a tax given in that act, and were diſcharged from the payment of the ſubſidies, which they had granted before in convocation. But in this act of parliament there is an expreſs ſaving of the right of the clergy to tax themſelves in convocation, if they think fit †. Gibſon, biſhop of London, uſed to ſay that this was the greateſt alteration in the conſtitution ever made, without an expreſs law." (B.)

* 16 and 17 Charles II. ch. 1.

† It is in the following words, as I find them in 2 Gib. Cod. 984; for theſe ſubſidy acts are not printed among the Statutes at large. " Provided always, That nothing herein contained, ſhall be drawn into example, to the prejudice of the antient rights belonging unto the lords ſpiritual and temporal, or clergy of this realm, or unto either of the univerſities, or unto any colleges, ſchools, alms-houſes, hoſpitals, or cinque ports."

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The ſaving clauſe, inſerted in the ſtat. 16 and 17 Charles II. ch. 1. left them at full liberty to exerciſe their own powers of legiſlation, if they ſhould prefer them to thoſe of the parliament.

Thus the caſe ſtands, upon the footing of the general law and uſage of parliament. By tracing the principles of the eccleſiaſtical law, it will be ſeen, that there is a fundamental ſeparation eſtabliſhed by that law, between the lay and clerical functions; which effectually prohibits any clergyman from exerciſing ſuch an office as the ſitting member is called to.

Stillingfleet* ſays, the church as well as the nation at large, has its *lex non ſcripta*, which is founded in immemorial uſage alone, and therefore may be diſtinguiſhed by the name of the common law *eccleſiaſtical*; becauſe the common law extends to all thoſe cuſtoms which have obtained the force of laws. This is alſo the opinion of Lord Chief Juſtice Hale, in one of his manuſcripts on the eccleſiaſtical power, not printed †; and of Judge Whitlocke, in the caſe of

* Eccl. Caſes, Part 2. p. 10, 11.

† I have been favoured with a copy of the paſſage here alluded to: It is extracted from an original MS. intitled, *Preparatory Notes, touching the Rights of the Crown*, in which there is a chapter on the eccleſiaſtical power; which work was communicated to Mr. Hargrave, by one of the Chief Juſtice's deſcendants. The extract is in theſe words: "When

of Evers and Owen, Godb. 432. Upon this authority depend the inſtitutions of pariſhes, and of the clerical orders of biſhops, prieſts, and deacons: The canon law has not founded, but only regulated theſe inſtitutions. Thoſe canons which prohibit the interference of the clergy in ſecular concerns, are only declaratory of the original eſtabliſhments of the church: Which herein had two objects; firſt, to preſerve the purity and ſacredneſs of their character; ſecondly, to confine the prieſthood to their religious duty. The 76th canon of 1603, was made with this view: "No man being admitted a deacon or miniſter, ſhall from thenceforth voluntarily relinquiſh the ſame, nor afterwards uſe himſelf in the courſe of his life as a layman, upon pain of

chriſtianity was firſt introduced into this iſland, I conceive it came not in without ſome form of external eccleſiaſtical diſcipline, or coertion; though, at the firſt, it entered into the world without it. But that external diſcipline could not bind any man to the ſubmiſſion to it, but either by the immediate power regal, where the king received it, or by the ſubmiſſion of thoſe that did receive it. If the former, then it was the civil power of this kingdom which gave that form of eccleſiaſtical diſcipline its life: If the latter, it was but a voluntary pact or ſubmiſſion; which could not give it power longer than the party ſubmitting pleaſed, and than the king allowed, connived at, and not prohibited it. And this, by degrees, introduced a cuſtom, whereby it came equal to other cuſtoms or civil uſages."

excom-

excommunication*;" and the churchwardens are required to preſent the names of thoſe who ſo forſake their calling, to the ordinary. This canon is taken from one of the provincial conſtitutions in 1571, almoſt in the ſame words: "Semel autem receptus *in ſacrum miniſterium* ab eo impoſterum non recedet; nec ſe aut veſtitu aut habitu aut in ullâ vitæ parte geret pro laico†." Here is a poſitive and general law. Upon the authority of it, the four law ſocieties, a few years ago, all agreed that they ought not to call a gentleman in prieſt's orders to the bar; and accordingly Mr. Horne, upon whoſe caſe the conſultation was had among them, was refuſed to be called‡. Yet there is a much greater

* 1 Gibſ. Cod. 184. The words in the original, in 4 Wilk. Conc. 393, are, "Nullus in diaconi aut preſbyteri ordinem ſemel admiſſus, quovis deinceps tempore ab eodem volens recedet; nec in vitæ ſuæ inſtituto pro laico ſe geret ſub pœnâ excommunicationis."

† 1 Gibſ. Cod. 184.

‡ This queſtion aroſe in the ſociety of the Inner Temple, of which Mr. Horne was a member, and in which he had been permitted to go through the ordinary previous forms of preparation for the bar. When the time for receiving his call to the bar came, the benchers conceived his caſe to be difficult, and wiſhed to take the opinion of the three other ſocieties upon it. Accordingly they ſtated it in the following words, and communicated it to each of them, viz.

"A gentleman in prieſt's orders, having applied to the benchers of the Inner Temple, deſiring to be called to the bar,

greater analogy between the two functions of prieſt and barriſter, than between the former and that of repreſentative: For, antiently, the clergy pleaded commonly at the bar of the ſecular courts, and were regular advocates; which occaſioned the proverbial ſaying, *Nullus clericus niſi cauſidicus.*

A more antient conſtitution in the reign of Henry III. in 1222, enacts, "Ne clerici beneficiati, aut in ſacris ordinibus conſtituti, villarum procuratores admittantur, viz ut ſint Seneſchalli aut Ballivi talium adminiſtrationum, occaſione quarum Laicis in reddendis ratiociniis obligentur; nec juriſdictiones exerceant ſeculares, præſertim illas quibus judicium ſanguinis eſt annexum *." The Apoſtolic canons ſtill more antient, forbid ſecular purſuits in theſe words: "ἢ Πρεσβύτερος ἢ Διάκονος ϛρατείαν σχολάζων καθαιρείσθω."

bar, they are deſirous to know the opinion of the benchers of the other law ſocieties, whether it is proper to call ſuch perſon to the bar. By the 76th canon of 1603, (&c. *ſtating it as in p.* 280") The benchers of Lincoln's Inn returned the following anſwer to the application.

"Lincoln's Inn, 16th of June, 1779.

"The benchers now preſent (being eleven in number) are unanimouſly of opinion, that it is not proper to call a perſon in prieſt's orders to the bar."

And a verbal anſwer, to the ſame effect, was ſent from the benchers of the Middle Temple and Gray's Inn.

* 1 Gibſ. Cod. 180.

There

There are but two ways of evading the operation of theſe laws; either by contending that a clerk in orders, or particularly in the orders of *deacon*, may abſolve himſelf from his ſpiritual office, and renounce it; or, that a deacon is not ſo far admitted into it, as to be included in the word *miniſtry*. As to the firſt, the 76th canon forbids any ſuch renunciation, either by *prieſt* or *deacon*, under the pain of excommunication. If, therefore, the putting off this character be unlawful, and a deacon cannot become a member of parliament, without putting it off, he muſt become ſuch by an unlawful act. That by ſuch act, he can acquire a right, is a propoſition too monſtrous to be maintained. As to the ſecond, the common expreſſion of the canons and eccleſiaſtical writers is, the *miniſter* and the *miniſtry*; which is meant of that perſon whom the common law calls a clerk in orders. *Sacrum miniſterium*, is the phraſe of the conſtitution of 1571; *in ſacris ordinibus* that of 1222; deacon *or* miniſter in the 76th canon. There was, formerly, another degree of perſons in holy orders, acknowledged by our law, as appears by the ſtatute 23 Henry VIII. ch. 1. ſ. 1. which deſcribes them in theſe words: " of the orders of *ſubdeacon* or above." Therefore a deacon, being of a ſuperior order, is certainly in holy orders.

The

The forms of ordination ſhew that a deacon is completely inveſted with the miniſtry. The biſhop therein gives him "authority to execute the office of a deacon in the church of God, committed unto him;" and (delivering him the bible) "to read the goſpel in the church of God, and to preach the ſame." The impoſition of hands, prayer, and ſolemn vow, are equally eſſential to both ordinations, of deacon and prieſt. In the caſe of the former, the biſhop propoſes this queſtion to the candidate: "Do you truſt that you are inwardly moved by the Holy Ghoſt to take upon you this office and miniſtration, to ſerve God for the promoting of his glory, and the edifying of his people?" The anſwer is, "I truſt ſo." Then comes the following queſtion: "Do you think that you are truly called, according to the will of our Lord Jeſus Chriſt, and the due order of the realm, to the *miniſtry* of the church?" The anſwer is, "I think ſo." In the ordination of prieſts, the queſtion is ſubſtantially the ſame; only, inſtead of the words *miniſtry of the church* in the above queſtion, the words propoſed to the prieſt are, *order and miniſtry of prieſthood* *. The words of ordination, pronounced by the biſhop, do not convey to the

* See the title *Ordination* in Gibſ. Cod. and Burn Eccl. Law, containing the whole of theſe forms.

latter

latter any higher ſpiritual authority than the other; except in the article of miniſtering the holy ſacraments, and that of abſolution*; which duties are particularly appointed to prieſts alone. Yet baptiſm, which is one of the church ſacraments, is performed by deacons. The ſolemn vow which deacons make, is more important than that made by the prieſt; and ſhews clearly, that the *miniſtry* to be executed by both, is undertaken upon the firſt ordination; and that the ſecond only raiſes the perſon to a higher rank in the *ſame* miniſtry †. Ayliffe's Parergon, p. 399.

* The biſhop ſays to the candidate, "Receive the Holy Ghoſt, for the office and work of a prieſt in the church of God, now committed unto thee by the impoſition of our hands. Whoſe ſins thou doſt forgive, they are forgiven; and whoſe ſins thou doſt retain, they are retained. And be thou a faithful diſpenſer of the word of God, and of his holy ſacraments, in the name of the Father, and of the Son, and of the Holy Ghoſt." And (delivering the bible) the biſhop ſays, "Take thou authority to preach the word of God, and to miniſter the holy ſacraments, in the congregation where thou ſhalt be lawfully appointed thereunto." 1 Gibſ. Cod. 175,—6.

† The following words of the Preface to the forms of conſecration and ordination, confirm this poſition: "It is evident unto all men, diligently reading holy ſcripture and antient authors, that from the apoſtles' time there have been theſe orders of *miniſters* in Chriſt's church; biſhops, prieſts, and deacons. Which offices were evermore had in ſuch reverend eſtimation, that no man might preſume to execute any

399, confirms this obſervation. His words are, " I ſhall take a view of holy orders as a ſacred ſign or ſeal, as it were, of ſome grant, whereby a ſpiritual power is given to the perſon ordained, to exerciſe ſome ſacred office or miniſtry in the church: And this, I think, is almoſt uncon-

any of them, except he were firſt called, tried, examined, and known to have ſuch qualities as are requiſite for the ſame; and alſo by public prayer, with impoſition of hands, were approved and admitted thereunto by lawful authority." 1 Gibſ. Cod. 115. Burnet, in the Addenda to the firſt volume of his Hiſtory of the Reformation, (Appendix, N° V.) has printed a paper under the title of " A Declaration made of the Functions and divine Inſtitution, of Biſhops and Prieſts," in the time of Lord Cromwell's eccleſiaſtical power, (about the year 1537) and ſigned by him, the archbiſhops, 11 biſhops, and 20 other divines, beginning with theſe words: " As touching the *ſacrament* of holy orders, we will that all biſhops and preachers ſhall inſtruct and teach our people, committed by us unto their ſpiritual charge—Firſt, &c."—Then follow, among other things, inſtructions relating to the divine inſtitution of orders in the church: And, after ſetting aſide the inferior degrees of orders in the foreign churches, the paper concludes in theſe words, " In the New Teſtament there is no mention made of any degrees or diſtinctions in orders, but only of *deacons* or *miniſters*, and of prieſts or biſhops."

The canons 31, 32, 33, 34, 35, 36, (4 Wilk. Conc. 385-6) throughout, apply the phraſe of *holy orders*, or the *miniſtry*, to both deacons and prieſts; and ſo the ſtatutes 13 Eliz. ch. 12, and 13 and 14 Charles II. ch. 4. It might be contended, that a *deacon* is *ex vi termini* peculiarly the *miniſter*: For Διάκονος is tranſlated *miniſter*, *famulus*; from whence the verb Διακονέω (*famulor*, *miniſtro*) is derived; and the comparative Διακονίστερος *expeditior in miniſtrando*.

teſtably

teſtably acknowledged to belong both to prieſts and deacons, from the very beginning of chriſtianity itſelf. Though ſome perſons have denied biſhops to be a diſtinct order, from preſbyters and elders in the church." In the ſame page, afterwards, he ſpeaks of "the apoſtles' eſtabliſhing the three orders of *miniſters*, under the names of biſhops, prieſts, and deacons."

Though, at this day, deacons cannot hold livings with cure of ſouls, that is not according to antient inſtitution, but an innovation by the ſtat. 13 & 14 Charles II. ch. 4. ſ. 14. In other reſpects, the clerical function differs very little from that of prieſts.

It is in conſideration of the ſacredneſs of their character, that the law indulges the clergy with many privileges and exemptions from the common civil duties, to which the laity are ſubject. There is a writ in the regiſter to exonerate them from ſecular employments, if they ſhould be appointed to them againſt their will *. In 1 Lev. 303 and 1 Vent. 105, in 22 Charles II. is a caſe of a clergyman, elected to an office in the management of Romney marſh; who, upon his application to the court of King's Bench, was diſcharged by the judges, upon the authority of theſe words in the regiſter: "*Vir militans Deo non implicetur ſecularibus negotiis*," and "*non*

* 2 Inſt. 3, 4. See 3 Burn, Eccl. Law, 180—191.

ponantur

ponantur clerici in officia." It is not only their privilege, but they have been compelled by penalties to uphold it. Nelſon, in p. 187 of his Rights of the Clergy, cites caſes in which the high commiſſion court had fined clergymen for intermeddling in ſecular concerns *. The ſame principle guided the legiſlature in the ſtat. 21 Henry VIII. ch. 13, which forbids all ſpiritual perſons to carry on farming. The preamble ſhews, that it had in view the purity of the ſacerdotal office.

Thus, whether the diſtinction is conſidered as a privilege, or as a burthen, it is alike preſerved and inforced, both by the law of the land and of the church.

* No clerk within holy orders, though he held a knight's fee, could be compelled, in the times of knighthood, to be made a knight; according to the ſtat. *de Militibus*, 1 Edw. II. Lord Coke, in his comment on it, 2 Inſt. 598, cites Matt. Paris, 29 Henry III. p. 882, in theſe words: "Rex, die natali, Johannem de Gateſden clericum, & multis ditatum beneficiis, ſed omnibus ante expectatum reſignatis, quia ſic oportuit' baltheo cinxit militari." So that, in this reſpect, the exemption was conſidered, at that time, to be a *privilege* to the order, which might be waved. Matt. Paris goes on to relate of this new knight, that he being very rich, and deſirous of gaining further honours in the ſtate, *curam exuens animarum periculoſam*, relaxed ſtill further, by *marrying* a lady of rank. Edit. 1684, p. 574. This happened in the year 1245.

The

The counſel for the ſitting member argued to the following effect.

The point in diſpute is a matter of merely temporal right, and the queſtion muſt be determined by the law of the land; not by the canon or eccleſiaſtical law, upon which the petitioner founds his objection. It is not neceſſary to contend now, that a *prieſt* may ſit in parliament; though, if it were, the ſubject furniſhes materials for ſupporting that poſition likewiſe. It is enough for the ſitting member's purpoſe, that *deacons* may. The counſel for the petitioner, by involving together theſe two diſtinct characters, have given ſome appearance of ſtrength to their argument.

On the part of the ſitting member, it is contended, that deacons are not excluded from the Houſe of Commons, either by the law of parliament, as it is explained in the caſes cited, or by the common law, or by the canons: That the ſuppoſed diſqualification never extended to deacons; and that even if it did, the reaſon of it has long ceaſed.

All the three caſes of excluſion, taken from the Journals, appear to have been founded in a reaſon drawn from the rights of the convocation; which, indeed, ſeems to be admitted in one part of the argument on the other ſide. Before this argument is anſwered, it will be worth while to

examine theſe caſes. The moſt modern, and therefore the moſt pertinent, is clearly founded on an extrajudicial opinion of the election committee; for Cradock, the clergyman, ſaid to be incapable, had not the majority of votes. It was, therefore, only a ſpeculative opinion, not warranted by the caſe, perhaps not argued by the counſel; and ought not to have made part of the report. The clerk is there called a *doctor*; from whence it is to be preſumed, that he was a doctor of divinity, and in *prieſt's* orders; which furniſhes another argument againſt this caſe. Nowell is deſcribed as a *prebendary:* It is to be preſumed that he too was a *prieſt*. This explanation being applicable to two of the three caſes, it may well be inferred, that the third is alſo open to it; particularly after obſerving, that Sir Edward Coke, in alluding to the caſe, (in 1 Journ. 512) ſeems to underſtand it ſo; and he ſays, in 4 Inſt. 47, that he was a prebendary.

But the caſe of Nowell is alſo open to another anſwer. The proceedings of the Houſe of Commons, in the reign of Queen Mary, had not attained to ſufficient regularity to intitle them to the authority of precedents: And it appears, by the account which Dr. Hody, in the Appendix to his Hiſtory of Convocations, gives of the ſame caſe, that Nowell was turned out by the influence of the court, for being a zealous proteſtant;

teſtant; and, conſequently, a determined oppoſer of their meaſures *. The citation from Carte's Hiſtory, by Mr. Hatſell, in his note in 2 Prec. 7. leads to the ſame inference; for Dr. Tregonwell, a prebendary of the ſame church with Nowell, was permitted to ſit in that Houſe as Sir Thomas Haxey †, in the reign of Richard II. and other clergymen had formerly done.

The authority of Mr. Finch's ſpeech, in one of the above debates, which has been relied upon on

* See his book, p. 429. The note in his Appendix, is in theſe words: "Our hiſtorians obſerve of that Houſe of Commons, that they were chiefly ſuch as the government had pickt out for the ſubverſion of the proteſtant religion. No wonder, therefore, if Alexander Nowell, a zealous proteſtant clergyman, was ejected upon *that new pretence*, that the clergy were uncapable of ſitting there. There ſeems to have been ſome other clergymen returned at the ſame time as burgeſſes; for our hiſtorians tell us, that together with Nowell, there were two others turned out of the Houſe. J. Hales, a layman, in his oration to Queen Elizabeth, preſented to her by a nobleman, in the entrance of her reign, ſpeaking of the tyrannicalneſs of that parliament, has theſe words: Alexander Nowell, with two other, all three being burgeſſes for divers ſhires, and chriſtian men, and all true Engliſhmen, and lawfully choſen, returned and admitted, were of force put out of the Houſe of Commons; for the which cauſe, the ſaid parliament is alſo void, as by a precedent of the parliament, holden at Coventry the 38 Hen. VI. moſt manifeſtly it appeareth."

† In 1 Parl. Hiſt. 457,8, he is called Thomas Haxey, *clerk*. In 2 Parl. Hiſt. 53, *Sir* Thomas Haxey.

the other ſide, is much weakened by the reaſoning of the ſpeaker. He conſiders clerks and *ſheriffs* as alike excluded. Now ſheriffs have been determined, in modern times, to be capable of ſitting in parliament, except for places within their juriſdiction*. Yet much greater authority, and better reaſons, can be urged againſt their becoming members of parliament, than againſt clergymen; for the writ of election particularly excludes them by name, and their office requires their attendance in their bailiwick. The law favours eligibility; and, therefore, when the authority of theſe old rules came to be fully weighed and examined, they were held not ſufficient to oppoſe this favouring principle. The Journals contain a reſolution of the Houſe of Commons as pointed as any of the forementioned, againſt the attorney general's ſeat in the Houſe; and it was for a long time inforced, and is, at this day, unreſcinded. Notwithſtanding which, the attorney general is regularly a member of the Houſe; and no man ever thought of ejecting him upon the ſtrength of the old reſolution.

As to the argument alledged from the ſtate of the convocation, it never was applicable to the caſe of deacons; and ſince the change in

* See the caſes of Abingdon and Southampton, in 1 and 4 Doug. Elect.

this

this part of our conſtitution is not applicable to any of the clergy. Before the time of Edward I. taxes were impoſed on the clergy by the authority of the pope. This king, in the 23d year of his reign, ſummoned them to a convocation by his own authority, at the ſame time and in the ſame manner with the parliament; of which, according to the better opinion of antiquarians, they in the beginning compoſed a part, and not a ſeparate aſſembly of their own. Afterwards, in conſequence of the reluctance of the clergy, to meet under a lay authority, by the immediate ſummons of the king, (although the clauſe *Præmunientes* * was continued in the parliamentary writ to the biſhops) they were actually aſſembled under a ſummons from the archbiſhop of each province, who received one from the king for that purpoſe; and not under the authority of

* This clauſe of a biſhop's writ of ſummons, is in theſe words; "*Præmunientes* decanum & capitulum eccleſiæ veſtræ, archidecanum totumque clerum veſtræ dioceſis, facientes quod iidem decanus & archidecanus in propriis perſonis ſuis, & dictum capitulum per unum, idemque clerus per duos procuratores idoneos, plenam & ſufficientem poteſtatem ab ipſis capitulo & clero habentes, unà vobiſcum interſint modis omnibus tunc ibidem, ad tractandum ordinandum & faciendum nobiſcum & cum cæteris prelatis & proceribus & aliis incolis regni noſtri, qualiter, &c." Gilb. Exchеq. 47. Nelſon's Rights of the Clergy, 226. & 4 Inſt. 4.

the king's writ to the biſhop. The ſtat. 21 Ric. II. ch. 2. plainly ſhews, that at that time, the proctors of the clergy ſate in parliament (C.) The convocation thus aſſembled, was not ſo much a ſpiritual as a temporal inſtitution; intended chiefly for granting aids to the king, jointly with the parliament. Archbiſhop Wake, in his Hiſtory of the Church, is of this opinion.

Deacons could not have had a voice in electing the members of this aſſembly; for the proctors of the clergy were choſen by parſons, vicars, and perpetual curates only *. It is true, the expreſſion of the *Præmunientes* clauſe is for *the whole clergy*; but they are to appear by two proctors for them. And by the archbiſhop's ſummons, under which they met, the archdeacon was required to cite, "Omnes abbates & priores, & præcipuè omnes & ſingulos eccleſias in proprios uſus habentes, rectores etiam & vicarios eccleſiarum, ac alios omnes *beneficiatos* quoſcunque," which is the form that Wilkins † has preſerved, and under which the aſſembly of the clergy was held in 1294. This confines it to the beneficed clergy. The cauſe of their meeting alſo ſhews, that it could not have been intended for any but them; for *they*

* 2 Burn, Eccl. L. 24. † 2 Wilk. Conc. 201.

only

only had taxes to pay, and therefore they alone were repreſented. It has been ſaid, that before the ſtat. 13 & 14 Charles II. deacons might hold livings; but as that ſtatute has entirely altered their ſituation, no argument drawn from their former ſtate can avail at this day. The virtual repreſentation of women, &c. that has been urged on the other ſide, does not remove the objection; becauſe deacons could not be the ſubjects of that taxation, which the convocation impoſed; but infants, women, &c. may poſſeſs the property from whence taxes are raiſed by parliament.

So far, the reaſoning is confined to deacons: But ſince that great eccleſiaſtical revolution which happened in 1664, the whole body of the clergy, whether beneficed or not, as conſtituent members of the convocation, are exempted from that doctrine of excluſion from parliament, which depended upon the legiſlative power of the convocation. That power is now radically and effectually gone. Though the form of the writ of ſummons is ſtill the ſame, it is now in this reſpect a dead letter; and has no more effect than that clauſe in the writ of election, by which *ſheriffs* are excluded. It is as nugatory as the name of *King of France* in the royal title of England.

It has been ſaid, that the ſaving clauſe inſerted in the ſtat. 16 & 17 Charles II. ch. 1. has preſerved the right. Admitting it to be ſo, no argument upon this queſtion can be drawn from the right, while it is dormant. But from the omiſſion of this clauſe in the ſubſequent ſtatutes, and the uniform practice * of 120 years ſince that period, it may be contended now, not only that the clergy have finally renounced this power of their convocation, but alſo that it is abſolutely paſſed from them, and extinguiſhed. By the imperceptible operation of that grand conſtitutional principle, "repreſentation always accompanies taxation," the whole body of the people are at length united in the ſame rights of ſociety. It is by the working of this principle alone, that the beneficed clergy at this day, have votes for county members, in reſpect of their benefices. In 1624, there had been a poſitive reſolution of the Houſe of Commons, to prevent their exerciſing this franchiſe †; but the

* Gibſon refers to another ſtatute in 22 & 23 Chas. II. ch. 3. having the ſame reſervation.

† 28 May, 1 Journ. 714. The whole of this entry, in the Journal, is as follows. A report is made of the election

"For Cambridgſhire.—Scholars and fellows of houſes, and parſons, vicars, &c. came, and gave voices for knights of the ſhire——(*on which the Committee had*)

"Reſolved,

the practice was tacitly introduced in company with the parliamentary taxation of the clergy, and became general; and has been ſince authoriſed by various acts of parliament; particularly by 10 Anne, ch. 23. ſect. 2. & 18 Geo. II. ch. 18. ſect. 1. Thus all the reaſons depending on the ſtate of the convocation, and particularly the effect of the caſes produced on the other ſide, are inconcluſive. The convocation has now no authority, but to make laws binding in matters eccleſiaſtical; in the ſame manner as corporations make bye-laws.

The argument deduced from the convocation, by the counſel for the petitioner, is alone an an-

" Reſolved, No ſcholars or fellows of colleges, halls, &c. having no other freehold, ought to have voice in elections of knights of the ſhire——

" Reſolved, (*in the houſe*) Upon queſtion, as at the Committee *ſupra*:—Nor are to have any hereafter——

" 2. Reſolved, The ſcholars or fellows having chambers above 40s. yearly value, giveth no voice in elections—Nor are to have any hereafter——

" He, that hath a chamber, cometh not in by livery and ſeiſin, nor by deed enrolled: No aſſize lieth: The freehold of it is in the corporation: His fellowſhip, like wages, and diet, given a ſervant——

" 3. Reſolved, Parſons, and vicars, &c. ought to have no voice in election of knights of the ſhire.

" Reſolved, (*in the houſe*) Alſo upon queſtion;—Nor are to have any hereafter."

ſwer

ſwer to another argument on the ſame ſide, in which it is conſidered, as an *offence* againſt the canon law, for a clergyman to ſit in parliament. If clergymen were not allowed to ſit in parliament, *becauſe* they made part of the convocation, the excluſion did not proceed from any *wrong* committed in the act. But it would be ſtrange indeed, for the ſame law to conſider that to be an offence in the loweſt order of the clergy, which it conſiders as a privilege in the heads of that body. The attendance of the biſhops in the Houſe of Lords, was never conſidered as a degrading interference of that order in ſecular concerns. Thoſe ſecular concerns which the canons reprobate, are ſuch as either diſgraced the clergy, or were felt as a burthen by them, as mechanical trades or employments, and troubleſome offices of no profit. The poſſeſſion of a voice in the legiſlature, could never have been included among the former, as appears from the attendance of the biſhops there; and in the latter caſe, the right of objection was a privilege, which might be renounced at pleaſure. In the caſe cited from Levinz and Ventris, it was a *claim of exemption*, which the judges allowed; yet in Levinz's report, the judges are not agreed upon the right; one of them exempting the clerk on that account, and the other for a different reaſon. Beſides, it was in favour of a *beneficed* clerk; and ſo is the writ in the regiſter

to be underſtood. Now it is a ſettled maxim of law "quiſquis renunciare poteſt juri pro ſe introducto."

The rules of the eccleſiaſtical law and the canons relating to this ſubject, muſt neceſſarily be underſtood to have theſe principles in view, when they prohibit the clergy from ſecular concerns. As far as they tend to exempt the clergy from the ſecular juriſdiction, they are to be received with caution, and conſtrued without favour *.

The argument in favour of the excluſion, drawn from the canons, and particularly the 76th, proceeds upon a notion, that a clergyman who diſobeys them, would be in a better ſituation, than one who ſubmits to them. The counſel on the other ſide muſt admit, that he who will riſk the penalty of excommunication, may exempt himſelf from their authority. Before the time of the prohibition enacted by the above canon, there was no law to prevent the acts which it prohibits; and, ſuppoſing it to extend to the preſent caſe, a deacon at the time it paſſed, might have renounced his function; after which he became as one of the laity: The only difference made by the 76th canon, conſiſts in the

* In 1 Vent. 273, it was ſaid to be the opinion of all the judges, that the clergy were liable to all charges impoſed by act of parliament.

danger

danger of excommunication. But there is nothing to prevent a man actually excommunicated, from being eligible to parliament. The houſe has determined, that outlaws are eligible; between whoſe ſtate, and that of the excommunicated perſon, there is not much difference in reſpect of legal diſability. It is a miſtake to ſay, that ſuch perſon becomes a member by an unlawful act; for the end of the law is anſwered by a ſubmiſſion to the puniſhment. After a diſcontinuance of the clerical function, and the aſſumption of a lay character, the perſon becomes to every civil purpoſe a layman. The ſitting member has taken this courſe, and has, in fact, renounced his clerical character. There being no particular method of form preſcribed for the reſignation of holy orders, he could not do more.

But the counſel for the petitioner draw a wrong concluſion from the canons, and other regulations of the eccleſiaſtical law, reſpecting the two orders of prieſt and deacon. If they were to ſucceed in obtaining their own conſtruction of the prohibition, they would fail in proving its application to the order of *deacons*. A deacon is not, in the true ſenſe of the canons, the *miniſter*, whoſe conduct is thereby regulated. A *prieſt* alone poſſeſſes that character: The deacon is in a ſtate of probation for the miniſtry; his office is only a ſtep to, and not

the exerciſe of that function. This is evident from Can. 32. "Cum ex patrum antiquorum ſententiâ & primitivæ eccleſiæ praxi, diaconi officium ad miniſterii dignitatem *gradus* quidam ſit conſtitutus; ſtatuimus, &c." and the canon proceeds to direct, that both orders ſhall not be conferred in the ſame day: Not that in every caſe a deacon ſhould be kept from the miniſtry for a year; but that the biſhop may obſerve, *quales in officio diaconi ſe exhibuerint, priuſquam in ordinem preſbyterorum ſuſcipiantur* *.

A deacon has no cure of ſouls; nor benefice to require his reſidence upon it, which might cauſe his abſence from other duties, with which that would interfere. But theſe reaſons may have operated in the caſe of a prieſt. The additional ſolemnity in the form of ordination of prieſts, the additional duties required of, and authority conferred upon them, afford ſtrong evidence of the pre-eminence of their ſtation, and confirm the inference drawn from the foregoing canon.

If therefore a deacon's orders are only a *ſtep* to the miniſtry, the expreſſion of the canons relating to perſons *in* the miniſtry, cannot affect a deacon. And his office being a ſtate of trial, ſeems to infer, that a choice is left to the can-

* 4 Wilk. Conc. 385. 3 Burn, Eccl. L. 38.

didate,

didate, either to relinquiſh it or not, as it may ſuit him. The whole of the provincial conſtitution in 1571, taken together, and not as it has been cited in ſupport of the petitioner, is conſiſtent with this opinion. Wilkins, in 4 Conc. p. 265. writes it thus: "Quivis miniſter eccleſiæ antequam in ſacram functionem ingrediatur, ſubſcribet omnibus articulis de religione chriſtianâ in quos conſenſum eſt in ſynodo; & publicé ad populum, ubicunque Epiſcopus juſſerit, patefaciet conſcientiam ſuam, quid de illis articulis & univerſâ doctrinâ ſentiet. *Semel autem receptus*, &c." (*as in p.* 281.)—Here is plainly, throughout, an application to the caſe of a beneficed clerk alone; for whom rules are preſcribed, upon inſtitution and induction to his living.

In addition to the foregoing arguments, it may be obſerved, that many perſons, who were notoriouſly in holy orders, have ſate in parliament, without any man's entertaining a thought of diſputing their right to it. Mr. Hatſell * ſpeaks of it as a well known fact of modern practice.

The attempt to revive exploded notions of the eccleſiaſtical juriſdiction in this liberal age, and in oppoſition to the favourite legal prin-

* 2 Prec. 10.

ciple

ciple of general eligibility, ought to be diſcountenanced in every ſhape. It is a maxim in daily uſe, that all laws inferring penalties or diſabilities, ſhould be conſtrued ſtrictly. The preſent caſe furniſhes a proper opportunity for carrying it into practice.

The counſel for the petitioner obſerved in reply,

That the main ground of their argument, being the effect of *holy orders* upon the perſon ordained, it had not been weakened by the reaſoning upon the other ſide, from the actual ſtate of the convocation; becauſe, though that had furniſhed an objection in the caſes mentioned from the Journals, yet it had only been a ſecondary and not the principal one. That the great diviſion of the people into clergy and laity, was coeval with the origin of our conſtitution; and the rights and duties of each order, had been ſo immutably fixed in it, that nothing ſhort of a poſitive and expreſs law, could alter it; and therefore, whatever change *in fact* might have been brought about by the revolutions in laws and manners, during many centuries, the original principles of the law ſtill continued the ſame. That it was a part of this our antient law, that no clergyman could engage in thoſe civil duties, which were in their nature ſeparate from and inconſiſtent with the clerical function;

of

of which nature this office of repreſentative, as they contended, partook.

That the authorities cited, did not ſhew, that there was any clerical difference between the offices of prieſt and deacon, as far as either related to the *miniſtry*; and particularly, that the 32d canon, which was relied upon to prove the deaconry a ſtep to the miniſtry, had a very different object. It was made to diſtinguiſh thoſe two degrees of holy orders more reſpectfully towards each other; and for this purpoſe directed, that the ſame perſon ſhall not receive both on the ſame day; that the dignity of the prieſthood may be ſomewhat raiſed by the ſeparation: But does not at all affect the office or miniſtry of a deacon.

That this ſacred character could not be put off; for there was no method of voluntary reſignation of orders known to the eccleſiaſtical law, as in the caſe of reſignation of a benefice: And a right derived under that law, muſt be diveſted by that law, and by no other. That the ſitting member therefore was ſtill a clerk in orders; and to be treated in this queſtion as if entring the houſe of commons in the habit of his order: Whereas in all thoſe caſes, which (it had been ſaid) had of late been frequent, of clergymen ſitting in that houſe, they had taken their ſeats, as it were, in diſguiſe, and under the

falſe

falſe appearance of a lay character, which in reality they had not. That on this occaſion, Mr. Ruſhworth had likewiſe aſſumed that appearance, and did not take his ſeat, or claim to hold it in fact, as a clergyman; (though his counſel had endeavoured to ſupport it on that ground) but by ſeeming to be one of the laity. But the Committee could not conſider him in that character; they muſt view him merely as a miniſter of the church.

That a great part of the argument for the ſitting member, had proceeded upon a virtual admiſſion (though not *expreſsly* made by the counſel) that a *prieſt* was excluded from the houſe: Yet if they relied upon the poſition, that whoever could vote for a member of parliament, might be elected, a prieſt with a benefice might become a member.—Again, they had argued, that a deacon, not being taxable by the convocation, could not belong to that body, or be repreſented there; and therefore the objection of the convocation could not be urged againſt him: But by the ſame rule, a prieſt without a benefice, would likewiſe be free from it. That this mode of reaſoning paſſed by the true ſpirit of the objection, drawn from the convocation; which was, that this aſſembly repreſented legally the whole body of the clergy, whether beneficed or not; in the ſame manner as the Houſe of Com-

mons repreſented all the freeholders of England, whether poſſeſſing 40s. freeholds or leſs.

That the antient practice in the beginning of parliaments, which had been referred to, of the clergy ſitting in them, together with the knights and burgeſſes, was too obſcurely treated of in hiſtory, to found any juſt arguments upon; and even ſuppoſing it to be clearly aſcertained, it did not at all ſupport the argument: Becauſe the clergy, when they might ſo appear in parliament, were a ſeparate body of themſelves, unmixed with the laity, and repreſenting their own order only, the ſame as in convocation. Indeed, it was ſtill in ſubſtance the convocation of the clergy; but for purpoſes of convenience, or when matters concerning their own body were brought forward, aſſembled in parliament.

That the ſtatute by which deacons were diſabled to hold livings, could not be conſtrued to *give* them any right which they had not before; and therefore if they were ſubject to excluſion before that law, they were ſo ſtill. Neither could the ſuppoſed renunciation of the rights of convocation, confirmed by the ſtat. 16 & 17 Chas. II. (if it were ſuch) *give* any right to the clergy who may have made it, in prejudice of the laity: Becauſe the laity alone, as the petitioner contends, had the *right* of appearing in parliament at the time of that alteration; and the clergy

could not infringe that right by any act of their own.

That there was a wide difference between the caſes of a clerk, and that of the attorney general; becauſe the latter depended entirely upon the arbitrary orders of the houſe alone, who could not of their own authority make an excluſion contrary to the law of the land; as that was proved to have been by an uniform practice to the contrary: But that the caſe of the clergy was founded in principles of the common law, and confirmed by uniform practice.

The determination of the Committee was expreſſed in general terms,

That the ſitting member was duly elected.

Of which the Chairman informed the houſe, Feb. 24 *.

* See 40 Journ. 561.

NOTES

ON THE CASE OF

NEWPORT.

PAGE 274. (A.) It is curious to obſerve the different manner in which the Commons have expreſſed themſelves, in different times, upon the ſubject of diſqualification, by attendance in the Houſe of Lords. In the year 1566, (1 Journ. 73) they attended the Lords to receive the Queen's licence to proceed to the choice of a ſpeaker, where one of their members "*moves for the Commons*, that for that Mr. Ric. Onſelowe, Eſq; ſolicitor general to the Queen's majeſty, was a member of the Lower Houſe, he might be *reſtored* to join in their election, as burgeſs for the borough of Steyning in Suſſex. And upon conſultation had among the Lords, the ſaid Mr. Onſelowe was ſent down with the Queen's ſerjeant at law, Mr. Carus, and Mr. Attorney General, to ſhew for himſelf *why he ſhould not be a member* of this Houſe; who alledging many weighty reaſons, as well for his office of ſolicitor, as for his writ of attendance in the Upper Houſe, was nevertheleſs *adjudged to be a member of this Houſe.*" He was afterwards, on the ſame day, choſen ſpeaker. The ſame proceeding was had in 1580, previous to the electing of Mr. Popham, then ſolicitor

ſolicitor general, to be ſpeaker: And a committee was ſent to the Lords to *demand the reſtitution* of the ſaid Mr. Popham. 1 Journ. 117. Again, in 1605, (ib. 257) upon a report from the committee of privileges for filling up vacancies, two of the judges are mentioned as members of the Houſe. The queſtion put to the Houſe upon their attendance in the Lords, is, "Whether they ſhall be *recalled*;" and it is reſolved they ſhall not. Theſe phraſes, ſoon after this period, came to be changed to thoſe of *diſcharged*, *rejected*, *diſabled*, &c. and now, the word which ſeems to be in general uſe is, *excluded*. Mr. Hackwell, in the debate referred to in p. 274, takes notice of this change, as it was obſerved in his time, and accounts for it by ſaying, as the minutes of his ſpeech repreſent, "Heretofore, as in Jeffreye's caſe, (*he was Queen's ſerjeant in* 1575) there was a ſtrife by the Houſe to increaſe their number; therefore ſent to have Jeffreyes remanded. Now the table turned——"

P. 278. (B.) Mr. Hume gives the following account of this affair, in the ſecond chapter (64th of his hiſtory) of Charles the Second's reign,

"A great alteration was made this ſeſſion in the method of taxing the clergy. In almoſt all the other monarchies of Europe, the aſſemblies, whoſe conſent was formerly requiſite to the enacting of laws, were compoſed of three eſtates, the clergy, the nobility, and the commonalty, which formed ſo many members of the political body, of which the king was conſidered as the head. In England too, the parliament was always repreſented as conſiſting of three eſtates; but their ſeparation was never ſo diſtinct as in other king-

doms. A convocation, however, had uſually ſitten at the ſame time with the parliament; though they poſſeſſed not a negative voice in the paſſing of laws, and aſſumed no other temporal power than that of impoſing taxes on the clergy. By reaſon of eccleſiaſtical preferments, which he could beſtow, the king's influence over the church was more conſiderable than over the laity; ſo that the ſubſidies, granted by the convocation, were commonly greater than thoſe which were voted by parliament. The church, therefore, was not diſpleaſed to depart tacitly from the right of taxing herſelf, and allow the Commons to lay impoſitions on eccleſiaſtical revenues, as on the reſt of the kingdom. In recompence, two ſubſidies, which the convocation had formerly granted, were remitted, and the parochial clergy were allowed to vote at elections. Thus the church of England made a barter of power for profit. Their convocations having become inſignificant to the crown, have been much diſuſed of late years."

Lord Chief Baron Gilbert writes thus of the above tranſaction: After mentioning the laſt ſubſidy of the clergy, and that it appeared more advantageous to continue to tax them by land and poll tax, *as it was in the* Rump *times*, he ſays, "From henceforward it paſſed that they ſhould have a vote for members in parliament, *as they had in the* Rump *times*; and they were taxed as the laity were." Gilb. Exch. 56. Burnet, in the firſt volume of his Hiſtory of his own Times, (p. 197) ſays, the parliament gave the king four ſubſidies, "being willing to return to the antient way of taxes by ſubſidies. But theſe were ſo evaded, and brought in ſo little money, that the court reſolved never

never to have recourſe to that method of raiſing money any more; but to betake themſelves for the future to the aſſeſſment begun in the war. The convocation gave, at the ſame time, four ſubſidies, which proved as heavy on them as they were light on the temporalty. This was the laſt aid that the ſpiritualty gave." After which, he ſays, it was reſolved in future, on account of the inconſiderable amount, and unequal proportion of the ſpiritual ſubſidy, to make one general taxation of them with the laity, " which proved, indeed, a lighter burthen, but was not ſo honourable as when it was given by themſelves. Yet intereſt prevailing above the point of honour, they acquieſced in it." Rapin relates this event in a few words. Tindal, in his note upon it, after citing Biſhop Burnet, adds, " The cuſtom of the clergy's taxing themſelves was broken during the late troubles. For then the clergy, either out of voluntary compliance, affectation of popularity, or becauſe they wanted proxies to repreſent their body, had their benefices taxed with the laity. *This the court found, after the reſtoration, to be an eaſier thing; than to have two bodies of men to pleaſe; and therefore intended to have deprived the clergy of that right, if they had not voluntarily relinquiſhed it.*" Warner, in his Eccleſiaſtical Hiſtory, Vol. II. p. 611, relates, that to *encourage their aſſent*, two of the four ſubſidies, which they had given, were remitted to them, and a ſaving of the rights to be inſerted in the act. It appears from Burnet, that the court had two objects in this ſcheme; not only to unite the lay and eccleſiaſtical taxations, but alſo to get rid of ſubſidies from both altogether.

In Mr. Hatſell's note, the ſpeaker writes "in *conſequence* of this, (but from what period I can't ſay) ..... the clergy have aſſumed, and without any objection, have enjoyed the privilege of voting in the election of members of the Houſe of Commons, by virtue of their eccleſiaſtical freeholds." According to the Chief Baron's authority, it appears, however, not to have been a conſequence of this law; but of the ſame principle operating, a few years before, in the time of the commonwealth.

I have been the more particular in referring to the different accounts of this revolution in our laws, becauſe of its great importance (according to my obſervation of it) in our conſtitutional hiſtory. It muſt afford a pleaſing reflection to the minds of all who contemplate the ſyſtem of our admirable conſtitution, to obſerve, in ſuch inſtances as theſe, its ſure effect and operation, according to reaſon and juſtice; producing its beneficial changes in ſilent and gradual progreſs, like the working of Nature herſelf, from fixed and unſeen general principles. A writer of practical law, who was contemporary with the civil war and reſtoration, mentions the right of clergymen to vote in county elections for their ſpiritual livings, as a point eſtabliſhed in the laſt century. See Dalton's Sheriff, p. 334: Although this work was compoſed, perhaps, leſs than 40 years after that poſitive reſolution of the Houſe of Commons (mentioned in p. 297) to the contrary.

P. 294. (C.) Dr. Hody, in the ſecond part of his Hiſtory of Convocations, from p. 371 to p. 430, has ſhewn many inſtances in w[illegible] whole body of the

the clergy antiently made one aſſembly, and ſate together with the parliament. It appears, however, that as often they did not, and made a ſeparate convocation by themſelves. In p. 393, he controverts obſervations of Selden and Lord Coke *, as to the ſitting and voting of the inferior clergy by their proctors *in parliament*; both thoſe authors aſſerting, that they were aſſiſtants only, and not members of it. It ſeems to me, upon reading the inſtruments and authorities recited by Hody, (in p. 410 and following) that this opinion, and the oppoſite to it advanced by the latter, are both true, according to the ſubject matters of deliberation in parliament. For caſes are mentioned by him, in which the parliament conſidered the aſſent of the clergy to be neceſſary to render their acts valid; and others of merely ſecular concern, in which the clergy themſelves ſeemed to act upon a notion that they ought not to intermeddle. Hody concludes his ſecond part (p. 431) thus: "Upon comparing all things together, I take the *Præmunientes* to have been continued in the writs, after it became a conſtant cuſtom for the clergy to meet in a ſeparate body, by virtue of the archbiſhop's mandate, that thereby our kings might aſſert their right of calling the clergy (if they pleaſe) to *parliament*; which the clergy oppoſed as an invaſion and inroad upon their liberties." If the reader wiſhes to learn more upon this ſubject, he may read, with much ſatisfaction, Lord Chief Baron Gilbert's fourth chapter of his Treatiſe on the Court of Exchequer, which contains an excellent general hiſtory of the inſtitution of convocations in England.

* See 4 Inſt. 4.

He

He follows the opinion of Archbiſhop Wake, whoſe hiſtory of the State of the Church he cites and refers to. In that work there is a chapter, the produce of much reading and well digeſted, to prove that the antient parliamentary convocation of the clergy, by the *præmunientes* clauſe, and the convocation by the archbiſhop's ſummons under the king's writ to him, were different aſſemblies, in rights, powers, and privileges. This, among other points, was denied by his opponent Atterbury; and one cannot wonder, that two learned men, of different parties, ſhould form different opinions of the rights and authority of an inſtitution, ſubſiſting in different forms under the ſame name, in remote antiquity. The work of the latter is written with more of the warmth and acrimony of diſpute than the former; and he is, therefore, to be more cautiouſly attended to in his poſitions. He wrote in ſupport of the privileges of the Lower Houſe of convocation, in whoſe cauſe he engaged with violence. Dr. Wake maintained the authority of the Upper Houſe. The ſeventh chapter of Dr. Atterbury's book on the Rights of the Convocation, in the latter part, contains a recital of many antient records upon the ſubject.

Burnet, in the 2d volume of his Hiſtory of the Reformation, has publiſhed three curious papers * upon this queſtion. The firſt is a petition of the Lower Houſe of convocation, in the beginning of the reign of Edw. VI. to the Higher Houſe, the ſecond article of which is in theſe words: "Alſo, that according to the antient cuſtom of this realm, and the tenour of the king's

* N° 16, 17, and 18, of the firſt book of his Collection of Records.

writ,

writ, for the ſummoning of the parliament, which be now and ever have been directed to the biſhops of every dioceſe, the clergy of the Lower Houſe of the convocation may be adjoined and aſſociate with the Lower Houſe of parliament; or elſe, that all ſuch ſtatutes and ordinances, as ſhall be made concerning all matters of religion and cauſes eccleſiaſtical, may not paſs without the ſight and aſſent of the ſaid clergy." The ſecond paper is another petition in the ſame reign, renewing and inforcing the ſame requeſt. The third is a paper offered to Queen Elizabeth, and afterwards to King James, for the ſame purpoſe. It is intitled, "*Reaſons to induce her Majeſty, that deans, archdeacons, and ſome other of her grave and wiſe clergie, may be admitted into the Lower Houſe of parliament.*" The 4th, 5th, and 6th articles, are as following: 4th, "It doth not appear why they were excluded; but, as it is thought, either the king offended with ſome of them, did ſo grievouſly puniſh the whole body; or elſe the ambition of one of them, meeting with the ſubtlety of an undermining politic, did occaſion this cauſeleſs ſeparation.

5th. They are yet, to this day, called by ſeveral writs, directed into their ſeveral dioceſſes, under the great ſeal, to aſſiſt the prince in that high court of parliament.

6th. Though the clergy and the univerſities be not the worſe members of this commonwealth, yet, in that reſpect, they are, of all other, in worſt condition; for, in that aſſembly, every ſhire hath their knights, and every incorporate town their burgeſſes; only the clergy and the univerſities are excluded."

The

The 4th article, when preſented to King James, was thus varied, "It is thought the clergie, falling into a *præmunire*, and not in the king's protection, it did afterwards pleaſe the king to pardon them, but not to reſtore them; ſo began this ſeparation as far forth as can be collected. Then the wiſdom of a great politician, meeting with the ambition of as great a prelate, wrought the continuance of the ſaid ſeparation, under this pretence, that it ſhould be moſt for the honour of him and his clergy, to be ſtill by themſelves in two aſſemblies of convocation, anſwerable in proportion to the two houſes of parliament."

The 13th and 14th articles are thus: 13th. "In the mean time, (which God in mercy grant may be for many generations) her majeſty ſhall be ſure of a number more in that aſſembly, that ever will be moſt ready to maintain her prerogative, and to enact whatſoever may make moſt for her highneſs' ſafety and contentment; as the men that, next under God's goodneſs, do moſt depend upon her princely clemency and protection.

14th. It would much recover the antient eſtimation and authority of that aſſembly, if it might be increaſed with men of religion, learning, and diſcretion; which now is ſomewhat imbaſed by *youths*, *ſervingmen*, and *outlaws*, that injuriouſly are crept into the honourable Houſe."

We may infer, from the Queen's not accepting this offer of implicit obedience from her loyal clergy, that ſhe thought her authority too firmly eſtabliſhed to require their ſupport; a moſt fortunate circumſtance for the liberties of this nation.

