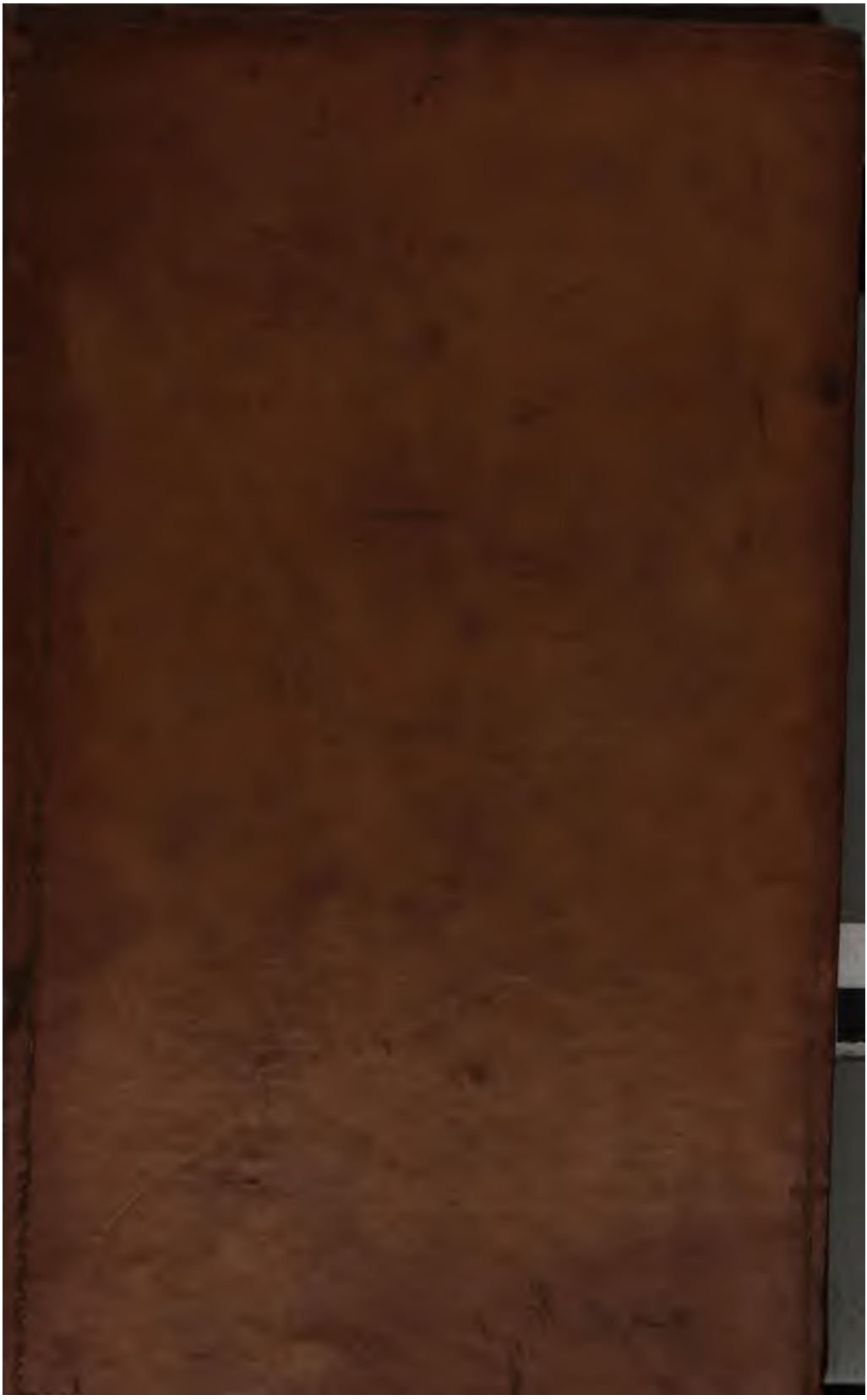

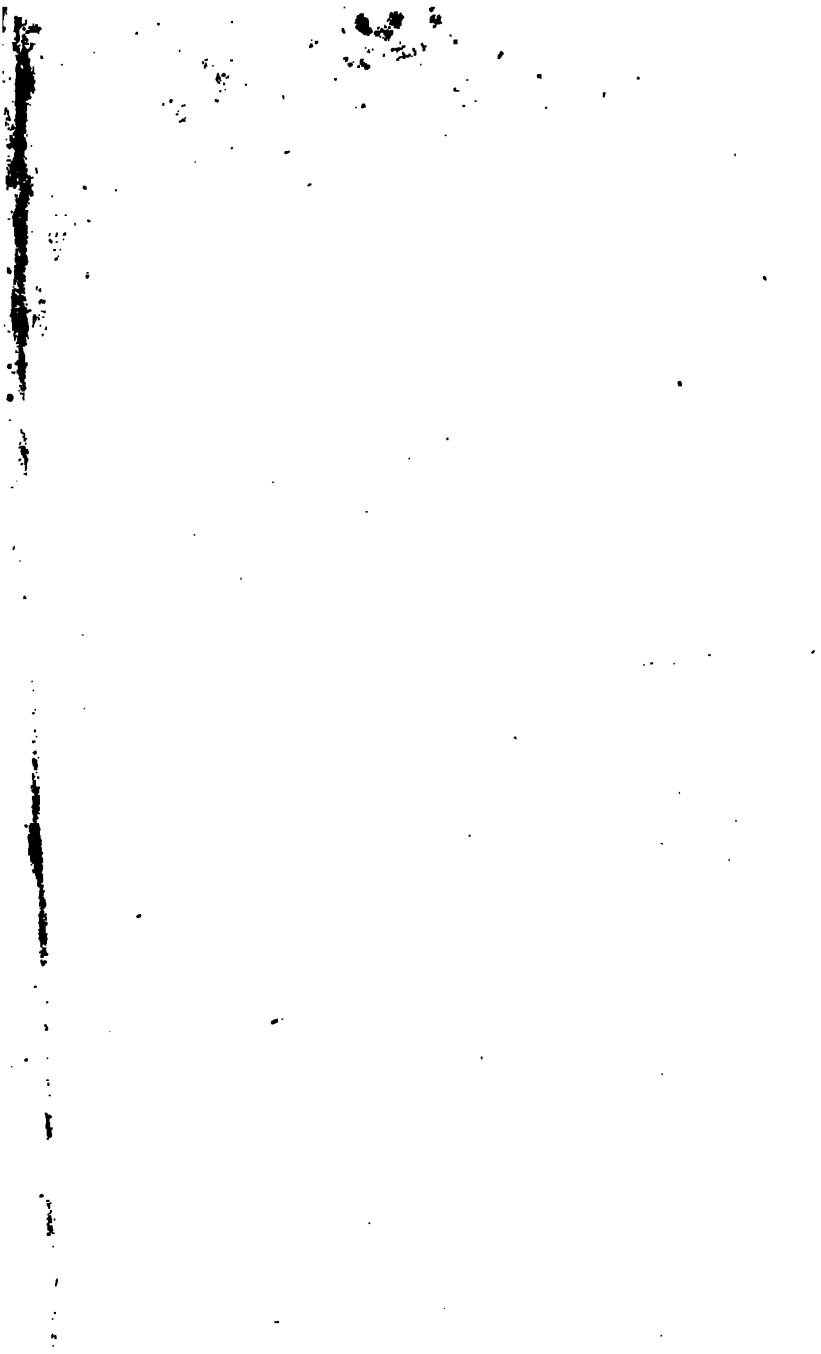

REPORTS

OF THE

PROCEEDINGS IN COMMITTEES

OF THE

HOUSE OF COMMONS,

UPON

CONTROVERTED ELECTIONS,

REPORTS

OF THE

PROCEEDINGS IN COMMITTEES

OF THE

HOUSE OF COMMONS,

UPON

CONTROVERTED ELECTIONS,

HEARD AND DETERMINED DURING THE

PRESENT PARLIAMENT.

VOL. I.

Containing the Proceedings on PETITIONS in the first Session of this PARLIAMENT, in the CASES of

PONTEFRACT,	BEDFORDSHIRE,
IPSWICH,	COLCHESTER,
MITCHELL,	AND
DOWNTON,	ILCHESTER.

BY ALEXANDER LUDERS, ESQ.

BARRISTER at LAW, of the INNER-TEMPLE.