Burnet

Burnet* writes of theſe petitions, that he had never met with any good reaſon to ſatisfy him of the juſtice of this claim. "There was a general tradition in Queen Elizabeth's reign, that the inferior clergy departed from their right of being in the Houſe of Commons, when they were all brought into the *præmunire* upon Cardinal Wolſey's legatine power, and made their ſubmiſſion to the king. But that is not credible; for, as there is no footſtep of it, which, in a time of ſo much writing and printing, muſt have remained, if ſo great a change had then been made; ſo, it cannot be thought, that thoſe who made this addreſs but 17 years after that ſubmiſſion, (many being alive in this, who were of that convocation; *Polidore Virgil* in particular, a curious obſerver, ſince he was maintained here to write the Hiſtory of England) none of them ſhould have remembered a thing that was ſo freſh, but have appealed to writs and ancient practices. But though this deſign of bringing the inferior clergy into the Houſe of Commons, did not take at this time, yet it was again ſet on foot, in the end of Queen Elizabeth's reign, and reaſons were offered to perſuade her to ſet it forward; which not being then ſucceſsful, theſe ſame reaſons were *again offered* to King James, to induce him to endeavour it. But whether this matter was ever much conſidered, or lightly laid aſide, as a thing unfit and unpracticable, does not appear; certain it is, that it came to nothing. Upon the whole matter, it is not certain what was the power or right of theſe proctors of the clergy in former times: Some are of opinion, that they were

* Vol. II. p. 48.

only

only aſſiſtants to the biſhops, but had no voice in either Houſe of Parliament. This is much confirmed by an act paſſed in the parliament of Ireland, in the 28th year of the former reign, which ſets forth, in the preamble, "That though the proctors of the clergy were always ſummoned to parliament, yet they were no part of it; nor had they any right to vote in it, but were only aſſiſtants in caſe matters of controverſie or learning came before them, as the convocation was in England; which had been determined by the judges of England, after much enquiry made about it. But the proctors were then pretending to ſo high an authority, that nothing could paſs without their conſents; and it was preſumed they were ſet on to it by the biſhops, whoſe chaplains they were for the moſt part: Therefore they were, by that act, declared to have no right to vote." From this ſome infer they were no other in England; and that they were only the biſhops' aſſiſtants and council." Burnet himſelf does not agree with this opinion, and refers to the ſtat. 21 Rich. II. ch. 2. and the practice of thoſe times, when the whole parliament formed but one aſſembly; at which time he thinks the inferior clergy made a part of that body; and that when the two Houſes of Parliament divided, the aſſembly of the clergy divided alſo into a ſimilar form, which it has borne ever ſince.

The act of 21 Rich. II. to which Burnet refers, (and the argument in p. 294) repeals a commiſſion of regency, which the king had been prevailed upon to grant in a former parliament. It is paſſed at the requeſt of the Commons, "*by the king, with the aſſent of all the lords ſpiritual and temporal, and the proctors*

of

of the clergy." The ſame ſtile is repeated in a more extraordinary form in chap. 12 of the ſame ſtatute, in the following words, (after reciting the treaſonable proceedings of the parliament in 11 Rich. II. whoſe acts they were about to repeal) " *Et ſur ceo les Seignurs eſpirituels & temporels et les procureurs de la Clergie* ſeveralment examinez *aſſenterent*, &c." And in the next ſentence, *the Commons* are added. In the enacting part, towards the concluſion, the words are, " *Sur quoi par le roy de l'aſſent des Seignurs eſpirituels & temporels & les procureurs de la Clergie & de les ditz Communes & par advys de les juſtices & ſerjeants ſuſdites*, &c." I do not find the proctors of the clergy, named in any other acts of this parliament, nor in the general preliminary title, which is in the uſual form; nor are they mentioned in the ſtat. of Henry IV. by which the acts of 21 Rich. II. were repealed. It is certainly a ſingular ſtile; and, perhaps, not to be found in any other ſtatute. It is plain that the proctors of the clergy, here mentioned, were as much a ſeparate body from the reſt, as the Commons from the Lords. The ſtatute 8 Henry VI. ch. 1, by which the members of convocation are allowed the privilege of parliament, in the ſame manner as the Lords and Commons, proves, by their not having it before, that they had not been conſidered as any eſſential part of the parliament.

In the ſecond volume of the Parliament Rolls, p. 368, in the 51ſt year of Edw. III. N° 46, there is a petition of the Commons to the King, which ſhews their extreme jealouſy of the interference of the clergy. It is in theſe words: " ITEM, *Que null eſtatut ne ordenance*

XI.

THE

CASE

Of the BOROUGH and HUNDREDS of

CRICKLADE,

In the County of WILTS.

The Committee was choſen on Monday, February 14, 1785, and conſiſted of the following Members:

Peter Johnſton, Eſq; *Chairman.*
John Moore, Eſq;
Brook Watſon, Eſq;
Joſhua Grigby, Eſq;
Sir James Duff, Bart.
Thomas Hunt, Eſq;
Sir William Moleſworth, Bart.
William M'Dowal, Eſq;
Edmund Nugent, Eſq;
James Martin, Eſq;
William Middleton, Eſq;
John P. Baſtard, Eſq;
Sir William Manſell, Bart.

NOMINEES.

John Galley Knight, Eſq; *Of the Petitioners.*
John Nicholls, Eſq; *Of the Sitting Members.*

PETITIONERS.

John Walker Heneage, and Robert Nicholas, Eſqrs. and certain Electors of the Borough in their Intereſt.

Sitting Members.

Charles Weſtley Coxe, and Robert Adamſon, Eſqrs.

COUNSEL.

For the Candidates Petitioners,
Mr. Batt, and Mr. Milles.

For the Electors,
Mr. Douglas.

For the Sitting Members,
Mr. Graham, and Mr. Le Blanc.

For the Returning Officer.
Mr. Charles T. Morgan.

THE CASE OF THE BOROUGH and HUNDREDS of CRICKLADE.

THE petitions alledged, that at the late election, many unwarrantable practices were made uſe of by the ſitting members, to procure a colourable majority in their favour: That Richard Townſend, the bailiff, and returning officer, before the poll, uſed undue influence to prevail upon perſons, who had no right of voting, to tender their votes for the ſitting members; giving them reaſon to believe, that he would admit them to poll at all events: That during the poll, he behaved with marked partiality to the ſitting members, and illegally and arbitrarily admitted many perſons to vote for them who had no right, and rejected many who were duly qualified on the part of the petitioners: That he attempted, by various other illegal means, to procure a fraudulent majority for the ſitting members, and admitted all perſons

without inquiry, to vote for them, and diſcouraged all inquiry into the rights of ſuch perſons.

That the ſitting members were guilty of bribery, by giving and promiſing money, and other rewards, to corrupt the voters to vote for them †, and that in conſequence thereof, and of the partiality of the bailiff, the ſitting members obtained a colourable majority in their favour, under which the bailiff had endeavoured to protect himſelf in the illegal return he had made, in prejudice of the petitioners, who had the majority of legal and uncorrupted voters, and ought to have been returned.

The petition of the electors contained the ſame charges as the foregoing *.

The borough of Cricklade derives its rights from preſcription; the particulars of which may be ſeen in Mr. Douglas's hiſtory of a former election there, in his 4th volume. The right of voting was determined by the ſelect Committee, who tried that election to be "in the inhabitants poſſeſſing houſes within the borough, who are freeholders, copyholders, or leaſeholders, for any term not leſs than three years; or for any ſuch term, or greater term, determinable on life or lives: Such freeholder, copyholder, or leaſeholder, having been in the occupation of

† There was no proof of this charge offered.

* 40 Journ. 20, 92.

the

the houſe, for which he may claim to vote 40 days preceding any election *."

The above determination was made in 1776, upon the trial of the election which happened in 1775; in conſequence of a diſpute between the parties, about the particular qualifications of the right; upon which a great deal of evidence was produced.

At the general election in 1780, Paul Benfield, John M'Pherſon, and Samuel Petrie, Eſqrs. were candidates for this borough. The two former were returned, but the latter petitioned againſt them. Upon the trial of this petition, in the beginning of 1782, Mr. Benfield alone preſerved his ſeat, and Mr. M'Pherſon's was declared void. The ſubject of that trial was bribery; which appeared to the Committee to have been ſo heinous, and ſo generally practiſed in the borough, as to require ſome ſignal and extraordinary puniſhment. Under the authority of their reſolutions and report to the houſe, a bill was there introduced, for preventing bribery and corruption in future elections in Cricklade; and was paſſed into a law, the ſtatute 22 Geo. III. ch. 31. The legiſlature conſidered, that the electors had, by their corruption, rendered themſelves unworthy of their pri-

* 4 Doug. Elect. 65.

vileges, and that it was proper to change the conſtitution of a town, in which this crime had taken ſuch deep root. This was the deſign of the act above-mentioned; the effect of which is, not to take away the ſubſiſting right of election in the borough; but to purify and amend the exerciſe of it, by mixing with the inhabitants of the town, the county-freeholders of the five adjoining hundreds; to whom (ſubject to the rules of county elections) this act gives an equal right in electing the members for Cricklade.

The election next after the paſſing of this act, happened in June 1782; when the hon. George Richard St. John, the preſent ſitting members, and Samuel Petrie, Eſq; were candidates to ſupply the place of Mr. M'Pherſon. The conteſt at the poll was only between Mr. St. John and Mr. Petrie; the other two having previouſly declined. The election was decided by a great majority in Mr. St. John's favour, but Mr. Petrie petitioned againſt him *. This petition was not tried during the ſeſſion in which it was preſented; was renewed † in the following, but ſoon after withdrawn ‡.

The preſent election is the ſecond, in which the new body of electors have had an oppor-

* 28 Journ. 1129. † 39 Journ. 28. ‡ 39 Journ. 175.

tunity

tunity of exerciſing their franchiſe. It took place on Thurſday the 8th of April, 1784: The petitioners and ſitting members, and likewiſe Mr. Petrie, being candidates. At the cloſe of the poll on the Tueſday following, the numbers were for

Coxe	-	442
Adamſon	-	435
Heneage	-	373
Nicholas	-	358

Coxe's majority being 69, and Adamſon's 62, over Heneage: And the former's 84, the other's 77, over Nicholas. Petrie had declined before the election day.

By the opening of the petitioners' caſe to the Committee, it appeared that they relied upon two ſeparate heads of objection to the ſitting members.

The firſt was, a general charge againſt the returning officer, for groſs miſbehaviour and partiality in conducting the election; to which alone they imputed the illegal return of the ſitting members.

The ſecond, an endeavour to reduce their numbers on the poll, by general and particular objections to the votes, ſo as to give themſelves a great majority. They propoſed to ſtrike off 136 of their borough votes and 20 hundredors; and to add 10 rejected votes to their own poll;

denance ſoit fait ne grante au petition du clergie, ſi ne ſoit par aſſent de vos communes. Ne que vos dites communes ne ſoient obligez par nulles conſtitutions q'ils font pur lour avantage, ſans aſſent de vos dites communes. Car eux ne veullent eſtre obligez a null de vos eſtatuts ne ordenances, faitz ſans lour aſſent."

The King's anſwer to the above petition is entered thus:

" Reſponſio, *Soit ceſt matire declarée en eſpecial.*"

THE

XI.

THE

CASE

Of the BOROUGH and HUNDREDS of

CRICKLADE,

In the County of WILTS.

adjourn the poll to Monday. Both parties agreed to it. After dinner, the bailiff, with Mr. Myers, a friend of his, came to the agents for the petitioners, and aſked "if their freeholders were come." Being told, that they were not, the bailiff and Myers ſaid, "it would then be uſeleſs to keep the poll longer open, and they would go and adjourn it." They accordingly went away; but, in a few minutes after, advice was brought from the huſtings to the agents, that the bailiff was there, carrying on the poll as uſual, and receiving borough votes. Upon this alarm, they ran to the hall, where they found a great crowd of borough voters, and one of them polling. The counſel for the petitioners was there, and charged the bailiff with a breach of his engagement, requiring him to adjourn the poll. A long altercation enſued. Townſend wanted to proceed: Said he would not ſit there to do nothing; and told the agents it was all a farce to wait longer for their freeholders, as he believed their ſtock was quite exhauſted, and that they had no more to poll. In this confuſion two hours were ſpent; at the beginning of which, two borough voters were received, and no other buſineſs was done: At laſt the poll was adjourned to Monday. On that day 90 freeholders polled, and 30 on Tueſday; on which day the poll finally cloſed.

The

The agents for the petitioners, from the beginning, wiſhed to have had the borough votes taken promiſcuouſly, ſo as not to have created delay by their ſeparation from the others; and on the ſecond day, Friday, applied to a friend of theirs of that claſs, reſiding in the town, to go to vote on that day, in the hope of inducing the bailiff to take the town votes in common with the others. This voter went accordingly to the hall; where Townſend, who knew him to be a freeholder as well as a burgeſs, told him, that if he intended to vote as a burgeſs, he would not then take his vote, for he was not yet come to them; if he choſe to vote as a freeholder, he might. The voter then polled as a freeholder, and went away. Townſend, at that time, as he had done often before, declared, that he would not poll the burgeſſes till all the hundredors had voted. Till Saturday, the numbers on the poll for the two parties, were nearly equal. On Monday morning, though there were freeholders ſufficient to employ the greateſt part of the day unpolled, he began regularly to take the burgeſſes, a great majority of whom were on the ſide of the ſitting members. Before any had polled, the counſel for the petitioners told him, that he claimed a right to examine all the borough voters, as to the particular intereſts and titles under which they might come to vote; and,

and, in particular, that where any ſhould claim as leaſeholders, he ſhould require the leaſe to be produced. At the ſame time he read to the bailiff, the reſolution of the ſelect Committee of 1776, upon this ſubject, which is recited in 4 Doug. Elect. 70, in theſe words: "That any deed upon which a voter claims to vote, ſuch vote being objected to by the parties, muſt be produced to the Committee; or proof given, that ſuch deed is unduly withheld or loſt, before the Committee can admit other evidence, as ſufficient to ſubſtantiate the vote."

Many of this claſs of voters, when aſked by the counſel for the petitioners, at the poll for their leaſes, applied to the bailiff for advice, who uniformly told them, they need not produce them; and to ſeveral, ſaid, that he himſelf knew them to be good votes. The ſame happened when queſtions were put upon other circumſtances of the voters' titles. One who claimed as a leaſeholder, having refuſed, in this manner, to anſwer queſtions from the counſel, and, in particular, to ſay how long he had had his leaſe was aſked by Townſend, if he had had it a hour, he anſwered, "Yes—ſeveral hours;" upo which the bailiff declared, that if a leaſe we brought to the poll, with the ſeal hot, he wou receive the vote; for ſuch was the right of el tion at Cricklade.

Ano

Another of this claſs, queſtioned and objected to by the counſel for the petitioners, ſaid he had lived in the houſe, for which he voted, a year and a quarter, and *ſuppoſed* he had a leaſe from the beginning, but had never had it in his poſſeſſion. The bailiff admitted his vote.

A voter for the ſitting members was objected to as one of the pariſh poor; (he was the firſt to whom that objection was made) and a perſon preſent told Townſend, that he muſt know the fact, as he had given him the relief himſelf. Extracts from the pariſh book, made by the petitioners' agent, were alſo offered to the bailiff, to prove the objection; and the agent offered to ſwear to the truth of the extracts. Townſend did not aſk for the book, or the extracts from it; but, hereupon, the counſel on the other ſide inſiſted upon the neceſſity of producing the book *itſelf* for this purpoſe, as the beſt evidence; in which opinion the bailiff coincided, and admitted the vote. The ſame reaſon ſerved him for the admiſſion of all thoſe, (and the number was conſiderable) to whom this objection was made, except one; whom he rejected, becauſe, he ſaid, he knew him to be one of the weekly poor. On the part of the petitioners, notice had not been given to the pariſh officers to produce their books at the poll.

Townſend,

Townſend, who kept a chandler's ſhop in Cricklade, was employed by the pariſh officers, in many inſtances, to give relief in kind to the poor, from his ſhop, and made out his bill to the pariſh for it.

The burgeſſes, on the ſide of the petitioners, were not queſtioned reſpecting their titles, by the counſel for the ſitting members.

The bailiff was ſeen frequently, during the election, in company with the ſitting members, and going in and out of their houſe: And the poll clerk, appointed by him, uſed often to take the poll book to the ſame houſe.

With reſpect to the hundredors, the petitioners did not complain of the bailiff for ſimilar miſconduct as to *their* polling. A great majority of them were for the petitioners.

One of the witneſſes who gave the above account of the bailiff's conduct, ſaid he believed that he generally followed the advice of Mr. Myers, who is an attorney, in his deciſions; who was commonly at his ſide during the poll: And that the latter adviſed him to the beſt of his judgment.

During the trial of this election, Mr. Myers attended the Committee as one of the agents for the ſitting members.

The above circumſtances were the ſubject of the complaint made by the petitioners againſt the

the returning officer. Their counſel relied much upon them; and argued, That his conduct had been highly criminal, and deſerving ſevere reprehenſion—That it ſhewed a partial abuſe of his authority, in order to injure the petitioners. That his refuſal to erect booths for the poll, proceeded from a deſign to tire out and vex the hundredors, (a majority of whom were for the petitioners) by a long and troubleſome election. That his intended ſeparation of the two claſſes in polling, ſhewed a corrupt endeavour to raiſe the importance of the town votes, in turning the election to the ſide which he favoured. That his behaviour at the poll, and particularly in reſpect of the town votes, was an indecent, as well as illegal, exerciſe of his office. And they urged the Committee to take proper meaſures for puniſhing him, either by their own cenſure, as in the caſe of Sudbury *, or by a report to the Houſe, as they ſhould think proper.

In the opening of the cauſe, they ſtated, that they ſhould conſider themſelves intitled, after proving the above miſbehaviour of the bailiff, to throw the burthen of proof, as to the merits of the caſe, upon their opponents; and oblige them to bring evidence in ſupport of their majority: Becauſe, if the returning officer had done

* See 2 Doug. Elect. 173.

his

his duty in the election, their clients muſt have been the ſitting members; and it would be but equal juſtice that they ſhould retain this ſtation in the conduct of the cauſe, if they ſhould feel any diſadvantage from that mode of proceeding, to which his conduct had driven them. But they ſaid, they thought it would be more convenient for the Committee, and their own clients, to wave this advantage, in the firſt inſtance, and to proceed as in other caſes; reſerving, however, the benefit of this claim, if, in a ſubſequent ſtage of the trial, they might think proper to reſort to it. As, for example, if the ſitting members ſhould be able to reſtore any of thoſe votes whom they ſhould impeach, they would, in ſuch caſe, inſiſt upon this point.

In this manner they entered upon their evidence; and, after examining the two witneſſes beforementioned, proceeded to others upon the merits of the election.

It was agreed between the parties, to treat the whole caſe reſpecting the borough votes firſt and ſeparately, in order to obtain a deciſion upon it from the Committee: Becauſe if the petitioners ſhould ſucceed in that, there would be a majority on their ſide, ſo great, as to make any further inquiry uſeleſs. In this proceeding 12 days were employed; in the courſe of which, they had given evidence to diſqualify (as they

contended) 122 votes; of whom 115 were for Cox, and 112 for Adamſon, beſides 13 croſs-votes. The counſel for the ſitting members then entered upon their caſe, in anſwer to the other. But in the courſe of their opening, having treated the caſe as if the petitioners had relinquiſhed the point, for which at firſt they reſerved their claim, reſpecting the mode of proceeding; and having propoſed to call evidence, in ſupport of ſuch votes only, as had been impeached by particular evidence on the part of the petitioners, or whoſe declarations at the poll had been falſified, the counſel for the latter interpoſed. They ſaid,

They had never given up the point they contended for; that the ſilence of the other counſel, and of the Committee reſpecting it, had led them to ſuppoſe that the juſtice of it was admitted: For they ſtill inſiſted upon it as a material ſubſtantive point, "that the conduct of the returning officer had been ſo groſsly partial and corrupt, as not only to call for puniſhment as a public offence, but likewiſe to intitle them to thoſe advantages of ſituation in this cauſe, which they would have had as ſitting members; of which place his guilt alone had deprived them." And they now required to have this queſtion decided by the Committee, conformably to the practice in the caſes of Car-

digan and Coventry. That they had avoided this courſe at the beginning, in the hope that the Committee would, of themſelves, have interfered as in the caſe of Coventry, in behalf of the petitioners in this reſpect; and becauſe they thought they could eſtabliſh their caſe more fully to the ſatisfaction of the Court, by proceeding regularly through it. That the court ſhould conſider themſelves as ſitting to do that juſtice, which the bailiff ought to have done; and therefore, as the voters in queſtion ought not to have been admitted by him, without ſhewing their titles, the Committee ought now to call upon the ſitting members to produce them, in order to keep their places on the poll.

The counſel on the other ſide contended,

That thoſe for the petitioners, by their conduct, had waved their argument and the effect of their claim; that it was too late to recur to it, after having proceeded regularly through their caſe, and concluded it: That it would be unjuſt now to confound the order of proceeding; for if at firſt the queſtion had been agitated and determined againſt the ſitting members, they would have accommodated their caſe to their change of ſituation; and might have had the advantage, which the petitioners had, of bringing forward their caſe *firſt*, and of replying to that made againſt them: Whereas, after what

had

had paſſed, the proceeding called for, would give the petitioners the advantage of both ſituations.

After more debate of this kind, the Chairman deſired the counſel on each ſide, regularly to argue the point in diſpute, to enable the Committee to determine it with preciſion.

The particular ſubject of this interruption, related to thoſe voters for the ſitting members, who, at the poll, refuſed to produce their leaſes, or to anſwer the queſtions reſpecting their titles to vote. The counſel for the petitioners had given no other evidence as to ſeveral of them, than that general account of their behaviour at the poll; which, they contended, was ſufficient, connected with the other circumſtances, to require the ſitting members to eſtabliſh their titles, by producing their leaſes.

They now argued to the following effect:

If the returning officer had done his duty, he would have required ſome ſatisfactory general evidence of the rights of the voters objected to at the poll; if he had aſked for this evidence, he would have been bound in duty to reject ſo many of them, as would have left the petitioners a clear majority on the poll. He could not have acted thus from ignorance, becauſe his whole conduct taken together betrays a corrupt motive. So far from uſing his authority

to obtain a fair account from the voters, he did all in his power, by coming forward actively, to ſuppreſs inquiry, and to encourage them to withhold the information neceſſary. When they aſked him for advice, he adviſed them wrong; for ſuch was his anſwer to them, "that they were not obliged to ſhew their titles."

In all caſes ſome evidence of a voter's right muſt be produced, whatever may be the nature of the election: By this it is not meant, that in all caſes title deeds, or legal proofs, are to be eſtabliſhed; but *ſome* proof is to be given if required. In counties, as long as elections have been regulated by poſitive law, this has been left to the freeholder's oath, as the moſt expedient method of aſcertaining the truth.—In boroughs, although their parliamentary conſtitutions are ſo various, as hardly to be reduced into regular claſſes, yet in all, the law has provided ſome means of aſcertaining the voters, and of ſupplying the place of a regiſter. There are three general diviſions, which in this point of view, comprehend them all; as 1. The right corporate: 2. That from ſcot and lot: 3. That from eſtate. In the firſt ſort, the books of the coporation contain ſuch proof of the claim, as is here intended, i. e. ſuch as *primâ facie* is ſufficient. In the ſecond ſort, the books of the pariſh rates, contain a ſimilar proof. In the third

third ſort, in which no public inſtrument can be referred to, as in the two former inſtances, the voters muſt ſupply the proof from their own documents; and without it, a returning officer is not bound to receive a vote, if queſtioned.

The two caſes of Cardigan in 1775, and Coventry in 1781, have inforced the above doctrine in a ſignal manner. In the former *, the mayor had declared, that he would admit all voters who would *ſay* they had voted at the former election. In that former election, the candidates had agreed to take all voters that came from the contributary towns, and to queſtion their rights afterwards by a ſcrutiny, if it ſhould be neceſſary; but no ſuch ſcrutiny was afterwards had; ſo that the having voted at this election, could form no rule to judge by. In this manner, an immenſe number of perſons, without any right whatever, were admitted to vote. When the merits of this election came on afterwards to be tried upon a petition, the ſitting member (like thoſe now for Cricklade) claimed the benefit of his poſſeſſion of the ſeat, and inſiſted upon the petitioner's bringing evidence to impeach his votes. But the Committee conſidered a poll ſo taken, as having no legal effect, and called upon the ſitting member, to ſhew

* See the caſe in 3 Doug. elect. 182—186.

ſome evidence of the right of voters ſo irregularly received *: In which failing, the petitioner ſucceeded to his ſeat.

In the caſe of Coventry, after the election in 1780, at the end of a poll which was protracted to ſix weeks, the corporation in a night had admitted to the freedom about 200 burgeſſes, who were brought to poll the next morning, for the parties who by their votes became the ſitting members. The petitioners, in the trial afterwards, gave general evidence of the fact; and on the third day of their proceeding, the Committee, of their own accord, ſtopped the counſel, and told them, they were of opinion that theſe men came upon the poll ſo queſtionably, that the party for whom they voted, ſhould prove their right in the ſame manner as if they had not ſtood upon the poll.

Theſe are caſes in point for the petitioners in the preſent queſtion. And as none of thoſe burgeſſes of Cricklade, who voted for the ſitting members, brought any evidence of their titles to the poll, the court ought, upon the principle of thoſe caſes and the rules of juſtice, to call

* The counſel in that caſe, perhaps, underſtood the Committee to be of this opinion; but in the hiſtory of the trial, it does not appear, that any reſolution of this ſort was expreſſed by the Committee; for the ſitting member's counſel, of their own accord, entered upon this evidence.

on

on them now for ſuch evidence. There is likewiſe an additional reaſon to be adduced from a precedent on record, which ſhews this to have been the particular practice of Cricklade. In the caſe in the Journals, in 1689, (10 Journ. 72. col. 2.) it appears, the voters uſed to produce their leaſes to the bailiff; the ſame in the caſe in 1695; (11 Journ. 461.) and the witneſs whoſe evidence is related, in 4 Doug. elect. 44. ſpeaks of the practice as cuſtomary.

The practical rule of law, *melior eſt conditio poſſidentis* has not place, in a caſe like this. It applies only to thoſe of merely private rights, where one perſon has the property of another, and has acquired a preſumptive right to it, by his negligence or ſufferance. In ſuch caſes, the law, for public convenience, conſiders a poſſeſſion ſo acquired, to be rightful, till proof of the contrary. But here the voters have gained their ſtation, not only by wrong, but by the wrongful act of a third perſon, a legal officer, without any negligence of the oppoſite party; and therefore have not that poſſeſſory right to which the maxim applies. It is like the caſe of a forcible entry into land; where, if an ejectment were brought, the poſſeſſion would be conſidered as no poſſeſſion at all: But the judge would require a further proof of title, from the party who ſhould claim this advantage from it.

The counſel for the ſitting members argued as follows:

There has been much inconſiſtency in the conduct of the petitioners, in ſpending ſo much time in evidence of facts, for which, as they ſay, they might have called on their opponents in the firſt inſtance. If they were ſincere in their claim, it is difficult to account for their not inſiſting upon it then, when their ſucceſs in it would have been ſo eſſentially ſerviceable to their cauſe. With reſpect to the bailiff's conduct, the ſitting members are not charged with partaking in it, and therefore they ought not to ſuffer from it, even ſuppoſing it to be criminal; and as to the officer himſelf, the evidence ſhews, that he acted by the advice of one, whom he might well have thought capable of directing him, and who is ſaid to have adviſed him to the beſt of his judgment. But it is not to reſt on this general obſervation: To every one of the charges brought againſt him, his defence may be eaſily made. As to the firſt, of refuſing booths for polling—He had no power to erect them. It is miſleading the court, to make *this* a head of accuſation. Even in counties, the ſheriff had no ſuch power, and the election muſt have been held in the uſual place in *them*, before the ſtat. 18 Geo. II. ch. 18. ſ. 7. which impowers and directs ſheriffs to make uſe of them.

His

His declaration of his intent to keep back the burgeſſes, till all the freeholders ſhould have polled, was prudent, and in order to avoid confuſion: His breach of it afterwards was accidental; for the poll being open by agreement that afternoon, and no freeholders attending, he could not of himſelf refuſe the votes of the burgeſſes who came and demanded to vote. Finding it oppoſed ſtrenuouſly by the counſel, he deſiſted; and in concluſion, only two votes were then received. So that the inconvenience of this to the petitioners, muſt have been trifling.

As to the paupers; their caſe is ſo particularly circumſtanced, and ſo different from the common caſe of pariſh poor, that he would have acted unwiſely, to have taken on himſelf to refuſe their votes. It remains to be decided by the Committee, whether they will not ſtill continue upon the poll with their approbation, after the arguments they will hereafter hear in ſupport of them.

As to his conduct reſpecting the leaſehold voters, the accuſation ſuppoſes, that he admitted them without *any* inquiry into, or evidence of their titles; and that in all claſſes of votes, a returning officer has ſome regular evidence of title ſhewn him; which in this inſtance the bailiff evaded. The firſt of theſe poſitions is contrary to fact, and the ſecond to law. The perſons

ſons who voted under this deſcription, lived in the houſes for which they voted; this was known to the bailiff, and not diſputed; and it was *primâ facie* evidence of ſome leaſe and right of poſſeſſion in the voters, which authoriſed the officer (nothing being proved to him to the contrary) to admit them. Perhaps it might be argued, that he was *bound* to admit them in ſuch caſe. The occupation of a houſe is a more ſubſtantial evidence of right to it, than a bare leaſe; more eſpecially in a place where it is well known, leaſes have always been made occaſionally for election purpoſes: And if there had been any leaſes produced at this election, they would have been only a mere form. The returning officer therefore was guided by a juſt preſumption of title.

As to the ſecond poſition, it falls to the ground upon a more correct inveſtigation of the ſubject. In corporations, in many caſes where a burgeſs has not been formally admitted, if he has the inchoate right to his freedom, a returning officer muſt admit him; therefore the want of a copy of the inrollment, is not ſufficient ground to refuſe the vote. In ſcot and lot boroughs, the rate is not the only qualification; inhabitancy is another; and the rate cannot prove that. There is another ſort of election right, which has not been mentioned, viz. that of potwallers: Where is the written

ten evidence of their titles? What other means has a returning officer of aſcertaining them, than *vivâ voce* evidence? In burgage tenure boroughs, deeds are commonly produced, no doubt —But why? Becauſe the voters have no other than the formal title, and can give no other proof of it. They can ſhew no reſidence or occupation; and in general have no knowledge of the eſtates they vote for. From hence what they call a rule of law, appears to be only a practice ſpringing up out of the abuſes of it. The law would not put men to ſuch monſtrous inconvenience, as that of carrying about their title deeds to every conteſted election; or require a returning officer to take upon himſelf the trial of ejectments. Again, what are deeds in a legal view, without proof of their execution? Then muſt witneſſes likewiſe be brought to the poll to eſtabliſh them? If the leaſes had been produced when called for here, perhaps the voters would have been equally blamed, for not bringing the atteſting witneſſes, and the bailiff for not requiring their attendance.

But they endeavour to prove Townſend criminal, becauſe, as they ſay, it had been the cuſtom at Cricklade always to produce the leaſes at the poll: And they prove this by paſſages in the Journals. But in the firſt caſe referred to, it is not mentioned as a *cuſtom* at elections;

but only a particular fact, at that election; and that not generally practiſed, but by ſome who are diſtinguiſhed by it. In the ſecond caſe, it is only mentioned as an argument of the counſel, who uſed it, perhaps, to gain time by the delay of producing deeds *.

Again, as to his anſwers and declarations to the voters: In theſe he did his duty according to law. A man is not bound to give evidence againſt himſelf. If any facts had been alledged to impeach a vote, then the voter might have been put to anſwer them; otherwiſe the bailiff was bound to receive him: And this is the doctrine inforced by the caſe of Aſhby and White. His advice to them not to anſwer queſtions, in theſe circumſtances, was ſuch as a lawyer underſtanding his duty, might have given with propriety. It was not a diſſuaſion to them on his part, but an opinion declared upon a reference to him.

* Theſe paſſages are as follow: A witneſs of the election in 1689, producing the poll, ſays, "The perſons firſt placed are the perſons *that ſhewed their leaſes* to the bailiff; the perſons placed next were the freeholders, &c." See 10 Journ. 72. In the caſe of 1695, the petition was founded on the want of due notice of the election, and the ſhortneſs of the time given; being only one day. And the petitioner's counſel argued, "That it could not be preſumed a reaſonable notice, becauſe *deeds were neceſſary to be produced*, to make out the voters right, which would require a longer time." 11 Journ. 461.

A re-

A returning officer may admit many bad votes on a poll, without being criminal or deſerving cenſure for it. Perhaps many may have been admitted on this poll. The error is on the ſafe ſide in theſe caſes.

In the caſe of Cardigan, the mayor had admitted votes contrary to all reaſonable grounds of judgment; becauſe, as a leading member of the corporation, he muſt have known the circumſtances of the preceding election, and that the voting in it could not afford evidence of right. But, at Cricklade, the voters lived in the houſes voted for; and this furniſhed a preſumption of title. Yet groſs as the miſconduct of the mayor of Cardigan was, it was not thought a fit ſubject for cenſure by the Committee.

The Coventry caſe was a flagrant violation of the principles of election, and of the rights of the corporation. The poll there was unlawfully protracted, for the purpoſe of that fraudulent admiſſion of freemen. It was an act manifeſtly partial and corrupt, which could not be juſtified by any ſhew of argument. In both theſe caſes, there is likewiſe a very material difference from the preſent. The returning officers in them were ruling members of the corporation; and, by having acceſs to the books, could at once know who were, and who were not, legally intitled to the freedom, and to vote as ſuch.

Their

Their neglect to inſpect them, in any caſe of diſpute, would have been criminal: But, in both inſtances, their guilt was carried farther, and amounted to an active violation of duty. But the bailiff of Cricklade had no ſuch guide to direct him; and was obliged to follow that, which the general circumſtances of the place led him to think reaſonable. He knew very well in what manner leaſes had been commonly made and uſed at Cricklade; and that the occupation of a houſe furniſhed a more ſubſtantial evidence of title, than an occaſional conveyance. He obſerved this rule uniformly; and the concluſion, drawn from his conduct, to prove a corrupt partiality, is an inference not warranted by the proofs.

The Committee, after deliberating upon the arguments, reſolved,

That the parties were bound to give evidence only in ſupport of the titles of thoſe voters which had been impeached; or whoſe declarations of the rights, under which they claimed to vote, had been falſified; or who had refuſed, at the poll, to give an account of the title under which they claimed a right of voting.

[This reſolution, in a ſubſequent ſtage of the cauſe, was explained by the court, ſo as not to exclude the petitioners from returning to the [illegible] of thoſe votes againſt whom they had neglected,

neglected, in going through their caſe, to give *particular* evidence: For, as they had relied upon the point above contended for, they had omitted this in ſome inſtances. Therefore, as ſoon as the ſitting members had cloſed *their* caſe, the counſel for the petitioners propoſed to call the witneſs, by whoſe evidence they made out their objection to ſome other votes, which they intended to bring within the terms of the above reſolution. The counſel for the ſitting members oppoſed this, arguing, that the petitioners had taken their own courſe at firſt, and cloſed their caſe; and therefore could not mend it by ſubſequent evidence. That it was contrary to eſtabliſhed rules thus to go through a caſe by piece-meal; and therefore, if they ſhould ſuffer by their conduct, it would be their own fault, in having left their caſe unfiniſhed, before they knew the opinion of the Committee; by which all parties muſt now abide.

On the other ſide it was contended, that the petitioners had not fully cloſed their caſe when they left it to their opponents to anſwer them; but had only proceeded ſo far, as in their judgment was proper to require an anſwer; having always acted upon and declared, their right to reſume their caſe again, if it ſhould be neceſſary: That the oppoſite counſel had not been miſled by this courſe; and if they had not then admitted

mitted the poſition held out to them, they ought in juſtice to have called for an explanation of it; or to have required the petitioners to have cloſed their caſe finally then; which would have brought on the ſame queſtion as was above decided: That, under the circumſtances then before the court, their reſolution could not mean to exclude the remainder of the caſe for the petitioners, but only to apply to what had *then* paſſed, and to the point contended for.

The Committee hereupon reſolved "*to permit the petitioners to examine the witneſs, as to thoſe voters, who, at the poll, refuſed to give an account of the title under which they claimed a right of voting.*" And they proceeded accordingly againſt five votes not before impeached.]

The counſel for the ſitting members, after being informed of the above reſolution in p. 350, proceeded upon evidence to prove, that it was the uſage of the borough to admit perſons to vote as leaſeholders, who had been 40 days in the occupation of the houſes for which they voted; although they might have had their leaſes a ſhorter time before the poll.

The counſel for the petitioners objected to this evidence; arguing,

Firſt, That the reſolution of the Committee of 1776, in 4 Doug. Elect. p. 65 *, ought to

* See it as copied in p. 324.

be

be conſidered; in effect, as a determination of the right, and to be adhered to as the juſt deciſion of a court of juſtice upon the point in iſſue. That it appeared from the proceedings of that Committee, the minutes of which were now upon the table, that the ſame queſtion was then agitated, and was conſidered as ſuch by them.

Secondly, That if it ſhould not be conſidered as a direct and expreſs deciſion upon the point, yet the reſolution neceſſarily implied it, according to the plain conſtruction of the words alone; without entering into the circumſtances under which it was made, as they appear upon the minutes.

Thirdly, That even admitting any ſuch cuſtom to be proved by evidence, it was illegal; for, if the evidence were to be given on a common law trial of the ſame queſtion, it might be demurred to: Becauſe occaſionality was a fraud upon the law of parliament, and therefore incapable of being eſtabliſhed by any evidence. That the ſitting members' caſe, in this reſpect, ſhould be conſidered as a declaration at law, ſtating an illegal cuſtom; which, however confirmed by uſage, muſt fall to the ground.

The counſel for the ſitting members maintained the propriety of receiving the evidence, by arguing,

1. That the determination of 1776, though juſt and legal, as far as the queſtions then agitated were involved in it, yet was no bar to the point which they now contended for; becauſe, as far as it might be conſtrued to relate to this point, it was extrajudicial; and could not be intitled to the authority of a deciſion, made upon full and competent examination of the ſubject. That the preſent queſtion was not (in its preſent ſhape, at leaſt) put to the Committee at that time; for it appeared, from the report of the trial *, that the queſtion there was, whether reſidence was neceſſary to freeholders and copyholders; but it was not argued or diſputed by the counſel, whether *leaſeholders* ſhould have reſided 40 days. That this appeared alſo from a peruſal of the evidence then produced, which did not bear upon this point; and though it had been inferred, from p. 58, 59, of the Report, that the counſel took it for granted in their arguments, yet it was, nevertheleſs true, that it had not been brought into deliberation, as a queſtion for judgment ought to be.

2. That the latter part of the determination ought not to be conſtrued to mean, that the leaſe ſhould have covered the whole occupation of 40 days; for, ſuppoſe a copyholder were to become

* 4 Doug. Elect. 15, 16.

a free-

a freeholder 20 days before an election; or, in caſe the occupier of a houſe *bonâ fide* ſhould not receive a leaſe of it till within the 40 days; in ſuch caſes it would not be argued that the vote was bad.

3. That the law againſt occaſionality did not furniſh a valid objection to the inquiry and evidence they contended for, however it might be applied upon the particular caſes which might be found open to it; and it would be the proper time to urge an objection on this ground, when ſuch caſes ſhould ariſe. That the general fraud was not to be preſumed; and, on the other hand, caſes might happen, in which a leaſe after the 40 days might not be occaſional, as in that abovementioned; for that the occupation of the houſe, in this borough, was the beſt teſt of the right, as far as occaſionality might come into queſtion.

The Committee determined to reject the evidence offered, and for this purpoſe came to the following reſolution:

That it is the opinion of this Committee, that the right of voting for members to ſerve in parliament for the borough of Cricklade, in the county of Wilts, is in the inhabitants poſſeſſing houſes within the ſaid borough, who are freeholders, copyholders, or leaſeholders, for any term not leſs than three years; or for any ſuch term, or greater term, determinable on

life or lives: Such freeholder, copyholder, or leaſeholder, having been as freeholder, copyholder, or leaſeholder, in the occupation of the houſe for which he may claim to vote, 40 *days preceding any election: And in the freeholders of the ſeveral hundreds, as directed by the ſtat.* 22 *Geo: III. c.* 31.

This matter being thus diſpoſed of, the counſel for the ſitting members proceeded to the caſe of thoſe voters who were objected to as pariſh poor, and whoſe right to vote they now undertook to maintain.

The circumſtances of it are as follows:

In the ſpring of the year 1783, the ſmall pox became very prevalent in the town and neighbourhood of Cricklade. The pariſh officers endeavoured to prevent the infection from ſpreading; but they ſoon found that it extended ſo generally, as to fruſtrate their endeavours; and, therefore, upon a conſideration of the impending danger to the town and its inhabitants, from the numbers who were liable to it, (for the alarm had ſpread abroad, and had very much injured the market) it was agreed, at a veſtry meeting, to propoſe an inoculation of the lower ſort, at the expence of the pariſh. An agreement was accordingly made for the purpoſe, with an apothecary; and public notice of it was given in the town. The entry made in the veſtry book, relating to this undertaking, is in theſe

words: "10th of April, 1783—It is agreed that the families ſhall be inoculated at the pariſh expence, except thoſe who can aſſiſt themſelves." A great many applied (and ſome with much earneſtneſs) to be inoculated, in conſequence of this ſcheme, and were paid for by the pariſh. But they were not all of the ſame ſort of perſons: Some were people who earned a livelihood by their labour, and maintained their families, in general, without any aſſiſtance from the pariſh; and were rated, and paid to the poor, but yet could not have borne the expence of the ſmall pox in their families, without aſſiſtance from the pariſh. Some were of that claſs called at Cricklade the ſecond poor, who did not receive relief from the pariſh, but from funds inveſted in the bailiff and pariſh officers as truſtees, appropriated to charitable uſes there, and occaſionally diſtributed; which were never applied to the relief of thoſe to whom the pariſh collection was given, called the weekly poor. Others were of the claſs of weekly poor. Some had only the medical expences of the ſmall pox defrayed; others had themſelves and families maintained likewiſe, as long as the effects of it continued.

The truſtees of the above charitable funds, upon a conſideration of the extraordinary diſtreſs and expence of the town, upon this occaſion, agreed to apply ten pounds out of their fund towards

the expences of the ſecond poor, under the inoculation; which was accordingly made uſe of by the pariſh.

There are two pariſhes in Cricklade; both of which joined in the meaſures purſued at this time. They partake equally in the eſtate above-mentioned, ſettled upon the truſtees for charitable uſes.

To all the voters who had received relief from the pariſh in the above manner, about 38 in number, the counſel for the petitioners ſtated the general objection, that they were thereby diſqualified; arguing,

That their caſe could not, upon any ſolid principle, be diſtinguiſhed from the common one, of receiving alms within the year; that the relief was applied for, and received, on account of the perſon's inability to maintain himſelf or family—given by the pariſh officers, and making part of their accounts; and thus coming within the reaſon and the definition of the diſqualification by receipt of alms. That the accidental misfortune of the ſmall pox could not, by being general, and overrunning a whole pariſh, alter the circumſtances of the individuals who ſuffered from it; or make a difference between the caſe of the perſons, ſo relieved by the pariſh, and that of a ſingle patient; that the misfortune to each man would be the ſame if a fever had ſubjected him

him ſingly to the ſame neceſſity; or if a hard winter ſhould involve one or many in want and diſtreſs, that would form no exception to the rule, however ſevere or unexpected the misfortune might be. That it never yet was attempted to argue ſuch caſes into exceptions to a rule, which was generally eſtabliſhed in parliamentary law; and was not only inforced upon the receipt of pariſh relief, but in other private charities, which were of the ſame nature.

The counſel for the ſitting members maintained theſe votes, by arguing,

That there was no ſuch generally eſtabliſhed rule of diſqualification, as the objection proceeded upon; but that, in every caſe, the conſtitution and practice of the place, where the queſtion aroſe, and the mode of giving and receiving the relief, were to be taken into conſideration. That the principle of diſqualifying voters, on this account, was according to Blackſt. 1 Com. 164, that perſons ſo diſtreſſed and dependent, could not be ſuppoſed to have any will of their own: And there was alſo another, viz. that thoſe who were a burthen to ſociety, could not be intitled to the privileges of it. That, upon theſe principles, the receipt of pariſh relief was not to be treated as an abſolute diſqualification, and concluſive againſt the voter, but only as general preſumptive evidence of his falling

within the reaſon of the diſqualifications: For, if one in this ſituation were, by a lucky turn of fortune, to become a rich man, and to vote at an election within the ſame year, would it not be unjuſt to reject ſuch a man's vote, on account of his former poverty? That if receipt of alms were a general diſqualification, yet it could extend no farther than that of ordinary pariſh relief: But the caſe of the voters in queſtion was not that of *ordinary* pariſh relief; nor was the expence underſtood by the pariſh officers, or by the perſons themſelves, to be incurred in the ordinary way: Neither did the truſtees of the charity eſteem it ſo, when they ſubſcribed a part of their fund towards it. That it was an extraordinary and anomalous caſe: For it was not in the character of diſtreſſed poor that they were provided for; but as perſons whom the pariſh officers, by a prudent exerciſe of their functions, involved in this neceſſity, in order to prevent a greater public calamity, and a local injury to the town and neighbourhood. It was a propoſal made by the pariſh to inoculate, and not a diſtreſs brought on by the perſons themſelves; a bargain made with them, by which lives were ſaved, and expences leſſened; and thus far a benefit obtained to the pariſh in effect.

That, therefore, the pariſh could not complain of theſe perſons as burthenſome, ſince whatever charge

charge was incurred, was by its own act; and this made a plain diſtinction between relief given upon diſtreſs or ſickneſs happening in the natural way, and ſuch as was adminiſtered to theſe perſons; *that* is accidental diſtreſs, and this artificial. And though in the caſe of a fever, or natural ſmall pox, the ſame perſons would have been ſubject to equal want; yet when the loſs of their franchiſe is in queſtion, and the objection is ſupported by arguing from a rule of law, which ſuppoſes the perſons to be burthenſome to their pariſh, this circumſtance is enough to diſtinguiſh the caſe out of any ſuch rule.

That the objection was always allowed with reluctance, in caſes out of the ordinary courſe; becauſe, in theſe, it deprives men of a valuable privilege unexpectedly, and, as it were, by ſurpriſe: For which reaſon, Committees have frequently inquired into the uſage, in reſpect of particular charities, whether they have been held to diſqualify or not; as in the caſe of Harpur's charity and others, in Bedford, mentioned in the report of the Bedford caſe, in 2 Doug. Elect. Similar principles prevailed in the arguments upon ſimilar caſes, in the trial of the Sudbury petition, in 1781. That the argument drawn from ſurpriſe upon the voter, was applicable to theſe; becauſe it could not be ſuppoſed, that they would have come with ſo much readineſs

to

to take the offer of the pariſh, if they had been told that it might deprive them of their votes at the election. Many might have eſcaped the infection; and others might have gone to earn a livelihood elſewhere, to avoid it.

The counſel for the petitioners replied,

That there was no caſe in which it had been determined, that receipt of alms, within the year, did not diſqualify. That the application of the charity money to the uſes of the pariſh, made not the leaſt difference in the caſe; becauſe it was employed together with the money collected by the rate, and as part of it; and it bore, beſides, but a ſmall proportion to it. That it was, therefore, ſimply a queſtion upon the effect of pariſh relief to a voter.

That upon this ſubject the rule was general; and, in order to avoid innumerable and ſubtle diſtinctions, a line had been drawn to include all perſons ſo circumſtanced: Many caſes having happened, in which the receipt of alms, but once within a year, had been held to diſqualify; for an inquiry into the relative ſituations of ſuch men would be endleſs.

That theſe voters had brought the diſability upon themſelves; therefore if any difference exiſted between perſons in diſtreſs from natural ſickneſs, and thoſe under an artificial one, the latter ſeemed the leaſt intitled to any favour; for

the

the burthen to the pariſh is the ſame in both caſes, and is equally felt in both, by thoſe whoſe property contributes to it.

That it could not be argued to have been a benefit to the pariſh, without admitting it to have been a benefit to the perſons themſelves; and if beneficial to them, it was merely on account of their inability to maintain themſelves; which is the ſtate of dependent poverty, that ſubjects men to the influence of others: That the ſame perſons would certainly have been in equal diſtreſs, if they had got the diſorder by infection; which, but for the precaution of the pariſh officers, would have happened here, moſt probably, with greater ſeverity to the patients.

That it was not neceſſary to tell men the legal effect of the receipt of alms, any more than the other obligations of the law; becauſe all men are preſumed and bound to know them, and muſt ſubmit to ſuffer, if they neglect this knowledge of their duty. But ſuppoſe theſe voters had been thus ignorant, and informed of the conſequent diſqualification, at the ſame time that they ſaw the danger of ruin to their families, from the approaching diſorder, would not the aſſiſtance thus given have been thought an equivalent, for the probable loſs of their votes at a diſtant election?

That

That it was fallacious to argue upon the caſe, as involving the *loſs* of a franchiſe, becauſe, at moſt, it amounted only to a temporary ſuſpenſion of it; which might revive again in the following year; and generally continued as long as the induſtry of the voter.

The Committee came to the following reſolution upon this caſe, viz.

That thoſe perſons who ſubmitted themſelves or their families, to be inoculated in the year 1783, *by the invitation of the pariſhes of Cricklade, and received relief in conſequence of ſuch inoculation, were not thereby diſqualified from voting at the laſt election.*

The above reſolution extended to ſeveral of thoſe voters to whom the petitioners had objected as receiving alms.

While the petitioners were examining witneſſes to eſtabliſh their objection to thoſe whom they called paupers, in many of which inſtances, the receipt of alms appeared to have been confined to the time of the ſmall pox, the counſel on the other ſide would have croſs examined the witneſſes as to the general circumſtances of the perſons; in order to ſhew, that at other times (*more than a year* before the election) they had paid rates, and were not at all in a ſtate of want. The counſel for the petitioners objected to any ſuch inquiries; contending, that the law had fixed the line, by limiting the period of inquiry

to

o a year, before the election: Let a man be ich both before and after that period, it ſignified nothing; his receipt of pariſh relief within it, diſqualified him abſolutely; he is thereby placed in a ſtate of dependence, when the vote is ſuppoſed to be aſked and given.

The counſel for the ſitting members contended, That this limitation was not general and unqualified, but exiſted only under ſpecial reſolutions of the Houſe of Commons reſpecting particular places; as in the caſe of Reading, it had been extended to two years. That there being no reſolution of this ſort affecting Cricklade, it remained open to the general principles of law and evidence; according to which, the receipt of alms afforded only a preſumption of poverty in the receiver, without excluding further inquiry into his general circumſtances. That it was more eſpecially juſt and reaſonable to permit ſuch inquiry in a caſe like this, ariſing upon a public calamity to a whole town, which was caſual and temporary.

The Committee reſolved,

Not to admit evidence to be heard as to the condition of the voters, beyond a year previous to the election *.

* The election happened in April, 1784. The time of the ſmall pox was in April and May, 1783.

The

The other queſtions that aroſe upon the borough votes were not decided; for which reaſon I do not enter into the particulars of them. There were ſeveral agitated; but the courſe taken by the Committee, in coming to their final determination, rendered it unneceſſary to deliberate upon them. They did not affect many votes, and chiefly aroſe upon individuals out of diſputed facts. The principal one was, whether a leaſe, intitling to vote, ought to be *in writing*.

At the time when the Committee came to the reſolution in p. 352, they determined likewiſe, that the petitioners ſhould then continue their proceeding, and go through their *whole* caſe both of borough and hundred voters *. This did not paſs upon the ſuggeſtion or debate of the counſel, but was the direction of the court. They proceeded accordingly; and, after this time, the cauſe became, in ſubſtance, the trial of a county election in the five hundreds.

* The counſel for the petitioners not being prepared to enter ſo ſoon on the evidence of this part of their caſe, after finiſhing their five new objections to the burgeſſes, deſired to have further time allowed them, by an extraordinary adjournment over the following day; and requeſted the chairman to move the Houſe for leave to make ſuch adjournment. This was accordingly done, and the adjournment made to the ſecond day following, when they produced their evidence upon the hundredors.

The

The petitioners proceeded againſt 95 freeholders, who voted for their opponents: The objection to 74, was founded upon the ſtatute 20 Geo. III. ch. 17. in reſpect of their aſſeſſment to the land-tax; in eight of which, other objections, included in the following numbers, were united; to 21 the objection was for not being legal freeholders; to ſix as paupers; to one, as not within the hundred; to one, as having purchaſed within the year; and they endeavoured to eſtabliſh ſeven, whom the bailiff had rejected.

The ſitting members objected to 103 freeholders: To 83 of this number, on account of aſſeſſments to the land-tax; to ſix, as not freeholders; to three, as having their eſtates reduced under value by mortgage; to one, for a ſimilar reduction by debts and legacies, under the will of the laſt owner; to two, for inferior value in themſelves; to three, as paupers; to three, as employed in the Poſt or Stamp Offices; to one, as not a year in poſſeſſion; to one, as not properly deſcribed on the poll; and they endeavoured to eſtabliſh one, whom the bailiff had rejected.

I have placed the few queſtions which the Committee decided, in this ſecond part of the cauſe, together with thoſe of the Bedfordſhire caſe upon the ſame ſubjects, and under their reſpec-

reſpective diviſions there, as the place to which they more properly belong: Except that I do not claſs the few which depend on the particular conſtruction of the aſſeſſment act, made by this Committee, with the correſponding caſes, but by themſelves; for the reaſon which the reader will find prefixed to thoſe caſes.

There were many other queſtions beſides thoſe mentioned in this book, argued by the counſel upon the county votes; but not determined by the Committee. The moſt important legal queſtion, aroſe out of an objection made by the petitioners to the votes of the 12 burgeſſes of Malmſbury; who hold each a parcel of land in right of their burgeſſhips, in ſome meaſure like the prebendal rights in chapter lands. The objectors argued, that the lands belonged to the corporation aggregate, and not to the individual members of it. The nature of this ſort of tenure was very learnedly diſcuſſed upon this occaſion; but I avoid a recital of the arguments for the reaſon before given.

The Committee having found, upon a view of the general queſtions in the cauſe, a great majority for the petitioners clearly eſtabliſhed, reſolved upon their final determination accordingly; without entering into the particular legal queſtions, either of the borough votes or hundredors.

dredors. This reſolution paſſed, and was communicated to the parties on the 31ſt of March.

On the 4th of April *, the Chairman informed the houſe, that they had determined,

That

* This diſtance of time between the determination of the Committee, and the Chairman's report to the houſe, was owing to the accidental ſtoppage of buſineſs there, by the non-appointment of the Committee for the Buckinghamſhire election. The day fixed for that appointment was March 22 preceding; on which day, though 172 members were preſent, ſo many were diſabled to ſerve, that a ſelect Committee could not be formed. On the following days there was the ſame deficiency; and the houſe continued in this ſtate of incapacity, daily opened and adjourned by the Speaker, as the law required, (Eaſter intervening) till the 4th of April following; when a Committee was at laſt formed for the trial of the above election, and the houſe was again opened to buſineſs. Till this day, the declaration of the reſolutions of the Cricklade Committee could not be made; becauſe the ſtat. 11 Geo. III. ch. 42. ſect. 4. provides, that the houſe ſhall not proceed to any buſineſs whatever except the ſwearing of members, previous to entering upon the ballot when fixed in the order of the day; and if that ſhould not take place, the houſe muſt immediately adjourn. This regulation, excellent in its principle, was however too rigid, in excluding from the houſe thoſe neceſſary acts of form, which are required in ſome important affairs, and which would not have interfered with the general deſign of the law. And it has been amended in the act of the laſt ſeſſion (28 Geo. III. ch. 52. ſect. 12.) ſo as to enable the houſe previouſly to receive and act upon reports from ſelect Committees, and to attend the royal ſummons in the Houſe of

*That the petitioners were duly elected *, and ought to have been returned.*

The Chairman at the ſame time reported to the houſe, by the direction of the Committee, the following reſolution, which they paſſed reſpecting the returning officer.

" *That it is the opinion of this Committee, that the conduct of the returning officer, in taking the poll and making the return, at the laſt election of members to ſerve in parliament for the borough of Cricklade in the county of Wilts, was partial and illegal; whereby a colourable majority was obtained on the poll for Mr. Adamſon and Mr. Coxe.*"

The houſe hereupon appointed a day in the following week, for taking this report into conſideration.

The ſubſequent proceedings in the houſe upon this laſt reſolution of the Committee, occaſioned many debates, and employed much time there; having continued by ſeveral adjournments to the end of the ſeſſion. The purpoſe which the Committee had in view, of drawing forth from the houſe ſome puniſhment upon the returning officer, was at laſt not obtained; and therefore I ſhall

Peers. In the preface to my firſt volume, I took the liberty to recommend ſuch an alteration.

* 40 Journ. 757.

relate

relate only a ſhort and general account of the proceedings upon this report.

It happened, I know not how, to intereſt and engage very particularly the moſt diſtinguiſhed members; and to be involved in thoſe conſiderations, on which parties exert themſelves in public affairs: And thus the meaſures propoſed on one ſide, were ſtrenuouſly oppoſed on the other; till by repeated adjournments, the whole of the ſeſſion was ſpent without concluding any thing upon the ſubject.

On the day after the above appointment, it was ordered, that the minutes of the proceedings of the Committee be laid before the houſe *. On the 11th of April, the report was taken into conſideration. The entry in the Journal of this day † ſtates; a motion for reading the Journal of the proceedings of the houſe, upon the caſe of Shoreham in 1770 and 1771; which was read. Alſo a motion for reading the petitions preſented to the houſe upon this election for Cricklade, which were read. Alſo a motion for reading the Journal of the proceedings, upon taking into conſideration the report of the ſelect Committee upon the Cricklade election in 1782, which was read. After which, the queſtion being propoſed, That the houſe agree with the Com-

* 40 Journ. 767, 772. † Ibid. 833.

mittee in their aforeſaid reſolution, the houſe was moved that the minutes of the evidence might be read, and this reading being objected to, and a debate ariſing thereupon, it was ordered, that the debate be adjourned till the 14th of April following.

Thus far the Journal: The debate upon theſe queſtions laſted ſome hours. A member of the Committee moved to have the charge againſt the bailiff heard at the bar; but dropped it, upon the recommendation of the ſpeaker to have the precedents looked into, and the ſubject adjourned, in order to be further conſidered. This gave riſe to further debate, and other motions. One was to agree with the reſolutions of the Committee; and another, to order the returning officer to appear at the bar, to make his defence. Theſe motions were ſtrenuouſly ſupported, and oppoſed. The argument for them was founded, in general, upon the neceſſity and expedience of placing implicit confidence in the reports of a ſelect Committee, after a regular judicial inquiry upon oath; ſo far, as to put the party upon his defence to a charge therein made, in the firſt inſtance; and afterwards to puniſh, if he ſhould not exculpate himſelf: And this was ſaid to be analogous to the practice of the houſe, in other caſes of as great importance, as upon private bills; and to the

courſe

courſe uſed before the Grenville act, when the houſe proceeded in the ſame manner upon reports of the Committees of privileges.

The principle of the argument againſt this meaſure was, That the houſe, as judges upon a criminal charge, were bound in juſtice and conſcience, to be informed by evidence given to themſelves; and ought not to proceed to puniſh a man, upon inference from facts found by another tribunal, without being convinced by knowledge of their own *: That it was, therefore, neceſſary to proceed through the evidence of the guilt charged upon the bailiff, by a regular inquiry *in the houſe*, before the houſe could inflict

* The ſame principle might be urged againſt a frequent practice of the houſe, ſince the inſtitution of the new election court. If a witneſs there ſhould commit perjury, or prevaricate (See ſect. 26. of the act 10 Geo. III.) the courſe was for the Chairman to report it to the houſe, and to move, that he be committed to Newgate: Upon which, the motion paſſed, and the Speaker made his warrant accordingly. Yet this was never objected to; but paſſed without any inquiry, by the houſe, into the particulars of the offence; and merely upon the authority of the Chairman's report. The laſt inſtance of this kind, I believe, is that which happened in the caſe of Ilcheſter, mentioned in my firſt vol. p. 470. In the act of the laſt ſeſſion, 28 Geo. III. ch. 52. a very proper amendment was made of the above ſection, by impowering the Chairman of the Committee, in ſuch caſe, to commit to the Serjeant at Arms directly.—See ſect. 16. of the laſtmentioned act.

any cenſure or puniſhment upon him. That the antient courſe, was only different in form, and not in ſubſtance from this; becauſe the Committee of privileges was a Committee open to the whole houſe; and a report from that Committee to the houſe, was only a reference from the houſe in one form, to the ſame body in another form.

Theſe arguments were illuſtrated and inforced in many able ſpeeches on each ſide. Both parties, however, ſeemed to agree in thinking, that it would be wiſer and better, to let the ſelect Committees in future exerciſe that authority over returning officers whom they might adjudge culpable, which now reſted in the houſe; and that ſuch an alteration of the law, might with propriety be introduced into the bill, then * paſſing through the houſe, for amending the Grenville act.

On the 14th of April, when the adjourned debate abovementioned was reſumed, a member who had taken a principal part againſt the returning officer, moved, "That a Committee

* The bill here alluded to, was the ſubject of many debates during this ſeſſion; but was at laſt dropped, before it was ready to paſs the Houſe of Commons. It has been ſince improved and extended, and again introduced into the houſe under the care of the ſame right honourable member who firſt propoſed it, and was paſſed into a law of the laſt ſeſſion, ſtat. 28 Geo. III, ch. 52. The amendment above propoſed does not make part of it.

be

be appointed to ſearch the Journals, touching the uſage of the houſe in caſes of reports of Committees of privileges or elections, reſpecting the conduct of returning officers; and to report the ſame to the houſe."

This was accordingly ordered without diſpute. The original debate was again adjourned for a week *, and then further adjourned to the 26th inſtant. On the 25th, the Committee above appointed to ſearch for precedents, made their report *; which is printed at length in the Journal of that day †; and the original

* 40 Journ. 850, 873, 894, 916.

† Ibid. p. 889. This report contains a great number of caſes, judiciouſly arranged in ſeparate claſſes according to their ſubjects. It does not appear that in any one of them, the houſe required that previous inquiry into the juſtice of a report againſt returning officers, in order to call them before the houſe to make their defence, which on one ſide was contended for in the preſent caſe. The greater part of the above caſes happened before the year 1673; till which time, the practice of the houſe was the ſame in its principle, as it would be at this time, to take a ſimilar courſe upon the reports of Select Committees: Becauſe, till then, the election Committees were compoſed of a limited number of members, and were not open Committees. In this period, therefore, the reports cannot be conſidered to have been made by the houſe in one form, to the *ſame* houſe in a different form; which was an argument employed againſt the effect of the precedents, on which one ſide had relied in the debate.

original debate was adjoured to the 29th *. Then again adjourned to the 2d of May *; again adjourned to the 19th following. On the 2d of May, the ſelect Committee were ordered " to extract from the minutes of the ſaid Committee,

The caſe of Shoreham in 1771, tried before a Select Committee, is ſo much in point to the argument of thoſe who moved to agree with, and to act upon, the reſolution of the Committee, that I have extracted it from the report for the reader's obſervation, in the words of the Journal, p. 893. " Shoreham, Jan. 29, 1771. Report received, ſtating, that the conduct of the returning officer in taking the poll, and making the return at the laſt election, was illegal—Ordered, " That the returning officer do attend this houſe on Thurſday, 14th February."—Feb. 8, Returning officer called in—His charge read—Directed to withdraw—Called in again, and having ſaid, that he was not guilty of the charge contained in the ſaid reſolutions, the original poll taken at the election was produced; and John Browne examined in ſupport of the charge. And then the ſaid Hugh Roberts, the returning officer, was heard in his defence. And having propoſed to produce evidence, in ſupport of what he had alledged in his defence, he was again directed to withdraw—Feb. 12—Called in again, and produced ſeveral witneſſes, who were examined, in his defence.—Directed to withdraw.—Reſolved, " That H. Roberts, the late returning officer, &c.—having, &c. &c.—hath thereby acted illegally, and in breach of the privilege of this houſe."—Ordered, " That the ſaid H. R. be for his ſaid offence, taken into the cuſtody of the Serjeant at Arms."—Feb. 13. A petition from the returning officer read.—Ordered to be brought to the bar to-morrow.

* 40 Journ. 922, 1001.

mittee, ſuch particulars as appear therein, of partial and illegal conduct in the returning officer for the ſaid borough:—And to report the ſame to the houſe, together with the evidence thereon *. On the 19th the debate was adjourned to the 3d of June; and on that day to the 9th following *. On the 9th the ſubject was not reſumed. On the 13th, a report was made by the ſelect Committee, of extracts from their minutes of the evidence, according to the order abovementioned *; which report is printed in the Journal of that day: After which there is nothing in the proceedings of the houſe of this ſeſſion, relating to the firſt report againſt the returning officer.

to-morrow.—Feb. 14. Brought to the bar, where he, upon his knees, received a reprimand from Mr. Speaker, and was ordered to be diſcharged out of cuſtody.

A ſimilar proceeding (in the firſt reſolutions) was had upon the report of the Cricklade Committee in 1782, upon the authority of which, the ſtatute for changing the right of election, as before-mentioned, was founded. But in that caſe, there were no ſteps taken for the puniſhment of an individual.

* 40 Journ. 1047, 1063.

XII.

THE

CASE

Of the COUNTY of

BEDFORD,

In 1785.

The Committee was choſen on Friday, March 18, 1785, and conſiſted of the following Members:

Lord Viſcount Middleton, *Chairman.*
Hon. Horatio Walpole.
John Vaughan, Eſq;
Edward Cotsford, Eſq;
George Dempſter, Eſq;
John M'Bride, Eſq;
John George Philips, Eſq;
Sir John Frederick, Bart.
Philip Raſhleigh, Eſq;
George Vanſittart, Eſq;
Richard Payne Knight, Eſq;
Henry Addington, Eſq;
Orlando Bridgeman, Eſq;

NOMINEES.

Sir James Erſkine, Bart. *Of the Petitioner.*
Wm. Mainwaring, Eſq; *Of the Sitting Member.*

PETITIONER.

Hon. St. Andrew St. John.

Sitting Member.

Lord Ongley.

COUNSEL.

For the Petitioner,

Mr. Graham, and Mr. Le Blanc.

For the Sitting Member,

Mr. Rous, and Mr. Douglas.

THE CASE

Of the COUNTY of BEDFORD,

In 1785.

THE petition contained a general account of the proceedings which led to the determination of the former Committee upon this election; ſtating the numbers on the poll, viz. for Lord Oſſory 1050, for Mr. St. John 974, and for Lord Ongley 973; Lord Ongley's petition, and the alteration of the return in his favour; by which Mr. St. John's majority of *one* was transferred to Lord Ongley, and the latter became the ſitting member: The whole of which proceedings may be ſeen in my Report of the caſe in the firſt volume.

The petition likewiſe contained a charge of bribery againſt Lord Ongley: And alledged, that the ſheriff had admitted many illegal votes in

in his favour, and rejected many legal votes tendered for Mr. St. John *.

On the ſame day in which this petition was read in the Houſe, (Feb. 1ſt.) it was "Ordered, That the petitioner ſhould, by himſelf or agents, on or before the 28th day of February, deliver to the ſitting member or his agents, liſts of the perſons intended by the petitioner to be objected to, who voted for the ſitting member; giving, in the ſaid liſts, the ſeveral heads of objection, and diſtinguiſhing the ſame againſt the names of the voters excepted to: And that the ſitting member ſhould, by himſelf or his agents, within the ſame time deliver the like liſts on his part to the petitioner or his agents †."

This order paſſed in conſequence of a general reſolution for the purpoſe in county elections, which the Houſe annually makes at the beginning of every ſeſſion. It appears in the votes of January 26, of this ſeſſion (A.)

The parties mutually exchanged their ſeveral liſts purſuant to this order (B.)

The reader has ſeen, perhaps, in the former volume, in what manner the firſt petition againſt Mr. St. John was determined. By that deciſion, Lord Ongley was conſidered to have been duly

* 40 Journ. 472. 1ſt of February, 1785.

† 40 Journ. 473.

elected

elected before the ſheriff, and intitled to the return; but without prejudice to any inquiry into the merits of the election. The preſent petition therefore ſtands *wholly* unconnected with the former; and in the ſame point of view, as if Lord Ongley had been originally the member returned, and Mr. St. John had, at firſt, petitioned againſt him upon the merits of the election. Theſe are the ſubject matter of the preſent cauſe.

I have found it difficult ſo to arrange and abridge the great maſs and variety of caſes determined by this Committee, as to bring it within the compaſs of my undertaking. A full and particular narrative of the whole trial would be uſeleſs to all but the parties concerned; and this method of treating a cauſe, neither ſuits my deſign or inclination. I have endeavoured, therefore, to ſtate the proceedings in ſuch a manner, as ſeemed fitteſt for profeſſional uſe. As to all other queſtions, relating only to the hiſtory of the election, or the local and temporary intereſts of the county or the parties, which will neceſſary be forgotten in a few years, even among themſelves, I have omitted them altogether.

In relating the ſeveral deciſions, I have not regarded the order of time, or the particular occaſions which produced them; but the ſubjects

to

to which they belong, according to my arrangement of them. For which purpoſe I have placed all thoſe upon votes objected to, or queſtions relating to them, that were capable of being ſo claſſed, ſeparate from the preſent general account of the cauſe; and, together with them, the correſponding deciſions of the Cricklade and Buckinghamſhire committees. By this arrangement, the reader will ſee altogether and at once, the whole body of determinations upon county votes, made in the preſent parliament; (or ſuch, at leaſt, as in my opinion, repreſent the whole) inſtead of ſearching for them in three detached caſes. In this reſpect, I conſider the above caſes as ſeveral parts of the ſame ſubject, capable of better effect, by being ſo far united. In reporting the general ſtate of the cauſe in each of them, I treat of ſuch matters only as do not contain their deciſions upon the freehold votes; which the reader may have obſerved of the Cricklade caſe.

I have omitted altogether many queſtions of merely legal rights; as thoſe ariſing upon wills, (of which there were ſome decided) and ſuch others, of which the courts of common law have the peculiar and proper cognizance; and have endeavoured to report only the caſes of a parliamentary or election kind: Becauſe the judgments of thoſe courts, and the reports of their pro-

proceedings, are the only authority to which lawyers ſubmit, upon judicial queſtions.

I have ſometimes doubted of the propriety of publiſhing the deciſions upon the aſſeſſment act; becauſe the effect of that act upon the right of voting, is to ceaſe after the commencement of the new law, to be eſtabliſhed in July 1790, by ſtat. 28 Geo. III. c. 36. But ſince the ſtate of public affairs has cauſed a general apprehenſion, that a new parliament may be called before that time, (in which caſe, county elections will be regulated by the old law) it ſeemed to me proper to include the caſes, explaining that law, in this Report. It is ſaid, likewiſe, that in many counties the new act has excited complaints, which are to be addreſſed to the Houſe of Commons againſt its eſtabliſhment. It will be found, perhaps, that theſe objections are not raiſed againſt the principle of the act, (which has always ſeemed to me an excellent one) but againſt the difficult and embarraſſed manner, by which many of its regulations are to be carried into execution.

The preſent being the firſt Engliſh county election which has been regularly tried *through* by a ſelect Committee, and determined upon a conſideration of the whole cauſe *, I think it neceſſary

* See the five concluding pages of the Reſolves of the Glouceſterſhire Committee, publiſhed by their chairman;

ſary to give a particular account of the mode of proceeding obſerved by the Committee, throughout their inquiry. And I hope this reaſon will ſerve for my excuſe, if, from an attention to ſuch points, I may ſometimes be thought tedious.

The original poll books of the election were produced in court by the clerk of the peace.

When the counſel for the petitioner had opened the general ſtate of their caſe, it became a queſtion in what manner it ſhould be conducted; whether the petitioner ſhould go through the whole of his caſe at once, and then receive a general anſwer from the ſitting member; or whether he ſhould proceed by ſeparate hundreds or booths, conſidering each hundred as a ſeparate cauſe, and obtaining a deciſion upon the votes in each, ſeparately, as he proceeded.

The counſel for the petitioner propoſed the latter method, and named the hundred of Barford as that with which they would begin: This was objected to by the other ſide. For the petitioner it was ſaid, That this method would tend much to facilitate and ſhorten the proceedings; that, according to the deciſions of the Committee in the firſt hundred, the parties might regulate all future caſes of the ſame ſort; whereas, without ſome

'from whence it appears, that the trial of that petition was 'abandoned by the petitioner, before the regular concluſion 'of the cauſe.

ſuch.

ſuch ſtandard, they would be obliged to bring forward a multitude of ſimilar caſes, from not knowing whether it were uſeful or not. That it would be much eaſier for the Committee to decide, as well as for the counſel to argue, and the agents to prepare evidence, upon the caſes of each ſeparate booth or hundred, than upon the aggregate maſs of the whole county; which latter method produced infinite difficulty in the Glouceſterſhire caſe, and rendered a full inveſtigation of the cauſe almoſt impoſſible.

For the ſitting member it was ſaid, That the Committee, having a power over the cauſe before them, ought ſo to order the conduct of it, as to deal equal juſtice to both parties; that it would be unjuſt to ſuffer one party to take that courſe which he might think moſt ſuitable to his own intereſt, and to proceed partially through his caſe, feeling his way as he advanced, and directing his evidence accordingly: That the general courſe of proceeding, in all cauſes, was for the plaintiff to prove his whole caſe, before the defendant was called upon to anſwer it; and no precedent could be ſhewn to authorize ſuch a departure from it, as was now required; no election cauſe having ever been ſo conducted: That the accumulation of queſtions ſo much dreaded by the petitioner's counſel, might eaſily be avoided, by obtaining general deciſions upon

ſuch legal queſtions as were likely to occur often; which the Committee would naturally reſolve for their own convenience, as well as that of the parties. That in the preſent inſtance, it would be peculiarly hard upon the ſitting member, who had relied upon the eſtabliſhed practice in ſuch caſes, and had not yet prepared evidence in his defence; naturally expecting to do it more effectually during the inquiry into the caſe of the petitioner.

The Committee, after deliberating upon the queſtion, came to the following reſolution:

"*That the counſel for the petitioner do begin with the hundred of Barford; and that upon his having concluded his objections to the votes within this hundred, the counſel for the ſitting member do proceed to ſubſtantiate the votes ſo objected to; and then proceed on the liſt of objections within the ſame hundred; and the petitioner's counſel will then enter upon the defence of the votes ſo objected to, and conclude his caſe, as far as it relates to that hundred.*"

When the Chairman communicated this reſolution to the parties, he ſaid, he was authoriſed to declare, "*That the Committee had not poſitively fixed upon this mode of proceeding for the whole cauſe; but if they ſhould find it inconvenient in this hundred, they would afterwards alter it. And if any particular inconvenience ſhould, in this*

firſt

firſt inſtance, happen to the ſitting member from following the rule laid down, they would endeavour to accommodate him in its application."

The petitioner accordingly proceeded in his evidence of objections to votes in the hundred of Barford, as ſtated in the liſt delivered to the ſitting member, purſuant to the order of the houſe.

The mode of proceeding by hundreds was not afterwards complained of on the part of the ſitting member; on the contrary, it ſeemed in practice to be mutually convenient to the parties, as well as approved by the court. While the petitioner was going through his caſe in the hundred of Barford, he gave timely notice to the ſitting member, that he intended to proceed next upon the hundred of Manſhead. In the courſe of his proceeding in that hundred, he alſo gave notice of the next he meant to take; ſoon after which, on the 12th of April, before Manſhead hundred was gone through, the counſel for the ſitting member applied to the Committee, to direct the petitioner to name the order, in which he meant to take all the remaining hundreds. This application was thought reaſonable, and the court accordingly required the petitioner to give notice of the order of his proceeding, as early as poſſible; and named the next day for it. The petitioner agreed, and

being then prepared to ſtate the order, delivered a paper containing it to the oppoſite party, which was acceded to. This order directed the remainder of the trial, without any difficulty ariſing on either ſide. It was as follows: 3d hundred, Clifton and Wixamtree; 4th, Bedford; 5th, Flitt; 6th, Redbornſtoke; 8th, Willey; 9th, Stoddon.

Sometime afterwards, on the 25th of April, the caſe of the voters rejected at the poll, preſented itſelf for conſideration, as requiring ſome ſeparate regulation. No queſtion of this ſort had occurred (thoſe for the petitioner being included in *his* liſts of objections) before the ſitting member began his caſe in the hundred of Flitt. He there offered evidence in ſupport of a vote tendered and refuſed at the poll. The other party objected to it, becauſe the vote was not ſpecified in the ſitting member's liſts of objections, ſo that they had no notice of it; and therefore contended, that it was not competent to them to enter upon it: That the caſe was within the ſpirit of the order of the houſe, requiring the exchange of liſts (*ſee p.* 382.); and the petitioner had complied with it on his part, as to ſuch caſes.

The counſel for the ſitting member anſwered,

That

That the order did not extend to ſuch caſes; but merely to the liſts of votes received upon the poll, by the words *who voted* and *heads of objection*; That this man could not be ſaid to have *voted*; nor was it poſſible to ſtate the *objection* as to him, becauſe the objection, if any, was to come from the other ſide; which objection had been already made at the poll, and had prevailed. That the ſitting member wanted to have him *received* on the poll, and therefore according to the true ſpirit of the order, the party objecting ought to have ſtated the objection intended by him to be made to the preſent application. That the petitioner had notice enough of the caſe, by the tender at the election, which doubtleſs had been entered in his check book. That the courſe now ſought for, had not been practiſed in the Glouceſterſhire caſe; and in that of Buckinghamſhire, in which no queſtion aroſe upon it, only *one* of the parties (as in the preſent cauſe) had obſerved it.

The petitioner's counſel replied,

That the reaſoning upon an implied notice from the check books, was equally applicable to all other caſes of objections.—That the only true conſtruction of the order was, to require a mutual notice of every vote intended to be the ſubject of evidence or inquiry, in the courſe of the trial, for the mutual convenience of par-

ties; within the reaſon of which rule theſe caſes fell, equally with the others. That in the Glouceſterſhire caſe, the want of ſuch notices in the liſts exchanged, had been felt by the Committee; who had directed the parties to deliver to each other, a liſt of ſuch rejected votes as they intended to bring forward.

The Chairman informed the parties, that the Committee had reſolved,

That they ſhould deliver to each other, on the next day, a liſt of all ſuch perſons as they meant to add to the poll in this and the following hundreds; and that the conſideration of all ſuch votes ſhould be deferred, till all the votes already objected to were decided.

At the latter end of the cauſe, after the ſitting member's caſe in the laſt hundred was cloſed, and it became the petitioner's turn to give evidence in reply, his counſel called on the other ſide to proceed *then*, with the remainder of his caſe upon the rejected voters, who were the ſubject of the above reſolution; and thus finiſh his *whole* caſe, before the petitioner ſhould enter upon the reply or requalification. This was refuſed by the ſitting member's counſel; who relied upon the terms of the reſolution, "till all the votes already objected to, ſhall be *decided*."

On

On the other hand, it was ſaid, that as the numbers of the poll were known to be very nearly ballanced, it would be dangerous to hold out ſuch a temptation to parties and witneſſes, as the previous deciſion of all but the few rejected votes would offer; as it might happen, that the election would depend upon two or three votes. That in this view of the ſubject, the court ought to conſtrue their reſolution, as they might think it moſt expedient to juſtice.

The Committee reſolved, not to communicate to the parties, their deciſions upon the votes of this laſt hundred, till the concluſion of the whole cauſe on their parts; when the deciſions upon the rejected votes would be declared, at the ſame time with thoſe of the hundred. And they then directed the petitioner's counſel to proceed with their evidence to requalify.

The caſe in this hundred was finiſhed in the ſame manner as the reſt. After that, the Committee deliberated upon the ſeveral caſes; but did not, as in the former hundreds, declare their deciſions upon them to the parties and counſel upon their being called into the court. The ſitting member then entered upon the caſes of his rejected voters, which were ſix in number.

One of them, John Dilly, had belonged to the poll book of the united hundreds of Clifton and Wixamtree; which had been paſſed through before

before that of Flitt, in which the above reſolution (in p. 392.) was made, and to which it refers. When the ſitting member offered evidence relating to him, it was oppoſed, on the ground of its not being within the reſolution; which (it was ſaid) extended only to the hundred of Flitt, and the others that ſtood after it, according to the meaning of the words "this and the following hundreds." The Committee ſeemed to be unanimouſly of this opinion: And Lord Ongley's counſel acquieſced in it, relinquiſhing their pretenſions to the vote.

From hence it is to be underſtood, that according to the opinion of this Committee, it is neceſſary for parties to give notice to their opponents, of thoſe rejected voters whom they intend to reſtore to the poll. With reſpect to the *time* of ſuch notice, there was nothing to aſcertain *that*, in the above caſe; further than that it may be *after* the beginning of the trial.

The petitioner's liſt of votes to whom he objected, amounted to 354; the ſitting member's to 398; reckoning in each the votes tendered and rejected, and the miſtakes on the poll. The former proceeded upon 329 votes before the Committee; the latter upon 248: So that the court decided upon 577 caſes. Many of them, indeed, produced no debate; it often happening, that

that the counſel finding an objection well founded, ſubmitted to it in the firſt inſtance.

According to my calculation of the numbers, the following liſt contains a general ſtate of the prevailing objections to the votes ſtruck off the poll upon this trial.

Not duly aſſeſſed to the land-tax -	174
Annuities not regiſtered - -	4
Having no right, or no freehold intereſt in the eſtates voted for - [Of which number there were 11 Copyholders, and 10 Leaſeholders.]	61
Under the yearly value of 40 ſhillings, (of which were reduced under value by mortgage, 6.)	42
Purchaſed within 12 months of the election - - - - -	5
Diſqualified by offices - -	3
Under age - - - -	2
Improperly deſcribed on the poll -	6
Polled twice - - -	2
	299

There were beſides, of

Votes not entered on the poll	and added now	1
Ditto rejected at the poll		5

The

The want of regular aſſeſſment to the land-tax, was an objection proceeded upon to 277 votes. In 223 of theſe, it was the only real objection; in the remaining 54, it was coupled with other objections: So great has been the effect of the ſtatute 20 Geo. III. ch. 17. in the determination of county elections. The title of it, "*To remove certain difficulties* relative to voters" at them, has given room for facetious remarks, which may perhaps be remembered; ſince its real merit may not happen to be fairly tried by time and experience: The continuance of it in this reſpect, depending on the introduction of the new law abovementioned, in the courſe of the next ſummer (C.)

The effect of the ſeveral deciſions of the Committee, at the concluſion of this trial, by ſtriking off from, and adding to the poll, left the numbers for

The petitioner	—	829
The ſitting member	—	825
Majority for the petitioner		4

In conſequence whereof

The petitioner was declared duly elected, and intitled to the return.

Of

Of which the Chairman informed the houſe, on Thurſday, the 19th of May *. The Committee having ſate continually, and with unremitting diligence, for two months.

In the courſe of the trial, two of the members were taken ill, and unable to attend; Mr. Raſhleigh on the 7th of April; and Mr. Dempſter on the 14th. And they had reſpectively leave of abſence granted them, upon motion made in the houſe for that purpoſe by the Chairman. Neither of them attended the Committee again.

On the day of Mr. Dempſter's firſt abſence, which was the 24th ſitting of the Committee, the members, juſtly conſidering the loſs and inconvenience that would enſue to the parties, if a third member ſhould, in the ſame manner, be rendered unable to attend, and their proceedings thereby become void, (according to ſect. 23 and 24 of the Grenville act †) recommended to

* 40 Journ. 997.

† Theſe reſtrictions of the original act, are amended and enlarged to a certain degree, in ſect. 17. of the ſtat. 28 Geo. III. ch. 52; by which it is provided, that in ſuch caſes, when the Committee ſhall have held 14 ſittings, a number not leſs than 12 may continue the proceedings; and after 25 ſittings, 11 members may, in the ſame manner, proceed: But here the extenſion of their authority ceaſes. In the Preface to my firſt volume, I ventured to recommend an enlargement

to their Chairman to move the houſe for leave to bring in a bill, to continue the proceedings of the Committee in caſe of any ſuch accident. Lord Middleton made report accordingly to the houſe on the ſame day, and had leave to bring in the bill *; which afterwards paſſed both houſes, and is now the ſtat. 25 Geo. III. ch. 17. It recites the circumſtances of the caſe, and the injury that might enſue to the parties from it, and enacts, That if the ſaid ſelect Committee ſhall, by the indiſpoſition or death of any of the

largement of the powers of the firſt act, in ſuch caſes of difficulty; and though the act of the laſt ſeſſion has conſiderably improved the firſt in this reſpect, I ſtill think the bounds of it are not extended enough. I would be underſtood, rather to object to the limitation in kind, than in degree; for the principle of it has always ſeemed to me ill founded; tending to create jealouſies of the proceedings of a court of juſtice, or ſuſpicions of its partiality, not warranted by experience, and not ſuited to the ſpirit of our judicial conſtitution. The Bedfordſhire act proves, that if a caſe ſhould happen not within the rule, it would be proper for the legiſlature to interfere, and to make a particular exception. This not only confounds together the legiſlative and judicial powers, which, though neceſſity may juſtify, ought to be moſt carefully avoided; but might likewiſe, from particular circumſtances, open the proceedings of the election Committee, while pending, to the houſe at large. Such an act as the caſe would require, muſt neceſſarily have its beginning in the Houſe of Commons; and I need not ſuggeſt caſes in which the ſpirit of party might immediately mix with, and direct the courſe of any application for it.

* See 40 Journ. 849, 854, 870, 874.

members, be further reduced to eleven, it ſhall be lawful for the Houſe of Commons, upon application made to them for that purpoſe, to authoriſe and direct the ſaid ſelect Committee to proceed in the matters referred to them, and report upon the ſame: Which report ſhall be deemed to be as valid, as if the number of the ſaid ſelect Committee had not been reduced to eleven; any thing in ſtat. 10 Geo. III. ch. 16. to the contrary notwithſtanding.

The caſe provided for did not happen; all the remaining members having continued their attendance. The act recites, and proceeds upon the probable injury and inconvenience to the parties; but neither of the parties in this caſe, applied for or interfered relating to it. It was entirely the act of the Committee, proceeding from a juſt ſenſe of the duty of their ſtation.

THE OBJECTIONS made and decided upon in the courſe of the cauſe, may be claſſed under the following heads; ariſing from

I. Miſtakes and errors on the poll. II. The inſufficiency of the eſtate. III. The want of regular aſſeſſment to the land-tax, or regiſtration. IV. Perſonal diſqualifications.

I. Miſtakes and errors on the poll, occaſioned by

1. Wrong entry of the vote as to the candidates.

2. Wrong

2. Wrong deſcription of the owner or tenant, ſituation or quality of the freehold.

II. The inſufficiency of the eſtate, depending on its quality, or value.

1. The quality, as copyhold, leaſehold, or other intereſt leſs than freehold.

2. The value, as either

1. Worth leſs than 40 ſhillings in itſelf; or

2. Reduced by

1. Charges, as rent, mortgage, &c.

2. Taxes, national or parochial.

III. The want of regular aſſeſſment to the land-tax, required by the ſtat. 20 Geo. III. ch. 17. ariſing from

1. The nature or quality of the freehold.

2. A wrong deſcription of its ſituation, owner or tenant.

[Regiſtration is required of annuities, by ſtat. 3 Geo. III. ch. 24.]

IV. Perſonal diſqualifications, as

1. Not being a year in the poſſeſſion of the freehold.

2. Under age.

3. Holding a diſqualifying office, according to ſtat. 22 Geo. III. ch. 41.

4. Receipt of alms.

5. Ideocy.

The

The caſes in the following collection, do not ontain queſtions upon all the foregoing heads: 'or although queſtions aroſe in the cauſe under ll of them, many were either not worth report- ıg, as depending on facts without any doubt f the law; or could not, in my judgment, be) clearly ſtated as to furniſh proper examples pon the ſubject. The reader will therefore onſider the collection, as compoſed of all the aſes in the cauſe that (with the exceptions be- ɔrementioned) could be brought to ſerve as ex- mples, upon the particular points.

I. Cases of Mistakes and Errors on the Poll.

T. Ayres. The vote of Thomas Ayres was entered in the book for Lord Offory *only*. The counſel for the petitioner offered evidence to prove this to be a miſtake of the poll clerk, and that he, in fact, declared his vote for both Lord Offory and Mr. St. John.

This vote was a ſubject of debate in the former caſe of Bedfordſhire, and is mentioned in pa. 377 of the firſt volume, under the name of *Eyre*; where the reader may find the arguments uſed upon that occaſion, to obtain a hearing of the caſe then, which the Committee on that petition (which was confined to the *return* only) refuſed to Mr. St. John.

The counſel for the ſitting member now informed the court, that as they had other objections of the ſame ſort to the poll on their ſide, it was indifferent to them, how the Committee might chooſe to proceed upon them. In point of form, they objected to the admiſſion of evidence to prove the caſe, merely in order to obtain ſome determination on the point. The counſel on both ſides agreed to make no arguments upon it, and to leave it upon the effect of thoſe which

which had been addreſſed to the former Committee * upon the ſame vote. Miſtakes, &c. on the Poll. T. Ayres.

The Committee, after deliberating, reſolved,

That it was competent to them to hear evidence to correct an entry on the poll.

Hereupon the counſel called, as a witneſs, one who had been a byſtander on the huſtings at the time when Ayres gave his vote. This evidence was oppoſed by the ſitting member's counſel, who contended,

That the evidence of witneſſes, or by *parol*, ought not to be received to contradict the poll book: Becauſe the ſtatute 18 Geo. II. ch. 18. by allowing check clerks and inſpectors to attend for the parties at elections, for the purpoſe of watching the poll, had plainly intended to render them the only authority to reſort to, in caſe of any miſtakes in it, whether accidental or deſigned. That the act in this reſpect had a conſideration of the violence and animoſity with which conteſted elections are carried on, and kindly protects the individuals intereſted, from the danger to which their conſciences would be expoſed, if in ſuch temper of mind their oaths were to be taken; and therefore directs a written inſtrument to be preſerved on both ſides, for the purpoſe of determining theſe diſputes. That

* See from p. 377, to p. 381, of vol. i.

Miſtakes, &c. on the Poll.

the proper and only evidence for the Committee, would be the check books verified by the clerks who made them, who are in the ſtatutes called *Inſpectors* of the poll, and ſeem to have been inſtituted for ſuch purpoſes *.

The counſel for the petitioner denied, that the ſtatute could have any ſuch deſign in appointing inſpectors of the poll, and permitting check clerks to the parties. They ſaid, that this was merely a regulation for the ſatisfaction and ſecurity of the candidates, during the election, and contended, That the evidence of any perſon preſent was as proper for this queſtion as that of the check clerks; and that the above reſolution of the Committee, neceſſarily led to the hearing of ſuch evidence. That a poll-book was no record in law, as the counſel on the other ſide wanted to conſider it, and a check book could not be conſidered in its legal effect, otherwiſe than as a memorandum from whence the clerk might refreſh his memory of the fact, when called as a witneſs; for that it would not be admiſſible of itſelf, and without being authenticated by the clerk who wrote it. Its uſe in evidence would depend on the clerk's examination, and thus *parol* teſtimony would be received.

* See ſtat. 7 & 8 Will. III. ch. 25. ſect. 3. and 18 Geo. II. ch. 18. ſect. 9.

This

This ſhews an inconſiſtency in the objection; which is founded on a poſition that admits the teſtimony of the check clerk, but at the ſame time denies the competency of *parol* evidence. That inſpectors or check clerks were not ſworn to their books, and were equally partizans to thoſe for whom they attended, with any other of their ſupporters; that their books were always in the cuſtody of the parties, who might alter them at pleaſure; which ſhewed, how unfit they were to be reſorted to as deciſive evidence.

Miſtakes, &c. on the Poll.
T. Ayres.

The Committee were of opinion, that their laſt reſolution involved the preſent queſtion; and therefore directed the counſel for the petitioner, to proceed with the evidence.

After the examination of this firſt witneſs, who ſaid, he heard Ayres poll for both candidates, the counſel called Ayres himſelf to prove the fact. His competence was objected to by the other ſide. In ſtating and inforcing this objection, and in the anſwer to it, arguments of conſiderable length were employed: But as they were in ſubſtance much the ſame with thoſe uſed by the ſame counſel in the former conteſt, upon a ſimilar caſe which I have reported in the firſt volume, I forbear to mention them. The reader will find theſe arguments employed on the caſe of Edward Bennet, in vol. i. p. 384 to 392.

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The deciſions, however, were oppoſite to each other. The former Committee thought the voter an incompetent witneſs: But the preſent Committee determined,

That Thomas Ayres ſhould be admitted to give evidence, for whom he voted at the election.

Ayres, when examined, ſaid, he polled for Lord Oſſory and Mr. St. John.

On the part of the ſitting member, they produced the check books of both candidates, which were the ſame, as to Ayres's vote, as the entry in the poll-book; and the counſel relied upon their authority againſt the evidence given on the other ſide. But a doubt aroſe on the appearance of the entry in Mr. St. John's check book, in which there was an eraſure; "Oſſory *and St. John*" appearing to have been written at firſt, and the latter name afterwards ſcratched upon by a knife. The book had been delivered into court as evidence by the petitioner's agent, in conſequence of a notice from the ſitting member to produce it; and the check clerk was not preſent. The book in this part not being looked at, till the ſitting member entered upon his evidence in anſwer, the eraſure was not diſcovered till then. The counſel for the petitioner then inſiſted, that the check clerk ſhould be called by the ſitting member to explain this, becauſe the book made part of the ſitting member's evidence.

The

The counſel for the ſitting member ſaid, they did not want his teſtimony, and would not call him: That the check book being the party's act, it bound him in this caſe, becauſe he ought to have known its contents, and to have been prepared accordingly. Miſtakes, &c. on the Poll. T. Ayres.

Hereupon the Committee came to a reſolution,

That the check book, having been delivered in to the Committee, is already admitted as evidence; and if the party who delivered it in, ſhould wiſh to controvert or explain any entry in the check book, it is incumbent on them to produce the clerk.

The diſpute here was directed to the expence of ſending into the country for the witneſs, which the party who wanted his teſtimony wiſhed to avoid.

He was afterwards called on the part of the petitioner, but his evidence did not explain the doubt.

The Committee reſolved,

That Thomas Ayres ſhould be put upon the poll for Mr. St. John.

The vote of William Day was entered on the poll for Oſſory and *St. John*; which was alledged to be a miſtake of the clerk in the ſecond name, in the ſame manner as in the laſt caſe; the vote having been given for Lord Ongley inſtead of Wm. Day.

Miſtakes, &c. on the Poll.

W. Day.

St. John. The voter himſelf related the fact; in which he was confirmed by perſons who were preſent, and by other circumſtantial evidence; together with the entries in the check books of both parties, which were in the names of Oſſory and *Ongley*.

The Committee directed this vote to be ſtruck off Mr. St. John's poll, and added to Lord Ongley's.

R. Taylor was deſcribed on the poll as voting for the petitioner, for *a houſe and land*, in the occupation of William Day. What Day held was a cloſe of land without a houſe, and of an under-value viz. 30 ſhillings; which furniſhed the ſitting member with an objection to him. But the voter had a houſe near it, let for 30 ſhillings, occupied by another perſon. The counſel for the petitioner, when it came to their turn to requalify their votes under objection, offered the evidence of the voter to prove that at the poll he could not recollect the name of the occupier of his houſe, and that the poll-clerk told him the name of *one* tenant was ſufficient, which occaſioned the entry to be made as above ſtated. This was oppoſed by the ſitting member on two grounds: Firſt, as being contrary to the reſolution, formed in an early part of the trial, upon *Odell*'s caſe, (hereafter mentioned under the head of Value) for

for adhering to the deſcription given in at the poll: Secondly, That the voter himſelf was not a competent witneſs to prove this caſe. In maintaining this latter ground, the counſel attempted to diſtinguiſh it from the caſe of *Ayres*; but unavoidably fell into the ſame line of argument which had been unſucceſsful there, and were ſtopped by ſome of the court, who recurred to the terms of that reſolution. They ſtill argued for a diſtinction of the two caſes; that in the former, there was no doubt about the voter's *right*, but only *how* the vote was given: But that here the *right* of voting was in queſtion; becauſe the ſtat. 18 Geo. II. c. 18, by requiring a particular deſcription of the freehold, neceſſarily made that eſſential to the right; and this was what the voter was called to eſtabliſh. And they contended too, that the precedent in *Odell*'s caſe was in point in their favour on the firſt ground. It was ſaid in anſwer hereto, That this rule could not be applied; becauſe here the diſpute was, *how* the vote was given, and *how* the voter deſcribed his freehold; not whether he ſhould abide by the deſcription given in: That the rule referred to, had proceeded upon that fact as aſcertained which here made the only doubt, and therefore evidence ought to be received to explain it. For anſwer to the other

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R. Taylor

part

Miſtakes, &c. on the Poll.

part of the argument, the counſel referred to the opinion given in Ayres's caſe.

R. Taylor.

The parties were informed by the chairman, That the Committee were of opinion, *That they had already decided this queſtion, when they reſolved to admit evidence to correct an entry on the poll, and allowed the voter himſelf to be called to prove a miſtake made by the poll clerk, with reſpect to his own vote.*

The counſel for the petitioner were then directed to proceed in their evidence. They called no other witneſs beſides the voter; who ſaid, that he gave in the names of both his tenants to the poll clerk; though, in the oath, he repeated the deſcription entered on the poll; and the check books of both parties confirmed the entry in the poll-book.

Ja. Smith.

The caſe of James Smith, who alſo voted for the petitioner, was like that of Robert Taylor; and the ſame evidence was offered to prove it. It was brought on by the petitioner immediately after the caſe of Taylor. The counſel for the ſitting member again reſumed their objection to the competency of the witneſs, and urged the Committee to reconſider their opinion, if it were only to prevent the opportunities it would give for perjury, where men were diſpoſed to it; and alſo the increaſe of trouble that would be brought upon

upon election cauſes, if it were publicly told, that each man's ſingle evidence would be received to ſet aſide his vote. Miſtakes, &c. on the Poll. Ja. Smith.

The Committee having deliberated, declared their opinion, *That the voter might be called:* At the ſame time they *Recommended it to the counſel to avoid, in ſuch caſes, the producing witneſſes unſupported by other teſtimony, or any concurring circumſtances; as their evidence would not be likely to have weight in the deciſion* *.

In this caſe too, the check books agreed with the poll-book; and the voter was the only witneſs to prove the fact. The only difference between the circumſtances of the two caſes, was, that in the latter, the voter having two houſes near adjoining each other occupied by different perſons, ſwore to the fact ſtated (by miſtake, by the counſel) to have related to Robert Taylor, of his forgetting the name of one of them at the poll, and his acting on the advice of the clerk.

* In the Cricklade Committee, the admiſſion of the evidence of a voter's declarations as to his *right*, after having voted, was oppoſed on one ſide, and the queſtion was argued by the counſel; after which the court reſolved, that the evidence was admiſſible. It was in the caſe of an objection to a voter as being a copyholder, who had ſaid, that the eſtate he voted for was copyhold. Similar evidence of a voter's declarations, was admitted in other caſes in the ſame Committee.

The

Miſtakes, &c. on the Poll.

The Committee gave credit to one of theſe men, but not to the other; for, in their deciſions, Taylor was allowed to be a good vote, but Smith was ſtruck off the poll.

W. Saunders.

His freehold was deſcribed to lie at Houghton: *This* was proved, on the part of the petitioner, to be under value. In ſupport of the vote, one witneſs proved, that the voter at the poll declared the ſituation of his freehold to be at Houghton *and Studham*; and that he ſpoke both names loud enough to be heard by the clerk. The value of his lands in both places, taken together, amounted to more than 40 ſhillings. This evidence was not contradicted*. The vote was held

GOOD.

* Yet there ſeems to be a ſtrong objection to the admiſſion of ſuch explanations, viz. that the party objecting, has no means of inquiring into the circumſtances of the eſtate added to make out the vote, ſo as to make objections to it; unleſs it happens, that many days intervene between the time of giving the evidence, and that of receiving the other party's reply to it; which depends on accident. On the other hand it may be ſaid, It is harder that a man ſhould loſe his vote, by the officer's miſtake, than that the candidate ſhould loſe an opportunity of attacking it. In the ſame manner, where the clerk enters a voter's name different from his real name, as was often the caſe in this election: For inſtance, *Cobb* was entered *Cook*; here, the objection that no ſuch perſon was aſſeſſed, was all that the party objecting could be expected to make to *Cook*'s vote.

Abraham

Abraham Dicks. The freehold was deſcribed to lie at Toddington, in the occupation of Sarah Dicks and others, and was objected to as no freehold, and not aſſeſſed. The voter's property in Toddington was proved to be copyhold; and his name was not in the aſſeſſment of that pariſh. In ſupport of the vote, a witneſs ſwore, that he went up to the poll with Dicks, and that the latter named *Weſtoning* as the ſituation of the eſtate, and ſpoke audibly enough. In Weſtoning the voter was duly aſſeſſed. The entries of the two check books agreed with that of the poll.

Miſtakes, &c. on the Poll.

Abraham Dicks.

Upon the credit of the witneſs, the vote was held GOOD.

William Smith, another voter in the ſame circumſtances, was held good upon the credit of the ſame witneſs.

Charles Cheſter, Eſq; deſcribed his freehold to be lands, in the occupation of *ſeveral perſons*.

Charles Cheſter, Eſq;

The ſtat. 18 Geo. II. c. 18, in the form of oath for freeholders, requires the voter to ſpecify the nature of his freehold eſtate; and if conſiſting in meſſuages lands or tythes, then to ſpecify *in whoſe occupation the ſame are*; and if in rent, to ſpecify the names of the owners or poſſeſſors of the lands, out of which the rent iſſues. The counſel for the party objecting contended, That the ſtatute required the voter to ſpecify

Miſtakes, &c. on the Poll.

Charles Cheſter, Eſq;

ſpecify the occupier of the freehold *by name*; that the reaſon for ſuch particulars in the deſcription, namely, the furniſhing means of diſcovery in caſes of fraud, would have no effect; and it would be as well to give no particulars at all, as any deſcription ſo general. On the other ſide, it was contended, That the intention of the legiſlature was ſufficiently complied with in this mode of deſcription; becauſe the ſituation and quality of the freehold, and the perſon of the freeholder, were the things which diſtinguiſhed it in the fitteſt manner, for objection and inquiry; and the voter had named theſe particulars: That the name of the tenants was a very uncertain deſcription of an eſtate, becauſe they changed ſo often: That, further, the ſtatute did not declare a vote, given without an obſervance of the regulations preſcribed by it, void; and, therefore, though this caſe ſhould be thought a diſobedience of the law, ſtill it was not a ſufficient cauſe for avoiding the vote.

GOOD.

Jn. Oliver —Polled in the book for the hundreds of Clifton and Wixamtree, for a freehold at *Clifton* pariſh. In this pariſh he had no freehold. It lay at *Shillington*, and he was aſſeſſed for it in the hundred of Flitt; the part of Shillington pariſh where it lay, being in that hundred. The voter was examined to prove, that he declared to the poll

poll clerk, that his freehold lay in Shillington. But the check books were the ſame as the poll book.

Miſtakes, &c. on the Poll.

J. Oliver.

The ſtatute 18 Geo. II. ch. 18, ſ. 7, directs the ſheriff to allot a number of booths for taking the poll, and to affix upon the booths the names of the diviſions for which they are allotted: To appoint a clerk for each booth to take the poll; and to make out for each of them, a liſt of the towns, villages, pariſhes, and hamlets; lying wholly, or in part, in that diviſion, for which the booth is deſigned. By ſect. 8, of this act, No perſon is to be admitted to vote for a freehold, ſworn to be at a place not mentioned in the booth liſt, unleſs it lies at a place not mentioned in any of the liſts.