LONDON:

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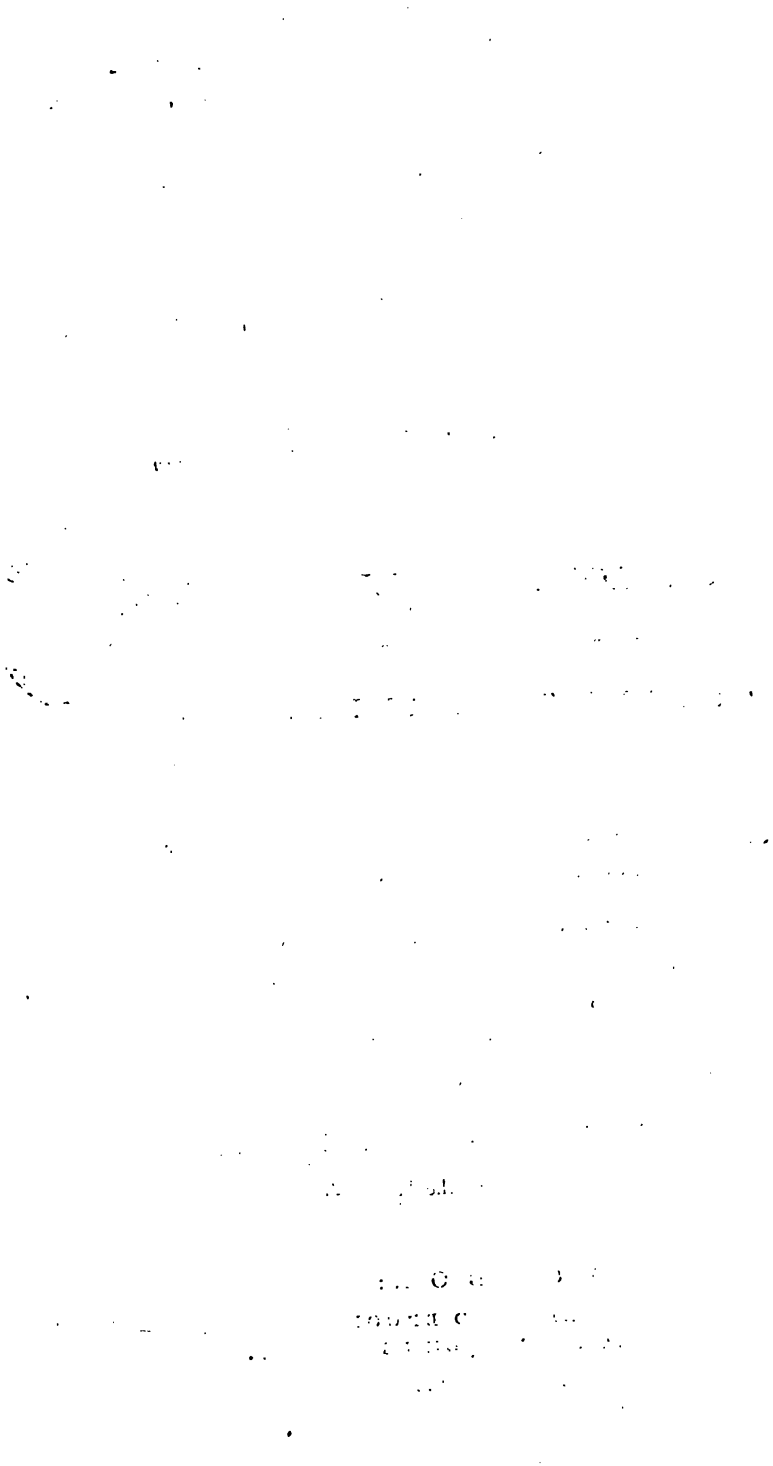

CONTENTS.

TO THE

RIGHT HONOURABLE

ALEXANDER,

LORD LOUGHBOROUGH,

LORD CHIEF JUSTICE OF HIS MAJESTY'S COURT OF COMMON-PLEAS.

MY LORD,

I Beg leave to ſolicit your Lordſhip's protection to a Work, which, if the writer's abilities were equal to the ſubject, might be uſeful to that Profeſſion, of which your Lordſhip is a diſtinguiſhed ornament.

When I conſider how nearly connected the Law of Elections is with the freedom of Parliament, and that your name is conſpicuous in that illuſtrious number, who formerly ſupported, with ſo much ſpirit and perſeverance, the conſtitutional freedom of election, I flatter myſelf, there is peculiar propriety in my requeſting your favourable

vourable notice of an endeavour to aſcertain the principles by which that law is adminiſtered.