The ſtatute 10 Anne, ch. 23, ſ. 5, directs the clerk to enter the freeholder's place of abode, and alſo the place of his freehold, as he ſhall declare the ſame.

The counſel, in ſupport of the above vote, contended, That as the voter had named the proper pariſh where his freehold lay, the miſtake of the proper hundred ought not to vitiate the vote. It is the clerk's duty to poll the voters in the proper hundred; but his not doing ſo ought not to occaſion the loſs of the vote.

BAD.

Thomas

Miſtakes, &c. on the Poll.

Th. Lane.

Thomas Lane voted for land in *Barton* pariſh. His freehold lay in the adjoining pariſh of High-am Gobian, and was aſſeſſed there. The voter's houſe was very near Barton: Letters were directed to the tenant who occupied it, at Barton turnpike; and his family went to Barton church. The counſel objecting to the vote contended, That it could not be ſupported without ſhewing a freehold ſituated as deſcribed, and aſſeſſed in like manner: That if it were held otherwiſe, the deſign of the law in requiring local deſcriptions, would be defeated; becauſe the oppoſite party muſt direct their inquiries according to the deſcription given in.

In ſupport of the vote, it was ſaid, That perſons were not to be expected to give exact technical deſcriptions of their property, in the hurry of a county poll; that all the ends of the law would be anſwered, by deſcribing an eſtate according to the place by which it was known, in the common intercourſe of life; and the voter having done ſo here, it ought to be held ſufficient: That it was not neceſſary to deſcribe a freehold by the name of a pariſh, but, in general, by the *place*; and accordingly the title of the column for ſituations in the poll book is, *Where the freehold lies*, not *Pariſh* where.

BAD.

Thomas

Thomas Love voted for houſe and land in the occupation of I. Cunnington. This tenant occupied a houſe, with a ſmall garden annexed to it, for which and for the fruit of an orchard adjoining, he paid 32 ſhillings rent: This was all he occupied. But there was a little field adjoining belonging to the voter, occupied by another tenant, at the rent of 20 ſhillings.

Miſtakes, &c. on the Poll. T. Love.

Againſt the vote it was contended, That the field ought not to be reckoned as part of the value, becauſe not within the deſcription on the poll; that though it might be reaſonable, and had been allowed by the Committee, to explain an imperfect deſcription, where *houſe and land* with the occupier of a houſe *only*, had been deſcribed; yet where the tenant named actually held enough to anſwer the deſcription as to him, as was the caſe here, (for he occupied a houſe *and garden*) ſuch latitude ought not to be permitted; but the voter muſt ſuffer for his negligence, becauſe he had in this caſe given a complete deſcription, and ought to abide by it.

On the other ſide it was ſaid, to be abſurd to ſuppoſe, that the voter could have intended any other *land* by his deſcription, than the field beforementioned; for a little yard or garden of a houſe, is commonly underſtood to be included in the term *houſe*. It therefore amounted to that ſort of imperfect deſcription, which it was rea-

Miſtakes, &c. on the Poll. T. Love.

ſonable to allow to be explained, by adding to it ſuch parts as naturally came into the contemplation of the voter, at the time of polling: That the receiving ſuch evidence with this diſtinction, was not inconſiſtent with the ſpirit and meaning of the reſolution, to abide by deſcriptions on the poll; by which it was meant, that voters ſhould not involve *different eſtates* in the deſcription of *one* only, ſo as to defeat the end of the law, that requires particular deſcriptions for the purpoſe of furniſhing means of inquiry to an opponent.

GOOD.

Stanley Burrough

—polled in the book of the hundred of Flitt. His freehold lay in the hundred of Redbornſtoke. The objection to him was included in the party's liſt of the latter hundred. In proceeding through the former, the ſitting member, who objected to him, offered evidence in ſupport of the objection. The petitioner oppoſed it, alledging, that it was neceſſary to adhere to the terms and order of the objections in the liſt.

On the other ſide it was ſaid, that this would force them into a dilemma, that would prevent *all* inquiry into the vote. That it was not neceſſary to diſtinguiſh objections by hundreds; and if the proceedings here had been, as thoſe

of

f Glouceſterſhire and Bucks, not divided by undreds, there would be no difficulty in the oint: Therefore the juſtice of the caſe ought ot to be excluded by a matter not only of nere form, but of accident alſo.

Miſtakes, &c. on the Poll.

S. Burrough.

To this it was replied, That the petitioner ad ſuffered by the ſame circumſtance; having tated objections to three votes in this hundred f Flitt, which he was not ſuffered to ſubſtantiate, becauſe they had voted in a different hundred, (one of thoſe already paſſed) and were not n the Flitt poll book. That in the Glouceſterhire caſe, though the proceedings had been in different form, the ſame regularity had been bſerved; for the courſe there taken, was to go egularly through a book or hundred; and neiher to go out of it, nor to return to it, after aving gone through it.

The Committee were of opinion,

That as the votes had not been objected to in this undred, the objections could not be proceeded on.

It ſeemed to be underſtood, as the ſenſe of he Committee, that the ſitting member could ot enter at all upon this objection. But afterards, in proceeding through the book of the undred of Redbornſtoke, the ſitting member's ounſel renewed their attempt to give evidence f this objection. But the Chairman informed hem, that according to the reaſons upon which

Miſtakes, &c. on the Poll.

the Committee had formed their firſt opinion, evidence could not be received.

D. Reynolds.

Rev. Decimus Reynolds went to the polling booth of the hundred of *Flitt*, and there was ſworn, and declared his vote for Lord Ongley, for a freehold at Thurleigh which is in the hundred of *Willey*. He alſo poſſeſſed a freehold in the hundred of Flitt, but ſaid nothing of that at the poll. There was no entry of his name in the poll-book, or in either of the party's check books. After he had (as he thought) given his vote, he was told at the polling place, to go to the Willey booth; but he did not go, thinking his vote had been properly taken down in Flitt.

It was contended, that the Committee ought not to allow this vote to be added to the poll, becauſe the voter had acted under a miſtake of what it was his duty to know, and therefore he ought to be anſwerable for it. That this was really the caſe in the underſtanding of the parties, was evident, from the circumſtance of Lord Ongley's own check clerk's having made no memorandum of the fact in his book. That the poll clerk had done his duty, and given him the proper directions for voting, which he did not chooſe to follow. The tender of his vote at the wrong booth, was, according to the proviſions of the ſtat. 18 Geo. II. ch. 18. as uſeleſs

leſs as if it had not been made; and his being ſworn there, was equally inſignificant. Miſtakes, &c. on the Poll.

On the other ſide it was ſaid, That the omiſſion now complained of, was owing to the negligence of the poll clerk, and not of the voter; becauſe the oath ought not to have been tendered to any one, whoſe name, as a voter, was not to be duly entered at the ſame time. Having been ſworn, and having given his vote, the voter could not lawfully or with any propriety have polled at any other booth, where he muſt have ſworn that he had not been polled before. Under theſe circumſtances, the caſe ſtands as if the vote had been entered on the poll; for it is juſt and reaſonable to conſider as done, that which it is the duty of any officer of the law to do, where an innocent party is to ſuffer by the negligence. Then the queſtion will be, whether a vote given in a wrong hundred ſhall be rejected. This was never yet acceded to. The act requiring a poll by hundreds, is only directory to the ſheriff, but does not annul the votes received differently. In this election too, there have been inſtances of ſuch votes being allowed, or not objected to, for this cauſe. There have been caſes, where the aſſeſſment of the freehold voted for, has been ſhewn in a different hundred, as an objection to a vote, but this objection has proceeded on a different principle; D. Reynolds.

Miſtakes, &c. on the Poll.

it is then an allegation, that the eſtate *actually voted for* is not aſſeſſed, and the objection is in fact made to the want of aſſeſſment.

Not added to the poll.

II. Cases of an Insufficient Estate.

Quality of the Freehold.

J. Conqueſt.

James Conqueſt voted for the petitioner under the following title. He married a widow, to whom and her former huſband the eſtate in queſtion had been deviſed in jointenancy, with remainder to her in tail. Previous to his marriage, a deed was made between him, and the wife, and a friend of hers, R. V. in which Conqueſt covenanted with R. V. not to intermeddle with the rents and profits of the eſtate, and that they ſhould remain to the ſeparate uſe of the wife—that R. V. ſhould receive the rents for this purpoſe, and have the ſole management of the eſtate, ſubject to the wife's controll: That the wife might deviſe and otherwiſe diſpoſe of it, as ſhe pleaſed, and he would join in all neceſſary acts for rendering her diſpoſal effectual. There was a receipt of rent by the wife produced in evidence by the tenant, who was called as a witneſs. He ſaid, he paid the rent to the wife.

The

The objection to the vote was ſupported by he following reaſons: It was ſaid, The bene- icial freehold, not the mere *legal* eſtate, is that vhich gives the vote. This conſiſts either in a nan's own occupation, or in that of his tenants. Conqueſt, though by the marriage he became ominal owner, has neither of theſe: For the leed before ſtated made R. V. a truſtee for the vife alone, and if a bill in Chancery were filed or the purpoſe, there would be a decree given or a conveyance of the legal freehold to R. V. urſuant to the covenants in the marriage arti- les. Perhaps upon the marriage it was tranſ- erred to him *ipſo facto*. But admitting this oint to be queſtionable, ſtill as Conqueſt has o right to receive any profit from the land, it annot be ſaid he has a freehold of the value of o ſhillings a year.

Quality of the Freehold. J. Conqueſt.

On the other ſide it was ſaid,

The deed, as far as relates to the voter, conſiſts only of covenants on his part before marriage; at that time he had no right whatever to he eſtate, and therefore he transferred no intereſt in it by his covenants. But by the marriage he became ſeiſed of the legal eſtate of his vife, The wife might, under this deed, have directed her huſband to receive the rents, and he court ought to preſume this to be the caſe etween huſband and wife; or that ſhe transfers

Quality of the Freehold. J. Conqueſt.

the rents to him, till the contrary be proved; for the producing *one* receipt only in the wife's name, is not ſufficient to rebut this preſumption of law. Though the wife, by means of a bill in Chancery, might inforce the covenants entered into by her huſband, yet till that power is executed, he enjoys all the conſequences of his right by marriage; and it is enough for the preſent purpoſe, that theſe covenants are not actually inforced. R. V. is not made by this deed a *truſtee* to whom an eſtate is conveyed for certain purpoſes; but merely a *covenantee:* For the word *truſt* mentioned at the end of the deed, will not give him that quality.

BAD.

James Smith

—had been five years in poſſeſſion of his freehold under the following circumſtances: It was part of a larger eſtate deviſed in his father's will to his elder brother Thomas, in truſt for payment of legacies to the younger children. Thomas refuſed to hold the land ſubject to this truſt; in conſequence whereof, the younger children took poſſeſſion of certain parcels in ſatisfaction of their legacies, with the conſent of the elder brother: This was one of them.

In objection to the vote it was ſaid, That though an equitable intereſt was in ſome caſes ſufficient to make a vote, yet it was requiſite to be

be an equitable *freehold*; that here the intereſt, till the legacies were paid, reſembled more the caſe of a judgment creditor, than that of the actual owner of the land. Quality of the Freehold. James Smith.

It was ſaid in anſwer, That in caſes of a deviſe in truſt like this, the regular way was to ſell the eſtate to raiſe money; but the *Ceſtui que truſt* has it in his option to take the eſtate ſubject to the charge, and prevent the ſale. Where this happens, it is in ſubſtance a ſale to the legatee; and a court of equity would decree a conveyance from the truſtee: That in this view the voter was to be conſidered as a purchaſer for a valuable conſideration; that his title was good againſt all perſons but the truſtee; and even againſt him in equity: That here the truſtee's acquieſcence removed every ground of objection to the title, as far as the right to vote could come into conſideration.

GOOD.

Matthew Handſcomb had been in poſſeſſion of the freehold, for which he voted, about 34 years; for the firſt ten years of which he paid rent for it: Since that time, the owner not having been heard of, no rent had been demanded of him or paid. This was the whole of the voter's title. Matthew Handſcomb.

It

Quality of the Freehold.

Matthew Handſcomb.

It was argued in objection to this voter, That the circumſtances proved him to hold merely as a tenant to the true owner, whenever he might return, to whom he was accountable for the rent: It was therefore unlike caſes in which length of poſſeſſion is conſtrued into a title by preſumption; becauſe the preſumption there is reſorted to for want of other evidence: But here it cannot ariſe, becauſe there is evidence to the contrary. Any length of poſſeſſion may be explained away by circumſtances ſhewing the cauſe of it. The utmoſt effect of this voter's poſſeſſion, would be to defend himſelf in an ejectment; though that might be doubted: For he has not held adverſely to his landlord. But a true freeholder ought to have the right of property in his eſtate.

It was ſaid in anſwer, That the voter's poſſeſſion was adverſe, becauſe he acted as owner by ſwearing to his freehold in the land. That a title that would be ſufficient in ejectment, was ſurely enough to make a man the owner to every purpoſe, ſhort of an action for the right; and while ſuch poſſeſſion remained unqueſtioned in that ſhape, it was to be preſumed unqueſtionable. If no intereſt had been paid on a bond for 20 years, the law preſumed it ſatisfied. Here a much longer period remains a blank with reſpect to the former owner; which may well juſtify the pre-

preſumption of ſome conveyance or releaſe to the preſent voter. The principle of law, upon which this rule of preſumption is founded, is ſtated by Lord Mansfield, in the caſe of Eldridge and Knott, Cowp. 215, in theſe words: "A grant, and even an act of parliament may be preſumed from great length of poſſeſſion: Not that in ſuch caſes the court really thinks the grant has been made; but they preſume the fact for the purpoſe, and from a principle of quieting the poſſeſſion." And, in the ſame caſe, Judge Aſton ſays, "A preſumption from mere length of time, which is to *ſupport* a right, is very different from a preſumption to defeat a right." Which laſt obſervation is very applicable to the caſe of this voter, who calls in aid this rule of preſumption to ſupport his right.

Quality of the Freehold. Matthew Handſcomb.

GOOD.

Robert Saunders voted in right of his wife's freehold, whom he married after the election began, and before he voted.

Robert Saunders.

GOOD.

John Jackſon had agreed, before the election, to ſell his freehold from Lady Day 1784, which was 13 days before the election commenced; but he would not execute the deeds till after the election, becauſe he had promiſed to vote.

John Jackſon.

After

Quality of the Freehold. John Jackſon.

After the election he executed the conveyance, which bore date 25th of March preceding, and an attornment of the ſame date, as tenant to the purchaſer from that day.

It was argued againſt the vote, That the real intereſt in the eſtate was transferred to the purchaſer, at the time mentioned in the deed: That the ſubſequent execution of it confirmed the firſt agreement, and related back to the date, ſo as to give the eſtate completely to the purchaſer from that time: That the voter's conduct proved that he had not a freehold *bonâ fide*, and was a fraud upon the election.

On the other ſide it was argued, That the voter was at liberty either to confirm the contract, or to diſagree to it; and till it was confirmed, he remained the only poſſeſſor of the eſtate: That, beſides, the agreement was made with an exception to the circumſtance of voting, which was lawful, and no fraud: That an eſtate paſſes on the delivery of the deed of conveyance, and not at the nominal date of it; and the relation back is not to vitiate intermediate acts valid at the time.

BAD.

Ja. Taylor —voted for a rent-charge. He was ſchoolmaſter of Sharpenhoe, and under that appointment received £.10 a year for teaching eight poor

oor boys, under a will made in 1686, Quality of the Freehold. Ja. Taylor
hereby the rent-charge was deviſed for the
urpoſe. The operative words of it were theſe,
iz. "The ſchoolmaſter and children, from
ime to time to be put in and placed there,
y the approbation and good liking of J. N.
nd his heirs." There were two objections to
he voter; 1. That he had no freehold; and,
. That he was not aſſeſſed. The Committee
hought the vote bad; but, as they did not de-
lare whether their judgment related to the want
f due aſſeſſment, or of freehold, I forbear to
tate the particular arguments of the counſel on
he caſe. Two recent inſtances in which the
naſters of this ſchool had been removed, with-
ut any cauſe aſſigned, and which they had ſub-
nitted to, were urged in ſupport of the objec-
ion, as a proof that the appointment was un-
lerſtood to be held during pleaſure, and there-
ore no freehold. The other ſide contended,
That theſe ejected maſters did not know their
ight, and that the court of King's Bench would
ave reſtored them by mandamus, if they had
pplied for it.

William Irons voted for a rent-charge. His W. Irons.
freehold was in his appointment to be ſchool-
maſter of the free-ſchool at Houghton Con-
queſt, under Sidney College Cambridge, in
right

Quality of the Freehold. W. Irons.

right of which he received an annual ſalary out of lands charged with the payment of it. The appointment recited, "That no perſon qualified, according to the will of the founder, had offered himſelf for the place; and that, therefore, the maſter and fellows, at the requeſt of the rector and inhabitants of the pariſh, did appoint William Irons to ſupply the place, till a perſon properly qualified ſhall offer."

This was contended to be an occaſional and temporary appointment, of one avowedly incapable, by the inſtitution of the ſchool, to hold the place; from which he muſt be diſcharged immediately, upon the application of a perſon duly qualified; and that therefore the appointment gave the voter no freehold in the office.

On the other hand it was ſaid, That the appointment was abſolute as to holding the office, and that it might poſſibly laſt for life, although liable to ſuch removal; and that this poſſibility gave the holder all the conſequences attached to this ſituation.

BAD.

In the caſe of the two ſchoolmaſters, Gardener and Maſon, hereafter mentioned under the head of Aſſeſſments, the appointment was in the lord of the manor of Stratton; who thought that he had not power, by the inſtitution, to remove

the maſters he had appointed. Thoſe votes were held good. I have claſſed them under the head of Aſſeſſments, becauſe the objection chiefly inſiſted on againſt them was to the want of aſſeſſment. Quality of the Freehold.

John Trotman. In ſupport of the objection, the petitioner's counſel called the tenant of the eſtate, who ſaid, he conſidered one Wells to be his landlord, to whom he paid his rent, and who had let him the eſtate at the Chriſtmas before the election: That it had belonged to William Hawkins, then dead. On the part of the ſitting member, Hawkins's will was produced, whereby the eſtate was deviſed to the voter; and the counſel argued, that from hence it ought to be preſumed, that Wells was only a tenant to Trotman; and that the petitioner, in order to ſubſtantiate the objection, ſhould have gone further, and given evidence of a ſale by him to Wells, if Wells really were the owner. J. Trotman.

GOOD.

Philip Turner voted for a rent-charge on the eſtate of the Rev. Mr. Hawkins. The objections to him were, 1. No freehold; 2. Not duly regiſtered; 3. Not duly aſſeſſed to the land tax. The voter had the appointment of ſchoolmaſter at Ampthill, given him by Mr. Hawkins the rector; Philip Turner.

Quality of the Freehold.

Philip Turner.

rector; under a deed made in 1740, whereby an eſtate was ſettled on the rector for the time being, on condition that he ſhould "apply out of the rents, £.5 a year, to *one or more* ſchoolmaſters or ſchoolmiſtreſſes," for educating 16 children. The rector, being called as a witneſs to ſpeak of the nature of the appointment, ſaid, he did not know that he was impowered to turn out a ſchoolmaſter who had been once appointed to the place; and knew of no inſtance in which any one had been diſplaced.

The voter was not aſſeſſed for this rent-charge, nor was it regiſtered as an annuity. The rector was duly aſſeſſed for his benefice.

It was argued in ſupport of the objections, That Turner had not a *certain* freehold of 40*s.* a year; for as the rector was authoriſed to appoint one *or more*, he might, in the exerciſe of this diſcretion given him, appoint three ſchoolmaſters, whoſe ſhares of the ſalary, in that caſe, would be leſs than 40*s.* each.

In ſupport of the vote, it was ſaid, That the bare poſſibility of this caſe, which had not happened in fact, could not affect the voter's preſent actual right to the whole of the £.5 a year.

GOOD.

William Dickins

—voted for houſe and land at Keyſoe. He was miniſter of a diſſenting congregation there, and had

had held the place upwards of 20 years; in right of which, beſides voluntary contributions, he enjoyed two houſes and an orchard, one of which houſes was let for £.2 14s. a year. For theſe he was regularly aſſeſſed to the land tax. Quality of the Freehold. William Dickins.

The circumſtances given in evidence, reſpecting this vote, were as following, viz. Some land was purchaſed by perſons who acted as truſtees for the congregation in 1741, to build a meeting houſe for public worſhip and a houſe for the miniſter. Since that time, there had been a regular ſucceſſion of miniſters appointed by the congregation; that is, by ſuch of them as received the communion of their church. There was no inſtance of any one of the miniſters having been removed after his appointment; but more than one had been rejected, after more than a year's ſervice in the meeting, in a ſtate of trial. Two members of this congregation who were examined, ſaid, they did not underſtand that the congregation had a power to remove their miniſter.

The counſel for the petitioner, who objected to the vote, argued,

That the voter could not be conſidered to have a freehold eſtate for life, but only a place with perquiſites annexed to it, during the good will of the congregation, and therefore not giving a right to vote. That the function of a

Quality of the Freehold.

William Dickins.

Proteſtant diſſenting miniſter, before the Toleration Act, 1 Wm. and Mary, ch. 18, was unlawful, and ſubject to penalties: At that time, therefore, he could acquire no right or privilege by his function. The alteration made by that ſtatute does not confer an *eſtabliſhment* upon diſſenting miniſters, but ſimply a *toleration*, by excuſing them under certain conditions, from the penalties of former laws (D.) But if they claim a freehold intereſt in their appointments, they muſt ſhew, either that the Toleration Act has the effect of an eſtabliſhment, or that the principles of the common law ſupport this claim. If the latter were the caſe, it might eaſily be ſupported by adjudged caſes, or by doctrines advanced in courts of juſtice before the revolution: Whereas none ſuch are to be found. The favour ſhewn them by the courts ſince that period, is derived wholly from the above ſtatute; but it has extended no further than to protection merely. The caſes in which their rights have been brought in queſtion in the King's Bench, have been ſuch as required the aſſiſtance of that court againſt wrongdoers, to which all the king's ſubjects are equally intitled; but the judges have never gone ſo far as to declare their places to be freeholds. In the caſe of the King and Barker, 3 Burr. M. 1265, (which perhaps

may be relied on by the other ſide) the court granted a *mandamus* to place a diſſenting miniſter in his function, which another unjuſtly withheld from him; but this did not proceed upon an inquiry into the nature of the office, nor did it decide what right the party had acquired by his appointment. But the court granted a mandamus to preſerve the public peace againſt treſpaſſors, there being no other remedy for the party aggrieved, and to prevent a failure of juſtice. If in any caſe the court had granted a mandamus to *reſtore* a diſſenting miniſter, clearly turned out by his congregation, it might, perhaps, warrant the argument which muſt be uſed in ſupport of the vote, becauſe it would ſhew that the ſtation was conſidered to give a permanent intereſt to the miniſter. But whatever the uſage of the different congregations may be, in point of law the office depends upon the pleaſure of the perſons compoſing them. They are all voluntary aſſociations, and may be diſſolved when the individuals pleaſe: If they ceaſe to meet, the miniſtry ceaſes with them; for where there is no congregation, there can be no paſtor.

Quality of the Freehold. William Dickins.

The preſent queſtion is not new; for it occurred in the caſe of Glouceſterſhire, in 1777: And that Committee, after a full inveſtigation of the ſubject, decided againſt the right of ſuch

Quality of the Freehold.

William Dickins.

miniſters *. This deciſion ought to have conſiderable weight in the minds of the Committee, if they ſhould think the point doubtful.

In ſupport of the vote, the following arguments were uſed:

Either the place in queſtion is held for life, or during pleaſure; for there is no circumſtance from whence an appointment for a limited term can be collected. A power to remove for miſbehaviour, is neceſſarily incident to all offices, even the greateſt; and therefore the voter's being liable to that ſort of removal, does not at all diminiſh his right: He is ſubject to that in common with every other man. If, therefore, he holds his place and his houſe during good behaviour, his intereſt in them is that of a freehold.

In order to make out this poſition, it is not neceſſary to argue, that the act of Toleration raiſed the diſſenting miniſters into an *eſtabliſhment*, in the ſenſe in which this word is applied to the national church, though ſome learned men have thought it did (D.) It is ſufficient, that their function is lawful; for being under the protection of the law, legal rights may be acquired by it.

* In the caſe of Mr. Samuel Thomas, who enjoyed 15l. a year of real eſtate, granted in 1720 to the miniſter of the congregation of Frenchay, payable "to the miniſter of the chapel there, ſo long as it ſhould be tolerated." Glouceſterſhire caſe, p. 95, 169, 176. And in another vote of the ſame ſort in p. 193 of that book.

The

The principles upon which the court of King's Bench has protected them, give a convincing proof that the judges consider them to hold their places during good behaviour; that is, upon the same terms by which every other office for life is held. It is absurd to suppose, that the court would grant a mandamus to admit a man to an office held during the pleasure of others, and from which they might remove him as soon as they had obeyed the writ by admitting him. No case of this sort can be produced; therefore the case of the King and Barker does prove the right now contended for, though that mandamus was to *admit* only; and such a decision of a point of law, ought certainly to have more respect paid to it than that of a Committee, howsoever respectable. Lord Mansfield, in delivering the judgment of the court in that cause, puts the case of a dissenting minister upon the same footing with that of "a *lecturer, preacher, schoolmaster, curate, chaplain*, and considers them intitled all alike to the writ in the same circumstances. But in a later case, which is not yet in print, the court went further, and actually granted a mandamus to *restore* a minister of a dissenting congregation, who had been turned out. It happened in Easter term, 1780, one Dr. Wachsell had been regularly appointed by a congregation of German Lutherans in London to be

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their miniſter; and under that appointment became intitled to a houſe and ſtipend. Afterwards he gave offence to his congregation, and they turned him out. He applied to the court for a mandamus to be reſtored, which, after a great deal of time employed in conſidering the queſtion he obtained.

Another caſe of the ſame ſort, under the name of Chadwick againſt Smith, was argued in the King's Bench in Eaſter and Trinity terms 1783. It aroſe out of a diſpute for the miniſtry of a diſſenting congregation at Leek in Staffordſhire. One miniſter had got poſſeſſion of the pulpit; the other claimed the election, and moved for a mandamus to be admitted. The court, previous to granting the writ, directed an iſſue to try the merits of the election, between the candidates; and though no mandamus actually iſſued afterwards in ſupport of the verdict upon that trial, yet there was no doubt of the right and propriety of granting it accordingly; which the court were prepared to do, if the loſing party had not ſubmitted to the verdict in the firſt inſtance.

At Mancheſter a diſſenting miniſter diſliked by his congregation, for many years kept poſſeſſion of his meeting houſe and the ſalary annexed to it, in direct oppoſition to the congregation,

gation, who tried every method in their power to remove him.

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It ſeems difficult to diſtinguiſh the preſent caſe from thoſe already determined by the Committee, in favour of the ſchoolmaſters whoſe votes have been allowed: For they have conſidered theſe perſons to have eſtates for life in their offices; except where there have been particular circumſtances in the nature of their appointments, from whence they might infer a diſcretional power of removal to exiſt. In In the preſent caſe there are no ſuch circumſtances: But there is one much in favour of the particular perſon; for he has been 20 years in poſſeſſion of the eſtate in right of which he votes; which, in a common caſe, would alone intitle a man to the right of voting.

The counſel of the other ſide, in their reply, obſerved upon the caſe of Dr. Wachſell, That the court founded their judgment upon the fact of a diviſion of ſentiment in the congregation, as to the removal; from whence they inferred it to have been an irregular act: And they therefore upheld the miniſter's poſſeſſion, becauſe they ſaw the congregation itſelf diſagreed upon the ſubject *. But this deciſion did not proceed upon

* This account of the determination is miſtaken. It appeared that the congregation accuſed Dr. Wachſell of

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upon a denial of the right of the congregation to remove; but left them free to exerciſe the right in a regular manner, if they ſhould think proper afterwards.

BAD.

John Bonfield. —His father deviſed an eſtate worth upward of £.5 a year to his ſecond ſon, the voter's younger brother, ſubject to an annuity of £.8 a year for life to be paid to the voter. He alſo deviſed other eſtates to the ſecond ſon; who, on agreement with his elder brother, gave up to him the eſtate charged with his annuity in ſatisfaction of it. This was only a parol agreement. The voter was in poſſeſſion of and voted for this eſtate.

GOOD.

Joſeph Marſhall —voted for *a windmill*. The argument in ſupport of the objection to this vote makes it neceſſary to give a particular account of the mill. It ſtood in a common field in the pariſh

ſeveral acts of miſbehaviour and impropriety of conduct, and for this cauſe removed him. A few of them, but a very inferior number, were againſt his being removed. The reaſon given by the judges for reſtoring him, was, "becauſe the congregation had expelled without hearing him; and had not made a proper inquiry into the charges alledged againſt him, by delivering them perſonally to him, and calling upon him for his defence."

of

if Yielding, upon a plot of graſs ground, large enough to clear the ſway of the wings, inloſed within a fence put up by the voter. It was fixed on a poſt, upon pattens, in a foundation of brick-work. Nothing was expreſsly proved to ſhew this plot of ground to belong particularly to the voter; and nothing on the other hand, to ſhew that it did not. Quality of the Freehold. Joſeph Marſhall.

The counſel objecting to the vote, ſaid, That as the voter had expreſsly deſcribed his freehold to be a windmill, he could not have availed himſelf of the value of any land with it, if he poſſeſſed any; but according to the evidence, here was no reaſon to ſuppoſe this; therefore the queſtion was ſimply, whether this windmill was a freehold eſtate; which they contended, it was not, but merely a chattel. That it did not follow, from the right of an heir, to take property by deſcent, that ſuch property was always of a freehold nature, for there are many *chattels* which go to an heir: Thus a term of years in truſt to attend the inheritance, is a chattel deſcending upon an heir. Comyns, in his Digeſt, under the title "Goods and Chattels," makes his ſecond diviſion of "What go to the heir." Therefore ſuch deſcent is not alone a proof of freehold, if in this caſe the voter could prove the deſcent as to the mill, which however is not the caſe.

It

Quality of the Freehold.

Joſeph Maſhall.

It has been determined, that a fire engine ſet up for the benefit of a colliery by a tenant for life, is part of his perſonal eſtate and goes to his executor. This was in the caſe of Lawton and Lawton before Lord Hardwicke, 3 Atk. 13. In that caſe a deciſion of the ſame ſort of Lord Chief Baron Comyns, in a cauſe before him upon a cyder mill, was cited and adopted by Lord Hardwicke. An action of trover was brought for the mill by the executor againſt the heir, and the judge gave his opinion for the former, who had a verdict.

Theſe caſes have aſcertained the law upon the ſubject; and it would be difficult to diſtinguiſh a windmill from the other ſubjects that have been conſidered as perſonal eſtate. The caſe of Lawton and Lawton, in the court of King's Bench in Eaſter term 1782, in which Salt pans were adjudged to belong to the heir, does not militate againſt this argument; becauſe it has been ſhewn, that theſe things may, notwithſtanding, be conſidered as perſonalty; and becauſe that judgment depended on the particular circumſtances of the caſe (E.)

In ſupport of the vote it was ſaid, That according to the evidence of this caſe, the voter muſt be preſumed to have a right to the ſoil on which his mill ſtands; therefore no objection could ariſe from that quarter.

In

ıe caſes on which the oppoſite argument ded, (if they were in point to the wind- he nature of the *ſubject* has never been red intrinſically, but always with relation *perſons* between whom the queſtion has 'Thus in thoſe of the fire engine and mill, the queſtion was, whether perſons ıd laid out ſo much money as theſe ſub- ıd coſt, in improvement of the eſtate held n, ought not to be indemnified in their ty, when the eſtate veſts in other hands: ccordingly the modern determinations d on principles of public convenience, and benefit of agriculture or commerce, have ɔd the executors of ſuch perſons againſt ɔceſſor, to the land. So where a tenant the ſame manner improved an eſtate, dlord has not been ſuffered to take advan- f it againſt him, or his repreſentatives. loctrine was ably explained by Lord Manſ- n the caſe of the Salt pans, to have de- l on theſe diſtinctions (E.); which caſe ong authority in favour of this argument: ıere the court held that the pans erected brine work, notwithſtanding the principle ouring trade, deſcended to the heir, and the executor.

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; if the caſes beforementioned were not ɔ theſe obſervations, it has not been ſhewn in

Quality of the Freehold. Joſeph Marſhall.

in ſupport of the objection, that a *windmill* has ever been conſidered as a chattel in any caſe, or in any opinion of a judge. Therefore upon general principles, conſidered as a building fixed in the ſoil, it muſt be accounted a part of the freehold.

GOOD.

Value in itſelf. See p. 408.

Wm. Odell voted for houſe and land in the occupation of Thomas Sibley. This was proved to be let for £.1 11*s.* 6*d.* a year; but the voter had another tenement near this, let to another perſon for £.3 a year. In objection to the vote, it was contended that he ſhould be bound by the deſcription of that freehold which he gave in at the poll, whatever other eſtates he might poſſeſs; for it is the voter's own fault, if when he may make uſe of all his eſtates, he chooſes to confine himſelf to an inſufficient one: That if this rule were not obſerved, the proviſion of the ſtatute for entering on the poll the particulars of the eſtate voted for would be uſeleſs.

On the other ſide, the counſel acquieſced in the propriety of this rule, and gave up the vote. Upon this the Committee deſired to have an entry made of the caſe in their minutes, for a precedent in future. It was accordingly done in theſe words, viz. *If a voter gives in a freehold on the poll which is not worth* 40*s. a year, the*

vote

vote is to be conſidered as a bad one, notwithſtanding he may be poſſeſſed of other freeholds amounting to more than 40s. Value in itſelf. W. Odell.

The proviſion of the ſtatute above referred to, is in ſect. 1, of ſtat. 18 Geo. II. ch. 18, preſcribing a form of oath for freeholders, in theſe words:

" You ſhall ſwear, (or being one of the people called Quakers, you ſhall ſolemnly affirm) That you are a freeholder in the county of and have a freehold eſtate, conſiſting of (ſpecifying the nature of ſuch freehold eſtate, whether meſſuage, land, rent, tythe, or what elſe; and if ſuch freehold eſtate conſiſts in meſſuages, lands, or tythes, then ſpecifying *in whoſe occupation* the ſame are; and if in rent, then ſpecifying the names of the owners or poſſeſſors of the lands or tenements, out of which ſuch rent is iſſuing, or of ſome or one of them) lying or being at in the county of of the clear yearly value of forty ſhillings, over and above all rents and charges payable out of, or in reſpect of the ſame; and that you have been in the actual poſſeſſion or receipt of the rents or profits thereof, for your own uſe, above twelve calendar months; or, that the ſame came to you within the time aforeſaid, by deſcent, marriage, marriage ſettlement, deviſe, or promotion to a benefice in a church,

Value in itſelf. W. Odell.

church, or by promotion to an office; and that ſuch freehold eſtate has not been granted or made to you fraudulently on purpoſe to qualify you to give your vote; and that the place of your obode is at in and that you are twenty-one years of age, as you believe; and that you have not been polled before at this election."

Timothy Kidman

—voted for houſe and land in the occupation of John Oſborn. This did not amount to 40s. But the voter's freehold conſiſted of two tenements under one roof, one let to Oſborn and the other to Cope, both together paying £.3, 8s. There was only one door in front of the houſe for the entrance of both families; but there were ſeparate ſtaircaſes and gardens, and in every other reſpect they were ſeparate dwellings. Cope had a ſeparate back door into the yard. Oſborn, who was examined, made uſe of the phraſe *the whole houſe*, when ſpeaking of both tenements.

In objection to the vote, it was contended, That it fell within the terms agreed upon in Odell's caſe and was therefore bad. On the other ſide, That this was *one* houſe, and the voter having deſcribed *it* on the poll for his freehold, the value of the *whole* houſe ought to be taken into conſideration, notwithſtanding the tenant named did not pay for the whole. That this deſcrip-

deſcription was ſufficient to anſwer the purpoſe of the ſtatute, as it gave the true guide to inquiry and could not miſlead. Value in itſelf. Timothy Kidman.

The vote was held good. In another caſe of one Perkins under the ſame circumſtances, the voter deſcribed his freehold as conſiſting of *houſes*, and it was held good.

John Gilbert, objected to principally for not having a freehold of the value of 40s. He deſcribed it at the poll, as conſiſting of *houſes* in the occupation of himſelf and others. The aſſeſſment was thus: "John Gilbert (landlord) *Himſelf* (tenant)." And the party objecting offered to prove that the houſe he *lived in*, was not worth 40s. a year; and concluded, that his vote muſt be rejected, becauſe the freehold *for which he voted* was either not aſſeſſed, or under value. J. Gilbert.

The principle of the objection was admitted; but the fact, as to the value, not being in the end ſatisfactorily proved, the objection was not perſiſted in.

John Southwell married one of ſix daughters, who were intitled to equal moieties of an eſtate conſiſting of a malting houſe, two other houſes, and a few acres of land, let to a tenant for eight guineas a year clear rent; he paying for the land tax J. Southwell.

Value in itſelf. J. Blackwell.

of a common right, and in tenderneſs to men's conſciences. No caſe fell out of ſuch nicety as to make it neceſſary for the Committee to decide upon this matter, when it was firſt diſcuſſed: But ſome days afterwards, in proceeding upon votes in the ſecond hundred, they came to the following reſolution, viz. *That the value of a freehold, in right of which the owner votes, is the rent which a tenant would give for it; and not what the owner, occupying it himſelf, may poſſibly acquire from it* *.

Value reduced by charge.

MANY CASES happened, in which a widow's dower was contended to be a diminution of value. Where it appeared in any of them, that the widow had not received or claimed dower for a conſiderable length of time, according to the circumſtances of the caſe, the Committee conſidered that as preſumptive evidence of a releaſe of it.

Mortgage. Richard Stringer.

THE QUESTION of the effect of a mortgage upon the value, occurred on the ſecond day of the trial. Richard Stringer, who voted for Lord

* It happened in many inſtances upon this trial, that the tenants being called as witneſſes to prove an objection of inferior value, ſwore to the payment of leſs than 40s. in rent to their landlords, though the latter had ſworn to the above value at the election.

Ongley,

Ongley, (having taken the freeholder's oath) was objected to as having a freehold of 9l. a year value, charged with a mortgage for 220l. the intereſt of which ſum reduced the annual produce of the eſtate under 40s. The counſel for Lord Ongley, without entering upon the truth of the fact, objected to the competency of any evidence to prove it. Mortgage. R. Stringer.

They contended, That a mortgage did not conſtitute ſuch a charge upon the land, as could affect the right of voting within the meaning of the election ſtatutes. The following is the ſubſtance of their argument.

The queſtion ariſes on the conſtruction of the following words, contained in ſtat. 18 Geo. II. ch. 18. ſect 5. viz.—"—no perſon ſhall vote—without having a freehold eſtate in the county for which he votes, of the clear yearly value of 40 ſhillings, over and above all rents and charges, payable out of, or in reſpect of the ſame."—The ſame expreſſion makes a part of the freeholder's oath.

In order to underſtand the legal application of the words, *rents and charges payable out of an eſtate*, it is neceſſary to conſider in the firſt place, the legal nature and effect of a mortgage. It is a general debt, for which the perſonal eſtate is anſwerable in the firſt inſtance; and though the land is made a ſecurity for it, it is only auxi-

Mortgage. R. Stringer.

liary to the perſonal eſtate for its payment. The authorities for this definition are Hardr. 465, 7, & 512. Caſes in Chanc. 285, 1 Willms. 294, & 1 Atk. 487, in which a mortgage is ſo conſidered by the judges in Weſtminſter-hall. In the caſe firſt cited, Lord Chief Baron Hale calls a mortgage *a chattel*. At one time there was a notion, that a mortgage of land, without a perſonal covenant to pay the money on the part of the mortgagor, might receive a different conſideration; but this was determined to make no difference upon the point, in the caſe above referred to, in 1 Willms. 294, 3 Willms. 358. and Precᵗˢ. in Chanc. 425. Upon this principle, there is no difference between the effect of a mortgage and that of any other debt: As where a plaintiff has obtained judgment in an action; in this caſe he may charge the defendant's land, by ſuing out an *Elegit*. The real eſtate is as ſoon affected in this way, as by a mortgage; for if the mortgagor is in poſſeſſion, the mortgagee cannot deprive him of it without an ejectment; a proceſs far more tedious than that of ſuing out an *Elegit*, after the judgment of which it is a regular conſequence. Yet it never would be contended, that a defendant, againſt whom ſuch judgment had been ſigned, had brought a charge upon his eſtate, reducing its annual value.

One

One who mortgages land for money borrowed, at his death incumbers his perſonal eſtate with the debt, if it is ſufficient to pay it; and the rights of the deceaſed deſcend in different capacities; the heir being intitled to the land, the executor to the money, which by the mortgage became added to the deceaſed's perſonal eſtate: And the former has a right to compel the executor to clear off the burthen from his eſtate. While a mortgagor retains poſſeſſion, he pays the intereſt of the mortgage as any other perſonal debt; nor do the parties at all conſider from what fund, whether it is from the rents, or from the general perſonal eſtate, that the intereſt is diſcharged. If therefore a man's perſonal eſtate is ſufficient to pay the intereſt of a mortgage, it can make no *charge* by which the annual value of his land can be ſaid to be reduced. It is impoſſible to aſcertain the effect of ſuch a loan, without diſcuſſing the whole circumſtances of a man's property; and the immenſe difficulty and inconcluſiveneſs of ſuch an inquiry, is of itſelf a deciſive objection to that conſtruction of the act for which the petitioner contends; for it will unavoidably lead to this inquiry in every caſe in which the objection may be taken. To ſhut out ſuch an inquiry, would be to decide, that a man who may have mort- Mortgage. R. Stringer.

Mortgage. R. Stringer.

gaged an eſtate of 40 ſhillings rent for 20l. having at the ſame time a perſonal property of the greateſt amount, is thereby rendered incapable of voting for his freehold. The abſurdity of ſuch a poſition is too glaring to paſs. Beſides, the intereſt of a mortgage, conſidered in proportion to the rent, is not a juſt method of valuing an eſtate: For it may often happen, that by ſale of a ſmall part of an eſtate, the mortgage debt might be diſcharged; when at the ſame time, the intereſt of that debt might be equal to the clear rent received by the owner.

The words *rents and charges payable out of*, &c. are uſed by lawyers emphaticaliy to expreſs only ſuch charges as are attached to the land *itſelf*, and for which that alone is anſwerable; ſuch as fee-farm rents, rent-charges, rents-ſeck, annuities, corrodies and the like, which do not bind the *perſon* of the owner. This argument will be ſtrengthened by conſidering the different mode of expreſſion uſed upon a ſimilar ſubject, in the acts of qualification for a ſeat in parliament. The words of ſtat. 9 Anne, ch. 5. and 33 Geo. II. ch. 20. are "—annual value—above *reprizes*,—over and above what will ſatisfy and clear all *incumbrances* that may affect the ſame:" Under which words, an eſtate to give a qualification, muſt be clear of mortgages and every other

other incumbrance *. It is juſt to infer from hence, that the legiſlature thought the expreſſions uſed in the election ſtatutes, were not large enough to comprehend charges of ſuch a nature as mortgages, and therefore extended them in this manner, for the particular purpoſe. The word *incumbrance* is much more general than *charge*, which has a technical application to the land itſelf; and it ſeems to have been deſignedly uſed in the act of Anne, as contradiſtinguiſhed from the word *reprizes:* For this word of itſelf would not have included the caſe of a mortgage, according to its legal definition; which in *Termes de la Ley* is thus deſcribed; "Repriſes are deductions, payments and duties, that go yearly and are paid out of a manor; as rent-charge, rent ſeck, penſions, corodies, annuities, fees of ſtewards or bailiffs, and ſuch like."—That there was ſome reaſon for this difference of expreſſion, will further appear, from conſidering the ſtat. 10 Anne, ch. 23. This act which may be called

Mortgage. R. Stringer.

* In the eſtabliſhment of a qualification for thoſe who elect Regiſters for the ſeveral Ridings of Yorkſhire, the election is confined to freeholders having 100l. a year. The expreſſions of the ſtatutes concerning it are very different from thoſe of ſtat. 18 Geo. II. ch. 18. The words are "freehold eſtate—of the yearly value of 100l." and in caſe of diſpute, it is to be determined by the oath of the elector himſelf. See 2 & 3 Anne, ch. 4. 6 Anne, ch. 35. and 8 Geo. II. ch. 6.

Mortgage. R. Stringer.

contemporary with that of 9 Anne, preſcribes a freeholder's oath, in which the words are "free of all charges payable out of the ſame." Now, if the legiſlature had had the ſame intention in this matter as in the point of qualification of members, they would naturally have uſed the ſame words in a law made ſo near the time of paſſing the qualification act.

Another difficulty in this caſe ariſes from that proviſion of ſtat. 7 & 8 Will. III. ch. 25. by which mortgagors *in poſſeſſion* are expreſsly impowered to vote for their eſtates. If therefore the annual value ſhould be conſidered to be reduced by the mortgage intereſt, all thoſe eſtates in which this reduction leaves leſs than 40 ſhillings, would be unrepreſented; for the mortgagee, out of poſſeſſion, cannot vote. It is hardly credible, if thoſe who deviſed the law had conceived ſuch an objection as the preſent to have exiſted, that they would not have taken notice of this effect of a mortgage, when expreſsly treating of its operation on the elector's right.

But it appears to have been the uniform opinion both of lawyers and members of parliament, from the earlieſt times, that the intereſt of a mortgage does not affect the vote. The Journals contain no trace of it (F.); and the preſent election is the firſt inſtance in which the objec-

objection was ever thought of. The reports of county elections in the Journals in different periods, have been ſearched for this purpoſe. There are three caſes, which from the circumſtances that occaſioned the conteſts, and from the manner of conducting them, may be conſidered as leading examples; that of Eſſex in 1716, of Yorkſhire in 1735, and of Oxfordſhire in 1755. They were all moſt obſtinately conteſted; and in the firſt and laſt of the three, the ſpirit of national party, then vehement, mixed with the diſpute. The caſe of Yorkſhire is ſtill more in point, becauſe in that county all tranſactions affecting lands are publicly regiſtered; which practice was eſtabliſhed long before the year 1735 *. Yet in none of theſe caſes did it occur to any man to ſtart the objection; although the moſt eminent men in Weſtminſter-hall were employed in them as counſel. The ſame may likewiſe be ſaid of the caſe of Glouceſterſhire, tried in 1777, by a ſelect Committee; in which almoſt every queſtion was raiſed, that ingenuity could deviſe. Mortgage, R. Stringer.

This clear proof of the uniform judgment of mankind, by conſtant and uninterrupted uſage, is ſuch a confirmation of the foregoing

* By 2 & 3 Anne, ch. 4, 6 Anne, ch. 35, and 8 Geo. II. (in 1735, for the *North Riding*) ch. 6.

argu-

Mortgage. R. Stringer.

arguments, as ought in reaſon to determine the queſtion.

The counſel for the petitioner, in ſupport of their objection to the vote, argued in the following manner:

By tracing the principle and progreſs of the ſeveral ſtatutes concerning county elections, it will appear, that all of them deſcribe the right of voting, as belonging only to thoſe who poſſeſs a *clear* rent of 40 ſhillings value iſſuing from their eſtates. The firſt ſtatute aſcertaining the qualification, (8 Hen. VI. ch. 7.) is very particular in limiting it to a rent or value *clear of all charges* *; and afterwards twice repeats the expreſſion, *ſuch as may expend* 40 *ſhillings by the year*; impowering the ſheriff to examine the voters upon oath, as to this clear value. The next ſtatute, 10 Hen. VI. ch. 2. limiting the qualification to the county, uſes the ſame form of expreſſion. This inſtitution received no alteration till after the revolution; when by ſtat. 7 & 8 Will. III. ch. 25. a particular form of oath was preſcribed for the freeholders. But this ſtatute did not in the leaſt add to the reſtriction; the legiſlature conceiving it to be clearly and thoroughly eſtabliſhed. By 10 Anne, ch. 23. a new limitation was made, by requiring the free-

* *Outre les reprises*, in the original.

hold

hold to be aſſeſſed to the public taxes; and a new form of oath was given, more ſtrict and preciſe than the former. This continued till 1745, when the ſtat. 18 Geo. II. ch. 18. framed a new oath ſtill more exact; upon the words of which the preſent queſtion ariſes. Mortgage. R. Stringer.

The caſes cited on the other ſide to prove the nature of a mortgage, and that it is a perſonal debt, were decided upon diſputes between heirs and executors; and, as *between them* or parties in their ſituations, there can be no doubt that mortgages are ſo conſidered. But when conſidered with reſpect to the *land* itſelf, they are always held to be a charge upon the land; and the mortgagee truſts to that alone, and has a right to inſiſt upon that for the diſcharge of his debt, and to look no further. If there is no bond or covenant from the mortgagor to pay the money, the mortgagee cannot charge the perſonal eſtate but by the aid of a court of equity.

It has been contended on the other ſide, that the word *charge* in this act, is to receive a technical and limited conſtruction; as if the antiquated payments of corodies and penſions, could have entered into the conſideration of the legiſlators of the year 1745: When it is much more juſt and natural to underſtand the word in its general ordinary ſenſe. The word *incumbrance*

Mortgage. has not a more extenſive meaning than *charge*;
R. Stringer. No lawyer can think ſo; and though the words of the qualification act are more numerous, they are not more ſignificant than thoſe in queſtion. It might as well be contended, that a mortgage is no diminution of a member's qualification upon that act, as of the value of the freehold upon this.

The act in the ſixth ſection declares, "That no public tax, county, church, or pariſh rate, or any other tax, rate, or aſſeſſment, upon any county or diviſion, ſhall be deemed a *charge*, &c." It is plain, therefore, that without this exception, ſuch taxes would have been ſo many deductions from the value of the land; yet many of theſe taxes do not fall within the definition given on the other ſide, of a *charge* upon the eſtate. By this particular clauſe, the legiſlature ſeems to have intended, that *every* payment out of an eſtate, but thoſe ſo excepted, ſhould be conſidered as charges reducing the value; and this is the moſt rational conſtruction of the clauſe, according to the object of the law.

The caſe put of a perſon poſſeſſed of large perſonal property mortgaging his land, is not likely to happen; but if it ſhould, it would not alter the legal conſequences; for the right of voting is derived from the *real* property. A mortgagor, though keeping poſſeſſion, is only a tenant

a tenant at will to the mortgagee, who is, in ſtrictneſs of law, the owner of the land; and he may at any time obtain poſſeſſion by an ejectment, and compel the tenants to pay their rents to him. Surely no charge upon land can be heavier than one attended with ſuch conſequences. The ſtat. 7 & 8 Will. III. ch. 25. did not in the leaſt intend to affect ſuch caſes as the preſent; nor can it without violence receive ſuch a conſtruction. The object of the ſection referred to, was to enable mortgagors who had *in form* conveyed their eſtates to others, to exert a particular act of ownerſhip, if at the ſame time they held poſſeſſion of thoſe eſtates; to relieve them from a legal diſability, and to make, as it were, a new claſs of voters in counties, who were ſubſtantially the owners of the freehold, though deprived of it by legal form. But it cannot be ſuppoſed, that theſe voters were not to be ſubject to the ſame reſtrictions as other freeholders. The inference drawn from this ſtatute, therefore, adds nothing to the argument for the ſitting member. Mortgagee. R. Stringer.

What the true meaning is of the words "clear yearly value," may be learnt from a caſe lately decided in the King's Bench upon the Game act, which is in point to the preſent queſtion; the caſe of *Wetherell* againſt *Hall* (G.) By ſtat. 22 & 23 Chas. II. ch. 25. the qualification for killing

Mortgage. killing game is limited to thoſe who poſſeſs lands
R. Stringer. *of the clear yearly value* of 100l. a year. An action having been brought upon this act againſt Hall as unqualified, the defendant proved, that he was owner of an eſtate of the annual value of 103l. But on the other hand, the plaintiff proved it to be reduced under the 100l. by a mortgage of lands producing 14l. yearly rent, for 400l. The defendant, the mortgagor, was in poſſeſſion, and regularly paid the intereſt of the mortgage. A caſe was hereupon made for the opinion of the court upon the queſtion, and was argued in Michaelmas term 1782, when the judges determined, (immediately, and without any difficulty) that by this mortgage, the annual value of the eſtate was reduced, and that it did not give the defendant ſuch a qualification as the ſtatute required *. When the words of the two ſtatutes are compared together, it will be found, that thoſe reſpecting an elector's qualification, are much more ſtrict than thoſe reſpecting the game; being, in the latter caſe, no more than "*clear yearly value*," which are much amplified in 18 Geo. II. ch. 18. So that the deciſion of the judges of the King's Bench, furniſhes the ſtrongeſt authority for deciding the

* Note (G.) contains a report of the arguments and deciſion in the caſe of Wetherell and Hall.

pre-

preſent queſtion: They have expreſsly declared the law upon this ſubject. Mortgage. R. Stringer.

The caſe of a judgment has been argued to be equally a charge upon the land, yet that this would not be contended for: But there is a great difference between the two caſes. A judgment *may*, in its conſequences, affect the land of the defendant; but a mortgage does abſolutely. A judgment does not affect any particular lands; but a mortgage is a ſpecific *lien* upon lands particularly aſſigned. A judgment cannot affect more than *half* of the defendant's land; and his perſonal eſtate is in the firſt place to be taken by the ſheriff, who ought not to attach the real, if the perſonal eſtate is found ſufficient. Further, this part of the argument is founded on an analogy to a caſe which never has been decided, and perhaps never has happened.

Thus the main ſupport of the argument on the other ſide, is the circumſtance of this objection's never having been urged before. Whether the fact be ſo or not, is uncertain; for it may have taken place in conteſts not now remembered; and it would be too great a labour to examine the reports of every county election in the Journals, in order to aſcertain it. But taking it to be ſo, it may be well accounted for. It can ſeldom happen, that a man lending money on mortgage, will take a ſecurity ſo near the

Mortgage. R. Stringer.

the value of the ſum lent, as to give riſe to the objection; and ſtill leſs frequently can ſuch private tranſactions be known to thoſe who would bring them forward. The peculiar circumſtances of the conteſt in this county have given extraordinary activity to the two parties; and this added to its ſmall extent, may account for the agitation of every point capable of ariſing.

It would not be weakening the preſent argument, to ſuppoſe, that an opinion may have prevailed upon this ſubject, (as there did upon the game act before the caſe of Wetherell and Hall happened) that a mortgagee's intereſt did not conſtitute an objection. In a caſe ſimilar to that of Wetherell and Hall, tried at the ſpring aſſizes at Thetford, in 1779 *, a very great judge (Blackſtone) would not permit any evidence to be given of a mortgage, to reduce the defendant's qualification, giving a poſitive opinion, that it was not a caſe within the meaning of the ſtatutes; and the matter proceeded no further. But ſince the judges of the King's Bench have ſolemnly determined the point, can any thing be inferred from this inſtance of the miſtaken opinion of one judge? Many miſtaken notions of law have at different periods been current, and

* Mr. Graham, who cited this caſe, had been counſel in the cauſe at the aſſizes.

even

even lawyers have authoriſed them. Such no- Mortgage
tions, however, are never to be revived, after R. Strin-
they have been once corrected. ger.

The counſel for the ſitting member obſerved in reply,

That the foundation of their argument, viz. *that a mortgage was a general perſonal debt*, had not been weakened by the obſervations in anſwer to it; and the ſeveral legal conſequences of that poſition, had not been contradicted.

That as the counſel for the petitioner derived their whole ſtrength from the caſe of Wetherell and Hall, it would be neceſſary to examine into the particular circumſtances of that caſe, from whence it would appear that it did not deſerve ſuch implicit reſpect, as had been paid to it on the other ſide. The caſe was not very ſolemnly argued at the bar, nor much diſcuſſed by the judges; but taken up haſtily. Then it was not brought forward upon a ſpecial verdict, or by motion in arreſt of judgment; ſo that no writ of error could be brought, in order to obtain the opinion of all the judges upon the queſtion; for as the opinion was ſomewhat unexpected in Weſtminſter hall, and a contrary opinion was known to have prevailed before, it is probable that this deciſion of the King's Bench might have been ſet aſide upon more mature deliberation among the 12 judges. In the courſe of the

Mortgage R. Stringer.

argument of this queſtion, it was mentioned by the counſel as a well known caſe, put by way of illuſtration, *that a mortgage would not affect a freeholder's qualification*; upon which Lord Manſfield, taking it for granted, obſerved, "but a voter *ſwears* to his qualification."

If we compare the progreſs of the different laws which reſtrain the qualification for killing game, with thoſe reſpecting the votes in county elections, they will appear to have proceeded upon a principle directly contrary to each other. The acts for preſerving the game, have always had in view ſome additional reſtraint, and have required an increaſe of the qualification. But the election acts have, in fact, always extended the right of voting, and made the real qualification of a county freeholder more general, as often as they have preſerved the nominal limitation of 40s. value; for the continual decreaſe of the value of money has conſtantly had this effect. The period intervening from the reign of Henry VI. to that of Will. III. had made a prodigious change in the ſtate of the electing freeholders, by the operation of this cauſe. This change was acceded to by the ſtat. 7 and 8 Will. III. and when the act of 18 Geo. II. paſſed, the ſame cauſe had again operated in the ſame manner, in the courſe of the 50 years elapſed ſince the act of Will. III.

This conſideration ought to have great weight in deciding the preſent queſtion; becauſe it ſhews that no deciſion upon the game acts can be in point to this ſubject, howſoever the words of the two laws may reſemble each other. No evidence has been offered here, that the voter has not perſonal eſtate ſufficient to pay the intereſt of the mortgage; and it is to be preſumed that he has, till the contrary be proved. If he has ſufficient, the land is thereby cleared of the charge. Mortgage R. Strinanger.

Although great ſtreſs is laid by the counſel for the petitioner, upon the expreſſion *clear yearly value*, yet it has been ſhewn that theſe words muſt relate to ſuch charges as the law acknowledges to be peculiar to the land. The perplexing conſequences of any other conſtruction have been already adverted to; to which it may be added, that the value of every acre of the eſtate, ought, in juſtice, to be meaſured by a more certain criterion, than the rent paid. Surveyors and farmers ſhould be examined; and the utmoſt amount of the value ſhould be known, before an elector ſhould be deprived of his franchiſe by ſuch an unfavourable objection.

The Committee reſolved,

That the intereſt upon a mortgage, the mortgagor ſtill being in poſſeſſion, is ſuch a charge upon the

Mortgage R. Stringer.

eſtate within the meaning of the ſtatutes, as to affect the rights of the voter *.

And likewiſe,

That the counſel be permitted to call evidence, to ſhew that the intereſt upon a mortgage reduces the clear yearly value of an eſtate below 40*s.*

A few days after this deciſion was made, when the counſel for the ſitting member began to enter upon their caſe in the ſame hundred, they ſaid, They conceived themſelves enabled, by the words of the above reſolutions, to offer evidence of the voter's ability to pay the intereſt of the mortgage from his perſonal eſtate; ſo as to leave him a clear annual income of 40s. from the eſtate for which he voted, after paying the above intereſt. Upon this the chairman interrupted them, by ſaying, That the Committee

* Since this reſolution paſſed, the legiſlature has made a declaration of the law upon the ſubject, in ſtat. 28 Geo. III. ch. 36, ſ. 6 and 9. The regulations therein preſcribed require the eſtate to be *of the clear yearly value of* 40*s. over and above the intereſt of any money ſecured by mortgage upon it, and alſo over and above all rents and outgoings payable out of, &c. other than* the public taxes. Yet conſidering the doubt and contradiction in which the point had been involved, by the opinions of individuals and the deciſions in the election courts, the clauſe has not that form and ſolemnity which might have been expected (from former inſtances) in a declaratory law, made upon a difficult legal queſtion. The ſubject is introduced indirectly into the act, and as if the law were taken for granted.

had

had conſidered the queſtion in this point of view, before they formed their opinion above mentioned. Another member ſaid, They had conſidered the mortgage as a ſpecific charge on the real eſtate itſelf, according to the deciſion in the caſe of Wetherell and Hall. Some members then propoſing to withdraw *, to conſider whether they ſhould add any thing to their former reſolution, the Committee withdrew; and ſoon after returned, when the chairman told the counſel, That the Committee had paſſed the following reſolution in addition to the two former, viz. Mortgage R. Strinſer.

That the intereſt of a mortgage, (which is charged upon the eſtate in right of which a voter voted) being eſtabliſhed by evidence, ſo as to reduce the value of the eſtate to leſs than 40*s.* per annum, *does invalidate the vote; and that ſuch evidence is concluſive, notwithſtanding any other property poſſeſſed by the voter.*

In the courſe of the evidence upon the eſtate upon which the above queſtion aroſe, (which conſiſted of a houſe divided into two tenements, and 11 acres of land) the annual value was proved, on the part of the petitioner, to be about 9 or £.10 excluſive of taxes; the annual intereſt of the mortgage money was £.8 16*s.* But in ſupport of the vote, it was made a queſ-

* At this time they ſate in the Court of Chancery.

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tion, Whether £.70 part of the principal ſum, was a legal charge on the eſtate: Beſides which, evidence was given of the value being equal to £.13 a year; which rendered the other queſtion unneceſſary. The eſtate had not been let; and the method of eſtabliſhing the value, was by examining perſons of the neighbourhood, farmers or others who were acquainted with the lands; and by inquiring into the amount and proportion of the public and pariſh taxes with which they were charged. The ſame method was followed in the other caſes in which an objection was made to the value. Where lands were let, the rent was in general conſidered only as one mode of eſtimating the value, but not ſufficient to exclude other means of information *.

In concluſion, the Committee held Richard Stringer's vote to be good, upon the evidence of the intrinſic value of his eſtate.

Cricklade
Mortgage

[In the Cricklade Committee, the objection of a mortgage, and that of an eſtate ſubject by will to the payment of debts and legacies, reducing the value in the ſame manner, were argued upon at the ſame time, and received both together the judgment of the court: It was contrary to that of Bedfordſhire, in the following words:

* See the reſolution in p. 450.

That

That the mortgagor in poſſeſſion * *of lands of the value of* 40*s. a year; and the deviſee in poſſeſſion of lands of the value of* 40*s. a year, deviſed ſubject to the payment of debts and legacies, are intitled to vote* †. Cricklade Mortgage

In the caſe of Buckinghamſhire, this queſtion was raiſed and argued on the ſecond day of the trial. The circumſtances of it were exactly the ſame as thoſe of Richard Stringer. The Committee reſolved, Buckinghamſhire.

That a mortgage is ſuch a charge on land, as may reduce the value of the freehold below what may intitle a perſon to give his vote for a knight of the ſhire.

The firſt, in point of time, of the above three deciſions, was that which paſſed in the Bedfordſhire Committee. The Cricklade caſe next, and within a few days after it; and that in Buckinghamſhire laſt.]

THE COMMITTEE declared their opinion of the effect of taxes on the value of an eſtate, upon a caſe that aroſe within a few days after their proceedings began. Value reduced by Taxes.

The ſtat. 18 Geo. II. ch. 18, ſ. 6, provides, That no public or parliamentary tax, county,

* In all the three caſes the mortgagor was in poſſeſſion.

† See note (F.)

Value reduced by Taxes.

church, or pariſh rate, or duty, or any other tax, rate or aſſeſſment whatſoever, to be aſſeſſed or levied upon any county, diviſion, &c. is or ſhall be deemed, or conſtrued to be any *charge* payable out of, or in reſpect of, any freehold eſtate, within the meaning and intention of this act, or of the ſolemn oath or affirmation, &c. The words of the ſame act thus referred to are, "clear yearly value of 40s. over and above all rents and charges payable out of, &c."

It was debated how far this exemption ſhould be carried. The voter, in whoſe caſe the queſtion aroſe, occupied his own freehold; which, without adding to the annual value the amount of taxes charged upon it, was worth leſs than 40s: The addition of the ſum paid for taxes raiſed it to more. The party objecting to the voter contended, That this freehold gave no right of voting. They argued thus:

Although where an eſtate is let for 40s. a year, taxes are not to make a reduction of the value, for the purpoſe of voting, yet the expreſſions of the ſtatute do not import that ſuch deductions ſhould be conſidered as *a part* of the value: This would be a great inconſiſtency. In the ſame manner a man's debts might be conſidered as part of his property: Such a poſition was never made before. The juſt way of conſidering

ſidering this matter is, to take an eſtate before the land tax was impoſed. Suppoſe it let for 36s. a land tax of 3s. in the pound would *raiſe* the value to 40s. if, in the ſenſe of the law, *not deducted* means *added*; and thus he who had no vote before, would find himſelf qualified by the charge; which would be abſurd: For, in truth, the eſtate was reduced to ſo much leſs; and, as it has turned out in fact, ſo much property as the tax amounted to, has been ever ſince loſt to the owner. Then can it with any propriety be ſaid, that taxes are part of the *produce* of an eſtate? The charge is not to deprive a man of a vote, who at the time when it was firſt impoſed, poſſeſſed 40s. a year. This is the extent of the act: That the right of voting may not be infringed by the diminution. The clauſe in queſtion merely makes an exception of certain caſes, and is not declaratory of a right. But the ſenſe which the other party would put upon it, would carry it by conſtruction much further than its ſpirit or letter will bear.

Value reduced by Taxes.

The argument on the other ſide was to the following effect:

There is no real difference in the diſtinction now made; for if it is admitted that the owner of 40s. a year preſerves his vote, when part of it is paid away for taxes, whereby the produce is ſo far reduced to him, it muſt follow that in the

Value reduced by Taxes.

the other caſe the taxes muſt be included in like manner; ſince in the firſt caſe the value cannot be made out without reckoning them, as in the other. All the difference lies in the manner of doing it, from whence the fallacy of their argument ariſes. For, ſuppoſe an eſtate of 40s. value, from which 8s. are paid for taxes, occupied by the owner: They admit the value continues the ſame. Suppoſe the owner lets it for 32s. and pays the taxes himſelf, is not the worth to the owner the ſame? Where the tenant pays the tax, the landlord receives the clear rent; where the latter pays it, he receives a groſs rent; but the real produce to him is the ſame in both caſes. The only difference conſiſts in the hand that pays the outgoings; and the addition and reduction of the tax are convertible terms, according to the nature of the caſe. In ſubſtance and effect the landlord ultimately pays the charges upon every eſtate.

But an ingenious difficulty has been raiſed in the way of this argument, by putting the caſe of a vote *created* by payment of taxes, which would be inſufficient without them. The ſolution of it is eaſy: If a tax is laid on the land, it muſt neceſſarily be ſuch as the property can bear; this follows from the nature of taxation. In the caſe ſuppoſed, the value of the eſtate is miſtaken by its owner, and ought to be rated higher;

higher; for by as much more as the owner paid when the tax came, was the rent too low before. If it is capable this year of paying the additional charge, it was equally capable in the year preceding of paying ſo much more in rent. Land let on ſuch terms might have been ſet higher; and a landlord would take advantage of that circumſtance, if a tax ſhould ceaſe, to raiſe his rent in proportion to the diſcharge of the tax. It was the object of the law to prevent a diſqualification by contributing to the public burthens; and if the conſtruction of it ſhould be thought doubtful, that courſe ſhould be taken which will beſt promote this end. Value reduced by Taxes.

While the counſel were arguing this queſtion, they were aſked by the court, if they put the poor rates upon the ſame footing with the public revenue taxes; to which it was ſaid in anſwer, that both were conſidered to be the ſame in this reſpect.

The reſolutions of the Committee were communicated to the parties in the following words, viz. A motion having been therein made,

That the parochial taxes, when paid by the tenant, conſtitute a part of the rent paid by him for the land, and are to be conſidered as part of the income, in right of which the owner votes,

It paſſed in the *negative.*

[This

Value reduced by Taxes.

[This queſtion was reſumed again by the Committee ſome time afterwards, during the trial of votes in the hundred of Manſhead, and a ſimilar reſolution then paſſed upon this re-conſideration of it.]

A motion, *That the land tax, when paid by the tenant, conſtitutes, &c.* (as in the former)

Paſſed in the *affirmative*,

A ſimilar motion reſpecting the *window and houſe taxes*.

Paſſed in the *negative*.

III. CASES upon the ASSESSMENT ACT, 20 Geo. III. ch. 17.

Aſſeſſment

When the firſt objection was opened to a vote upon the conſtruction of this ſtatute for regulating the aſſeſſments to the land tax, a propoſal was made by the Committee to the counſel, to agree upon a preciſe ſtate of ſuch queſtions as they intended to agitate upon it, and to argue them altogether. Accordingly, upon a ſubſequent day this was done.

The firſt ſection of this ſtatute enacts as follows, (reciting the difficulty of aſcertaining the rights of voters, and the diſputes thereby occaſioned

ſioned at elections in counties, as the law then ſtood.) That from and after the 1ſt of January 1781, no perſon ſhall vote for electing of any knight or knights of the ſhire to ſerve in parliament within England or Wales, in reſpect of any meſſuages, lands or tenements, which have not for ſix calendar months next before ſuch election, been charged or aſſeſſed towards ſome aid granted or to be granted to his majeſty, his heirs or ſucceſſors, by a land tax, *in the name of the perſon or perſons who ſhall claim to vote at ſuch election, for or in reſpect of any ſuch meſſuages, lands, or tenements, or in the name of his or their tenant or tenants, actually occupying the ſame, as tenant or tenants of the owner or landlord thereof.* Aſſeſſment

The ſecond ſection provides an exception for annuities and fee-farm rents, (duly regiſtered) iſſuing out of any meſſuages, &c. aſſeſſed as aforeſaid; and alſo for perſons who may become intitled by deſcent, marriage, marriage ſettlement, deviſe, or promotion to any benefice in a church, or to an office within 12 months before the election, if the meſſuages, &c. for which the vote is given, *have been within two years next before the election rated or aſſeſſed to the land tax, in the name of the perſon* through whom the voter derives his title; *or in the name of ſome predeceſſor*, within two years next before the election, of a perſon voting in reſpect of a benefice, or an office; *or in the name*

of

Aſſeſſment *of the tenant* of ſuch perſon, ſuch tenant actually occupying ſuch meſſuages, &c.

The third ſection directs the commiſſioners of the land tax to deliver to the aſſeſſors a printed form of an aſſeſſment, as ſet forth in a ſchedule annexed to the act; and the aſſeſſors are required to make their aſſeſſments according to the ſaid form, and to cauſe a copy to be ſtuck upon the church door. And if the name of any *owner* of any meſſuages, &c. intitled to vote ſhall be omitted, he may appeal to the commiſſioners of the land tax, who upon ſufficient cauſe ſhall amend the aſſeſſment, by inſerting the name of the actual occupier, and of the owner or perſon intitled to or in receipt of the rents; or eraſe the name of any perſon improperly inſerted. Theſe are the three principal clauſes of the act; for the reſt, as well as for the expreſs words of theſe, I refer the reader to ſuch parts of the act itſelf, as are copied in note (H.) ſubjoined to this caſe. The following is the

FORM of ASSESSMENT to which the ACT refers. Aſſeſſment

County of N. to wit: For the pariſh of —— in the ſaid county. } An aſſeſſment made in purſuance of an act of parliament, paſſed in the year of his majeſty's reign, for granting an aid to his majeſty by a land tax, to be raiſed in Great Britain, for the ſervice of the year one thouſand ſeven hundred and

Names of Proprietors.	Names of Occupiers.	Sums aſſeſſed.
A. B. — —	Himſelf. — —	— — —
A. B. — —	C. D. — —	— — —
E. F. — —	C. D. — —	— — —
C. D. — —	G. H. — —	— — —
L. K. and L. M. — —	N. O. — —	— — —
P. Q. — —	R. S. and T. U. — —	— — —

Signed this day of

17 by us,

A. B. } Aſſeſſors.
C. D. }

The queſtions propoſed to be argued were theſe:

1. Whether the form of the ſchedule muſt be ſtrictly complied with.

2. Whether the name of the perſon claiming to vote muſt not appear upon the aſſeſſment either as owner, in the proper column, or as landlord to the particular tenant mentioned, in the column of tenants.

3. Whe-

Aſſeſſment 3. Whether, where the name of another owner appears upon the aſſeſſment, it is competent to the voter to prove that the tenant aſſeſſed is his tenant.

The counſel for the petitioner contended, That the form of the ſchedule need not be ſtrictly complied with; that it was not neceſſary that the voter's name ſhould appear upon the aſſeſſment; and that in the latter caſe it was competent to the voter to prove the fact. They argued thus:

Whatever might have been the original deſign of thoſe who planned this ſtatute, the effect of it is now to depend upon the terms in which it is expreſſed. Thoſe relating to the point in queſtion are in the disjunctive, viz. "in the name of the perſon claiming to vote, *or* in the name of his tenant." Now though there are many caſes in the law, as in the conſtruction of wills or deeds, in which the word *or* is made to ſignify *and*, and has a copulative ſenſe given it, becauſe the meaning of parties cannot otherwiſe be effectuated; yet that method of conſtruction, and the reaſon of it, are never applied to acts of parliament, which are deliberately and ſolemnly made, and to which miſtakes cannot be imputed: Beſides, the clauſe before us has a clear and known ſenſe as it ſtands. Therefore by this regulation of the ſtatute, it plainly is ſufficient

ficient that either the name of the landlord, or of the tenant, is in the aſſeſſment. The form of the printed ſchedule, no doubt, gives both names; but this form, though preſcribed by the law, is not eſſentially neceſſary to the rate. The words of the two different parts of the act are eſſentially different. The firſt ſection is poſitive, "No man ſhall vote, &c." This is abſolute: But in the third ſection, "the aſſeſſors are *required*" to aſſeſs in a particular form. There is a known diſtinction between ſuch proviſions of the ſtatutes as are directory only, and ſuch as are concluſory. The aſſeſſors ought to follow the form preſcribed, and are puniſhable for their diſobeying the requiſition. But their neglect of duty is not to annihilate the elector's franchiſe. There is no ſentence in the ſtatute from which ſuch concluſion can be drawn. It is in this point only *directory* to the aſſeſſors, not *concluſory* upon the voters. In the ſame manner as in the caſe of the King and Sparrow, 2 Stra. 1123, which aroſe upon an appointment of overſeers of the poor, made after the time directed by law, the court confirmed the appointment, though they held the juſtices culpable in not making it ſooner. The ſtat. 43 Eliz. directs the appointment to be in Eaſter week, or within a month after Eaſter: Yet in the above caſe, the appointment there held valid was not made till ſix weeks after. Aſſeſſment

Aſſeſſment

Sir Edward Coke has given authority to the diſtinction between *directory* and *concluſory* laws, which ſeems to have guided the judges in the above caſe *. According to him, the *direction* of a ſtatute is *matter of order, which maketh nothing void:* An opinion very applicable to the directions of the ſtatute in queſtion.

So in a queſtion upon the ſtatute 43 Eliz. which requires that pariſh apprentices ſhall be bound before juſtices *dwelling in or near the place:* An objection having been made to the binding for the want of this qualification in the juſtices, the court overruled the objection, ſaying, that the ſtatute was in this reſpect only *directory.* Comb. 289, cited in Bott 142. The allowance of a poor's rate was objected to for the ſame reaſon, and received the ſame anſwer. Vin. Abr. tit. *Poor*, 425. And in another caſe, upon that clauſe of the ſtat. 5 Eliz. which requires the binding to be till the apprentice's age of 24, otherwiſe to be void *to all intents*, the judges in the ſame manner conſidered this clauſe to be only *directory*; and that a ſettlement was lawfully gained under ſuch apprenticeſhip. Bott 145.

The caſes cited are full illuſtrations of the point contended for. But further, if this form is neceſſarily to be followed, and nothing elſe will do, then all the proviſions reſpecting it are

* In the debate upon ſtat. 1 Hen. V. & VIII. & 23 Hen. VI. requiring reſidence. See 1 Journ. 516, 7.

equally

equally eſſential to the right of voting. If the order of the columns in the ſchedule ſhould be inverted, if the proper duplicates ſhould not be made, if they ſhould not be ſtuck upon the church door, in either caſe, by this rule, the aſſeſſment is bad: Which is too abſurd to be contended for. Aſſeſſment

It is ſaid, the intention of the framers of this bill, was to give to an aſſeſſment the effect of an exact regiſter of county voters. Perhaps it was ſo; but they were not able to carry it into execution. And the queſtion before the court, ariſes upon the intention of the legiſlature, as expreſſed in the law itſelf; and not upon the wiſhes of thoſe who propoſed it. Many alterations were made to the bill, in its progreſs through the houſe; and, among others, that material one which placed the word *or* in the room of *and* (as it firſt ſtood) in that ſentence upon which the argument ariſes. This ſhews, that the legiſlature was aware of the difficulties of that mode of aſſeſſment which the ſitting member contends for, and ſtudiouſly provided a different one.

Another objection to the neceſſity of this form of aſſeſſment is, that the aſſeſſors would thereby have it in their power to exclude whom they pleaſed from voting. Perhaps it may be argued in anſwer to this, that parties are impowered to appeal againſt the aſſeſſment, if they have any cauſe. But this appeal is given to the *landlord*

Aſſeſſment only, upon the omiſſion of *his* name, and not to the tenant; the omiſſion of whoſe name is not made the foundation of an appeal.

Theſe obſervations are applicable to all the three propoſitions; for if either landlord *or* tenant may be rated, it follows, that the aſſeſſment may be in a different form; that the voter's name need not be there, if his tenant's is; and that he may prove the perſon rated to be his tenant.

The only words of the act, from whence any ambiguity can ariſe upon this ſubject, are thoſe at the end of the firſt clauſe, "actually occupying the ſame, as tenant or tenants of the owner or landlord thereof," from whence it will be inferred, perhaps, that the tenant is to be aſſeſſed *as tenant to the particular landlord.* This is even more than the ſchedule requires; and ſuch a ſenſe cannot be derived from the clauſe, but by conſtruing the words out of their grammatical order. Relative words muſt be carried to the next antecedent, by which rule the ſentence "as tenant &c." refers to "actually occupying the ſame." An obvious reaſon offers for inſerting thoſe words here. It might have been for the purpoſe of excluding meſne tenants, and caſes of diſputed rights. The law means, that the tenant named, ſhall be he who actually occupies the freehold.

The

The ſecond ſection makes this conſtruction plain. It excepts the caſes of deſcent or ſucceſſion, and promotion, from the regulations of the firſt ſection, if the tenements have been rated within two years in the name of the predeceſſor, "*or* in the name of the tenant or tenants of ſuch perſon, *ſuch tenant or tenants actually occupying ſuch meſſuages, &c.*" Aſſeſſment

With reſpect to the third queſtion, the act certainly could not mean, that the aſſeſſment ſhould be *concluſive* evidence of the right to vote. If A.'s eſtate is occupied by B, and C. is named as landlord inſtead of A. it would be unjuſt as well as contrary to the object of the act, to prevent A. from ſhewing this miſtake in ſupport of his vote: Becauſe *his* tenant is aſſeſſed, and he votes in reſpect of land paying the tax, in the name of ſuch tenant.

Beſides theſe particular arguments upon the body of the act itſelf, the conſtruction now contended for will receive additional force from conſidering what difficulties it was intended to remove. It is well known to thoſe who are converſant in the buſineſs of parliament, that ſome caſes in the Glouceſterſhire election, tried in the beginning of 1777 *, firſt ſuggeſted the uſefulneſs of new regulations of the land-tax aſſeſſ-

* See P. 47—55 of the reſolves of that Committee.

Aſſeſſment

ments. It appeared to that Committee, that the owners of many eſtates paid no land tax directly. Small eſtates, carved out of larger, had been purchaſed free from land-tax; i. e. the owner of the principal eſtate paid the tax for the whole after its diſmemberment, and was rated for it. In the courſe of a few years, it often became difficult for the owner of the parcel, to prove that his land was aſſeſſed or paid for. This was one of the evils which this act intended to remedy; which end will be ſufficiently anſwered, if the aſſeſſment contains the name either of the landlord or of the tenant; for in either caſe it ſhews, that the particular eſtate bears the charge.

If in ſuch a caſe the Committee ſhould entertain doubts upon the queſtion, they ſhould conſider this general principle, that where a law infringes upon a general right, it ought to be conſtrued moſt favourably to the right, and ſo as to enlarge rather than reſtrain it.

The counſel for the ſitting member contended for the affirmative of the two firſt queſtions, and the negative of the third, in the following manner.

There are certain rules of conſtruction invariably obſerved by the judges in the expoſition of ſtatutes; which being eſtabliſhed by their authority, ought to be followed by the Committee in conſidering the ſtatute before them.

Accord-

According to theſe rules, it is neceſſary to conſider how the law ſtood at the paſſing of an act, what evils it propoſed to remedy, and in what manner to carry its proviſions into effect. For this purpoſe, that conſtruction is to be followed, which will beſt advance the remedy, and ſuppreſs the evil *. If any clauſes are ſeemingly inconſiſtent, the general ſcope and deſign of the act is to be the means of reconciling them: And if any are dubious, the conſequences as to public or private inconvenience are to be attended to; ſo as to give effect, if poſſible, to every particular clauſe, but in ſubſervience to the whole. Aſſeſſment

The preamble of this ſtatute declares, that the laws aſcertaining the rights of election in counties, are difficult to be carried into execution, from whence numberleſs diſputes have ariſen. The remedy propoſed for theſe difficulties, is to ſubſtitute a clear written inſtrument of authority, to aſcertain theſe rights, inſtead of the uncertain parole teſtimony by which moſt of the diſputes were before occaſioned; and to prevent the neceſſity of recurring to extrinſic evidence of the fact. The only method therefore to effectuate this intention of the act, is to require the aſſeſſment to be made in that form, which will beſt ſerve for an explicit regiſter of voters.

* See 1 Black. Comm. p. 187. and the places there cited.

Aſſeſſment

Before this act, the ſtat. 18 Geo. II. ch. 18. regulated the aſſeſſment of freeholds. It enacts, in ſect. 3. That after 24 June 1745, no perſon ſhall vote for a county, "in reſpect or in right of any meſſuages lands or tenements, which have not been charged or aſſeſſed towards a land-tax, 12 calendar months next before ſuch election." Such aſſeſſment muſt neceſſarily have been in the name of the owner *or* occupier—it could be no other. This method was open to thoſe difficulties which the preſent act complains of: For it was ſo conſtrued, that if any implied aſſeſſment was made, that was held ſufficient; and therefore the laſt act preſcribes a new method. But if the conſtruction contended for by the petitioner prevails, it will pervert its deſign, and render its proviſions nugatory. For the new mode of aſſeſſment will contain no more particulars, and give no further information than the old one. Thus all the pains taken by the legiſlature will be fruitleſs, and a ſolemn law, framed after long conſideration, eluded.

Not only the title and preamble of the act, ſhew its object to have been as above ſtated; but the ſubſidiary regulations, upon which many ſections of it are employed, are all directed to the ſame end; and can anſwer no purpoſe whatever, unleſs ſuch be its object. Thus it directs duplicates to be made with great care, and preſerved

ſerved ſo as to be at all times ready for inſpection, and to furniſh legal evidence; for which purpoſe, the clerk of the peace has ſeveral duties injoined him, and among others, that of being in waiting at elections, and upon ſeveral days previous to them *; and a heavy penalty is inflicted upon his neglect of theſe duties. But if the other argument ſucceeds, his office is in this reſpect uſeleſs, and his attendance with the duplicates an idle ceremony. Aſſeſſment

Precaution is alſo taken for preſerving the regularity of the aſſeſſment, by enabling the freeholder to appeal if his name is omitted. It is ſaid on the other ſide, that the giving this appeal to the *landlord* only, and not to the tenant, proves it to be unneceſſary to rate both. But the inference is not juſt; for the owner is the only perſon intereſted, and therefore the only one who could with any propriety appeal †. Upon ſuch appeal the Commiſſioners would be bound to comply with the form preſcribed, and to inſert both names, in all caſes where the land was let. It is plain the act intended to have both names inſerted in the rate in *all* caſes, by directing the owner's name to be repeated in the column of occupiers, when he occupies his land himſelf.

* Sect. 16.

† See ſect. 10. "*any perſon* aggrieved" may appeal.

The

Affidavit

The counſel for the petitioner, for their chief ſupport, rely upon a forced diſtinction that was formerly made between directory and concluſory laws. It is to be lamented that ſuch a method was ever taken for repealing a ſtatute; for it cannot be denied, that this diſtinction has the effect of a *repeal*. It is not very honourable to the expounders of our laws, to have given way to ſuch trifling ſubterfuges. Laws do not ſpeak in the language of recommendation, but of command; and all their injunctions are to be obeyed alike. It is probable, however, that this notion was not in its origin a judicial one, but political; though Sir Edward Coke himſelf was the firſt who countenanced it *. Yet this was not

* I have met with a different account of the origin and diſuſe of the ſtatutes, upon which Coke employed this diſtinction, given by Harley Earl of Oxford when Speaker. In the opening of the debate on the Aylesbury caſe (Aſhby and White) in the Houſe of Commons, he gave the houſe an account of the election laws; in which, ſpeaking of the abovementioned laws of reſidence, he ſays, "Some of the law books give *a pretty conſtruction* of it, *that though there was ſuch law, yet the cuſtom of parliament was to be the rule:* But it ſeems a better conſtruction, that it being then reckoned a ſervice, and a hard ſervice, none but reſidents in the borough were *compellable* ——." See his ſpeech in 8 State Tri. 92. from whence I cite it. The *pretty conſtruction* he alludes to, is probably that of Chief Juſtice Pemberton, in the Haſlemere caſe of Onſlow and Rapley, tried in 1681, and cited in 1 Doug. elect. 342; in which the court would not inforce thoſe antient ſtatutes requiring reſidence, for that reaſon.

done

done on the ſeat of juſtice, but in the Houſe of Commons; at a time when he was a leader of the national party there, and upon a point in which that party made head againſt the court. Therefore though the diſtinction may have been obſerved, on account of the weight of his opinion, it appears not to be intitled to the authority of a legal principle. It is remarkable too, that the very ſtatute which was then the ſubject of debate, and of this doctrine, and was then evaded by it, has been thought ſo valid by the legiſlature itſelf in modern times, that a ſtatute was made expreſsly to repeal it *. A ſtriking proof this, of the little reſpect the doctrine is intitled to. But admitting it, for argument's ſake, it is not in point to the preſent queſtion. Where great public inconvenience is likely to follow from the ſtrict execution of a law, it has been palliated by this mode of conſtruction; and no caſe has extended it further. But here the petitioner's argument would introduce the diſtinction, in order to produce great public inconvenience; not in order to ſilence an obſolete Aſſeſſment

* See ſtat. 14 Geo. III. ch. 58. In the year 1571, according to 1 Journ. 84, 85, a bill was introduced in the Houſe of Commons, which ſeems to have had the ſame object as the above ſtatute. It appears to have been twice read, after which I can find nothing further relating to it.

law,

Aſſeſſment law, (as was Sir E. Coke's caſe) but to annul the effect of a law newly made.

The caſes cited on this point ſhew, that where the courts have made uſe of the diſtinction, it has been on this principle, and in order to execute a ſtatute according to its true ſpirit. Thus in the caſe of the King and Sparrow, the court held that the chief end of the act in the appointment of overſeers, being for the benefit of poor, the regularity of their appointment according to the method preſcribed, was not ſo much to be attended to, as the *end* and *uſe* of it; and therefore ſupported the officers who had not been legally made in point of form, in order to this end. So in the caſe of juſtices allowing a rate, which is for the benefit of the poor, and the act of allowance merely formal, the courts, for public convenience, would not ſet aſide a rate, to which there was no other objection than that the juſtices were not deſcribed as dwelling *in or near the place.*

In the apprentice's caſe, under ſtat. 5 Eliz. the queſtion was not upon the validity of the indenture made contrary to the act; but upon a collateral right derived under it, namely, whether ſuch a ſervice was not ſufficient to gain a ſettlement; as to which point the legal forms of the binding were indifferent; and the judges, liberally conſidering that the apprentice himſelf could

could not have prevented the defect, would not Aſſeſſment
ſuffer *him* to be affected by it. The obligation of binding till the age of 24, is conſidered to be provided by the act, for *the benefit of the maſter*; and therefore though he declines it, ſtill the binding has been held legal as to other purpoſes. In theſe caſes, it is not ſo much to the law, as to the tendency of the queſtion raiſed upon it, that the judges have applied the phraſes mentioned. The caſe under ſtat. 43 Eliz. was an indictment for refuſing an apprentice; and the court would not countenance a refuſal ſupported by ſuch an evaſion of the law, as the defendant employed: For his conduct could not have been affected by the place of reſidence of the juſtices.

If in the conſtruction of formal ſettlements that are drawn with the greateſt care, and often from approved precedents, the meaning of words has been directly changed, in order to effectuate the meaning of the parties, there can be no reaſon why the ſame conſtruction ſhould not prevail, to give effect to the deſign of a public law, where the public at large are the parties concerned. *A fortiori* in caſes of this ſort it would be juſt to conſtrue *or* to mean *and*, in a law which would fail in its principal object without ſuch a conſtruction. For it is clear, that the whole argument of the petitioner, is founded on

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Aſſeſſment

the ſtrength of the word *or* in the firſt ſection: The other clauſes are far more conſiſtent with it in the ſenſe of *and*, than in its own ordinary ſenſe.

The words "actually occupying the ſame," are ſaid to be relative to the next antecedent; but it is as grammatical and proper to underſtand them not to be relative words, but a parentheſis. In this caſe the clauſe ſhould be underſtood to require an aſſeſſment of the tenant *eo nomine* as tenant. There is a good reaſon in law for requiring the tenant to be named in the rate; becauſe the tax is laid on the land, and to be received there. As between landlord and tenant it is conſidered as a tax on the owner; but as to the public revenue, it is a tax on the occupier. This was lately the doctrine delivered in the court of King's Bench in a caſe before them *.

It has been urged on the other ſide, that the ſtatute infringes on the common law right, and therefore is to be taken more favourably for the right. But this argument ſuppoſes a right of voting to be a pecuniary property; whereas it is a public truſt, which individuals exerciſe for the public benefit. The ſuppoſed hardſhip on the voter, in being reſtrained in the exerciſe of

* The caſe of the King and the inhabitants of Mitcham, in Eaſter Term 1783. Cald. 282.

his

his franchiſe, if the fact were ſo, can furniſh no Aſſeſſment
argument againſt the true conſtruction of a public act, becauſe it would be no *public* inconvenience. But the regulation propoſed puts no reſtraint upon any but thoſe who neglect their own intereſts, by not obſerving the courſe marked out by the act. *Lex vigilantibus non dormientibus ſubvenit.* Public notice of the rate is directed to be given; and if a freeholder indolently ſuffers his name to be omitted from it, he has no right to complain afterwards. Such a mode of argument might be uſed with more juſtice in ſupport of thoſe voters in ſcot and lot boroughs, whoſe names are not in the poor rate; becauſe the right derived from thoſe rates depends on a ſtatute, made without the leaſt deſign to affect the right of voting. Yet it has been long eſtabliſhed, that a man who lets go by his time of appealing againſt thoſe rates, ſhall forfeit the privilege reſulting from them. Now the ſtatute in queſtion was made expreſsly to regulate the rights of election, and the appeal is one of its moſt effectual proviſions for this purpoſe. There is therefore much ſtronger reaſon for inforcing the legal conſequences attached to that regulation, than in the other caſe.

If the aſſeſſment is not made according to the form preſcribed, it ought not to be conſidered as legal evidence of the rating; for it is not

Aſſeſſment

the legal inſtrument required. The form of the rate is an eſſential part of the law, and muſt be literally complied with. In the ſame manner as the indictment at the ſheriffs turn, preſcribed by the ſtatute of Weſtminſter; which if not adhered to, would be quaſhed, according to the authority of 2 Inſt. 387. So a bill of exceptions would be bad, if not under ſeal, becauſe that is the form preſcribed by the ſtatute.

If the court ſhould conſtrue the preſent act, ſo as to allow a different mode of rating, there can be no ſubject of grievance to be remedied by the appeal which is ſo particularly deſcribed in ſect. 3, 10, and 11. For if a man is not prevented from voting by a different form of aſſeſſment, he has nothing to complain of.

The foregoing arguments tend to ſhew, that the conſtruction contended for by the petitioner, will be an evaſion of the act; and that the way to prevent this, is to adhere to the form of aſſeſſment annexed to it. But if the Committee ſhould think this not eſſentially neceſſary, the next precaution required, is that of inſerting in it the freeholder's name at leaſt; becauſe, without that, the rate cannot produce the good which the act intended.

This gives an anſwer to the firſt and ſecond queſtions propoſed. The anſwer to the third is a corollary from the other two: For if when the

the right owner's name is not inſerted, the aſſeſſment is bad, it muſt be equally ſo if a wrong owner's is inſerted. If parol evidence is received to prove the aſſeſſment of a freehold, the written aſſeſſment, which the act intended to make concluſive and the only evidence of the fact, becomes uſeleſs. Aſſeſſment

The Committee, after deliberating on the above arguments, came to the following reſolutions, viz.

1ſt. *That it is not neceſſary that the form of the ſchedule ſhould be ſtrictly complied with.*

2d. *That the owner's name muſt appear on the aſſeſſment, either as the perſon aſſeſſed, or as owner of the land for which the tenant is aſſeſſed* *.

The following caſes are claſſed as nearly as their ſubjects will admit to the firſt general arrangement of them †, in order to explain the above conſtruction of the law.

Wm. Gale voted for *land in Goldington* in the occupation of Mrs. Smith. The objections were two: 1. That he was not duly aſſeſſed; and 2. That he had no ſuch freehold as he deſcribed at Wm. Gale Schoolmaſter.

* The Buckinghamſhire Committee conſtrued this law differently. The reader will find their reſolution, together with that of Cricklade, with which it accords, ſubjoined at the end of this third ſection of caſes.

† See it in p. 400.

Aſſeſſment Wm. Gale

the poll. The voter was the ſchoolmaſter of a free ſchool at Thurleigh, appointed by the vicar, who alſo had the appointment of ſix boys to be taught by the maſter. Under this appointment he received 40s. a year, iſſuing out of lands in Goldington, that were charged with the payment of it, *for the benefit of the ſchool of Thurleigh*, (which were the words of the foundation deed.) His right to vote depended on this appointment. Theſe lands belonged to Mrs. Edwards, and were occupied by Mrs. Smith, as tenant to her; and ſhe annually paid the 40s. to the voter. The entry in the aſſeſſment which was relied upon for the ſupport of the vote, was that of Mrs. Edwards's eſtate, in the words "*Mr. Edwards*, (landlord) *Mrs. Smith* (tenant)." Mr. Edwards being in the management of his mother's eſtate, his name was entered upon the aſſeſſment by miſtake for hers.

There was a diſpute as to the manner in which the voter deſcribed his freehold at the poll. He came there on the ſide of the petitioner; and the circumſtances of his claim occaſioned ſome altercation in the election booth, between the counſel. Lord Ongley's counſel requiring that his vote ſhould be entered for the houſe he lived in, and not in right of his ſalary, becauſe it was not regiſtered according to the ſtat. 3 Geo. III. ch. 24.

ch. 24. The witneſs who related this, heard Gale give in his vote, *for his ſalary out of meadow land in Goldington, with the name of the tenant.* Aſſeſſment Wm. Gale

The counſel for Lord Ongley, in objecting to this vote, now contended, That it was bad every way: That if he had an annuity out of this eſtate in right of his place, it ought to be regiſtered according to ſtat. 3 Geo. III. ch. 24. That if his freehold conſiſted of *land*, it ought to be aſſeſſed to the land tax; and that if it was that ſort of annuity not required to be regiſtered, it was equally neceſſary that it ſhould be aſſeſſed to the land tax.

The counſel for the petitioner relied upon the evidence of what paſſed at the poll, from whence they argued, That it was improperly entered as it ſtands, by the miſtake of the poll clerk; who ought to have taken it down as the voter deſcribed it, *for his ſalary*. And they argued, That the above ſtat. 3 Geo. III. ch. 24*, did not

* This act provides, that after the 1ſt of Auguſt, 1764, no perſon ſhall vote for any annuity or rentcharge, iſſuing out of freehold lands or tenements, and granted before the 1ſt of June, 1763, unleſs a certificate upon oath be entered with the clerk of the peace, in a form therein preſcribed. The concluſion of this form is in theſe words: "And I, or the perſon or perſons *under whom I claim*, was or were ſeized of the ſaid annuity or rentcharge, before the 1ſt of June, 1763." The ſecond ſection provides for the caſes of

 deſcent,

Aſſeſſment Wm. Gale not require annuities annexed to offices to be regiſtered. That the caſe of an annuity paid to a clergyman in lieu of tythe, was of the ſame ſort with this, which the Glouceſterſhire Committee, in 1777, had allowed to be good under a ſimilar aſſeſſment to this, in the caſe of the Rev. Richard Jones*. That as to the objection

deſcent, &c. or promotion to an office, within 12 months before the election. The third ſection directs the manner of entering memorials of the annuities granted after the 1ſt of June, 1763, viz. 12 months before the election, and *under the hand and ſeal of the grantor or grantors*, with the date, names, additions and abodes of the parties and witneſſes. The fourth ſection directs certificates of the aſſignment of annuities, with equal ſtrictneſs.

The above regulations do not ſeem to have been intended for caſes of annuities annexed to offices; but chiefly for thoſe which paſs upon valuable conſideration between parties. It is intitled, An act to prevent *fraudulent* and *occaſional* votes ——— ——— by virtue of an annuity or rent charge.

* The following is a copy of this caſe from p. 40, of the Reſolves of that Committee.

" Rev. John Jones. Objection, annuity not regiſtered. The annuity for which he voted was a payment of £.20 a year, in lieu of tithes. It was contended, That this payment was not of the nature of thoſe annuities which the act directs to be regiſtered: That the regiſtering act ſuppoſes annuities to be granted ſo ſecretly, as to facilitate the ſplitting of votes: That in the caſe of a ſalary, it was of a public nature, and could not be concealed.

" It was anſwered, That if a ſalary was not under a neceſſity to be regiſtered, every perſon enjoying an annuity would

tion on the ſcore of the rating, this was a caſe which formed a neceſſary exception to the aſſeſſment act; becauſe *Gale* could not obtain an inſertion of his name in the rate, by any method therein provided; and was abſolutely without remedy, if omitted by the aſſeſſors. Aſſeſſment Wm. Gale

GOOD.

Thomas Gardener and Peter Maſon voted each for *land and tythe in the occupation* of Edward Rudd. They were ſchoolmaſters; the former of the free ſchool of Biggleſwade, the latter of Holme, inſtituted by the will of Sir John Cotton in 1726; under which appointments they received annual ſalaries out of an eſtate ſettled by the will for thoſe uſes. The eſtate was aſſeſſed under the name of *Charity land.* Thomas Gardener. Schoolmaſter.

GOOD.

would evade the act by calling it a ſtipend: That if a man has an inviſible intereſt, not corporeal, it is denominated an annuity or rentcharge: That this being of an incorporeal nature, could not be found out without being regiſtered, which was one of the principal purpoſes of the act.

"It was replied, That it would be neceſſary to ſhew that a ſalary implying a payment for work, was either a rent charge or an annuity.

"Moved,

"That the Rev. John Jones, ſtanding on the poll as voting for a ſalary iſſuing out of great tithes, is obliged to regiſter the ſame under the act for regiſtering annuities or rent charges.

Aye 1, Mr. Owen. Noes 13."

Aſſeſſment Richard Shadbrook—voted for land in the occupation of Joſeph Lilly. He was ſchool-maſter of Keyſoe, in right of which he received the rent of a farm called Bolnhurſt ſchool farm. For this he voted. The aſſeſſment was of "*Bolnhurſt ſchool farm*, Joſeph Lilly (tenant.")

Richard Shadbrook

Schoolmaſter.

Againſt the vote it was ſaid to be exactly the ſame caſe with that of *Dunſtable charity land*, before held to be bad *. On the other ſide it was ſaid, the deciſions on the caſes of ſchool-maſters had proceeded upon a diſtinction as to ſuch perſons: Becauſe the land in theſe caſes being held by truſtees, and not belonging to them directly; and their profit from it not being received immediately from the land as rent, but through the medium of the truſtees, and in a different ſhape, it would be impoſſible for them to get their names entered upon the rate.

Good.

Rev. J. Thompſon Another caſe of the Rev. J. Thompſon was under the ſame circumſtances. The aſſeſſment was of "*Kimbolton ſchool farm, J. Parſler*" (tenant) which was likewiſe held good.

John Hill —voted in right of an annuity of £. 20 a year, deviſed to him for life, iſſuing out of lands charged with it. The lands were deviſed

Annuity.

* See hereafter the caſe of W. Ward in p.

in

in truſt, and the annuity was paid to the voter by the tenant of the land, by the direction of the truſtee. He deſcribed his freehold at the poll to conſiſt of *houſe and land*, with the proper tenant. The owner of the eſtate charged with the annuity was aſſeſſed; but the voter was not. The annuity was not regiſtered. It was ſaid in objection to the vote, that it was bad either way; as a freehold eſtate in land not aſſeſſed, and as an annuity not regiſtered; (as in p. 497 in Gale's caſe.) The ground chiefly relied on in ſupport of the vote was, that the party objecting (the ſitting member) had not ſtated as a cauſe of objection in the liſt delivered, the want of regiſtration. The cauſes of objection there ſpecified being, the voter's having no ſuch eſtate as deſcribed, and not being aſſeſſed to the land tax. The counſel for the ſitting member, in reply to this, defended their ſtatement of the grounds of objection in the liſt, by ſaying, That as they were relative to the deſcription entered on the poll, it could not be neceſſary to go further than to contradict that deſcription; and as the voter had made no mention there of his *annuity*, no objection could have been raiſed againſt that from the entry on the poll.

Aſſeſſment
John Hill

BAD.

Aſſeſſment Daniel Palmer—voted for *houſe and land* in the occupation of John Palmer, and was not aſſeſſed.

Daniel Palmer. His freehold was an annuity of £.100 a year, deviſed to him before the year 1763, charged upon the above houſe and land which belonged to John Palmer, who was duly aſſeſſed to the land tax.

Annuity.

It was objected to the voter, That he was not aſſeſſed; and the counſel contended, That he had no ſuch eſtate as he deſcribed, and muſt abide by that given in at the poll; and 2d, That he could not vote in right of his annuity, becauſe it was not regiſtered according to 3 Geo. III. ch. 24.