Though your Lordſhip is now raiſed above the ſphere within which the Election Judicature is exerciſed, I have no doubt but that the ſame talents which led to this elevation, will at all times maintain an inſtitution ſo neceſſary to the freedom of Parliament; that if it ſhould be thought neceſſary to propoſe any additional improvements to the new Tribunal, they will find in the Houſe of Peers an able and enlightened ſupporter in your Lordſhip; and that the ſame care with which your Lordſhip protected its firſt beginning, will attend its progreſs to perfection.

I have the Honour to be,

Your LORDSHIP's moſt obliged,

And obedient Servant,

Inner Temple,
January 26, 1785.

Al. Luders.

PREFACE.

THE public benefit derived from the operation of Mr. Grenville's act is univerſally acknowledged: A numerous ſeries of deciſions made in the judicature created by that law, has introduced a ſyſtem of order into the trials of elections; and the experience of fourteen years has reconciled to the inſtitution, ſome of thoſe who were formerly moſt adverſe to it. But the effect of theſe deciſions would be very limited, and gradually loſt, if memorials of them were not recorded and preſerved. The public is on this account much indebted to Mr. Douglas for having engaged in the taſk of reporting the proceedings of election Committees: His valuable work contains many examples of the good effects of the new judicature, and leaves us to regret that his place was not ſupplied in the ſeſſions next after the general election in

1780.

1780. The conteſts of that year gave riſe to many important queſtions of election law, and to many wiſe deciſions upon them, the good effects of which are, I fear, chiefly confined to the parties concerned. The few Caſes of this period that have been publiſhed by Mr. Philips, contain a very ſmall part of the number then determined.

The general uſe and reputation of Mr. Douglas's collection encouraged me to report the Caſes of controverted elections, determined in the preſent Parliament. The following work is only the firſt part of my undertaking, and contains the Caſes of the laſt ſeſſion. If its reception with the public ſhould be favourable, I ſhall continue it. My object in attending the Committees was, from the beginning, to publiſh their proceedings: I am therefore anſwerable to my readers for the errors they may diſcover in a book that was always intended for public uſe. In the execution of it, I have generally followed the method practiſed by Mr. Douglas, becauſe it ſeemed to me the fitteſt poſſible for the ſubject; and I acknowledge my obligations to him for having marked out ſo juſt a courſe in ways

———*nullius antè*
Trita ſolo ———

and where ſome guide was wanting to ſupply the place of experience.

I hope

I hope no perſon will be led by the foregoing paſſage to draw a compariſon between the two publications; it muſt be too obvious that mine will ſuffer by it. However, I can aſſure thoſe who have been uſed to expect ſatisfaction to their reſearches in books of this ſort, that I have ſpared no pains (as far as time would permit) to be correct. By the indulgence of the counſel and agents in the ſeveral cauſes, I have had an opportunity of comparing my own notes with their papers, and of reviewing the ſeveral ſubjects in converſation where any doubts required it: I have alſo been favoured with a peruſal of the clerk's minutes: And to all I take this opportunity of acknowledging my obligations.

Wherever reference has been made to caſes in the Journals or Law books, I have always examined them myſelf; and I can venture to ſay that there is not a ſingle reference to any of them in the following compilation, which I have not peruſed, in order to ſtate with accuracy. Where the ſubject has led my inquiries further, I have ſubjoined the reſult of them in my notes at the end of each caſe.

I have been leſs minute in ſtating the formal parts of the proceedings, becauſe Mr. Douglas's work has already publiſhed full information upon that ſubject; and I have often taken the liberty to arrange the ſeveral matters of a cauſe a little

a little differently from their original ſtate, in the manner which ſeemed to me moſt proper for underſtanding the principal queſtion.

Although ſeveral of the Committees of the laſt ſeſſion were ſitting at the ſame time, yet it generally ſo happened that no two points of argument were at the ſame time going on in two together; where I was not able to hear the *evidence* in all, I read the clerk's minutes afterwards.

With reſpect to the CASES of this volume, it may be uſeful to give ſome preliminary account.

I am ſenſible that my report of the CASE of PONTEFRACT will by many be thought unſatisfactory. In the beginning of it I refer the reader to Mr. Douglas's report of the ſame caſe; and in fact I conſider mine as only an appendix to his. This Committee being the firſt of the Seſſion, and ſitting only three days, concluded their inquiry before any other was opened; on this account it engaged my whole attention, and it was then my deſign to have given a full ſtate of it: I have altered that opinion ſince, not from indolence, but from a full conſideration of the ſubject, which induced me to make the obſervation in page 4. of this Caſe, and to act accordingly.