The counſel on the other ſide, as to the firſt objection, ſaid, That according to the deciſion in Gale's caſe, it would be competent to them to ſupport the vote by the annuity. And upon the ſecond point they argued, That the ſtatute 3 Geo. III. ch. 24, did not extend to annuities coming by deviſe. Becauſe the deſign of the act is to prevent fraudulent and occaſional *grants* of a rent charge, and for this purpoſe the word *grant* is the ruling phraſe in it; which word in law is always uſed to denote a contract *inter vivos*, and never applied to deviſes. The regulations preſcribed in the act for the regiſtering of annuities, are ſuch as can relate only to ſuch grants, viz. the memorial is to be *under the hand and ſeal of the grantor*, which cannot be had

after

ter his death; and the witneſs *to the execution* Aſſeſſment
the grant (a form of expreſſion not uſual in Daniel
e caſe of Wills) is to atteſt the ſealing and Palmer.
elivery, at the time of regiſtration. This con-
ruction of the act is further juſtified by the
cond ſection, which includes expreſsly the
fferent modes of acquiring annuities by ſucceſ-
on, deſcent, *deviſe* and promotion, and requires
regiſtration only when theſe accrue within 12
onths before the election *.

The counſel againſt the vote, in reply ſeemed
ſs anxious upon the ſecond point, becauſe,
ey ſaid, they relied upon the effect of the firſt:
hat this caſe bore no reſemblance to Gales',
:cauſe in that, there had been a diſpute about
e manner in which the voter ſhould *deſcribe*
s freehold upon the poll; under which diſpute
s deſcription was given in ſubject to future
ſcuſſion: But here, the voter had of his own
:cord taken upon him to deſcribe a freehold
at he did not poſſeſs.

BAD.

Edward Pincard voted for an *annuity* under a Edward
ll, by which it was charged upon the teſtator's Pincard.
tates. It was not regiſtered, nor aſſeſſed to the Annuity.
nd tax, otherwiſe than under the names of
oſe to whom the eſtates belonged.

BAD.

* See the note in p. 499, 500.

Rev.

Aſſeſſment Rev. Edmund Whadley voted for *tythes as vicar of Houghton*, occupied by T. Brandreth, Eſq. The aſſeſſment was of *T. Brandreth, Eſq; for houſe land and tythes, in his own occupation.*

Rev. Edm. Whadley.

Benefice.

It appeared that the vicarage had been endowed with the tythe of two pieces of land; and that there was paid to the vicar annually by the impropriator of the great tythes, in conſequence of an agreement made a century ago, the price of two quarters of wheat and two of barley, in lieu of this tythe. The preſent impropriator had paid it to the voter and his predeceſſors 30 years: He underſtood the agreement to have been originally made by his anceſtor, in order that he might collect the whole tythes of the pariſh. The parties then contracting agreed, that the one ſhould have the tythes, upon the annual payment to the other of this ſtipulated price. The deed referred to was not produced to the Committee.

In ſupport of the vote it was argued, That the reſolutions of the Committee were applicable only to the common connection of landlord and tenant, which was materially different from that ſubſiſting between this vicar and Mr. Brandreth; who did not hold the tythes in quality of tenant to the vicar. That in ſuch caſes, the aſſeſſment of the *ſubject of the vote*, without reference to the owner, was all that could reaſonably be expected.

pected. On the other ſide, the reſolution requiring an aſſeſſment of *the voter*, was held up as deciſive. Aſſeſſment. Rev. Ed. Whadley.

GOOD.

Rev. Richard Dowbiggen—voted for glebe and tythe in the occupation of Lord Leigh. The aſſeſſment was, "Lord Leigh for tithe occupied by John Mann." It appeared that Lord Leigh had a leaſe for lives of the prebend of Leighton Buſſard, of which the voter was prebendary. Mann rented the tythe of Lord Leigh, who paid upwards of £.76 a year to the voter, being the reſerved rent of his leaſe of them. Rev. R. Dowbiggen. Benefice.

GOOD.

Rev. W. P. Netherſole—voted for the vicarage of Ledlington. The caſe was, he received £.10 a year from the impropriator of the great tithes, (Lord Oſſory) in right of his vicarage; and was no otherwiſe aſſeſſed for it than under the name of Lord Oſſory. The counſel againſt the vote contended, That there was nothing in the nature of a vicarage, from whence it could obtain an exception to the aſſeſſment act. On the other hand, it was ſaid to be the ſame as that of Mr. Whadley before determined, and neceſſarily to be allowed; becauſe it would be impoſſible for the Rev. W. P. Netherſole. Benefice.

vicar

Aſſeſſment vicar to get *his* name inſerted in the rate, by any means allowed him by the law.

GOOD.

James Wittenſtal, Joint Eſtate. James Wittenſtal and his brother Henry, held the eſtate in jointenancy, and Henry alone was aſſeſſed.

BAD.

Samuel Charlton, Joint Eſtate. Samuel Charlton—voted for an eſtate that belonged in equal ſhares to the voter and his couſin Daniel Charlton. The latter, who was the elder, voted for the petitioner, and was not objected to by the ſitting member. Samuel voted for the ſitting member, and was objected to for not being aſſeſſed. The rate was of *Mr. Charlton*, which, the party objecting contended, ſhould be applied to the elder of the two; and that the ſitting member, by not objecting to his vote, had indirectly admitted *him* to be duly aſſeſſed under that aſſeſſment.

BAD.

H. Smith, Truſt Eſtate. Hugh Smith, the brother of James, mentioned in p. 424, had held his freehold under the ſame circumſtances as his brother, two years; but the elder brother (Thomas) was aſſeſſed for it. In ſupport of the vote, it was contended, That Thomas who had the legal eſtate, was properly a truſtee

truſtee for his brother; and he being aſſeſſed, and the voter having poſſeſſion as of an equitable eſtate, the aſſeſſment ought to be conſidered as a virtual one of Hugh the voter. Aſſeſſment H. Smith.

BAD.

Thomas Harwood, Eſq; deſcribed his freehold to be land in *Colmworth*. In that pariſh he was not aſſeſſed; but he was duly aſſeſſed for an eſtate at *Roxton*, a different pariſh in the ſame hundred. It was at firſt contended in ſupport of the vote, That as the miſtake did not carry the freehold into a different hundred, it was competent to the parties to prove an aſſeſſment for a different eſtate, provided it were in the ſame hundred; and that it was not neceſſary to deſcribe the ſituation by the *pariſh*. But afterwards the counſel admitted the vote to be untenable. Situation. T. Harwood, Eſq.

Wm. Leigh voted for a tenement in Sandy pariſh, in the poll-book of the hundred of Biggleſwade. It was aſſeſſed in a rate for the hamlet of Beeſton, part of which only is in Sandy. The pariſh of Sandy is in the hundred of Biggleſwade, but Beeſton is in that of *Wixamtree*; although with reſpect to church and poor rates, it is conſidered as a hamlet of Sandy. From hence aroſe the objection, that the voter had no freehold *as deſcribed* duly aſſeſſed, becauſe he voted in W. Leigh.

Aſſeſſment in the Biggleſwade booth. It was ſaid in anſwer, That it did not ſignify in what pariſh or hamlet the freehold was aſſeſſed, provided it were aſſeſſed in any.

Situation.
W. Leigh.

GOOD.

Henry Belfield —voted for a freehold in *his own* occupation, in the pariſh of *Studham*. Part of this pariſh lies in Hertfordſhire, the other part in Bedfordſhire, in both of which the voter had land. That which he occupied *himſelf* lay in Herts, that in Bedfordſhire was *let*, and the voter was properly aſſeſſed for it.

BAD.

Another voter was under the ſame circumſtances in Caddington pariſh, in the hundred of Flitt. Having two tenants, he named at the poll the one who rented the land in Herts.

Rev. Rob. Willan —polled for a vicarage at Cardington. In this pariſh he was not aſſeſſed; but he likewiſe held the vicarage of Keyſoe in another hundred, for which he was duly aſſeſſed. The poll-clerk proved, that the voter was very ill when he came to poll; that another gentleman came with him to ſpeak for him, who ſaid his freeholds were the livings of Cardington *and Keyſoe:* But he (the clerk) did not enter the latter in the book, becauſe not in his hundred.

The

The voter, in the evening after he had polled, finding the entry to be as here ſtated, deſired to have it altered, and both vicarages inſerted in the book; and application for this purpoſe was made to the ſheriff, who would not permit it. Aſſeſſment Situation. Rev. Rob. Willan.

It was ſaid in objection to the vote, That he ought to have polled in the book of the hundred in which he was aſſeſſed.

BAD.

[In the Cricklade Committee the following caſes were decided upon this part of the ſubject. Aſſeſſment in Cricklade.

William Huſſey, Eſq; voted for a freehold in Highworth. This pariſh conſiſts of ſeveral tythings, each of which is ſeparately rated to the land tax. One of theſe tythings is named Highworth; in this the voter was not rated, but in another. One ſide contended, that the objection was eſtabliſhed, becauſe the freehold voted for was not aſſeſſed. On the other ſide, it was ſaid to be competent to them to prove an aſſeſſment in any one of the tythings of the pariſh; for it would be unreaſonable to appropriate the name of *Highworth* on the poll, to a part only of the pariſh ſo called. W. Huſſey Eſq.

The Committee reſolved, *That the voter's being rated on the aſſeſſment of ſome or one of the*

Cricklade Aſſeſſment Situation. *tythings, part of the mother pariſh of Highworth, was ſufficient.*

H. Mereweather —voted for a freehold in Leigh. The pariſh is *Leigh* and *Cleverton*; and the aſſeſſment was in two diviſions, one of Leigh, the other of Cleverton; in the latter of which the voter's freehold was aſſeſſed. GOOD.

William Clements —voted for a freehold in Broad Town. This is a tything of the pariſh of Cliff Pepard. The aſſeſſment of this pariſh was in four diviſions for the four tythings of, 1ſt, Cliff Pepard; 2d, Cadhill; 3d, Thornhill; 4th, Broad Town, made by the ſame aſſeſſor on the ſame paper. The voter was aſſeſſed in the tything of Cliff, but not in that of Broad Town, in which the freehold voted for lay.

BAD.

J. Bailey. John Bailey and two others voted for freeholds in Malmſbury. They were ſituated in the town of Malmſbury, but in the *pariſh* of Weſtport, in which they were aſſeſſed. The pariſh of Malmſbury has an aſſeſſment and other parochial rights of its own, and ſo has Weſtport. The Committee did not paſs any reſolution on theſe votes; but I underſtood that the counſel, judging from the

the other deciſions, conſidered them to be untenable.] Aſſeſſment

Before many objections had been proceeded on, it appeared to be neceſſary to form ſome rule for the manner of giving evidence, in thoſe caſes that aroſe from a miſtake of the voter's name, or of the deſcription of the eſtate in the aſſeſſment, as ſeveral objections depended merely on ſuch miſtakes. The counſel on one ſide contended, That when the objection was apparently well founded, it was incumbent on the others to bring evidence to reconcile the difference, if it could be done; and that it could not be neceſſary for the party objecting to go further than to ſtate the objection, in ſuch caſes. The counſel for the other party admitted, that in general ſuch was the practice in conducting proofs; but argued, that for the convenience of parties, it would be better to proceed differently here, on account of the great expence incurred by ſending into the country for evidence upon ſuch ſlight objections: That the party objecting in ſuch caſes ought, on this account, to ſhew ſomething of a *real* difference of *perſons* as well as of names. At the ſame time they obſerved, that, for this reaſon, the Cricklade Committee then ſitting, had but a few days before eſtabliſhed a ſimilar rule of practice. Miſtake of Name.

Aſſeſſment
Miſtake of
Name.

The caſe which brought this ſubject into diſcuſſion was the following: John Muſgrave, who voted for a tenement in the occupation of *John Sharman*, was objected to as not aſſeſſed. On the aſſeſſment there was the name of John Muſgrave (landlord) *Himſelf*, (tenant) which appeared to be owing to a change in the occupation, between the times of the aſſeſſment and the election.

The Committee reſolved, *That the party objecting to the vote, muſt prove a* real *difference, between the property aſſeſſed, and that on the poll.*

Geo. Jas.
Gorham.

About the ſame time, a ſimilar objection occurring to the vote of G. J. Gorham, which was anſwered in the ſame manner, by proving a recent change of tenants on the eſtate, the counſel in ſupport of the vote obſerved, That ſuch caſes ought not to furniſh grounds of objection; becauſe a wrong aſſeſſment in reſpect of the *tenant*, could not be corrected by the owner's appeal, if at the ſame time the owner himſelf were rated. Upon this caſe the court reſolved,

That the omiſſion or miſ-ſtatement of the tenant's name in the aſſeſſment, ſhould not be deemed a valid objection to the owner's vote.

Upon the ſame principle, and in order to promote the convenient diſpatch of buſineſs,

The

the Committee recommended to the counſel, (and directed it to be entered on their minutes,) Aſſeſſment Miſtake of Name.

*That when the agents of the party who is to attack any vote on the ground of an error in the aſſeſſment, have given in * the objection to ſuch vote, the agents who are to ſupport that vote, ſhall give in * the defence intended to be ſet up to ſupport that vote; that the whole caſe may be brought at once before the Committee.*

[On the Cricklade trial the following ſuppoſed caſes were put, in order to receive the direction of the court as to the mode of proceeding in evidence; and to decide upon which party the burthen of proof ſhould fall, in ſuch caſes as are abovementioned in p. 513, in which a reference is made to the Cricklade proceedings, viz. Cricklade

1. A. polls for land in the poſſeſſion of B. and is aſſeſſed for land in his own poſſeſſion.

2. A. polls for land in the poſſeſſion of himſelf, and is aſſeſſed for land in the poſſeſſion of B.

3. A. polls for land in the poſſeſſion of B. and is aſſeſſed for land in the poſſeſſion of C.

The queſtion was, Whether in theſe caſes, the party objecting ought not to prove further,

* It may be neceſſary to obſerve, that this order relates to the conduct of parties *in court*, in the courſe of the trial; not to the liſts of objections: For many objections may have been ſtated againſt a vote in the liſt, of which only *one* may have been proceeded on.

Aſſeſſment. Name. that the *fact* agreed with theſe appearances; or whether the party ſupporting the vote, ſhould be obliged to give evidence of the circumſtances to reconcile them. In the firſt part of the trial in the hundreds, objections of this ſort had given much trouble, by engaging parties in the expence of bringing evidence to eſtabliſh votes, without any other cauſe than that of an accidental change in the occupation of the premiſes, after the aſſeſſment was made. This was thought burthenſome to the parties, when (as it often happened) there was no ſubſtantial objection to the vote. And the Committee, in order to prevent it, reſolved, *That in theſe caſes they would conſider the voter as duly aſſeſſed* primâ facie; *ſo as to require evidence to impeach the poll and aſſeſſment, from the party objecting.*] *See p. 537.*

Bucking-hamſhire. [Upon a queſtion of the ſame ſort, the Buckinghamſhire Committee reſolved,

That the ſitting member (i. e. the party whoſe vote is objected to) *is to be put on proof of the freehold of the voter, where only the ſame occupier's name as is on the poll, appears on the rate.*

The ſame rule was obſerved in caſes in which the owner's name was not on the rate, but the tenant's only.

That when the Chriſtian name only of the voter is different in the rate and poll, the party is not to be put on the proof.

The

The caſe upon which the firſt of theſe reſolutions paſſed, was of two *Mr. Kings* * in the ſame pariſh. William King was objected to by the petitioner, who alledged that the tenant to *Mr. King* named in the rate, was not tenant to *William* King. Aſſeſſment Name.

The ſecond reſolution paſſed on the caſe of Edward Ryman, the aſſeſſment being of *Mr. Ryman.*]

John Hughes. His freehold was aſſeſſed by the name of *William Hughes*, with a different tenant from that on the poll. In ſupport of the vote, the John Hughes.

* There were two *William Wyats* of the ſame place who polled for Mr. Aubrey, and the petitioner had objected to *one* of them as not duly aſſeſſed. Upon entering into the objection, the ſitting member's counſel ſaid, it was neceſſary for the petitioner to identify the voter objected to; for as only *William-Wyat* had been named, it would be enough for them to ſupport the vote of a William Wyat; and that the petitioner ſhould have objected to both of them, in order to ſucceed in his own way. No direct reſolution paſſed on the queſtion; but the petitioner's counſel, underſtanding from the chairman the ſenſe of the Committee to be againſt them, abandoned the objection.

In the Glouceſterſhire caſe a rule was made for ſimilar objections. There were three voters of the name of John Ballanger, of the ſame place; and the ſame difficulty occurring as abovementioned, the Committee reſolved, *That as ſeveral John Ballangers appear on the poll, the evidence ſhall be confined to John Ballanger who polled on the firſt day.* Reſolves, &c. 126.

Aſſeſſment Name. J. Hughes.

tenant proved, that there was no other Hughes in the place than the voter whoſe eſtate he held, and from hence it was contended to be only a miſtake of the Chriſtian name of the perſon aſſeſſed. The counſel on this propoſed the following rule for ſuch caſes, viz. That if there was a perſon in the pariſh of the names entered in the aſſeſſment, it would be incumbent on the voter to prove himſelf to be the perſon intended; becauſe the preſumption would be towards the perſon bearing thoſe names: But that it ſhould be preſumed to be a clerical miſtake of the name of the right perſon, where no other perſon anſwering to it lived in the place. Except in ſuch caſes as where a father and ſon having different Chriſtian names, the deceaſed father's name remained on the aſſeſſment beyond the two years after the ſon had been in poſſeſſion: In theſe caſes the aſſeſſment of the father could not be appropriated to the ſon.

The Committee held this vote to be good. In caſes where the father's name remained on the aſſeſſment after the time, they did not allow the ſon's freehold to be duly aſſeſſed thereby; unleſs it appeared, that the aſſeſſor believed it to be the ſon's name, and uſed it by miſtake for him. Upon theſe occaſions and others of the ſame kind, in which doubts aroſe from the names in the rate, the aſſeſſors were called as witneſſes to explain them.

Sir

Sir Robert Barnard. The aſſeſſment being in the name of his father Sir *John*, as it had remained for ſome years, and there being no reaſon to ſuppoſe it a miſtake of the name of Sir Robert, his vote was admitted to be bad by the counſel who were to ſupport it. Aſſeſſment Name. Sir R. Barnard.

Richard Beaumont. The aſſeſſment was of *Robert*. In anſwer to the objection it was proved, that there was none of the latter name on the eſtate, and thence it was contended to be only a clerical error and miſnomer of the right perſon. Richard Beaumont

GOOD.

S. Safford. His freehold was occupied by Geo. Stratton, and the aſſeſſment was of *John* Safford (landlord), Geo. Stratton (tenant.) It appeared that John was the name of a brother of the voter's, who died in 1783 before the aſſeſſment was made, and had not had any right to the eſtate. The voter had ſucceeded a brother named William, in whoſe time the aſſeſſment was of *Mr. Safford*. This was contended (in ſupport of the vote) to be merely a miſtake of the voter's Chriſtian name. S. Safford.

GOOD.

H. Wagſtaffe deſcribed his freehold on the poll, as occupied by Wm. Day. The entry referred to in the aſſeſſment, was "*William* Wagſtaffe—William Watts (tenant)." The voter had no ſuch tenant at the time of the aſſeſſment; at Henry Wagſtaffe.

Aſſeſſment Name. Henry Wagſtaffe. which time and at the election his freehold was occupied by William Day. Watts had been the tenant, and quitted about two years before, when Day took the farm. The aſſeſſor gave evidence, that there had not before been a *William* Wagſtaffe on the eſtate: That the name of the voter's father, whom he ſucceeded, was Henry; and that he (the aſſeſſor) meant to aſſeſs the voter by this name of William, which he then ſuppoſed to be his name. The counſel againſt the vote contended, That as Day was the tenant when the aſſeſſment was made, and the voter was at that time the owner, a rating under other names ought not to be allowed: That as Watts had never been tenant to the voter, and as the name of Wagſtaffe was common in that diſtrict, the entry referred to was probably intended for ſome other perſon. In ſupport of the vote it was ſaid to be merely a miſnomer, according to the aſſeſſor's evidence; if it were not ſo, the fact might eaſily and ought to have been proved, in ſupport of the objection. That a wrong deſcription of the *tenant* was no ground for rejecting the aſſeſſment.

GOOD.

W. Paine. —The aſſeſſment was of *Jane Sloper*, with Wm. Paine named as the tenant, as he then was.

BAD.

S. Clark. —The aſſeſſment was by the name of *Billington Town land*, and that of the occupier. This was held

held bad. So, of Thomas Roberts, under an aſſeſſment of *the heirs of Thomas Foſkey*. Roberts was the grandſon of Thomas Foſkey, who had died two years before the election. So, the vote of William Ward, under the aſſeſſment of *Dunſtable Charity*: Likewiſe the aſſeſſment of *Meakham's Children*, with the right tenant's name.

Aſſeſſment Name. S. Clark. W. Ward.

Dixey Gregory.—His freehold was aſſeſſed under the words *Late Franklin*'s. It was his in right of his wife, to whom he had been married two years, whoſe mother's name (from whom the eſtate came) was Franklin. The counſel on the other ſide admitted this aſſeſſment to be bad within the terms of the Committee's reſolution.

Dixey Gregory.

Francis White.—The entry in the aſſeſſment was "Late White's in diſpute."

Francis White.

GOOD.

On a ſubſequent day, when the counſel referred to this deciſion in their arguments, one of the members ſaid, "They had allowed this aſſeſſment, on the effect of the words *in diſpute*, which ſhewed the right to have been uncertain; and till the ownerſhip was aſcertained, there was none to appeal againſt the rate; and that the party objecting to the vote, had not proved that at the time of the aſſeſſment, or within the time of appealing, this *diſpute* had been ſettled; which if he had done, the objection might have been eſtabliſhed.

John

Aſſeſſment Name. J. Lilley.

John Lilley voted for a tenement occupied by Thomas Burton. He had a brother Joſeph, who had a freehold in the ſame pariſh, occupied by William Laughton. The aſſeſſor had entered on the rate the name of John Lilley only for both tenements, (by which he meant the father of theſe two, whom he thought the owner of both tenements, as he managed both) and placed the amount of the tax for both tenements, oppoſite to his name, with the name of William Laughton as the tenant of both. He did this, becauſe he thought Laughton a reſponſible man, and that he ſhould have difficulty in obtaining the tax from Burton.

BAD.

Martin George

—voted for a freehold at Eaton Socon, in the occupation of Shefford *and others:* On the aſſeſſment, the occupier was *Himſelf.* The objection was ſupported by evidence, that no perſon of the name of Shefford lived in Eaton Socon; that the voter's eſtate there was held by different perſons; that George in diſcourſing of his vote after the election, had ſaid, he had named a wrong tenant at the poll, as the one he had mentioned held an eſtate of him at *Keyſoe*, and not at Eaton. From hence the counſel argued, that this caſe was like that of Odell (*in p.* 444,) and within the rule there made. To obviate the effect of this evidence, it was proved that this

this eſtate at Keyſoe was occupied by *one* perſon, from which it was inferred, that if he had intended to vote for it, he would not have deſcribed it as occupied by *ſeveral*. It was contended too, that though Shefford were not the tenant of the eſtate voted for, yet the addition of *and others*, in deſcribing it, would enable the party to ſupport the vote, by ſhewing who the actual tenants were.

Aſſeſſment Name. Martin George.

GOOD.

Richard Fitchett was aſſeſſed under the name of *Mitchell*, which the aſſeſſor ſuppoſed to be his name; meaning to aſſeſs him as the owner of the eſtate.

Richard Fitchett.

GOOD.

Thomas Harriſon was aſſeſſed by the name of *Harris*, by which name, according to the evidence of his neighbours, he appeared to be known as well as by that of Harriſon.

Thomas Harriſon

GOOD.

J. Harrodine. The ſame deciſion paſſed upon the caſe of one who voted by the name of *Harrodine*, and was generally called Bartle; who was aſſeſſed by the latter name, by which he was moſt commonly known, though his real name was Harrodine.

J. Harrodine.

John Vernon, jun. Eſq; voted for a freehold in the occupation of James Harris. The aſſeſſment was in the following form:

Form of the Rate. John Vernon, Eſq.

Land-

Aſſeſſment	Landlord.	Tenant.
Form of the Rate.	Mr. Vernon.	Daniel Cleaton.
	Ditto.	Iſaac Pennyfather.
John Vernon, jun.	Ditto.	James Harris.

John Vernon, ſen. had voted for the eſtate occupied by Daniel Cleaton; and the party objecting contended, that theſe ſeveral aſſeſſments referred to the *ſame perſon* by means of *Ditto* repeated. On the other hand, Mr. Vernon, ſen. proved that Harris was tenant to his ſon, not to him, as did the tenant himſelf.

Thomas Whittall. GOOD.

His name in the aſſeſſment ſtood in the column of tenants; but it was in this form, viz. "Wm Boyes and | Thos Whittall | £0, 59, 0, | The eſtate belonged to theſe two. In ſupport of the vote it was ſaid, that Whittall could not have procured a different method of aſſeſſment, if he had appealed againſt the rate, becauſe he could not require more than to be named upon it *. On the other hand it was ſaid, that neither was aſſeſſed to any *particular*

* But upon an appeal, the Commiſſioners muſt neceſſarily direct an aſſeſſment according to the form preſcribed in the act. See it in p. 479.

The latter argument ſeems to proceed on a miſunderſtanding of the clauſe alluded to; which has in view the ſeparate aſſeſſments of different eſtates, held by the *ſame tenant* of different owners.

ſame,

ſum, and the rate was therefore bad, according to the third ſection of the ſtatute; by which the proportions of the tax to be paid by each ſeveral owner, where the occupation is joint, are expreſsly required to be charged. Aſſeſſment Thomas Whittall.

BAD.

J. Tanſley. His freehold conſiſted of a field let for a guinea a year, and two houſes, the one let for 26 ſhillings and the other for twenty-four. It was the cuſtom of the pariſh where they were ſituated, to aſſeſs *land* only, and no houſes whatever to the land tax; and though the land and houſe were adjoining parts of the ſame tenement, the land tax was always laid upon the land. The voter was aſſeſſed for this field only. The ſum charged upon it to the tax was four ſhillings, which was rather more than the uſual rate, according to poundage in that pariſh, for the rent of a guinea. Mode of Rating. J. Tanſley

In objection to the voter it was ſaid, That he had not a freehold of forty ſhillings value aſſeſſed to the land tax; for his *land*, which alone was aſſeſſed, did not amount to that ſum. That in order to ſupport the vote, it muſt be contended that the houſes are *virtually* aſſeſſed; which mode of aſſeſſment it was a principal object in making the late ſtatute to prevent, and therefore the Committee ought not to allow it.

On the other ſide it was ſaid, That the particular mode in which the aſſeſſors may chooſe to

Aſſeſſment Mode of Rating. J. Tanſley

to execute their duty, ought not to prejudice the right of voting; that the difference, ſtill, between this mode of aſſeſſing property and the common one, conſiſted more in form than ſubſtance; becauſe it was plain, that though land alone was expreſſed, the rate was not framed in proportion to the value of that alone, but with relation to other property; as appeared from the ſum charged on this land. That in another point of view, the vote ought alſo to be conſidered as good: It being clear, that the voter poſſeſſed forty ſhillings a year of freehold, and that he was duly aſſeſſed for part of it; which, in the preſent caſe, muſt be deemed a ſatisfaction of the law, from the particular uſage of the pariſh.

GOOD.

Rev. Hen. Hinde

—voted for houſe and land in his *own occupation*. For this, which was the parſonage houſe, he was not aſſeſſed; but he had three tenements in the pariſh held by others his tenants, for which he was aſſeſſed. The aſſeſſor ſaid in his evidence, that it was not uſual in his pariſh to aſſeſs the clergyman for the houſe he lived in.

It was contended, That the vote muſt be rejected, becauſe the freehold for which the vote was given, was not aſſeſſed; and the party could not now rely upon any other freehold than that given in at the poll.

On

On the other ſide, it was ſaid to be ſufficient for the ſupport of this vote, that the freeholder was aſſeſſed for a freehold *in the pariſh* named at the poll, though it might not happen to be preciſely the eſtate named; becauſe, the locality being aſcertained, the oppoſite party could not be miſled in their inquiries; and a reference to the rate would ſhew at once, that the voter's property was aſſeſſed. But if it were not ſo, this particular caſe ſhould be diſtinguiſhed, on account of the practice in the place to omit the clergyman's own houſe from the rate. Aſſeſſment Rev. Hen. Hinde.

GOOD.

James Crouch. In that copy of the rate which was given to the clerk of the peace, and by which the court proceeded, he did not appear to be aſſeſſed: But in one of the duplicates in the hands of the Commiſſioners of the land tax, he was ſo. It was contended, that all the duplicates of the aſſeſſment were equally authentic. Duplicates James Crouch.

GOOD.

William Geary, Eſq. In the duplicate left with the clerk of the peace, there was no ſum affixed to his name, and therefore it was objected, that he was not duly aſſeſſed: The counſel contending, that the ſtatute intended to make the duplicates in the cuſtody of the clerks of the peace, concluſive evidence of the aſſeſſment. In ſupport of the vote the aſſeſſor produced the original rate, W. Geary, Eſq.

in

Aſſeſſment W. Geary, Eſq. in which the ſum of 14l. 4s. 8d. was written oppoſite to the voter's name; he alſo ſaid, that if the copy he had made out for the clerk of the peace, differed from that in any reſpect, it had been by miſtake. It was likewiſe contended by the counſel for the vote, that the act required *aſſeſſment* only, and not aſſeſſment in particular *ſums*. GOOD.

Infancy. T. Cave. Thomas Cave. His mother was aſſeſſed. His freehold was deviſed to him by his father's will, and he came of age within a year before the election. GOOD.

Richard Pedder —voted for a freehold in his own occupation. It was aſſeſſed under the name of Thomas Britton, as owner and occupier. Britton married the voter's mother, and held poſſeſſion of this eſtate till the voter came of age. The latter did not obtain poſſeſſion of it, till the Michaelmas before the election. GOOD.

William Mantle. —This was like the foregoing caſe of Pedder, except that here, the ſon (the voter) was *twenty five* years old. It was the mother's till he came of age, and the ſtep-father, ſince that time, received the rents for his uſe. BAD.

Henry Field. —The aſſeſſment for his freehold was of Thomas Field his elder brother. The father had been

been dead ſome years, and the elder brother managed his eſtate, (which was deviſed to the children equally) and was rated for the whole, including the voter's part of it. Henry came of age in May 1783; but this was unknown to the aſſeſſor of the pariſh. Aſſeſſment Infancy. H. Field.

It was contended, that this vote ought to be allowed upon the ſame principle as that of Pedder; becauſe the time of the voter's taking by the deviſe, ought, for this purpoſe, to be reckoned from the day of his coming of age; which would bring the caſe within the exception of the act.

GOOD.

The Aſſeſſment was thus: "Mr. Bull—Thomas Joyce" (tenant). The voter polled for his wife's eſtate, whom he married a very ſhort time before the election. She was the daughter of one Love, from whom ſhe derived the eſtate, and came of age within two years before the election; and at the ſame time obtained poſſeſſion of the eſtate from her guardian Mr. Bull. He had married Love's widow; and in right of his wife had managed the eſtate of the voter's wife, as her guardian, till her coming of age, and as ſuch came to be named in the aſſeſſment. The voter was in poſſeſſion of the eſtate as *tenant* when the rate was made, and before his marriage. Marriage. Thomas Joyce.

Aſſeſſment
Marriage.
Thomas Joyce.

Againſt the vote it was ſaid, That the exception in the ſecond ſection of the act, did not extend to this caſe; becauſe it did not appear that the tenement had been aſſeſſed "within two years next before the election, in the name of the perſon through whom the voter claimed." That he claimed nothing through *Bull*, but in right of his wife, and ſhe from her father. And further, that Bull had an intereſt perſonal to himſelf in the eſtate, by marrying the widow, who was intitled to dower; for *this* he muſt be ſuppoſed in law to have been aſſeſſed, and not as guardian of his wife's daughter.

On the other ſide it was ſaid, That the wife having come of age within the two years, and having then got poſſeſſion of the eſtate *from Mr. Bull*, who acted as her guardian, the rating of him ought, (conſiſtently with the former deciſions of the Committee, in the caſes of Pedder and Field) to be taken, upon an equitable conſtruction of the ſtatute, to be within the exception.

BAD.

Ja. Braſier —had a freehold in right of his wife, whom he married in 1780. It was aſſeſſed in the name of *Mrs.* Braſier, together with that of the tenant.

In ſupport of the vote it was ſaid, That as this eſtate was the huſband's only *in right of his wife*, an aſſeſſment in her name with the tenant's, was according to the ſtatute, an aſſeſſment of

the latter *as tenant to the owner*; or, if this point ſhould fail, the Committee (rather than ſtrike off a vote under ſuch circumſtances) ought to believe the entry of the word *Mrs.* in the aſſeſſment a miſtake for *Mr.* Aſſeſſment Ja. Braſier

In objection to the vote it was ſaid, That the *owner* deſcribed in the act, is the perſon claiming to vote; and though an eſtate may be the huſband's in right of his wife, ſtill it is the *huſband's* eſtate, and he ought to be aſſeſſed for it.

BAD.

Richard Stanyan ſucceeded to the eſtate for which he voted, as heir at law to a Mrs. Wagſtaffe who died more than two years before the election: But he did not know of his right till within a year before it, and after the aſſeſſment of 1783 was made out, and did not get into poſſeſſion till ſome months afterwards; which time was employed in making out his title to the ſatisfaction of the tenants. The eſtate was aſſeſſed under the name of *Mrs. Wagſtaffe.* Deſcent. Richard Stanyan.

In ſupport of the vote it was contended, That the caſe came within the reaſon of the exception for caſes of deſcent within a year before the election; the voter having been guilty of no default or neglect: That it reſembled the caſe before determined, with reſpect to voters who had obtained poſſeſſion of their eſtates on their coming of age, though intitled to them many

Aſſeſſment Richard Stanyan. years before. In anſwer to which it was ſaid, That the law ſuppoſes all men to be careful of their own intereſts, and lends no aid to thoſe who are not ſo; that the voter had had an opportunity of appealing againſt the rate, if he had thought proper, and had neglected it.

BAD.

Evidence. In the liſts of voters objected to, the petitioner had ſtated as the cauſe of objection to one, that he was *not duly aſſeſſed*, as the only cauſe. The ſitting member produced an aſſeſſment, which was alledged to apply to him, in which the ſum charged was 6*s*. 9*d*; and the petitioner endeavoured to ſhew, from the amount of the tax compared with the value of the land, (which was alledged to be under 40*s*.) that this aſſeſſment did not apply to the freehold deſcribed on the poll; for which purpoſe it was neceſſary to inquire into the value of the eſtate ſo aſſeſſed. The ſitting member oppoſed the petitioner's right to make this inquiry, on the ground of its opening an objection to the value of the freehold, which he had no right to proceed upon now; becauſe he had not ſtated it among his heads of objection in the liſts. In anſwer to this, the counſel cited a caſe in the Milborn Port Committee in 1781, which was thus: "A witneſs on the part of the petitioner was called to prove agency to the ſitting members, by ordering

dering treats and dinners at a tavern, and paying for them on their behalf. The counſel for the latter objected to this evidence, becauſe there was no charge of *Treating* in the petition, and it might avoid the election, according to the Treating act:—That upon a trial of felony, the proof muſt not be by evidence of *another* felony. In actions for ſlander, when matter of aggravation is offered by proving other ſlander than that declared upon, it is never permitted to give evidence of ſuch ſlander as would furniſh another *ſubſtantive* cauſe of action; becauſe a man is not to be tried upon any other charge than is alledged againſt him. On the other hand it was obſerved, That the Committee need not apply the evidence further than the counſel urged it, i. e. to prove agency between the parties. But further, they ſaid, Treating was one ſpecies of bribery, and their petition contained a direct and principal charge as to that. Upon which the Committee reſolved, That the counſel might produce the evidence *to prove the agency* *." After ſtating

Affeſſment Evidence.

* I was preſent in this Committee when the above queſtion aroſe. After the reſolution was communicated, the counſel for the ſitting members ſaid, That the petitioner could not abſolve the Committee from adminiſtering the law according to their oaths, if the material facts ſhould appear in evidence before them.

It was there mentioned in the courſe of the argument, that in the firſt petition preſented on the Worceſter election of

Aſſeſſment Evidence.

ſtating this caſe, they admitted likewiſe, that if on their inquiry it ſhould be found that the freehold were under value, they could not avail themſelves of it in any other way, than as tending to eſtabliſh the objection ſpecified in the liſt: But thus far they claimed a right to make the inquiry into the value.

The Committee deliberated on the point, and delivered their opinion, *That the petitioner might proſecute the inquiry, for the purpoſe of aſcertaining the queſtion ariſing upon the aſſeſſment.*

1773, a charge againſt the ſitting member for treating, had been omitted; and that afterwards, upon a conſultation had with the petitioner's counſel, a ſupplemental petition was preſented, chiefly for the purpoſe of ſetting forth that charge; from an opinion entertained by them, that a ſelect committee would not allow the petitioner to give evidence of it, if it ſhould not have been made a ſubſtantive charge in the petition. I have read theſe petitions in the Journal, (See 34 Journ. 400 and 425, January 20 and 31, 1774) the contents of which are according to the above ſtatement of them. The firſt is by the unſucceſsful candidate: The ſecond by the freemen in his intereſt, containing no other ſubſtantive charge than that of treating.

[CRICKLADE ASSESSMENTS.]

Deciſions of the CRICKLADE Committee, under their Conſtruction of the Aſſeſſment Act, 20 Geo. III. ch. 17.

I place the following caſes (though ſo few in number) by themſelves, becauſe depending on the different rules of conſtruction, by which this Committee were led to form a judgment of the above ſtatute, differently from that of Bedfordſhire. The different deciſions in theſe committees of ſome caſes apparently the ſame, might appear contradictory, if they were to be read as correſponding judgments of the *ſame* caſes. Whereas, the only difference between them was the firſt and fundamental one, upon the general conſtruction of the act. The particular deciſions upon the votes, are to be conſidered as corollaries from and dependent upon that: And they are therefore, in truth, neither an affirmance of each other, where they ſeem to agree, nor the contrary, where they may ſeem to differ.

This ſubject received the conſideration of the Cricklade Committee, ſome days before the reſolution upon it in that of Bedfordſhire. It was

Cricklade Aſſeſſment

treated in the ſame manner in both, and the ſame arguments were employed by the counſel. In this obſervation likewiſe the Buckinghamſhire caſe may be included. I ſhall therefore only ſtate the caſe and reſolution, conformably to the method I have followed upon all queſtions that have been decided in theſe different elections in the ſame ſhape, for the ſecond or third time. It happened too, that ſome of the ſame counſel were engaged in all the three here preſented to the reader: So that it can hardly be ſuppoſed that they took a different courſe of argument in any of them.

The queſtion here aroſe after the caſe of the ſitting members had been opened, upon the firſt objection taken by their counſel; which was to the vote of a freeholder of the pariſh of Aſhton Keines. No caſe had occurred before, that made it abſolutely neceſſary to enter upon the conſtruction of the ſtatute; but it was thought ſo in this. The ſitting member's counſel here contended for that conſtruction, which in the Bedfordſhire caſe was afterwards maintained on the part of Lord Ongley; inſiſting upon an adherence to the form directed by the ſtatute.

The Committee reſolved,

That ſuch freeholders as were aſſeſſed for the premiſes in reſpect of which they claimed to vote, either

either in their own names, or in the names of their tenants actually occupying the ſame as tenants of ſuch freeholders, were intitled to vote at the late election for the borough of Cricklade. Cricklade Aſſeſſment

In the abovementioned rate of Aſhton Keines, there were many names ſtanding ſingly, with the ſums for which they were charged ſet oppoſite to them; by which the perſons aſſeſſed were not deſcribed to be either landlords or tenants. It was ſaid by the party objecting, That the rate itſelf was ſufficient evidence of the objection, according to the above reſolution. On the other ſide, it was ſaid to be neceſſary to go further in proof of the objection, by calling the aſſeſſors to explain who the perſons aſſeſſed were; becauſe the names ſtanding alone ſhould be preſumed to be thoſe of the owners, and then the aſſeſſment would be proper.

The Committee reſolved,

That the party who wiſhed to ſubſtantiate a vote included in the Aſhton Keines aſſeſſment, ſhould produce the aſſeſſor.

Jacob and Broom Pinnegar, an uncle and nephew, held an eſtate in common, for which they voted. It was rated thus: "The Mr. Pinnegars." J. and B. Pinnegar.

This was held a good aſſeſſment of each.

Robert

Cricklade Aſſeſſment Robert Hapgood. Robert Hapgood voted for a freehold occupied by W. Hill. The voter and his brother James had two houſes adjoining together, let by them as one tenement to Hill: But the rate was thus; "*James* Hapgood—W. Hill."

BAD.

W. Jacobs —was rated together with ſix other perſons, all in the occupation of their premiſes, in one joint ſum of £.5 12*s*. the whole ſeven being braced together in a circumflex oppoſite to that ſum.

GOOD.

Wm. Price —voted for a freehold in the poſſeſſion of Richard Dibbins. The voter's name was not in the rate; but that of Dibbins was, as tenant to *S*. Price. The counſel in ſupport of the vote offered to prove by the aſſeſſor, that he was tenant to the voter, and not to *S*. Price. This was objected to on the other ſide, and the reſolution (in p. 536) was held up as concluſive againſt it.

The Committee would not receive the evidence, and held the voter not to be duly aſſeſſed.

J. Munday —voted for land occupied by William Lewis. The name of *William* Munday with W. Lewis as his tenant, was in the aſſeſſment: And the counſel for the vote offered to prove that there

was

was no *William* Munday in the pariſh, and conſequently that *James* muſt have been the perſon intended. Cricklade Aſſeſſment

But this evidence was oppoſed on the other ſide, and refuſed by the Committee.

William Kempe voted for a freehold which belonged to him as ſchoolmaſter of Lineham. The aſſeſſment was of "The ſchoolmaſter of Lineham," W. Kempe

Goop.

[In the Buckinghamſhire caſe, the queſtion on this act was argued on the fourth day of the trial. That Committee reſolved, Buckinghamſhire.

That it is not neceſſary that the name of the owner ſhould appear upon the rate.

This was the only reſolution paſſed by them upon this law; the trial ending three days after, and no particular caſe of aſſeſſment having required a deciſion, except upon thoſe points of evidence mentioned in p. 516.]

IV. Cases of Personal Disqualifications.

Not a year in poſſeſſion. J. Freſhwater.

J. Freſhwater was objected to by the petitioner under theſe circumſtances: He purchaſed his freehold on the 26th of April 1783, having then for the firſt time bargained for it. The conveyance was not executed till the beginning of May following. His bargain gave him the eſtate from the Lady-day preceding the purchaſe, and he enjoyed it accordingly; and the ſeller paid no taxes, and derived no profit from it after that day. This election began April 7, 1784, and the return was made on the 19th following.

This caſe being ſatisfactorily proved, the counſel for the ſitting member gave up the vote, admitting it to be

BAD.

W. Smith —had been in poſſeſſion of his freehold more than a year before the election, under a contract for the purchaſe of as long ſtanding: But *all* the purchaſe money was not paid, nor was the conveyance executed by the ſeller, till ſix months before the election. GOOD.

Thomas

Thomas Shepherd ſucceeded to his freehold as one of the bailiffs of Bedford, in right of that office, upon the death of the laſt incumbent within a few months before the election *. The only objections ſtated in the liſts againſt his vote were, the want of due aſſeſſment and being under value, which being conſidered as not eſtabliſhed, the vote was held

Not a year in poſſeſſion.
Thomas Shepherd.

GOOD.

Thomas Barringer was objected to by the ſitting member as being a collector of the duties on houſes and windows, under the diſqualifying ſtat. 22 Geo. III. ch. 41, which excludes the vote of "any ſurveyor, collector, comptroller, inſpector, officer, or other perſon employed in collecting, managing, or receiving the duties on windows or houſes."

Diſqual. Office.
Thomas Barringer.

In order to underſtand this ſubject, it is neceſſary to refer to the ſtat. 20 Geo. II. ch. 3, by which all former duties upon houſes and windows were repealed, and new ones impoſed, with new powers and a new mode of collection added. The following ſections of the ſtatute are the moſt material to this point.

Sect. 6, enacts, That all the commiſſioners of the land tax for the year 1747, or who ſhould

* See p. 368.

there-

Diſqual. Office. Thomas Barringer.

thereafter be appointed commiſſioners of the land tax, ſhould be commiſſioners for putting in execution that act; which ſaid commiſſioners are directed to meet together at the moſt uſual place within their counties, &c. on or before the 18th of April, 1747, and in like manner to meet yearly at the appointed times of the land tax meetings, and to divide themſelves for the execution of the act, in hundreds, &c. within their limits, in ſuch manner as to them ſhall ſeem meet; and to direct their precepts to ſuch inhabitants and ſuch number of them as they ſhall think moſt convenient to be preſentors and aſſeſſors, requiring them to appear before the commiſſioners, at ſuch time and place as they ſhall appoint, not exceeding ten days; and at ſuch their appearances, to read to them the ſeveral rates and duties in the act mentioned, and openly declare the effect of their charge unto them, and how they ought to make their certificates and aſſeſſments according to the ſeveral rates aforeſaid; and then to prefix another day for the ſaid perſons to appear before the commiſſioners, and bring in their certificates in writing under their hands, to be verified upon their oaths, of every dwelling houſe inhabited and charged by this act, within the limits of thoſe places for which they are to act; and of the number of windows, &c. and of the ſeveral

ſums

ſums of money, &c. without concealment or favor; upon pain of forfeiture of any ſum not exceeding five pounds, nor leſs than forty ſhillings: And alſo then to return the names of two or more able and ſufficient perſons, within the bounds or limits of thoſe pariſhes or places where they ſhall be aſſeſſors reſpectively, to be collectors of the ſeveral rates and duties granted to his majeſty by this act; for whoſe paying to the receiver general ſuch money as they ſhall be charged withall, the pariſh or place by whom they are ſo employed ſhall be anſwerable: And every aſſeſſor ſo appointed ſhall, before he take upon him the execution of the ſaid employment, take the oaths of allegiance and ſupremacy. Diſqual. Office. Thomas Barringer.

By ſect. 7, the particular duty of the *collectors* is preſcribed to them, and they are required to pay over their receipts to the receiver general, his deputy or deputies.

In ſect. 9, the collectors are injoined and required to collect and pay, &c. under the ſeveral penalties and forfeitures in the act provided.

Sect. 30, impowers the *lords of the treaſury* to appoint *ſurveyors* and *inſpectors* for examining and controlling the aſſeſſments and certificates of the collectors, with full powers for the above purpoſes.

Sect. 43, impowers them to give ſalaries to the *ſurveyors* and other officers for their ſervice.

The

Diſqual. Office. Thomas Barringer.

The material parts of ſtat. 20 Geo. II. ch. 33 are preſerved in the ſubſequent acts, by which the ſame duties have been continued or extended. By ſect. 2, of 22 Geo. III. ch. 41, it is provided, That nothing in the act ſhall extend to any perſon or perſons, for or by reaſon of his or their being a commiſſioner or commiſſioners of the land tax, or for or by reaſon of his or their acting by or under the appointment of ſuch commiſſioners of the land tax, for the purpoſe of aſſeſſing levying, collecting receiving or managing *the land tax, or any other rates or duties* already granted or impoſed, or which ſhall hereafter be granted or impoſed by authority of parliament. The third ſection provides for the exception of offices held by patent for a freehold term; and the fourth contains an exception of "any perſon who ſhall reſign his office or employment on or before the 1ſt of Auguſt, 1782."

The objection to the vote was ſupported by the following arguments of the counſel for Lord Ongley.

The declared intent of this act was to reduce the influence of government in elections, by annihilating the votes of all thoſe perſons who held offices or ſituations, in which that influence is likely to direct them. The act conſiders in this character, and expreſsly excludes from voting a *collector* of the window tax, which office the voter

voter holds. It has likewiſe the following general and comprehenſive words, " or *other perſon* employed in collecting the duties, &c." So that if it could be ſuppoſed that the word *collector*, as it ſtands, was intended for an officer of a different deſcription from thoſe commonly called collectors, ſtill the voter would be within the terms of the diſqualification, as *a perſon employed in collecting the duty*. It muſt therefore be ſhewn, that there is ſomething in the act inconſiſtent with itſelf, if ſuch perſon is not to be diſqualified. It may perhaps be argued, that the proviſo in the ſecond ſection will have this effect; by which, perſons acting under the appointment of the commiſſioners of the land tax, are excepted out of the clauſe of diſqualification. If the facts warranted it, this would be a ſtrained conſtruction, to repeal an enacting clauſe of a ſtatute by a proviſo; a mode of conſtruction which is to be rejected.

Diſqual. Office. Thomas Barringer.

But the caſe will not admit of this argument, for the collector is not appointed by the commiſſioners of the *land tax*. Although the ſame perſons are commiſſioners of both taxes, and may tranſact the buſineſs of both at the ſame meetings, they act in ſeveral capacities in each reſpectively. When they proceed upon the buſineſs of the window tax, they ſtile themſelves commiſſioners for that duty, and not of the land

Diſqual. Office. Thomas Barringer.

tax. Juſt ſo, if the ſame perſons happened to be the commiſſioners of the cuſtoms and excife at the ſame time, they would not act as commiſſioners of the cuſtoms, in the affairs of the excife.

Penalties are annexed to their acting without qualifying. Now if an action were brought for the penalty, the declaration would ſtate that they acted as commiſſioners of *the window tax*, or elſe the penalty would not be recovered.

The Chancellor and Judges are truſtees of the Britiſh Muſeum: The ſame perſons are Governors of Greenwich Hoſpital. It might as well be argued, that they would act as Truſtees of the Muſeum, in any matter relating to the government of the Hoſpital.

The only expreſſion that ſeems to give that ſenſe which the other ſide would put upon this proviſo, is in the exception of perſons appointed by the commiſſioners of the land tax, for the purpoſes of the land tax or of any *other rates or duties*. But the preceding ſentence reſtrains it to the *commiſſioners of the land tax*, and plainly controlls the meaning of the words following them. Further, it was neceſſary to add them on account of the other rates which are managed by the commiſſioners of the land tax, as ſuch—as the place tax, and (a little before this act paſſed) the ſervant's tax. This latter tax had been about that time put under a new regulation, and the manage-

management of it taken from the land tax board to that of the exciſe. No other reaſon could be given for inſerting theſe words, but that ariſing from this circumſtance. The mode of collecting the land tax being ſuch as to admit of very little of the influence of government upon thoſe concerned in it, it was thought proper to make them an exception; and to extend it to any other branches of the revenue depending on the *ſame* management: But it extends no further. The tax on houſes and windows is independent of the authority of the land tax commiſſioners, and has commiſſioners for itſelf, and diſtinct officers throughout.

Diſqual. Office. Thomas Barringer.

The actual ſtate of the management of theſe taxes in the city of London, is a clear illuſtration of the foregoing arguments. There, the ſame perſons are not the commiſſioners of both duties, as in other places, but differently conſtituted; and a different qualification is required in order to act as a commiſſioner of the window tax from that of the land tax. The ſame regulation might be made all over the kingdom. The accidental connection of the two characters can furniſh no ſubſtantial ground for determining the extent and effect of the law.

The counſel for Mr. St. John uſed the following arguments in ſupport of the vote.

Diſqual. Office. Thomas Barringer.

It is admitted that the end of the ſtatute in queſtion, was to abridge the influence of government in elections, by cutting off the votes of perſons lying under that influence; and the means of its operation on individuals are violent, by depriving them of a valuable franchiſe, and of the uſe of a private right. Therefore, in order to give effect to the law, the conſtruction of it ought not to be carried further in any doubtful parts, than to lay the reſtraint on ſuch perſons only.

The ſaving clauſe of the ſtatute, and the nature of the office of collectors of the window tax, will ſhew that it could not be intended to exclude them from voting. The act, when ſpeaking of *commiſſioners of the land tax*, means to include the whole of their office, and to uſe the words in the common application of them to all the ſeveral branches of their duty. Commiſſioners of the land tax are always appointed to manage the window and houſe tax, as well as the place tax; for which reaſon, the ſecond ſection involves them altogether, and makes only one claſs of the ſeveral perſons, whoſe appointment depends on the ſame authority; for in this manner the end of the act was thought to be ſufficiently anſwered. The mode of managing theſe brancnes of the revenue not being thought (as the counſel on the other ſide allow) to render the

the perſons employed in them dependent on government. If the act had not intended this, it would hardly have uſed the plural words *any other duties*; when, according to the other conſtruction, theſe words include the place tax only. It is ſaid on the other ſide, that this is a *ſtrained* conſtruction; but it is the moſt conſonant to the ſpirit and end of the act, and within the expreſs words of the ſecond ſection. They ſay a proviſo ought not to be conſtrued ſo as to repeal an act: But this is no repeal; it is only a limitation, which is always the effect of a proviſo in ſtatutes; that general proviſions may not have too extenſive an operation, where the general words uſed might otherwiſe lead to it.

Diſqual. Office. Thomas Barringer.

An argument might be urged from the order in which the act claſſes the ſeveral perſons enumerated, in the management of the window tax, when the nature of a collector's office and appointment is conſidered. It begins with the *ſurveyor*; next to which comes the *collector*; and after that come *comptroller*, *inſpector*, *officer*. Yet the perſons generally called collectors, and holding the office poſſeſſed by the voter, are of an inferior rank in this department both to comptrollers and inſpectors. Hence it might be inferred, that the legiſlature had in view ſome other deſcription of perſons than theſe, (probably the *receivers*, or ſurveyors and inſpectors, who

Diſqual. Office. are appointed and paid by the treaſury) to whom it gave this name of collectors.

Thomas Barringer. The nature of the office ſhews that it could not have been a ſubject in the contemplation of thoſe who framed the ſtatute. It is not lucrative, but burthenſome; it is not under the appointment of government, nor ſought for by the perſons bearing it, but impoſed on them; and they are obliged to execute it, or they may be puniſhed. The ſtat. 20 Geo. II. ch. 3, ſect. 6, deſcribes the manner of appointing collectors, which is more in the manner of pariſh offices, than of appointments under government. Thoſe officers who receive their places from the treaſury, as the ſurveyors and inſpectors, are paid by a ſalary from the treaſury. But collectors have none: Their ſmall profit ariſing from a per-centage on the revenue, is too inconſiderable to repay their labour in the collection.

The fourth ſection of the diſqualifying act is a ſtrong confirmation of the foregoing argument. It preſerves the rights of thoſe who ſhall reſign their offices before a certain day. This is a convincing proof that none were intended to be diſqualified, but thoſe who held offices worth holding, and which might be reſigned. But collectors of the window tax cannot reſign their offices, which they are compelled, and in general againſt their inclination, to execute. If in any

ſubſequent

ſubſequent act for the collection of this duty, the method of appointing and paying the collectors ſhould be altered; if they ſhould receive their appointment and pay from the treaſury, and both were to become lucrative, in ſuch caſe it would be reaſonable to include them among the perſons diſqualified. But in the preſent caſe, ſuch a conſtruction would pervert the deſign of the legiſlature.

Diſqual. Office. Thomas Barringer.

The Committee determined, *That the voter was not diſqualified* *.

The foregoing argument was introduced by an objection made on the part of the petitioner, to the evidence offered by the ſitting member to prove his objection to *Thomas Barringer*, viz. that he was a collector of the window tax. After the Committee had deliberated, the chairman informed the counſel that they had negatived the following motion, viz.

That any collectors or aſſeſſors, appointed by or acting under the commiſſioners of the land tax,

* The above determination was of great importance to the parties in this cauſe, as the objection was ſaid to extend to 51 perſons.

It is curious to obſerve in the progreſs of a law made againſt the inclinations of a miniſter, and in order to leſſen the influence of all ſucceeding miniſters, a party ſupporting the adminiſtration contending for the moſt extenſive effect of the law, and the reſtriction of it maintained by the party in oppoſition; as it happened in this inſtance.

Diſqual. Office. Thomas Barringer. *whether acting as ſuch, or as commiſſioners for the management of the duties on houſes and windows, or for the management of any other rates or duties impoſed or to be impoſed by parliament, are diſqualified from voting at elections of members to ſerve in parliament.*

[In the Buckinghamſhire Committee, the above objection was made in the ſame manner by the petitioner there, and received a ſimilar determination.]

Jn. Arch —was objected to by the petitioner, as being a ſubdiſtributor of ſtamps.

The words of the diſqualifying act on which the objection was founded, are the following: "Any commiſſioner, officer, or other perſon concerned or employed in collecting, receiving, or managing any of the duties on ſtamped vellum parchment and paper; nor any perſon appointed by the commiſſioners for diſtributing of ſtamps."

The voter had been appointed by the diſtributor of ſtamps for the county, a ſubdiſtributor for the diſtrict of Shefford. The nature of the appointment is this, as it was related in the evidence of Mr. Leach, the diſtributor for Bedfordſhire. The diſtributor appoints whom he pleaſes, as his aſſiſtants in the diſtribution, for

for the convenience of collecting the revenue, by the direction of the board of Commiſſioners, and makes a return to them of their names once a year. But the Commiſſioners exerciſe no controll over them; though if they were to diſapprove of any perſon ſo appointed, the diſtributor would remove him. But this would be by his own authority. The diſtributor is anſwerable for what money the ſubdiſtributors receive, and they to him. The profit of the appointment to the ſubdiſtributors, is 2l. 10s. per cent. on the money collected by them; to the former 5l. per cent. Diſqual. Office. J. Arch.

The ſubdiſtributors likewiſe make out licences for carts, waggons, and horſes, and ſign them with their own names.

The objection to the voter was ſupported by the following arguments:

The deſign of this law being to diminiſh the influence of government in elections, the conſtruction of it ought to be ſuch as beſt to advance this deſign, which was thought ſo remedial to the conſtitution. If perſons in the ſituation of the voter are neceſſarily ſubject to that influence, they come within the ſcope of the ſtatute; and certainly the expreſſions of it, include them by name.

Now the appointment under which the voter acts, renders him dependent upon the perſon appointing

Diſqual. Office. J. Arch.

appointing him, (an immediate ſervant of government) as far as the profit of the place extends, which muſt neceſſarily be advantageous to the officer. And though he is not immediately appointed by government, his ſituation is in effect the ſame; becauſe if the Commiſſioners were to diſapprove of him, he would be removed. Nor is it likely that the board would require to have the names of the ſubdiſtributors returned to them, but for the purpoſe of approving or rejecting them. They are likewiſe anſwerable to government for the money they collect, as well as to the diſtributor. Under theſe circumſtances it cannot be doubted, whether they are ſubject to the influence of government.

The words of the act, "perſon employed in collecting, &c." directly include the voter. If any argument can poſſibly ariſe upon the words, it can only be from the redundancy of the expreſſion following, in which perſons *appointed by the Commiſſioners* are particularly deſcribed; as if the ſituation of perſons in this and the former deſcription were different. The latter part of this clauſe was perhaps unneceſſary; however it can only have been inſerted from extreme caution: And it would be moſt abſurd to turn it to an effect directly contrary to the plain intent; which is ſo pointed and ſtrong in the firſt words, as to require no obſervation.

If

If this clauſe were conſtrued not to extend to this claſs of perſons, the effect of it would be very trifling. It would only diſqualify one perſon in each county, viz. the diſtributor; and even this might be rendered nugatory. For if the Commiſſioners ſhould chooſe to defeat the act, they need only appoint one diſtributor for the whole kingdom, who by appointing all others in his own name as ſubdiſtributors, would in this caſe exempt them from the intended diſqualification. Diſqual. Office. J. Arch.

The following arguments were uſed on the other ſide.

Laws introducing penalties, are to be conſtrued ſtrictly; and any doubtful expreſſions in them are to be conſtrued favourably to the party. If the Committee ſhould decide the voter to be diſqualified, their deciſion may involve him in an action for the 50l. penalty, which the ſtatute inflicts upon any diſqualified perſon's voting. It is therefore a queſtion of great importance to the voter, which the court ought to determine upon the ſame principles as they would follow, if they were a jury trying an action againſt him for the penalty.

It is not proved that the voter's ſituation renders him dependent on government, for the appointment is independent of it. The diſtributor himſelf appoints whom he pleaſes; the profit

Diſqual. Office. J. Arch.

profit ariſes from the contract made with him alone. He receives no orders or inſtructions whatever from the Commiſſioners, and has no communication with them. Nor is he, as has been aſſerted on the other ſide, anſwerable to the crown if he fails in his payments; but to the diſtributor: Although the latter might iſſue an extent *in aid* againſt him in ſuch caſe, becauſe the diſtributor is debtor to the crown. But this proves the ſubdiſtributor to be debtor to the other, and not to the crown. If all perſons who may be indirectly liable to ſome of the influence of government, are to be excluded from voting by the conſtruction of this act, it would extend to an infinite variety of connections, and might embrace half the nation; whereas the act deſcribes only certain direct dependencies.

It is ſaid, the ſtatute is pointed and ſtrong for the diſqualification; but a cloſer examination of them ſhews it otherwiſe: For if the claſs of perſons mentioned as appointed by the Commiſſioners, are not different from thoſe before deſcribed in the general words, why were thoſe words added? The act therefore muſt be ſuppoſed to diſtinguiſh perſons appointed by the Commiſſioners, from thoſe who are not ſo, by framing a particular excluſion for them; and in this it controlls the preceding general words, which may well be ſuppoſed to mean ſuch only as are appointed

appointed receivers of the duty. Theſe general words may be charged with uncertainty, with as good reaſon as the other words have been charged by the oppoſite counſel with redundancy. It is plain, that the diſtributors themſelves (who are appointed by the Commiſſioners) were not thought to be included in the firſt general words; by the addition of the ſecond ſentence to take them in. But a ſubdiſtributor of ſtamps is not appointed by the Commiſſioners, and therefore not within this clauſe. Diſqual. Office. J. Arch.

In the above ſenſe, the Buckinghamſhire Committee * have received this clauſe of the act, and have allowed the vote to be good; their deciſion may be conſidered as a precedent in this caſe.

The caſe put of the poſſibility of one diſtributor being appointed for the kingdom, is ſuch an extreme caſe as can hardly be ſuppoſed. It could not take place without drawing down a parliamentary puniſhment upon the Commiſſioners who ſhould attempt it.

GOOD.

[The above objection was made by the petitioner in the caſe of Buckinghamſhire, and received

* Their deciſion paſſed on the laſt day of the trial, the 11th of April. The above arguments were delivered here in the week following,

Diſqual. Office. ceived the ſame determination there. It aroſe and was argued in the caſe of Cricklade, but was not determined in that cauſe.]

Rev. John Hempſted —objected to as huſband to the poſt-miſtreſs of Newmarket. She was appointed to the office in the uſual form of deputation in 1778, and married the voter in 1781.

The words of the diſqualifying act, 22 Geo. III. ch. 41. relating to this queſtion are theſe, "Any poſt-maſter, poſt-maſters general, or his or their deputy or deputies, or any perſon employed by or under him or them, in receiving, collecting, or managing the revenue of the Poſt-office, or any part thereof."

It was contended, that the voter was diſqualified, upon the following reaſons, viz.

The huſband and wife are in law conſidered as the ſame perſon; her property becomes the huſband's ſo completely, that ſhe cannot grant any thing to him. She is not allowed to give evidence for or againſt him, upon the ſame principle. If the office in queſtion is beneficial, the whole profit of it is the huſband's; whatever money is paid to her for it, he has a right to; and can inſiſt upon payment to himſelf, if he pleaſes. He is alſo liable to actions for any default of hers, and the ſecurity for her due diſcharge of the office, muſt be given in his name.

This

This is like the caſe of an office held in truſt for another; in which caſe there would be no doubt that the *Ceſtui que truſt* would be diſqualified under this act, though the office were nominally in another perſon. Diſqual. Office. Rev. John Hempſted

But if the rule of law were not ſo clear upon this point, a juſt conſideration of the ſpirit and deſign of this ſtatute, would lead to the ſame concluſion. For it cannot be doubted, that the influence of this profitable employment, whatever it be, affects the huſband equally with the wife. The advantage reſults to him indirectly, but as effectually as if he held the place in his own perſon.

On the other ſide it was contended.

That the penal diſabilities of this act were not to be extended by implication: That as the voter was not included in the expreſs words of diſqualification, it would be an unfavourable conſtruction, and contrary to the uſual mode of conſtruing penal laws, to include him in it indirectly, when ſo heavy a penalty would be thereby adjudged to have been incurred. That if it were a queſtion at law on a trial for the penalty, the voter would have a verdict; for the plaintiff in the action would not be able to prove *his acting* in the office, from which acting the penalty ariſes: And in this caſe the right to vote, and the not incurring the penalty, are convertible terms.

That

Diſqual. Office. Rev. John Hempſted

That it was plain, likewiſe, that the act extended only to perſons who could reſign the diſqualifying offices; but the voter could not reſign his wife's appointment, if he were ſo inclined; nor could he compel her to reſign it.

That the legal ſtate of the connection between huſband and wife, did not affect the connection ſubſiſting between the Poſt-office and its deputy the voter's wife; for at the office ſhe was conſidered as the perſon reſponſible; and, no doubt, any miſconduct on her part, without the default of her huſband, would occaſion her being diſmiſſed.

That the perſons intended to be diſqualified by the act, were thoſe in the employment of the different offices; and the proper rule to follow would be to trace the different claſſes of officers there ſpecified, which were extended enough; for it would be endleſs to follow the train of influence under government through all its communications.

That there could be no pretence here for ſuppoſing the appointment of the wife was only nominal, or for the purpoſe of covering a diſqualification; ſince ſhe had held the office and executed the duties of it, before her marriage with the voter.

BAD.

Thomas

Thomas Godfrey Burr, objected to as poſt maſter at Luton. The voter held the office under the regular appointment, but it was executed by John Smith an inn-keeper there, who by Burr's agreement received the ſalary for his own uſe. The correſpondence with the poſt-office in London, was carried on in Burr's name, and orders from thence were ſent to *him*, not to Smith. The voter was a brewer, and Smith rented the inn and ſome land of him. The latter ſwore, that he gave no conſideration for the profits of the office to Burr; but when he took the inn of him, he expected to have the office with it. Diſqual. Office. T.G.Burr

The counſel againſt the vote contended, That the agreement between the voter and Smith did not affect his diſqualification by the ſtatute, as a perſon acting under the Poſt-office appointment; becauſe there was no room for ſaying, that the former held the office in truſt for the latter, and derived no benefit from it to himſelf: That Smith was to be conſidered as his ſervant, and paid by him, he being the real officer: That the rent of his inn was certainly raiſed, and the conſumption of his beer increaſed by the buſineſs being carried on in this manner; and by this means he gained conſiderable benefit from the office, though indirectly: That if it were not ſo, Burr would not continue to hold a very reſponſible

Diſqual. Office. ſtation, in which he ran great riſks upon the caſual negligence of others.

T.G.Burr On the other ſide it was ſaid, That conſiſtently with the deciſion in Hempſted's caſe, this voter might well be allowed; becauſe he did not enjoy the *real* benefit of the office, but held it merely by name: That the voter's connection with the Poſt-office was a charge, not a benefit; for he was liable to anſwer for all defaults, while another received the profits: That this circumſtance diſtinguiſhed the caſe out of the ſtatute; for the influence of government which it was made to reſtrain, could not extend to offices not profitable to the holders.

BAD.

Ja.Wilſon —objected to as a perſon employed in collecting the revenues of the Poſt-office. He was appointed by the poſtmaſter at Luton to diſtribute the letters and receive the poſtage, for the pariſh of Barton, which is within the Luton diſtrict and not a poſt town of itſelf; for which he received for his own profit, a penny a mile upon each letter, above the office poſtage received for his principal. Perſons in this ſituation are called at the Poſt-office ſub-deputies, and are generally appointed with the approbation of the poſtmaſter general, though not by him.

him. There was nothing in the books of the Poſt-office relating to the voter's appointment. Diſqual. Office.

It was ſaid in ſupport of the vote, That the appointment being unconnected with the Poſt-office, made merely for the convenience of the inhabitants of the pariſh, and not paid for by government but by the pariſhioners, it ought not, upon a liberal conſtruction of the act, to be conſidered as a diſqualification. J. Wilſon.

GOOD.

John Houghland was objected to, as having received pariſh alms within a year before the election. Receipt of Alms. J. Houghland.

In ſupport of the objection it was ſaid, That if it held againſt voters in boroughs, it ought to hold *a fortiori* in counties, where the right of voting is to be derived from property, and not as it is in many boroughs, from a perſonal right independent of any property. Though there is no expreſs reſolution to be found in the Journals, applying to counties in particular, yet it has been always underſtood to be equally an objection in them as in boroughs; as appears from the ſtate of the Eſſex caſe in 1716, 17 May, 18 Journ. 447, where it is treated as a known ground of objection. The Cricklade Committee had but a few days before received it as ſuch,

Receipt of Alms.

and paſſed a direct reſolution in confirmation of it *. Their authority has made it *res judicata.*

J. Hough-land.

On the other ſide it was ſaid, That the reaſon for conſidering the receipt of alms as a diſqualification in boroughs, was becauſe of the perſon's thereby becoming a dependent member of ſociety, without property to maintain him; that in ſuch caſe it was a *perſonal* diſqualification from exerciſing a *perſonal* right: But that in counties, a freeholder's poſſeſſing forty ſhillings a year, was the only neceſſary qualification; and while this remains with him, the law would not ſuppoſe him in a ſtate of indigence. That it ought rather to be preſumed that his receipt of alms was only accidental; becauſe, the pariſh need not have relieved him if he refuſed to give them up his property, which they might have required from him; and their ſuffering him to retain it, argued that he was not conſidered by them as one of the ordinary poor.

The Committee held the vote good. The following motion,

That pariſh alms paid to a freeholder do invalidate his vote, although he continues in poſſeſſion of a freehold of the clear yearly value of forty ſhillings,

Paſſed in the *negative* †.

Charles

* See their reſolution, next after the following caſe of C. Myers.

† Not only in the caſe of Eſſex abovementioned, (the parti-

Charles Myers. In this caſe a diſpute aroſe between the counſel upon the meaning of the reſolution above ſtated, which the Committee explained to mean, "that pariſh relief made no diſqualification, while the voter retained the poſſeſſion of his freehold." Receipt of Alms. C. Myers.

The objections ſtated againſt this voter were, That he had no freehold, none of the value of forty ſhillings, and received pariſh relief; and the petitioner's counſel wanted to give evidence, that the voter was out of the poſſeſſion of his

particulars of which are recited in note (F.) but likewiſe in that of Oxfordſhire, (27 Journ. 202, 232.) the receipt of alms is treated as a known objection. In the Yorkſhire petition in 22 Journ. 499, 500, it is alſo named among the objections; though the petitioner does not ſeem to have brought evidence in ſupport of it. In the Glouceſterſhire caſe it is reckoned in the liſt of thoſe whom the petitioner had diſqualified, and was likewiſe made uſe of by the ſitting member; although in another part of the cauſe the competence of it was denied on his part; but this was in the caſe of a particular *charity*, as diſtinguiſhed from pariſh relief. And it is with reference to ſuch caſes, that I ſhould underſtand the Chairman's obſervation in his book, in which he treats the queſtion as *undecided*. For otherwiſe that is inconſiſtent with one of the reſolutions of that Committee, in which, after argument, they permitted evidence to be given of the receipt of pariſh relief, in order to diſqualify a voter; thereby plainly deciding the queſtion. See p. 84, 125, 178, 179, 180, of the Reſolves of that Committee; in the laſt of which, the Chairman adds a N. B. that the caſe of *pariſh poor was not argued*.

Receipt of Alms. C. Myers.

eſtate for a year before the election. The other counſel objected to this, becauſe that was a diſtinct ſpecific head of objection of itſelf, which was not ſtated in the liſts, and therefore evidence of it ought not to be received; that the objection of pariſh relief, being in itſelf held by the Committee not to affect the vote, it ſhould be conſidered as not having been ſtated; and in that caſe the evidence offered was irrelevant to the objections that were ſtated.

To this it was anſwered, That the objection of alms could not be made out, according to the deciſion of the Committee, but in this way; and therefore it muſt neceſſarily be received as competent upon the cauſe of objection ſtated.

The Committee declared an opinion for receiving the evidence offered *.

It appeared that the voter received pariſh relief, but was in poſſeſſion of his eſtate, from which he derived forty ſhillings a year; in conſequence of which, the pariſh allowed him ſo much leſs than he would have otherwiſe received from them of relief. From hence the counſel againſt the vote argued, that the voter did not receive the rent as owner, for his own uſe; but really, for the benefit of the pariſh and as agent to them. But the Committee ſeemed to think the fact too

* See the caſe in p. 532, 3.

plain,

plain, and that the voter was not diſqualified within the terms of their reſolution; and hereupon the counſel did not preſs the objection to the vote, which the Committee afterwards allowed to be good. Receipt of Alms. C. Myers.

[In the caſe of Cricklade, the Committee were of a different opinion. The queſtion aroſe upon the vote of Robert Strange a freeholder of Highworth, upon which they came to the following reſolution: Cricklade.

That Robert Strange having within twelve months before the election received pariſh relief, was thereby diſqualified from voting.]

An objection was made to the vote of William Burgeſs, that he was an ideot; but according to the ſtate of the evidence in ſupport of it, the fact was not ſufficiently eſtabliſhed, and the objection failed *. Ideocy. W Burgeſs

The petitioner objected to a voter that he was a Papiſt. The counſel for the ſitting member ſaid, this furniſhed no ground for objection; that the voter had taken all the oaths required of him at the poll, and if the other party had thought proper at the election, they might then Papiſt.

* In the Oxfordſhire caſe there was an objection to a voter as being *inſane, and ſo diſordered in his ſenſes that he could not repeat the oaths.* 27 Journ. 176.

have tendered the oath of abjuration to him; which was the only trial they could make of his religion, and at that time only. The court ſeemed to be of this opinion, and no more was ſaid upon the ſubject.

Evidence. In the firſt part of the trial there were frequent diſputes upon evidence, but they were in general too complicated to be ſtated here, as regular legal queſtions. In thoſe caſes in which the contents of deeds were neceſſary to ſupport an objection, it ſoon became an eſtabliſhed rule, that no evidence of it ſhould be received, unleſs notice had been ſerved upon the party to produce the deeds. The Committee paſſed an expreſs reſolution to this effect in the caſe of Richard Matſon. Neither would they lend their aſſiſtance to the parties, in order to *compel* a production of deeds to invalidate the title of a voter. Some ſubpœnas having been ſigned by the Chairman to witneſſes *to produce deeds*, in the beginning of the trial, (which had paſſed as a matter of courſe, and this particular effect of them unobſerved) were recalled by him as ſoon as the purport of them was known.

At the end of the cauſe, during the trial of the tendered and rejected votes on Lord Ongley's

ſide, his counſel had proved their caſe as to one of them, John Hunt; which the petitioner propoſed to anſwer, by proving from the *voter's own declarations*, that the tender had been improperly made, and was therefore void. It was argued againſt this, That the evidence of his declarations was improper in the queſtion of tender; becauſe he might be examined himſelf to prove the fact; not being intereſted in that, as he is with reſpect to his *right* to vote; and therefore what he had been heard to ſay upon it was not the beſt evidence, as the court might hear it from himſelf, if thoſe who wanted the evidence ſhould chooſe to call him before them. Evidence.

It was replied, That the diſtinction between the right to vote, and the right to be on the poll, had no real difference as to this queſtion of intereſt, if there were any ſuch *; that if a voter's declaration were admiſſible againſt his right, it ought upon the ſame principle to be equally admiſſible againſt his tender to vote.

The court did not decide this queſtion of evidence; but the counſel for the petitioner waved the point on their ſide, and called the voter himſelf, who was examined upon the particulars of his tender at the poll.

*. See the caſe of the King and Bray, cited in vol. i. p. 389, from Hardw. Rep. 358.

NOTES

NOTES

ON THE CASE OF THE COUNTY OF

BEDFORD,

In 1785.

PAGE 382. (A.) The reſolution here alluded to, was firſt made in the beginning of the ſeſſion which commenced in January 1735-6, and was occaſioned by the petition on the Yorkſhire election then preſented. It paſſed after a debate, in which *twenty* different queſtions of amendments had been put upon it; after which the reſolution ſtood as follows:

Reſolved, That in all caſes of controverted elections for counties in England and Wales, *to be heard at the bar of this Houſe, or before the Committee of privileges and elections*, the petitioners do by themſelves or their agents, within a convenient time to be appointed *either* by the Houſe, *or the Committee of privileges and elections, as the matter to be heard ſhall be before the Houſe, or the ſaid Committee*, deliver to the ſitting members, or their agents, &c. (*as in the order ſtated in p.* 382.) See 22 Journ. 501.

Since the year 1736, the above reſolution has been annually paſſed among the other annual reſolutions; except that when the preſent inſtitution for trying

 elections

elections took place in 1770, an alteration was made by omitting from it the words before-mentioned in Italic, which related to the aboliſhed mode of trial *.

The original deſign of this reſolution was to impower thoſe who were to try the election, to regulate the delivery of the liſts; but it was impoſſible, from the nature of the inſtitution, to transfer this power to the new election court; and therefore the Houſe wiſely reſerved it to themſelves; though it is, in ſome meaſure, an incroachment upon the juriſdiction of the new tribunal. It is warranted by its juſtice and propriety, tending ſo much to facilitate the proceedings on the trial, that it is to be wiſhed (as I have before, in the preface to Vol. I. obſerved) that the ſame regulation were to take place in all numerous elections, as well in boroughs as counties.

It appears by the Journal of the 29th of Nov. 1699, 13 Journ. 9, that the election committee of that period had made ſome order like this, of their own authority, but the particulars are not ſtated; the entry is as follows: "A debate ariſing in the Houſe concerning certain orders lately made by the Committee of privileges and elections, relating to the giving of liſts of perſons excepted to on either ſide, in caſes touching elections depending before them; and the Houſe conſidering the inconveniencies that have ariſen thereby,

Ordered, "That the ſaid orders be diſcharged: And that it be an inſtruction to the ſaid Committee, That they do make no ſuch orders for the future." This entry leaves us at a loſs to diſcover what the incon-

* See 33 Journ. 6.

veniencies

veniencies complained of were; perhaps they arose more from the practice of the court than from the regulation itſelf.

The only inſtance in which I have found the delivery of liſts in a county election, required by the Houſe previous to 1736, is in the caſe of Rutlandſhire in January 1710-11; when, upon the ſecond day of hearing that election at the bar of the Houſe, the Houſe of its own accord required liſts from the *ſitting member* of ſuch voters as he intended to object to, or to have added to his own. It is ſaid in the Journal (16 Journ. 461) to have been "moved and acquieſced in as the ſenſe of the Houſe." But theſe liſts were delivered *to the Houſe*, not to the other party. "Afterwards Mr. Speaker deſired to know the pleaſure of the Houſe, whether the clerk might give copies of thoſe liſts to the petitioner: Which the Houſe acquieſced in that he might do." It does not appear that the ſitting member made any objection to this proceeding; and probably it was occaſioned by a voluntary delivery of liſts on the part of the petitioner, in the firſt inſtance.

The Committee upon the Southwark election in 1785, in the beginning of the ſame month of March in which this trial began, took the like courſe of proceeding. The borough of Southwark conſiſts of five pariſhes, and the number of voters is very great. The petitioner's counſel, in opening the caſe, propoſed to proceed by ſeparate pariſhes, (as afterwards practiſed in Bedfordſhire by hundreds,) and to exchange liſts of objections with the ſitting member as in counties; and they began with the pariſh of St. John. The ſitting member's counſel agreed to the mode of proceeding, and to the propoſal of exchanging liſts; but

but propoſed that the liſts ſhould not be delivered on their part till the petitioner's objections in the pariſh ſhould be finiſhed. Hereupon the court paſſed the two following reſolutions unanimouſly.

1. *That the Committee approve of the plan propoſed and agreed on by the counſel on both ſides, of determining the merits of the votes in each pariſh on both ſides, before they proceed to any other pariſh.*

2. *That the counſel on both ſides be directed mutually to exchange liſts of all the votes they mean to object to, in the pariſh of St. John, on or before Monday next the 7th of this inſtant March: And that they do proceed in the impeachment of the votes in the order in which they are mentioned in the ſaid liſts; unleſs by leave of the Committee to proceed otherwiſe.*

The above reſolutions paſſed on Friday, March 4, the firſt ſitting of the Committee. The petitioner declined before his objections in the pariſh of St. John were finiſhed, on the 28th of the ſame month.

In the preface to my firſt volume, (p. 30) a caſe is mentioned of a *borough* election, tried in 1714, in which the Houſe ordered an exchange of liſts of objections; which, it is much to be wiſhed, were eſtabliſhed by authority, as a general regulation for all populous elections.

P. 382. (B.) The following are copies of the forms of the lifts exchanged between the parties, parts of which I recite, in order to ſhew the manner of drawing them up. The petitioner's was thus:

"BEDFORDSHIRE.

A Liſt of Voters for Lord ONGLEY, objected to by Mr. ST. JOHN.

MANSHEAD HUNDRED.

Freeholder.	Place of Abode.	Where the Eſtates are ſituate, in right of which the pretended Votes were given, or ſuppoſed to be given.	Objections.
Timothy Deacon.	Everſholt	Everſholt	No freehold. Not worth 40s. a year. Not conveyed to the voter 12 months before the election. No poſſeſſion 12 months before the election. No freehold as deſcribed on the poll.
Thomas Meacher.	Ivinghoe	Eaton Bray	Not aſſeſſed to the land tax. Not 40s. a year clear of all rents and charges. No freehold. No freehold as deſcribed on the poll.
Ja. Smith		Harlington	No freehold. Not aſſeſſed to the land tax. Not 40s. a year clear of all rents and charges. No freehold as deſcribed on the poll.

Benjamin

Freeholder.	Place of Abode.	Where the Eſtates are ſituate, in right of which the pretended Votes were given, or ſuppoſed to be given.	Objections.
Benjamin Seare	Heath and Beach	Heath & Beach	Not 40s. a year clear of all rents and charges. Mortgaged, or otherwiſe incumbered. No freehold. No freehold as deſcribed on the poll.
Thomas Cook	Great Gatts, Herts	Houghton Regis	Not aſſeſſed to the land tax. No freehold. No freehold as deſcribed on the poll.
Ja. Cocks, Eſq.	Cleveland Row, St. James's.	Houghton Regis	Not aſſeſſed to the land tax. Not conveyed to the voter 12 months before the election. No freehold. Not in poſſeſſion 12 months. No freehold as deſcribed on the poll.
John Millard	Leighton	Leighton	Not aſſeſſed to the land tax. No freehold as deſcribed on the poll.
To be added to Mr. St. John's poll. (*See p.* 390)	Henry Horton of Tottenhoe Wm. Bennett of Apſley Guiſe.		Voted for Mr. St. John, and omitted to be taken down on the poll.
	Samuel Groom of Wingfield. Wm. Morris of Weſtoning.		Tendered their votes for Mr. St. John, and were improperly rejected.

FLITT HUNDRED.

Freeholder.	Place of Abode.	Where the Eſtates are ſituate, in right of which the pretended Votes were given, or ſuppoſed to be given.	Objections.
James Wilſon	Barton	Barton	Not aſſeſſed to the land tax. Deputy poſtmaſter. Employed under the poſtmaſters general in collecting or managing the revenues of the poſt-office, or ſome part thereof.
Thomas Wildman	Flitton	Flitton	Not aſſeſſed to the land tax. No freehold. Not 40s. a year clear of rents and charges. No freehold as ſtated on the poll. Did not vote.
Daniel Palmer	Flitton	Flitton	No certificate of rent charge or annuity entered, or the memorial thereof regiſtered with the clerk of the peace. No freehold. Not aſſeſſed to the land tax. Not 40s. a year clear of rents and charges. No freehold as ſtated on the poll.
Henry Eggers	London	Luton.	A foreigner. No freehold. No freehold as ſtated on the poll.

Lord

Lord ONGLEY's Liſt was in the Form following.

MANSHEAD HUNDRED. N° I. Pariſh of Everſholt.

	OBJECTIONS.
1. Thomas Mayes	Having no ſuch eſtate as deſcribed on the poll, or having no freehold in the occupation of the tenant named on the poll, or the eſtate voted for not duly aſſeſſed to the land tax.
2. John Butcher	Employed in collecting the duties on windows and houſes.
7. William Bullock	The eſtate voted for not duly aſſeſſed to the land tax.

Pariſh of EGGINGTON.

9. Samuel Marks	Having no freehold in the eſtate voted for, or having no freehold in ſuch eſtate of the yearly value of 40 s. according to the ſtatutes.

Hamlet of BILLINGTON.

10. Patrick Macfarlane	Having no ſuch eſtate as deſcribed on the poll, or the eſtate voted for not duly aſſeſſed to the land tax.

Lord Ongley's liſt of each hundred was numbered, and in this reſpect more convenient for uſe. He did not ſtate the objection of *mortgage* in his liſt, not expecting it to be proceeeed on; but after the court had allowed the competence of the objection, his counſel proceeded upon it, where they thought proper, under the objection to the value as ſtated above againſt N° 9, which was not oppoſed by the petitioner. The conſequences of his not having included the rejected votes in his liſt, have been already related. See p. 390—394.

P. 396. (C.) This act entirely changes the ſyſtem of county elections, by introducing a regiſter of freeholders in every county, ſubdivided according to the parochial diſtricts of the land tax collection; for each of which there is to be a particular regiſter, under the care of the collectors of the land tax, who are hereby appointed regiſter keepers. They are directed to inroll the names of all freeholders, who make application for the purpoſe in the manner preſcribed; and no freeholder is to be permitted to vote at a county election after the 10th of July 1790, whoſe name ſhall not have been ſo regiſtered for twelve months before; except in the uſual caſes excepted, under certain regulations.

There are ſeveral minute proviſions for regulating and preſerving the inrollments, copies of which are to be delivered upon oath to the clerks of the peace in January and July in every year, who are to keep them for uſe and inſpection. Theſe regiſters are to be abſolute and concluſive upon the right of voting in every reſpect: And when this law ſhall take place, the aſſeſſment act of 20 Geo. III. together with ſuch parts of 18 Geo. II. ch. 18. as direct the aſſeſſment of voters, and the ſheriff's and freeholder's oaths at elections are to be repealed. But the regiſtration of annuities and rentcharges according to 3 Geo. III. ch. 24. is continued.

As it is ſaid, that this act is to undergo a reviſion in the courſe of the preſent ſeſſion, in conſequence of the petitions that have been preſented againſt it, I forbear to enter more particularly upon the conſideration of it.

P. 434, 436. (D.) The opinion of Lord Mansfield on this ſubject, delivered in the Houſe of Lords, in the caſe of the Chamberlain of London and Evans, Feb. 4, 1767, which brought the effect of the Toleration act directly into queſtion, is in theſe words: "It has been ſaid (*alluding to the contrary opinion of Baron Perrott*) that the Toleration act amounts only to an exemption of proteſtant diſſenters from the penalties of certain laws therein particularly mentioned, and to nothing more; that if it had been intended to bear and to have any operation upon the Corporation act, the Corporation act ought to have been mentioned therein; and there ought to have been ſome enacting clauſe exempting diſſenters from proſecution in conſequence of this act, and enabling them to plead their not having received the ſacrament according to the rites of the Church of England, in bar of ſuch action. But this is much too limited and narrow a conception of the Toleration act, which amounts conſequentially to a great deal more than this, and it has conſequentially an influence and operation on the Corporation act in particular. The Toleration act renders that which was illegal before, now legal; the diſſenters' way of worſhip is permitted and allowed by this act; it is not only exempted from puniſhment, but rendered innocent and lawful: It is *eſtabliſhed*: It is put under the protection, and is not merely under the connivance of the law."

I have taken the above paſſage from the copy of Lord Mansfield's ſpeech, printed by Dr. Furneaux in the appendix to his letters to Mr. Juſtice Blackſtone; which he publiſhed after his lordſhip's peruſal and approbation of the manuſcript. There is reaſon

to think, that the word *eſtabliſhed* was uſed emphatically by Lord Mansfield on this occaſion, with a view to its common application to the eſtabliſhment of our national church; according to the following paſſage in Dr. Furneaux's firſt letter. He ſays in p. 24. "When the late incomparable ſpeaker of the Houſe of Commons, Mr. Onſlow, was informed of the expreſſion which the learned and noble lord uſed on this occaſion, he obſerved in a converſation with which he honoured me, that this was the language he himſelf had always held; that, as far as the authority of the law could go in point of protection, the Diſſenters were as truly eſtabliſhed as the Church of England; and that an eſtabliſhed church, as diſtinguiſhed from their places of worſhip, was properly ſpeaking, only an *endowed* church; a church which the law not only protected, but endowed with temporalties for its peculiar ſupport and encouragement."

P. 442. (E.) The following is a copy of my own note of this caſe of Lawton and Lawton. "In a building deſcended to the heir, were four ſalt pans, erected by the anceſtor for a brine work; made of iron and fixed on the ground in two pieces of brick work, ſeparated from the walls of the building by a path. The building was of little value without them, but now was let for 8l. a week. The adminiſtrator claimed them of the heir by this action. Lord Mansfield, in giving judgment, ſaid, "All the old caſes upon this ſubject are in favour of the heir; even pictures in the wainſcot, furnaces and other conveniencies not inſeparably fixed to the freehold, have been held to go to the heir. But this rule has been relaxed in modern times

in

in two caſes: Firſt, between a landlord and tenant, out of regard to the intereſts of trade and improvement; thus, marble chimney-pieces put up by a tenant may be taken away at the end of the term; becauſe the eſtate is ſtill returned to the leſſor in the ſame ſtate as when granted out. Secondly, between a tenant for life, &c. and the reverſioner; as, if the former erects a fire engine and dies, his executor may remove it, upon the ſame principle; and this applies to every moveable improvement, the loſs of which leaves the eſtate *in ſtatu quo*. But as between the heir and executor we find no ſuch relaxation of the law, for this principle does not apply to that caſe. In the preſent caſe, the land is ſo far from being left *in ſtatu quo*, if the pans are removed, that its value is gone; for the building was erected for the work. A ſalt-brine work, in that country (*Cheſhire*) is a valuable inheritance; but it would be unprofitable without the pans. The perſon erecting them can have no contemplation of giving them to his executor, as a ſeparate moveable. He would be at great expence in removing them, and the value would be thereby much diminiſhed; ſo that he would only have a power of laying the inheritance under contribution. They ought therefore to belong to the heir: But it would have been different as between a termor and the reverſioner; for the latter, who is benefitted by a removeable improvement of this ſort, ought in juſtice to purchaſe it."

P. 456, 7. (F.) I have looked over the accounts contained in the Journals of ſome other county elections, beſides thoſe particularly mentioned here, without finding any inſtance of an objection of Value re-

duced by a mortgage. But in the Oxfordſhire caſe, there is one that bears a reſemblance to it; more eſpecially to the circumſtances of the caſe, as it was argued before the Cricklade Committee. The entry of it in the Journal, vol. xxvii. p. 63, is thus: "The counſel for Lord Wenman and Sir James Daſhwood having examined a witneſs, in order to diſqualify Charles Dent, who voted for the ſaid Lord Parker and Sir Edward Turner, as *not having a freehold in the ſaid county, of the value of* 40*s. per annum*. And the probate of the will of Richard Dent being produced, in order to prove to whom, and *ſubject to what charges*, part of the eſtate claimed by the ſaid Charles Dent was deviſed. And a witneſs having been examined in order to prove, that another perſon is in poſſeſſion of part of the ſaid eſtate. And the ſaid witneſs being withdrawn, it was propoſed that the ſaid probate ſhould be read." (*Upon which there follows a queſtion upon the admiſſion of the probate in evidence. Afterwards in p.* 146, *when the counſel on the other ſide come to requalify this vote, the entry is as follows:*)

"And they having propoſed to eſtabliſh the vote of Charles Dent, who voted for the ſaid Lord Parker and Sir Edward Turner, and whom the counſel on the other ſide had endeavoured to diſqualify, as not having a freehold in the ſaid county of the value of 40s. per annum; in ſupport of which objection, they had produced evidence, in order to prove that the eſtate for which the ſaid Charles Dent claimed to vote, was charged with the payment of ſeveral ſuch ſums of money, as reduced the value of the ſaid eſtate to leſs than 40s. per annum.

The

The counſel for the ſaid Lord Parker and Sir Edward Turner, examined a witneſs in order to prove that one of the ſums of money ſo alledged to be charged upon the ſaid eſtate, had been paid to the perſon intitled thereto. And the ſaid counſel having called another witneſs, in order to prove the payment of ſeveral other of the ſaid ſums of money, to the ſeveral perſons reſpectively intitled thereto: And the ſaid witneſs having offered to produce a paper, purporting to be a receipt from Anne Dent, for the ſum of money to which ſhe was intitled, and which was alledged to have been charged upon the ſaid eſtate: The counſel on the other ſide objected to the ſaid paper's being admitted to be read, as evidence of payment of the ſaid money. (*Then follows an argument and queſtion on the admiſſibility of the evidence, which being decided, the Journal proceeds.*)

Then the ſaid paper was produced and read: And the ſame witneſs was examined, and produced evidence in relation to the payment of two other of the ſaid ſums of money charged upon the ſaid eſtate, to the perſons reſpectively intitled thereto, and in relation to the times of the payment of the ſaid ſums reſpectively. And another witneſs was examined, in order to prove the payment of the remaining ſum, alledged to have been charged upon the ſaid eſtate, to the perſon intitled to the ſaid ſum, and in relation to the time when it was paid."

The above extract contains all the evidence relating to this vote. The reader may have obſerved, that it was offered under the general objection ſtated in the liſt, of *not having a freehold in the ſaid county of the value of* 40*s. per annum*. So that an objection of mortgage

may have been brought forward in election trials under that objection, without an expreſs one containing the word; although from the prevailing opinion, and the ſilence of the Journals reſpecting it, the contrary is more probable. In Dent's caſe the counſel defend the vote, by denying the charge as a matter of fact, ſeeming to admit the legal effect of it; which is a caſe in point to the argument maintained on one ſide in the Cricklade queſtion.

As the three elections mentioned in the argument to which this note refers, were the moſt obſtinately conteſted of any upon record, the reader may be pleaſed with comparing together the general ſtatements of the objections made in them. That of Eſſex in 1716, was tried before the Committee of Privileges and Elections, and is reported to the Houſe by the Chairman, as follows in 18 Journ. 447.

" Mr. Hampden, according to order, reported, &c. That the Committee have examined the merits of that election.

That the poll was,

For Mr. Harvey,	—	2,541
Mr. Honeywood,	—	2,517

That the petitioner's counſel added three to his poll, viz. one who voted for the petitioner, and was put down for the ſitting member; another voted for the petitioner, and was put down for Mr. Middleton, who was dead; another was undercaſt in the petitioner's poll.

And they objected to 157 of the ſitting member's voters; and produced evidence, who diſqualified 142 under the following heads, viz.

One a mortgagor out of poſſeſſion;

Two

Two voted for reverſions; and

Six for leaſeholds;

Six purchaſed within a year before the election;

Seven were minors;

Seven were vicars, and four ſchoolmaſters, not rated;

Twenty-one had no freeholds;

Eight had freeholds under value, and were not rated; and

Eighty were in none of the public rates.

The other fifteen who were objected to, were not diſqualified by the evidence which was offered againſt them.

That the ſitting member's counſel objected to 251 of the petitioner's voters; and produced evidence, who diſqualified 112, under the following heads, viz.

One a mortgagor out of poſſeſſion;

One a ſchoolmaſter not rated;

Two purchaſed within a year before the election;

Two were minors;

Four received charity;

Fourteen had freeholds rated under value;

Four had freeholds, proved by witneſſes, to be under value;

Twenty-two had no freeholds; and

Sixty-two were in none of the public rates.

As to 117 other perſons, objected to by the ſitting member's counſel, the evidence was as follows:

Sixty-four were objected to, as not rated, viz. (*and then it ſtates the evidence.*)

Fifty-three others were objected to, as not being in any rate.

That the ſitting member's objections to twenty-two others were not proved.

To

To qualify forty-two of the ſitting member's voters, it was inſiſted on by the counſel,

That thirteen were good votes, though not rated, viz.

Five vicars, four parſons, and four ſchoolmaſters:

Two were proved to have freeholds of value, and twenty-ſeven were proved to be rated in their own or tenant's names; which anſwered the objections that had been made to them.

That the petitioner's counſel, on their reply, alledged, That ſix which had been diſqualified, as not having freeholds, or not rated in any rates, were only miſnomers upon the poll, by literal miſtakes of the clerks; ſuch as Bilſdon for *Pilſdon*, Stoke for *Stuck*, &c. And,

They proved by the rates, That fourteen were rated; the contrary of which had been averred by the ſitting member's witneſſes, who inſpected thoſe rates.

Thus the petitioner's counſel qualified thoſe 14, and falſified ſeveral of the ſitting member's witneſſes.

And that upon the whole matter, &c." Then follow reſolutions for ſeating the petitioner.

The Yorkſhire election in 1736, was tried at the bar of the houſe. At the concluſion of the petitioner's caſe, the entry in the Journal (22 Journ. 696) ſtates the general account of it, from the ſumming up of the counſel thus:

"The counſel for the petitioner * * * ſummed up their evidence; by which they alledged, That they had diſqualified ſeveral perſons as *not being aſſeſſed* to the public taxes, church rates and pariſh duties.—Others, as *having no freehold in the place where* they ſwore that their freeholds did lie, and of them, ſeveral as *having*

no

no eſtate at all—As being *Schoolmaſters*—*Pariſh Clerks*—*Curates*—*Hoſpital-men*—*Leaſeholders*, and *Copyholders*—Others, as *not having freeholds of the value of* 40*s.* per annum—as being *Minors*—as having *purchaſed their freeholds within one year before* the election—as having been *influenced to vote by threats*—as having *voted twice*—one as being *an Alien*; and others whoſe votes appear upon the poll, though there are *no ſuch perſons*, either in the places where they ſwore their freeholds did lie, or in the places where they ſwore that their abode was."

The trial did not proceed to more than one day of the ſitting member's caſe; and there is no general ſtate of the objections on his part.

The Oxfordſhire election in 1755, ſeems to have made the moſt obſtinate conteſt of them all. That too was heard at the bar of the houſe, and continued from the 3d of December to the 23d of April following, during which time it was heard before the houſe 45 times. I have read all the entries of the proceedings in the Journal (vol. 27.) There is none that contains a general account of the objections on either ſide, as in the Yorkſhire caſe. They are diſperſed through the proceedings of the ſeveral days: But there were more heads of objection taken than in the latter. The caſe of Dent abovementioned is the only one which ſtates a charge upon the eſtate, in objection to the vote.

Upon comparing theſe elections with that of Bedfordſhire, it will appear, that the objections raiſed upon the aſſeſſments are vaſtly more numerous, in proportion to the numbers on the poll, in the latter caſe than in them.

P. 461,

P. 461, 2. (G.) The caſe of Wetherell and Hall, was an action of debt on the ſtat. 22 & 23 Charles II. ch. 25. for the penalty inflicted by that act on thoſe who kill game, not having the eſtate therein deſcribed. It was tried at the Durham aſſizes in the ſummer of 1782, when the circumſtances upon which the defendant reſted his defence, having occaſioned doubts in the court, it was agreed to ſtate them in a ſpecial caſe for the opinion of the court of King's Bench in the following Michaelmas Term. This caſe ſtated, that the defendant, in right of his wife, was ſeiſed of an eſtate of inheritance, part copyhold, of the clear yearly value of 103l. That in May 1780, before the time of the ſuppoſed offence, the defendant and his wife mortgaged a cloſe of the value of 14l. per ann. part of the ſaid copyhold. That the ſaid mortgagee was admitted to the ſaid mortgaged part, but had never been in poſſeſſion; the intereſt of the mortgage (which was for 400l.) having been regularly paid: And that at the time of the ſuppoſed offence, the ſaid mortgage continued on the ſaid cloſe.

The counſel for the plaintiff argued, That the defendant had nothing more than an equitable eſtate, of which the court of King's Bench cannot take notice. It muſt be of an inheritable nature. The defendant muſt be the proprietor: Here he is only tenant at will. But, further, on a fair conſtruction of the above act, the defendant is not qualified. The legiſlature meant perſons of a certain independent income, by the words "*clear yearly value.*" In caſe he had taken it ſubject to the mortgage, inſtead of mortgaging it himſelf, or ſuppoſe the value reduced by taxes, in either caſe he has not the income deſcribed by the act; for

the

the groſs value of an eſtate is not the meaſure of that.

The counſel for the defendant argued, That the only queſtion made at the trial, and to be conſidered now was, whether the intereſt of the mortgage was to be conſidered as a deduction. There are many caſes in which courts of law take notice of equitable intereſts, as in ejectments againſt *ceſtui que truſt*. 2d, This is a penal act, and equitable eſtates are within it. An equity of redemption is conſidered as real eſtate; it deſcends to the heir of the mortgagor. A mortgage is only a debt.

The queſtion remaining is, whether the intereſt can be any thing more than a debt. The words *clear annual value* relate only to the property, without any regard to the debts. The mortgagee, if in poſſeſſion, might kill game, and the court would not inquire into the quantity of the debt or intereſt. The penalties of the law are to be determined by juſtices of peace, and it could not be intended that they ſhould go into all the tranſactions and circumſtances of the defendant's property. There are no caſes on the ſubject, but ſome circumſtances in the old qualification acts are in favour of this conſtruction. In the ſtat. 1 James, ch. 27. ſ. 3. and 3 James, ch. 13. ſ. 5. a perſonal eſtate is one of the qualifications. No mention is there made of debts: The poſſeſſion of chattels to the amount of £.200 is ſufficient. In the qualification to vote by 7 & 8 W. III. ch. 25. a mortgagor in poſſeſſion is to vote. By *incumbrances*, are meant caſes in which ſome other perſon receives the rents.

Lord

Lord Mansfield—"The privilege is given to *property*. In the caſe of voting, a man *ſwears* to his having 40s. a year. The mortgagee has a charge on the land: It might be carried ſo far, as that the mortgagor might have nothing."

Judges Willes and Aſhhurſt were of the ſame opinion. Judge Buller was of the ſame opinion, and added—"As to the juſtices of peace, they *muſt* in many caſes go into ſuch inquiries; as on contracts between landlord and tenant. The only doubt is, whether *clear yearly value* means value in poſſeſſion of the defendant. It is clear upon the words of the act that it does; and eſpecially when the ſtatute of James is conſidered."

Hereupon the court gave judgment for the plaintiff.

P. 478. (H.) The ſtatute is as follows:

"An act to remove certain difficulties relative to voters at county elections.

"Whereas the ſeveral laws now in being, for aſcertaining the rights of perſons claiming to vote in the elections of knights of the ſhire to ſerve in parliament, for that part of Great Britain called England, are difficult to be carried into execution, and great delays and inconveniences have been occaſioned by the numberleſs diſputes which have ariſen at county elections concerning ſuch rights, for remedy whereof be it enacted, &c. That from and after the firſt day of January, 1781, &c. (*as in p.* 477.)

"Sect. 2. Provided always, That this act, with reſpect to ſuch rating and aſſeſſing as aforeſaid, ſhall not extend, or be conſtrued to extend, to annuities or fee-farm rents, (duly regiſtered) iſſuing out of any

meſſuages, lands, or tenements, rated or aſſeſſed as aforeſaid; nor ſhall the ſame extend, or be conſtrued to extend, to any perſon who became entitled to ſuch meſſuages lands or tenements, for which he ſhall vote or claim to vote as aforeſaid, by deſcent, marriage, marriage ſettlement, deviſe, or promotion to any benefice in a church, or by promotion to an office, within twelve calendar months next before ſuch election; but ſuch perſon ſhall be entitled to vote at ſuch election, if the meſſuages lands or tenements for which he ſhall vote or claim to vote, as aforeſaid, have been, within two years next before ſuch election, rated or aſſeſſed to the land tax, in the name of the perſon or perſons by or through whom ſuch perſon voting or claiming to vote as aforeſaid, ſhall derive his title to the meſſuages lands or tenements for which he ſhall vote or claim to vote, as aforeſaid, or in the name of ſome predeceſſor within two years next before ſuch election, of ſuch perſon claiming to vote in reſpect of any promotion to any benefice in a church, or promotion to an office, or in the name of the tenant or tenants of ſuch perſon or perſons, ſuch tenant or tenants actually occupying ſuch meſſuages lands or tenements.

"Sect. 3. And be it further enacted, That the commiſſioners of the land tax for that part of Great Britain called England, or the principality of Wales, at their reſpective meetings held for appointing aſſeſſors of the land tax for the ſeveral pariſhes and places lying within the diviſion for which ſuch commiſſioners ſhall act, ſhall cauſe to be deliyered to each of the ſaid aſſeſſors, a printed form of an aſſeſſment, as ſet forth in the ſchedule hereunto annexed; and the ſaid aſſeſſors are

hereby

hereby required to make their aſſeſſments according to the ſaid form; and ſhall make three duplicates of ſuch aſſeſſments; and ſhall (at leaſt fourteen days before ſuch aſſeſſment ſhall be delivered to the commiſſioners of the land tax for the county riding or diviſion, within which the pariſh or place for which ſuch aſſeſſment ſhall be made ſhall lie) cauſe one of the ſaid duplicates, or a fair copy thereof, to be ſtuck up upon one of the doors of the church or chapel of the pariſh or place for which ſuch aſſeſſment ſhall be made; but in caſe ſuch aſſeſſment ſhall be made for an extraparochial or any other place where there is not any church or chapel, then ſuch aſſeſſment ſhall be ſtuck up upon one of the doors of the church or chapel in a pariſh next adjoining; and if any perſon or perſons (renting, holding, or occupying, any meſſuages lands or tenements in any ſuch pariſh or place,) ſhall rent, hold, or occupy, meſſuages lands or tenements, belonging to different owners or proprietors, the ſame ſhall be ſeparately and diſtinctly rated and aſſeſſed in ſuch aſſeſſments, that the proportion of the land tax to be paid by each ſeparate owner or proprietor reſpectively, may be known and aſcertained; and the ſaid duplicates ſhall be delivered to the land tax commiſſioners, at their meeting for the receipt of aſſeſſments; and if the name of any owner or owners of any meſſuages, lands, or tenements, in ſuch pariſh or place, entitled to vote as aforeſaid, ſhall not appear or be included in ſuch aſſeſſment, it ſhall and may be lawful for ſuch perſon or perſons, by himſelf or themſelves or by his or their agent or agents, to appeal to the commiſſioners of the land tax, to whom ſuch aſſeſſments ſhall be returned; and every perſon ſo intending to appeal

ſhall,

ſhall, and is hereby required to give notice thereof in writing to one or more of the aſſeſſors of the pariſh or place wherein he is rated: And the ſaid commiſſioners, on ſufficient cauſe to be ſhewn, ſhall amend the duplicates of ſuch aſſeſſments, by inſerting therein the name or names of the actual occupier or occupiers, and of the owner or owners of ſuch meſſuages lands or tenements, or the perſon or perſons entitled to, or in the actual receipt of the rents iſſues and profits thereof; or by eraſing the name of any perſon who ſhall appear to them to have been improperly inſerted therein. And the ſaid commiſſioners are hereby required to cauſe one of the ſaid duplicates ſo amended (after the ſame ſhall be duly ſigned and ſealed by the ſaid commiſſioners or any three of them) to be returned to the ſaid aſſeſſors, or one of them; and ſuch aſſeſſors are hereby required to deliver ſuch duplicate, ſo amended, within ten days after the receipt thereof, to one of the chief conſtables of the hundred lath or wapentake, within which the pariſh or place for which ſuch aſſeſſment was made ſhall lie, taking the receipt of ſuch chief conſtable for the ſame, and which receipt ſuch chief conſtable is hereby required to give: And ſuch chief conſtable is hereby alſo required to deliver ſuch duplicate upon oath, (which oath the ſaid magiſtrates are hereby impowered to adminiſter), without any alteration, at the next general quarter ſeſſions of the peace for the county riding or diviſion, within which ſuch aſſeſſment ſhall be made, in open court, the firſt day of ſuch ſeſſions, to the clerk of the peace attending ſuch ſeſſions, to be by him filed and kept amongſt the records of the ſeſſions.

Sect. 4. And be it further enacted, That if any aſſeſſor ſhall neglect to deliver ſuch duplicate ſo amended to ſuch chief conſtable as aforeſaid, or if ſuch chief conſtable to whom the ſame ſhall be delivered, ſhall neglect to deliver the ſame to ſuch clerk of the peace, at the next general quarter ſeſſions of the peace as aforeſaid, or ſhall wilfully alter or deface any ſuch duplicate; every ſuch aſſeſſor and chief conſtable ſo offending ſhall, for every ſuch offence, and for every ſuch duplicate ſo neglected to be delivered as aforeſaid, forfeit the ſum of five pounds, to be levied and recovered in the manner herein after mentioned."

In ſection 5, the clerk of the peace is directed, during every Michaelmas ſeſſions, to examine whether all the land tax duplicates of the ſeveral diviſions have been brought in; and if not, to report it to the court, who are to fine the chief conſtables ſo having made default.

In ſect. 6, 7, and 8, a method is provided for puniſhing the aſſeſſors and diſcharging the chief conſtables, if it ſhall appear that the fault was in the former: And the fines are to be paid to the treaſurer of the county.

In ſect. 9, the juſtices (or any two) are impowered to order the aſſeſſment to be made, where omitted, and delivered to the clerk of the peace.

Sect. 10, is thus: "And be it further enacted, That if any perſon or perſons ſhall be diſſatisfied, or ſhall think himſelf or themſelves aggrieved by any determination of the ſaid commiſſioners of the land tax, it ſhall and may be lawful for ſuch perſon or perſons to appeal againſt ſuch determination, to the general

quarter ſeſſions of the peace for the county riding or diviſion within which ſuch commiſſioners ſhall act, which ſhall happen next after the cauſe of complaint ſhall have ariſen, giving ten days notice of ſuch appeal to one of the commiſſioners ſigning the duplicate of the ſaid aſſeſſment, and alſo to one of the aſſeſſors of the pariſh or place where the eſtate belonging to the perſon or perſons who ſhall think himſelf or themſelves aggrieved ſhall lie: And the juſtices aſſembled in ſuch ſeſſions are hereby authorized and required by examination upon oath, (which oath the ſaid juſtices are hereby authoriſed to adminiſter,) to hear and determine the matter of ſuch appeal, and to amend ſuch aſſeſſments where they ſhall think neceſſary; and alſo to award ſuch coſts, as to them in their diſcretion ſhall ſeem reaſonable; and by their order or warrant to levy the coſts which ſhall be ſo awarded, by diſtreſs and ſale of the goods and chattels of the perſon or perſons againſt whom the ſame ſhall be ſo awarded, rendering the overplus (if any) to the owner or owners after deducting the reaſonable charges of ſuch diſtreſs."

In ſect. 11, proviſion is made that perſons whoſe names on appeal ſhall appear to have been improperly omitted from the rate, ſhall be deemed to have been duly rated.

Sect. 12, relates to huſbands of women intitled to dower out of the eſtates of their former huſbands, who are enabled to vote although the dower may not have been actually aſſigned.

Sect. 13, directs the clerks to give inſpection and copies of the duplicates, on being paid as therein provided; "which ſaid duplicates and alſo a true copy

of them or any part of them, ſigned as aforeſaid; and alſo the duplicate of any aſſeſſment in the poſſeſſion of the commiſſioners of the land tax, or in the poſſeſſion of the receiver general of the county, or a copy of the ſaid duplicates ſigned by the ſaid commiſſioners, and purporting the ſame to be a true copy, ſhall at all times and in all places be allowed and admitted, as legal evidence of ſuch aſſeſſments certificates memorials and books of entries, in all caſes whatſoever: And ſuch copy ſhall be delivered within a reaſonable time after the ſame ſhall be demanded."

Sect. 14, directs the clerk of the peace or his deputy to attend at every county election with the original duplicates, at the requeſt of any candidate; who is to pay him two guineas a day for attendance, and eighteen pence a mile for his travelling expences.

In ſect. 15, That after notice of the iſſuing of the writ, the clerk of the peace is to attend from nine to three each day, where the records of the county are uſually kept, for the purpoſe of making copies of the duplicates, &c.

Sect. 16, inflicts a penalty of 500l. on the clerk of the peace for wilful miſbehaviour contrary to this act; the action to be brought within two months. And the remaining ſections of the act regulate the proceedings for recovering the penalties, or indemnifying the parties concerned.

THE

XIII.

THE

CASE

Of the COUNTY of

BUCKINGHAM.

The Committee was choſen on Monday, April 4, 1785, and conſiſted of the following Members:

Edward Phelips, Eſq; *Chairman.*
Daniel Pultney, Eſq;
Hon. Ed. James Eliot.
John Call, Eſq;
Sir Charles Preſton.
Hon. John Eliot.
Sir John Miller, Bart.
Robert Colt, Eſq;
John M'Namara, Eſq;
Sir Charles Kent, Bart.
John Kynaſton, Eſq;
Lord Viſcount Duncannon.
Alexander Popham, Eſq;

NOMINEES.

Dudley Long, Eſq; *Of the Petitioner.*
John Parry, Eſq; *Of the Sitting Member.*

PETITIONERS.

The Right Hon. Ralph Earl Verney, of the kingdom of Ireland, and certain Freeholders in his Intereſt.

Sitting Member,
John Aubrey, Eſq;

COUNSEL.

For the Petitioners,
Mr. Graham, and Mr. Law.

For the Sitting Member,
Mr. Rous, and Mr. Douglas.

THE CASE

Of the COUNTY of BUCKINGHAM.

THE petition of Earl Verney, and that of the freeholders in his favour, were alike in ſubſtance; and contained the general allegations of a majority of legal votes on the ſide of the petitioner, and of illegal means employed by his opponent Mr. Aubrey to obtain an undue return *.

Mr. W. Grenville, who had been returned with Mr. Aubrey for this county, was not made a party to the petition; his return being unqueſtioned.

The numbers on the poll ſtood as following:

For the Right Hon. Wm. Wyndham Grenville, —	2261
John Aubrey, Eſq; —	1740
The Right Hon. Earl Verney,	1716

* 40 Journ. 39, 472.

In the beginning of this cauſe, after the petitions had been read, the ſame kind of diſpute aroſe between the parties, as happened in the caſe of Bedfordſhire, related in p. 386, reſpecting the mode of proceeding; i. e. whether by ſeparate hundreds, or through the whole county. It began here before the leading counſel for the petitioner had opened the caſe; upon his application to the court to know whether he ſhould open the whole of the petitioner's caſe then, or only the ſtate of that hundred with which he propoſed to begin the trial, and ſo proceed upon the other hundreds reſpectively in the progreſs of it; propoſing to take the ſame courſe as was held in the Bedfordſhire Committee then ſitting, viz. by ſeparate hundreds. To this the ſitting member's counſel objected; and the point was argued on both ſides. The reaſoning and obſervations were in ſubſtance the ſame as are before related upon the ſame queſtion in the Bedfordſhire Committee, to which I refer the reader *. But the deciſion was different from that. The Committee by their reſolution, directed

The petitioner to go through the whole of his caſe.

* See p. 386, 7, 8, 9.

After

After declaring which, the Chairman recommended to the parties, to adhere as much as poſſible to the arrangement of their evidence by hundreds, for their own mutual convenience, and that of the court.

Accordingly the counſel ſtated, in a general manner, the whole of the petitioner's caſe.

The queſtions propoſed to be agitated, were of the ſame kind as thoſe in Bedfordſhire; and the few that were decided have been mentioned in that caſe. The trial was only carried on for ſix days; having commenced on Tueſday the 5th of April, and ended on Monday the 11th following: On which day, the petitioner's counſel having made two objections depending on the conſtruction of the diſqualifying act of 22 Geo. III. ch. 41. which the Committee determined againſt them, formally declined any further proceeding againſt the ſitting member. Theſe objections were, to the votes of a ſubdiſtributor of ſtamps, and of a collector of the window tax; the deciſions of which have been before related.

Mr. Aubrey was hereupon declared duly elected; of which the Chairman informed the houſe April the 11th *.

* 40 Journ. 827.

The

The following is a liſt of all the objections upon which the petitioner proceeded in evidence.

Want of due aſſeſſment to the land tax	39
Inſufficient or no freehold —	4
Inferior value in itſelf — —	5
Reduction of value by mortgage —	5
Bankruptcy — — —	1
Copyhold — — —	1
Mortgagor out of poſſeſſion —	1
Subdiſtributor of ſtamps — —	1
Collector of the houſe and window tax	1
	58

Upon ſome points of evidence which were agitated in this cauſe, of the ſame kind as thoſe mentioned in p. 568,9 of the Bedfordſhire proceedings, the Committee followed the ſame rules. A witneſs was going to relate the contents of a voter's title deeds, of which he had obtained inſpection by threats. This evidence was objected to, and the Committee hereupon reſolved,

That they ought not to compel the production of title deeds: And that the evidence of deeds obtained under the threat of compulſion be not admitted.

In proceeding upon one of the mortgage objections, the circumſtances falling within the above

above reſolution, the petitioner could not produce the deeds in evidence; and a witneſs was called who had made extracts from the deeds, which he was about to read to the court. The counſel for the ſitting member objected to the extracts as not the beſt evidence. The other party anſwered, That the reſolution prevented their producing the originals, and they were therefore to be conſidered as loſt, which would enable them to read the extracts. The Committee reſolved,

That the extract of a deed, in the poſſeſſion of a party not adverſe to its production, be not admitted in evidence inſtead of the original.

[The following caſe in this trial, was by accident omitted to be inſerted in p. 447, next after the caſe of T. Kidman, to which it bears a relation.

John Creaker was objected to as voting for a freehold of leſs than 40s. value. He deſcribed it on the poll as *land*. His freehold conſiſted of a houſe, with a yard annexed to it appurtenant to the houſe, uſed by him as a carpenter's yard. The yard alone was worth 20s, but both together more than 40s. a year. The counſel for the ſitting member contended for the right of taking the value of the *houſe* into conſideration, in eſtimating the freehold; becauſe *land* in the legal ſenſe included buildings on the land, and where both made one entire tenement, neceſſarily paſſed together; although where they are ſeparate from each other, it might be neceſſary to deſcribe both. The petitioner's

petitioner's counſel objected to any evidence of the value of the *houſe*, to ſupport a vote which had been deſcribed to conſiſt of land alone; becauſe it would confound the common deſcription of *houſe and land*, which cuſtom had very properly eſtabliſhed for diſtinguiſhing the two, according to the requiſitions of the law. The court by their reſolution allowed the inquiry into the value of the houſe, in order to make out the qualification of the voter.]

APPENDIX.

The ſtatute 28 *Geo. III. ch.* 52. *containing many uſeful regulations upon the ſubject of elections, will neceſſarily be referred to often upon the trials of them: For which reaſon it ſeemed to me proper to ſubjoin an exact copy of it to this volume, for the convenience of parties concerned,* viz.

Stat. 28 Geo. III. ch. 52.

An Act for the further Regulation of the Trials of controverted Elections or Returns of Members to ſerve in Parliament.

WHEREAS, by an act of parliament paſſed in the tenth year of the reign of his preſent Majeſty, intituled, An Act to regulate the Trials of Controverted Elections, or Returns of Members to ſerve in Parliament, certain regulations were eſtabliſhed, for a time therein limited, for the trials of controverted elections, or returns of members to ſerve in parliament: And whereas, by an act paſſed in the eleventh year of the reign of his preſent majeſty, intituled, An Act to explain and amend an Act made in the laſt Seſſion of Parliament, intituled, *An Act to regulate the Trials of Controverted Elections, or Returns of Members to ſerve in Parliament*, further regulations were made therein: And

Preamble reciting 10 Geo. III. cap. 16;

11 Geo. III. cap. 42;

And whereas the provisions of the said Acts were, by an act passed in the fourteenth year of the reign of his present majesty, continued and made perpetual: And whereas, by an act passed in the twenty-fifth year of the reign of his present majesty, intituled, An Act to limit the Duration of Polls and Scrutinies, and for making other Regulations touching the Election of Members to serve in Parliament for Places within England and Wales, and for Berwick upon Tweed, and also for removing Difficulties which may arise for Want of Returns being made of Members to serve in Parliament. The provisions of the said acts were extended, in the manner therein mentioned, to petitions complaining that no return has been made to a writ issued for the election of a member or members to serve in parliament, within the times limited in the said act; or that such return is not a return of a member or members according to the requisition of the writ: And whereas it is expedient that further regulations should be made for the execution of the said several acts, and that provision should be made for discouraging persons from presenting frivolous or vexatious petitions, or setting up frivolous or vexatious defences, in any of the cases to which the above-recited acts relate: And that provision should also be made for the final decision of questions respecting the rights of voting at such elections, or of nominating or appointing the returning officer or returning officers who are to preside thereat: BE IT THEREFORE ENACTED by the King's Most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, That no petition complaining of an undue election or return, or of the omission of a return, or of the insufficiency of a return, shall be proceeded upon in the manner prescribed in the said above recited acts, unless the same shall be subscribed by some person or persons claiming therein to have had a right to vote at the election to which the same

and 25 Geo. III. cap. 84.

No petition complaining of an undue election or return, to be proceeded upon, unless subscribed as herein mentioned.

shall

ſhall relate, or to have had a right to be returned as duly elected thereat, or alledging himſelf or themſelves to have been a candidate or candidates at ſuch election. Provided always, That in any caſe where a writ has been iſſued for the election of a member to ſerve in parliament for any diſtrict of burghs in that part of Great Britain called Scotland, any ſuch petition as aforeſaid ſhall and may be ſo proceeded upon, if the ſame ſhall be ſubſcribed by any perſon or perſons claiming therein to have had a right to vote at the election of any delegate or delegates, commiſſioner or commiſſioners, for chuſing a burgeſs for ſuch diſtrict.

In caſe of death of ſitting member, or of his becoming a Peer, or his place vacated, or if he will not defend, notice to be ſent by the Speaker to the returning officer of the place to which any ſuch petition relates,

II. And be it further enacted, That if, at any time before the day appointed for taking any ſuch petition into conſideration, the Speaker of the Houſe of Commons ſhall be informed, by a certificate in writing ſubſcribed by two of the members of the ſaid houſe, of the death of the ſitting member or ſitting members, or either of them, whoſe election or return is complained of in ſuch petition, or of the death of any member or members returned upon a double return, whoſe election or return is complained of in ſuch petition, or that a writ of ſummons has been iſſued under the great ſeal of Great Britain, to ſummon any ſuch member or members to parliament as a peer of Great Britain; or if the Houſe of Commons ſhall have reſolved that the ſeat of any ſuch member is by law become vacant; or if the ſaid houſe ſhall be informed, by a declaration in writing, ſubſcribed by ſuch member or members, or either of them, as the caſe ſhall be, and delivered in at the table of the houſe, that it is not the intention of ſuch member or members to defend his or their election or return; in every ſuch caſe notice thereof ſhall immediately be ſent by the Speaker to the ſheriff, or other returning officer for the county, borough or place to which ſuch petition ſhall relate: And ſuch ſheriff or other returning officer ſhall cauſe a true copy of the ſame to be affixed on the doors of the county hall or town hall, or of the

and a copy to be affixed on the doors of the coun-

parish

ty or town hall, or neareſt church, and inſerted in the Gazette.

pariſh church neareſt to the place where ſuch election has uſually been held, and ſuch notice ſhall alſo be inſerted, by order of the Speaker in the next London Gazette; and the order for taking ſuch petition into conſideration ſhall, if neceſſary, be adjourned, ſo that at the leaſt thirty days may intervene between the day on which ſuch notice ſhall be inſerted in the ſaid Gazette, and the day on which ſuch petition ſhall be taken into conſideration.

Order for taking ſuch petitions into conſideration may be adjourned.

Within 30 days after ſuch notice, any voter may petition to be admitted a party.

III. And be it enacted, That it ſhall and may be lawful, at any time within thirty days after the day on which ſuch notice ſhall have been inſerted in the ſaid Gazette, for any perſon or perſons claiming to have had a right to vote at ſuch election, or at the election of delegates or commiſſioners for making ſuch election, to petition the houſe, praying to be admitted as a party or parties, in the room of ſuch member or members, or either of them; and ſuch perſon or perſons ſhall thereupon be ſo admitted as a party or parties, and ſhall be conſidered as ſuch, to all intents and purpoſes whatever.

Members giving notice of intention not to defend, not to be admitted as parties.

IV. And be it enacted, That whenever the member or members, whoſe election or return is ſo complained of in ſuch petition, ſhall have given ſuch notice as aforeſaid of his or their intention not to defend the ſame, he or they ſhall not be admitted to appear or act as a party or parties againſt ſuch petition, in any ſubſequent proceedings thereupon, any thing in the above-recited acts to the contrary notwithſtanding. And he or they ſhall alſo be reſtrained from ſitting in the houſe, or voting in any queſtion, until ſuch petition ſhall have been decided upon in the manner preſcribed by the above recited acts and by this act.

No proceedings upon any petition, unleſs one of the ſubſcribers enter into a recognizance to appear.

V. And be it further enacted, That no proceeding ſhall be had upon any petition, by virtue of the above recited acts or of this act, unleſs the perſon or perſons ſubſcribing the ſame, or ſome one or more of them, ſhall, within fourteen days after the ſame ſhall have been preſented to the houſe,

or

or within ſuch further time as ſhall be limited by the houſe, perſonally enter into a recognizance to our ſovereign lord the king, according to the form hereunto annexed, in the ſum of two hundred pounds, with two ſufficient ſureties in the ſum of one hundred pounds each, to appear before the houſe at ſuch time or times as ſhall be fixed by the houſe for taking ſuch petition into conſideration; and alſo to appear before any ſelect Committee which ſhall be appointed by the houſe for the trial of the ſame, and to renew the ſame in every ſubſequent ſeſſion of parliament, until a ſelect Committee ſhall have been appointed by the houſe for the trial of the ſame, or until the ſame ſhall have been withdrawn by the permiſſion of the houſe: And if, at the expiration of the ſaid fourteen days, ſuch recognizance ſhall not have been ſo entered into, or ſhall not have been received by the Speaker of the Houſe of Commons, the Speaker ſhall report the ſame to the houſe, and the order for taking ſuch petition into conſideration ſhall thereupon be diſcharged, unleſs, upon matter ſpecially ſtated and verified to the ſatisfaction of the houſe, the houſe ſhall ſee cauſe to enlarge the time for entering into ſuch recognizance. And whenever ſuch time ſhall be ſo enlarged, the order for taking ſuch petition into conſideration ſhall, if neceſſary, be poſtponed, ſo that no ſuch petition ſhall be ſo taken into conſideration till after ſuch recognizance ſhall have been entered into and received by the Speaker. Provided always, That the time for entering into ſuch recognizance ſhall not be enlarged more than once, nor for any number of days exceeding thirty.

and if no recognizance entered into, the order to be diſcharged, unleſs cauſe, &c.

VI. And be it enacted, That the ſaid recognizances ſhall be entered into before the Speaker of the Houſe of Commons, who is hereby authorized and empowered to take the ſame; and the ſufficiency of the ſureties named therein ſhall be judged of and allowed by the ſaid Speaker, on the report of two perſons appointed by him to examine the ſame; of which two perſons the clerk, or clerk aſſiſtant of the houſe,

Recognizances to be entered into before the Speaker, and the ſureties to be allowed of by him, on report, &c.

ſhall always be one, and one of the following officers, not being a member of the ſaid houſe, ſhall be the other; (that is to ſay) maſters of the high court of Chancery, clerks in the court of King's Bench, prothonotaries in the court of Common Pleas, and clerks in the court of Exchequer: And the ſaid perſons ſo appointed are hereby authoriſed and required to examine the ſame, and to report their judgement thereupon; and are alſo hereby authoriſed to demand and receive ſuch fees, for ſuch examination and report, as ſhall be, from time to time, fixed by any reſolution of the houſe of commons.

Sureties living more than 40 miles from London may enter recognizances before a juſtice.

VII. Provided always, and be further enacted, That in any caſe where the party or parties who are to enter into ſuch recognizance, or his or their ſureties, or either of them, ſhall reſide at a greater diſtance from London than forty miles, it ſhall and may be lawful for ſuch party or parties, ſurety or ſureties, reſpectively, to enter into ſuch recognizance before any of his majeſty's juſtices of the peace; and his majeſty's juſtices of the peace, or any of them, is and are hereby authorized and empowered to take the ſame; and ſuch recognizance, being duly certified under the hand of the juſtice, and being tranſmitted to the Speaker of the Houſe of Commons, ſhall have the ſame force and effect as if the ſame had been entered into before the ſaid Speaker: Provided alſo, that it ſhall and may be lawful for the perſons to whom it is referred by the Speaker to examine the ſufficiency of ſuch ſurety or ſureties, to receive as evidence in their ſaid examination, any affidavits relating thereto which ſhall be ſworn before any maſter of the high court of Chancery, or before any of his majeſty's juſtices of the peace; and ſuch maſter of the high court of Chancery, or juſtice of the peace, reſpectively, is hereby authorized to adminiſter ſuch oath, and is authorized and required to certify ſuch affidavit under his hand.

Affidavits before a maſter or juſtice, to be evidence of the ſufficiency of ſureties.

VIII. And

VIII. And be it enacted, That the houſe ſhall not permit any ſuch petition to be withdrawn, except ſo far as the ſame may relate to the election or return of any member or members who ſhall, ſince the ſame ſhall have been preſented, have vacated his or their ſeat by death, or in any other manner. No petition to be withdrawn unleſs the ſeat vacated.

IX. And be it enacted, That if the petitioner or petitioners who ſhall have entered into ſuch recognizance as aforeſaid, ſhall not appear before the houſe by himſelf or themſelves, or by his or their counſel or agents, within one hour after the time fixed, in purſuance of the above recited acts and of this act, for calling in the reſpective parties their counſel or agents, for the purpoſe of proceeding to the appointment of a ſelect Committee; or if the ſelect Committee appointed in purſuance of the ſaid acts and of this act, for the trial of ſuch petition, ſhall inform the houſe that ſuch perſon or perſons did not appear before the ſaid Committee by himſelf or themſelves, or by his or their counſel or agents, to proſecute their ſaid petition; or if ſuch perſon or perſons ſhall neglect to renew their ſaid petition within four ſitting days after the day of the commencement of every ſeſſion of the ſame parliament, ſubſequent to that in which ſuch petition was firſt preſented, and until a ſelect Committee ſhall have been appointed for trial of the ſame, or until the ſame ſhall have been withdrawn by the permiſſion of the houſe, in every ſuch caſe ſuch perſon or perſons ſhall be held to have made default in his or their ſaid recognizance: And the Speaker of the Houſe of Commons ſhall thereupon certify ſuch recognizance into the court of Exchequer, and ſhall alſo certify that ſuch perſon or perſons have made default therein; and ſuch certificate ſhall be concluſive evidence of ſuch default, and the recognizance being ſo certified ſhall have the ſame effect as if the ſame were eſtreated from a court of law: Provided always, That ſuch recognizance and certificate ſhall in every ſuch caſe be delivered, Recognizances of petitioners not appearing at the time fixed, to be certified into the Exchequer. Recognizance and certificate to be delivered

into the Exchequer.

vered by the clerk or clerk aſſiſtant of the Houſe of Commons, into the hands of the Lord Chief Baron of the Exchequer, or of one of the Barons of the Exchequer, or of ſuch officer of the court of Exchequer as ſhall be appointed by the ſaid court to receive the ſame.

Good Friday to be excepted.

X. And whereas, by ſeveral proviſions contained in the above-recited acts made in the tenth and eleventh years of the reign of his preſent majeſty, Sunday and Chriſtmas Day are excepted from the general regulations of the ſaid acts; be it hereby enacted, That in every ſuch caſe, Good Friday ſhall alſo be excepted therefrom, in the ſame manner as if the ſame had been ſpecially excepted in the ſaid acts.

If on the day preceding a holiday, there ſhall not be a Committee, the order and the houſe, may be adjourned for any number of days.

XI. And be it alſo enacted, That if, on the day immediately preceding any of the three following days, that is to ſay, Chriſtmas Day, Whitſunday, or Good Friday, after reading the order of the day for taking any ſuch petition as aforeſaid in conſideration, it ſhall be found that there are not one hundred members preſent, or that the number of forty-nine members not ſet aſide or excuſed cannot be completed, it ſhall and may be lawful for the houſe, if they ſhall think fit, any thing in the above-recited acts to the contrary notwithſtanding, to direct that the ſaid order ſhall be adjourned for any number of days, and the houſe ſhall then immediately be adjourned to the hour and day to which ſuch order ſhall be ſo adjourned.

On days appointed for petitions, the houſe may receive reports from Select Committees, and attend the Houſe of Lords.

XII. And whereas it is enacted, by the ſaid act paſſed in the eleventh year of the reign of his preſent majeſty, that on the day appointed for taking ſuch petition into conſideration, the houſe ſhall not proceed to any other buſineſs whatſoever, except the ſwearing of members, previous to the reading of the order of the day for that purpoſe; be it hereby enacted, That it ſhall and may be lawful for the houſe, previous to reading ſuch order, to receive any report from any ſelect Committee appointed in purſuance of the above-recited acts or of this act, and to enter the ſame upon their Journals,

and

and to give the neceſſary orders and directions thereupon; and that previous to reading the ſaid order, the clerk of the crown may be admitted to alter or amend any return, in purſuance of an order made on a preceding day, or on that day; and alſo, that it ſhall and may be lawful for the houſe, previous to reading the ſaid order, to poſtpone the ſame for the purpoſe of attending his majeſty or his majeſty's commiſſioners, in the Houſe of Lords, in conſequence of any meſſage from his majeſty or from his majeſty's commiſſioners, ſignified to the houſe in the uſual manner.

If petitioners do not appear within an hour after the time fixed, the order to be diſcharged.

XIII. And be it alſo enacted, That if, within one hour after the time fixed in purſuance of the above-recited acts and of this act, for calling in the reſpective parties their counſel or agents, for the purpoſe of proceeding to the appointment of a Select Committee, the petitioner or petitioners, or ſome one or more of them, who ſhall have ſigned any ſuch petition, ſhall not appear by himſelf or themſelves or by his or their counſel or agents, the order for taking ſuch petition into conſideration ſhall thereupon be diſcharged, and ſuch petition ſhall not be any further proceeded upon in the manner directed in the above-recited acts, and in this act.

Regulations for trial of petitions, where no party appears to oppoſe them.

XIV. And be it enacted, That if, within one hour after the time ſo appointed as aforeſaid, the ſitting member or ſitting members, or other party or parties oppoſing the ſaid petition, ſhall not appear by himſelf or themſelves or by his or their counſel or agents, or if, at the time ſo appointed as aforeſaid, there ſhall be no party before the houſe oppoſing the petition, the houſe ſhall proceed to appoint a ſelect Committee, to try the merits of ſuch petition, in the following manner; (that is to ſay) That the names of forty-nine members ſhall be drawn, in the manner preſcribed in the above-recited acts; but in reducing the liſt of ſuch names to thirteen, the place of a party oppoſing the petition ſhall be ſupplied by the clerk appointed to attend the ſaid Committee,

who ſhall, as often as it ſhall come to his turn, as ſupplying the place of the party oppoſing the petition, to ſtrike out a name, ſtrike out that name which then ſhall be firſt in the ſaid liſt; and in every caſe where the party oppoſing the petition would be impowered by the above-recited acts, to nominate one member to be added to the ſaid thirteen, the ſaid thirteen ſhall, from among the perſons preſent in the houſe at the time of drawing the names of the members, chuſe one perſon to ſupply the place of the member to have been ſo nominated, in the ſame manner as is directed by the above-recited act made in the eleventh year of his majeſty's reign, in the caſe where there are more than two parties on diſtinct intereſts.

The ſame method of reducing the liſt to 13 members, &c. to be followed when the right to it waived.

XV. And be it further enacted, That the ſame method of reducing the liſt of members drawn to thirteen, and of nominating a member to be added to the thirteen remaining on the ſaid liſt, ſhall be reſpectively followed, whenever any party ſhall waive his right of ſtriking off names from the ſaid liſt, or of nominating a member to be added to the ſaid thirteen.

Witneſſes not attending, or giving falſe evidence, &c. to be committed.

XVI. And be it further enacted, That if any perſon ſummoned to attend the ſaid ſelect Committee by the warrant of the Speaker of the ſaid houſe, or by order of the ſaid Committee, ſhall diſobey ſuch ſummons, or ſhall give falſe evidence, or prevaricate, or otherwiſe miſbehave in giving, or in refuſing to give evidence before the ſaid Committee, the ſaid Committee ſhall have power, by a warrant to be ſigned by the Chairman, and directed to the ſerjeant at arms attending the Houſe of Commons, or to his deputy or deputies, to commit ſuch perſon (not being a peer of the realm or a lord of parliament) to the cuſtody of the ſaid ſerjeant, without bail or mainprize, for any time not exceeding twenty-four hours if the houſe ſhall then be ſitting; or if not, then for a time not exceeding twenty-four hours after the hour to which the houſe ſhall then be adjourned.

XVII.

XVII. And whereas it is enacted by the ſaid act made in the tenth year of his majeſty's reign, That if more than two members of the ſaid ſelect Committee ſhall, on any account, be abſent therefrom, the ſaid ſelect Committee ſhall adjourn in the manner in the ſaid act directed, and ſo from time to time, until thirteen members are aſſembled; and that no ſuch determination as in the ſaid act is mentioned ſhall be made, nor any queſtion be propoſed, unleſs thirteen members ſhall be preſent; and that no member ſhall have a vote on ſuch determination, or any other queſtion or reſolution, who has not attended during every ſitting of the ſaid ſelect Committee; and that, in caſe the number of members able to attend the ſaid Committee ſhall, by death or otherwiſe, be unavoidably reduced to leſs than thirteen, and ſhall ſo continue for the ſpace of three ſitting days, the ſaid Committee ſhall be diſſolved, and another choſen to try and determine the matter of ſuch petition, in the manner in the ſaid act before provided; Be it hereby enacted, That whenever any Committee ſhall have ſat for buſineſs fourteen days, not including thoſe days on which they ſhall have adjourned on account of the abſence of any member, nor including Sunday, Chriſtmas Day, or Good Friday, it ſhall and may be lawful for them to proceed to buſineſs, if a number of members not leſs than twelve be preſent; and in ſuch caſe, the Committee ſhall not be diſſolved by reaſon of the abſence of the members, unleſs the number of members able to attend the ſame ſhall, by death or otherwiſe, be unavoidably reduced to leſs than twelve, and ſhall ſo continue for the ſpace of three ſitting days: And whenever any Committee ſhall in the like manner have ſat for buſineſs twenty-five days, it ſhall and may be lawful for them to proceed to buſineſs, if a number of members not leſs than eleven be preſent; and in ſuch caſe, the Committee ſhall not be diſſolved by reaſon of the abſence of the members, unleſs the number of members able to attend the ſame ſhall, by death

Recital of ſect. 24 of 10 G. III. ch. 16.

If a Committee ſhall have ſat 14 days, 12 members may proceed therein;

and if 25 days, 11 members may proceed.

or otherwiſe, be unavoidably reduced to leſs than eleven, and ſhall ſo continue for the ſpace of three ſitting days.

Committees to report whether petitions, &c. are frivolous or vexatious.

XVIII. And be it further enacted, That every ſuch Committee, at the ſame time that they report to the Houſe their final determination on the merits of the petition which they were ſworn to try, ſhall alſo report to the Houſe whether ſuch petition did, or did not, appear to them to be frivolous or vexatious: And that they ſhall in like manner report, with reſpect to every party or parties who ſhall have appeared before them in oppoſition to ſuch petition, whether the oppoſition of ſuch party or parties reſpectively did, or did not, appear to them to be frivolous or vexatious: And that if no party ſhall have appeared before them in oppoſition to ſuch petition, they ſhall then report to the Houſe whether ſuch election or return, or ſuch alledged omiſſion of a return, or ſuch alledged inſufficiency of a return, as ſhall be complained of in ſuch petition, according as the caſe ſhall be, did, or did not appear to them to be vexatious or corrupt.

Parties oppoſing petitions reported vexatious or frivolous,

XIX. And be it enacted, That whenever any ſuch Committee ſhall report to the Houſe, with reſpect to any ſuch petition, that the ſame appeared to them to be frivolous or vexatious, the party or parties, if any, who ſhall have appeared before the Committee in oppoſition to ſuch petition, ſhall be entitled to recover, from the perſon or perſons, or any of them, who ſhall have ſigned ſuch petition, the full coſts and expences which ſuch party or parties ſhall have incurred in oppoſing the ſame; ſuch coſts and expences to be aſcertained in the manner herein-after directed.

and petitioners reported to have been vexatiouſly or frivolouſly oppoſed, to have coſts.

XX. And be it alſo enacted, That whenever any ſuch Committee ſhall report to the Houſe, with reſpect to the oppoſition made to ſuch petition by any party or parties who ſhall have appeared before them, that ſuch oppoſition appeared to them to be frivolous or vexatious, the perſon or perſons who ſhall have ſigned ſuch petition ſhall be entitled

to

to recover from ſuch party or parties, or any of them, with reſpect to whom ſuch report ſhall be made, the full coſts and expences which ſuch petitioner or petitioners ſhall reſpectively have incurred in proſecuting their ſaid petition; ſuch coſts and expences to be aſcertained in the manner herein-after directed.

Where no party appears in oppoſition to a petition, the coſts to be paid by the ſitting members, &c.

XXI. And be it alſo enacted, That whenever, in any caſe where no party ſhall have appeared before ſuch Committee in oppoſition to ſuch petition, ſuch Committee ſhall report to the Houſe, with reſpect to the election or return, or to the alledged omiſſion of a return, or to the alledged inſufficiency of a return, complained of in any ſuch petition, that the ſame appeared to them to be vexatious or corrupt, the perſon or perſons who ſhall have ſigned ſuch petition ſhall be entitled to recover from the ſitting member or ſitting members (if any) whoſe election or return ſhall be complained of in ſuch petition, ſuch ſitting member or ſitting members not having given notice as aforeſaid of his or their intention not to defend the ſame, or from any other perſon or perſons whom the Houſe ſhall have admitted or directed to be made a party or parties to oppoſe ſuch petition, the full coſts and expences which ſuch petitioner or petitioners ſhall have incurred in proſecuting their ſaid petition; ſuch coſts and expences to be aſcertained in the manner herein-after directed.

How ſuch coſts and expences are to be aſcertained.

XXII. And be it enacted, That in the ſeveral caſes herein-before mentioned, the coſts and expences of proſecuting or oppoſing any ſuch petition ſhall be aſcertained in manner following; (that is to ſay), That on application made to the Speaker of the Houſe of Commons, by any ſuch petitioner or petitioners, or party or parties, as before-mentioned, for aſcertaining ſuch coſts and expences, he ſhall direct the ſame to be taxed by two perſons, of whom the clerk or clerk aſſiſtant of the Houſe ſhall always be one, and one of the following officers, not being a member of the Houſe, ſhall be

be the other; (that is to ſay), Maſters in the High Court of Chancery, clerks in the court of King's Bench, prothonotaries in the court of Common Pleas, and clerks in the court of Exchequer; and the perſons ſo authorized and directed to tax ſuch coſts and expences ſhall, and they are hereby required to examine the ſame, and to report the amount thereof to the Speaker of the ſaid Houſe; who ſhall, on application made to him, deliver to the party or parties a certificate, ſigned by himſelf, expreſſing the amount of the coſts and expences allowed in ſuch report; and the perſons ſo appointed to tax ſuch coſts, and report the amount thereof, are hereby authorized to demand and receive, for ſuch taxation and report, ſuch fees as ſhall be, from time to time, fixed by any reſolution of the Houſe.

If coſts, &c. be not paid on demand, they may be recovered by action of debt, &c.

XXIII. And be it enacted, That it ſhall and may be lawful for the party or parties entitled to ſuch coſts and expences, or for his, her, or their executors or adminiſtrators, to demand the whole amount thereof, ſo certified as above, from any one or more of the perſons reſpectively, who are herein-before made liable to the payment thereof, in the ſeveral caſes herein-before mentioned; and, in caſe of nonpayment thereof, to recover the ſame by action of debt, in any of his Majeſty's courts of record at Weſtminſter; in which action it ſhall be ſufficient for the plaintiff or plaintiffs to declare that the defendant or defendants is or are indebted to him or them (in the ſum to which the coſts and expences, aſcertained in manner aforeſaid, ſhall amount) by virtue of this act; and the certificate of the Speaker of the Houſe of Commons, under his ſignature, of the amount of ſuch coſts and expences, together with an examined copy of the entries in the Journals of the Houſe of Commons, of the reſolution or reſolutions of the ſaid Select Committee or Committees, ſhall be deemed full and ſufficient evidence in ſupport of ſuch action of debt: Provided always, That in every ſuch action

action of debt, no wager of law, or more than one imparlance, shall be allowed; and the party or parties in whose favour judgment shall be given in any such action, shall recover his or their costs. Judgement in such actions to entitle the party to costs.

XXIV. And be it further enacted, That in every case where the amount of such costs and expences shall have been so recovered from any person or persons, it shall and may be lawful for such person or persons to recover in like manner from the other persons, or any of them, if such there shall be, who shall be liable to the payment of the said costs and expences, a proportionable share thereof according to the number of persons so liable. Persons paying costs may recover a proportion from any persons liable.

XXV. And be it further enacted, That whenever any such Select Committee, appointed to try the merits of any such petition as aforesaid, shall be of opinion that the merits of such petition do wholly or in part depend on any question or questions which shall be before them respecting the right of election for the county, city, borough, district of burghs, or other place to which such petition shall relate; or respecting the right of chusing nominating or appointing the returning officer or returning officers, who is or are to make return of such election, the said Committee, in such case, shall require the counsel or agents for the several parties, or if there shall be none such before them, shall then require the parties themselves to deliver to the clerk of the said Committee, statements in writing of the right of election, or of chusing nominating or appointing returning officers, for which they respectively contend. And the Committee shall come to distinct resolutions on such statements, and shall, at the same time that they report to the House their final determination on the merits of such petition, also report to the House such statement or statements, together with their judgement with respect thereto. And such report shall thereupon be entered in the Journals of the House, and notice thereof shall be sent by the Speaker to the sheriff, or other returning When petitions depend on questions respecting the right of election, &c. statements of such right to be delivered in writing; and the committee to report their judgement on such statements. Report to be entered in the Journals, and notice thereof sent

to the returning officer.

returning officer of the place to which the ſame ſhall relate; and a true copy of ſuch notice ſhall, by ſuch ſheriff or other returning officer, be forthwith affixed to the doors of the county hall or town hall or of the pariſh church neareſt to the place where ſuch election has uſually been held; and ſuch notice ſhall alſo be inſerted by order of the Speaker in the next London Gazette.

Any perſon may, within 12 months after, petition againſt the right thereby eſtabliſhed;

XXVI. And be it enacted, That it ſhall and may be lawful for any perſon or perſons, at any time within twelve calendar months after the day on which ſuch report ſhall have been made to the Houſe, or within fourteen days after the day of the commencement of the next ſeſſion of parliament after that in which ſuch report ſhall have been made to the Houſe, to petition the Houſe to be admitted as a party or parties to oppoſe that right of election, or of chuſing, nominating or appointing the returning officer or returning officers, who is or are to make return of ſuch election, which ſhall have been deemed valid in the judgment of ſuch Committee.

But if no ſuch petition, the judgement to be concluſive.

XXVII. And be it enacted, That if no ſuch petition ſhall be ſo preſented within the time above limited for preſenting the ſame, the ſaid judgement of ſuch Committee, on ſuch queſtion or queſtions, ſhall be held and taken to be final and concluſive in all ſubſequent elections of members of parliament for that place to which the ſame ſhall relate, and to all intents and purpoſes whatſoever; any uſage to the contrary notwithſtanding.

Forty days to intervene between the preſenting and hearing ſuch petitions.

XXVIII. And be it enacted, That whenever any ſuch petition ſhall be ſo preſented, a day and hour ſhall be appointed by the Houſe for taking the ſame into conſideration, ſo that the ſpace of forty days at the leaſt ſhall always intervene, between the day of preſenting ſuch petition and the day appointed by the Houſe for taking the ſame into conſideration; and notice of ſuch day and hour ſhall be inſerted, by order of the Speaker, in the next London Gazette, and ſhall alſo

alſo be ſent by him to the ſheriff or other returning officer for the place to which ſuch petition ſhall relate; and a true copy of ſuch notice ſhall, by the ſaid ſheriff or other returning officer, be forthwith affixed to the doors of the county hall or town hall or of the pariſh church neareſt to the place where ſuch election has uſually been held.

Before the hearing, *any perſon* may petition to defend the right.

XXIX. And be it enacted, That it ſhall and may be lawful for any perſon or perſons, at any time before the day ſo appointed for taking ſuch petition into conſideration, to petition the Houſe to be admitted as a party or parties to defend ſuch right of election, or of chuſing nominating or appointing the returning officer or returning officers; and ſuch perſon or perſons ſhall thereupon be ſo admitted, and ſhall be conſidered as ſuch to all intents and purpoſes whatever.

Committee to be appointed to try ſuch petitions, whoſe determinations ſhall be concluſive.

XXX. And be it enacted, That at the hour appointed by the Houſe for taking ſuch petition into conſideration, the Houſe ſhall proceed to appoint a Select Committee to try the merits thereof, according to the directions of the above-recited acts, and of this act. And ſuch Select Committee ſhall be ſworn to try and determine the merits of ſuch petition, ſo far as the ſame relate to any queſtion or queſtions reſpecting the right of election for the place to which the petition ſhall relate, or reſpecting the right of appointing nominating or chuſing the returning officer or returning officers who are to make return of ſuch election: And the determination of ſuch Committee on ſuch queſtion or queſtions, ſhall be entered on the Journals of the Houſe, and ſhall be held and taken to be final and concluſive in all ſubſequent elections of members of parliament for that place to which the ſame ſhall relate, and to all intents and purpoſes whatever, any uſage to the contrary notwithſtanding.

2 Geo. II. cap. 24, ſect. 4.

XXXI. And whereas it is amongſt other things enacted, by an act paſſed in the ſecond year of the reign of his late Majeſty king George the Second, intituled, An Act for the

more

more effectual preventing Bribery and Corruption in the Elections of Members to ſerve in Parliament, That ſuch votes ſhall be deemed to be legal which have been ſo declared by the laſt determination in the Houſe of Commons; which laſt determination concerning any county ſhire city borough cinque port or place, ſhall be final to all intents and purpoſes whatever, any uſage to the contrary notwithſtanding; Be it enacted, That ſo much of the ſaid act as is above recited ſhall be, and the ſame is hereby repealed, in ſo far only as the ſame relates, or might be conſtrued to relate, to any ſuch determination to be made in the Houſe of Commons ſubſequent to the paſſing of this act.

repealed as to any determination ſubſequent to paſſing this act.

Recited acts to be in force with reſpect to Committees under this act.

XXXII. And be it enacted, That all and every the rules regulations authorities and powers preſcribed or given by the above-recited acts, or by this act, to Select Committees for the trial of controverted elections or returns, ſhall be in full force and effect with reſpect to Select Committees appointed by virtue of this act, for the trial of ſuch queſtion or queſtions of right as aforeſaid, in as full and ample a manner as if the ſame were herein repeated, and particularly and ſpecially enacted, concerning ſuch Select Committees: Provided always, That the ſeveral rules and regulations herein-before enacted, by which certain perſons are directed to enter into recognizances, and by which certain perſons are made liable to the payment of coſts, in the particular manner and in the ſeveral caſes herein before ſpecified, ſhall not be conſtrued to apply to the caſe of any petition preſented in purſuance of this act, and relating ſolely to any queſtion or queſtions reſpecting the right of election, or of chuſing nominating or appointing a returning officer or returning officers.

Recognizances and payment of coſts not to apply to petitions ſolely reſpecting right of election.

Committees not diſſolved by prorogation.

XXXIII. And be it further enacted, That whenever it ſhall happen that parliament ſhall be prorogued while any Select Committee ſhall be ſitting for the trial of any ſuch petition as aforeſaid, and before they ſhall have reported to

the Houſe their determination thereon, ſuch Committee ſhall not be diſſolved by ſuch prorogation; but ſhall be thereby adjourned to twelve of the clock on the day immediately following that on which parliament ſhall meet again for the diſpatch of buſineſs (Sundays, Good Friday, and Chriſtmas Day, always excepted): And all former proceedings of the ſaid Committee ſhall remain and continue to be of the ſame force and effect, as if parliament had not been ſo prorogued: And ſuch Committee ſhall meet on the day and hour to which it ſhall be ſo adjourned, and ſhall thenceforward continue to ſit from day to day, in the manner provided in the above-recited acts and in this act, until they ſhall have reported to the Houſe their determination on the merits of ſuch petition.

FORM of the RECOGNIZANCE referred to in this Act.

BE it remembered, That on the Day of in the Year of our Lord before me A. B. [*Speaker of the Houſe of Commons*] or [*One of His Majeſty's Juſtices of the Peace for the County of*] *came* C. D. E. F. *and* J. G. *and ſeverally acknowledged themſelves to owe to our Sovereign Lord the King the following Sums; that is to ſay, the ſaid* C. D. *the Sum of Two hundred Pounds, and the ſaid* E. F. *and the ſaid* J. G. *the Sum of One hundred Pounds each, to be levied on their reſpective Goods and Chattels, Lands, and Tenements, to the Uſe of our ſaid Sovereign Lord the King, His Heirs and Succeſſors, in caſe the ſaid* C. D. *ſhall fail in performing the Condition hereunto annexed.*

The

The Condition of this Recognizance is, that if the ſaid C. D. *ſhall duly appear before the Houſe of Commons, at ſuch Time or Times as ſhall be fixed by the ſaid Houſe for taking into Conſideration the Petition ſigned by the ſaid* C. D. *complaining of an undue Election or Return for the of* [Here ſpecify the County, City, Borough, or Diſtrict of Burghs] or, *complaining that no Return has been made for the ſaid* [ ] *of* [ ] *within the Time limited by Act of Parliament*, or, *that the Return made for the ſaid* [ ] *of* [ ] *is not a Return of a Member or Members according to the Requiſition of the Writ, and ſhall appear before any Select Committee which ſhall be appointed by the Houſe of Commons for the Trial of the ſame, and ſhall renew his ſaid Petition in every ſubſequent Seſſion of this preſent Parliament, until a Select Committee ſhall have been appointed by the ſaid Houſe for the Trial of the ſame, or until the ſame ſhall have been withdrawn by the Permiſſion of the ſaid Houſe; then this Recognizance to be void, otherwiſe to be of full Force and Effect.*

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