I believe the CASE of IPSWICH is the firſt under the new judicature, in which the merits of the election have depended ſolely upon the ſtatute 7 & 8 Will. III. ch. 4. (called the Treating Act): It has alſo this advantage, (beſides that of containing a queſtion of bribery, ſimple and unqualified) that the facts of the caſe were chiefly admitted, and occaſioned little or no diſpute between the parties. In moſt of the caſes of general bribery, the queſtion has either been involved in diſputed facts, or has been mixed with other queſtions upon which the parties have advanced their claims concurrently.

It often happens in the trial of elections, that the grounds of the deciſion are not aſcertained: This defect, it muſt be owned, is almoſt peculiar to that juriſdiction in which they are tried, and materially obſtructs their uſe as precedents. If this fault ſhould be imputed to the CASE of MITCHELL, I am apt to think I ſhould not have mended it, by ſtating the proceedings more at length, in order to have enabled the reader to have formed conjectures upon what the principle of the deciſion may have been; or if I had ventured my own conjectures upon the ſame baſis. But ſuch caſes ſometimes contain other uſeful matter leading to the final reſolutions: And although the taſk of reporting them may be

be irkſome, and their uſe contracted, they do not thereby prevent the attainment of ſubſtantial juſtice to the parties.

Almoſt every queſtion that can ariſe in boroughs of burgage-tenure, was agitated in the CASE of DOWNTON. All thoſe upon which preciſe determinations were given, I have endeavoured to ſtate correctly and diſtinctly.

It would be in me a great preſumption, to give any opinion upon thoſe determinations; but I cannot let my account of this caſe go forth to the public, without paying my tribute of applauſe to the members of this Committee; for the diligent and deliberate attention with which they perſevered ſo long, through a tedious, unintereſting, legal inquiry; for the diſtinct deciſions they gave upon every queſtion, and for the anxiety they ſhewed upon all occaſions to decide according to the beſt authorities. An example, ſo honourable, held forth in the beginning of a Parliament, if followed as it deſerves, would produce in a ſhort time all that is wanting to form a code of parliamentary law.

The CASE of BEDFORDSHIRE contains many uſeful arguments upon thoſe technical diſtinctions which the uſage of the Houſe of Commons has raiſed in election petitions. The deciſion of

of this Committee has extended the diſtinction of Caſes relating only to the *Return*, further than any I have ſeen in the Journals. I have not had leiſure to examine all thoſe in which particular circumſtances have furniſhed occaſion for a previous inquiry into the Return; I believe there are more than thirty of this ſort. Thoſe I have ſeen, lead me to think, that the diſtinction was at firſt adopted upon no ſettled principle, and perhaps to ſerve a turn; and that the probable loſs of the diſtinction by extending its application, will be a conſequence beneficial to the law of Parliament.

The legal principle of diſtinguiſhing between the *right* and the *poſſeſſion*, to which the parliamentary proceeding is ſaid to be analogous, is a juſt one in Weſtminſter-hall, and its exerciſe there is conſiſtent with the principle; becauſe by the rules of law flowing out of the feudal ſyſtem, different forms of *real* actions are inſtituted for obtaining juſtice; and a regular body of law has been eſtabliſhed (whether the cauſe or the effect of theſe forms I know not) adapted to theſe ſeveral actions. But in a judicature wherein only one form of obtaining juſtice is practiſed, and where the ſuit is confined to one object, there can be no good reaſon for maintaining this diſtinction; it tends only to double the ſuit, or at leaſt to divide it for the purpoſe of obtaining

obtaining the ſame end in two ſeveral ways: Whereas in the legal ſuit the objects of the ſeveral actions, are eſſentially different. But, in another point of view, this analogy is quite out of the queſtion; when it is conſidered that the diſtinction of *right* and *poſſeſſion* is applied to a ſubject which ought not to be regarded as a *property* in any ſhape, but merely as a *ſervice* of repreſentation.

But, further,—the practice of the Houſe of Commons upon this ſubject is inconſiſtent. In double returns, there is certainly ſtronger reaſon for inforcing the diſtinction than in any other caſes; yet in them it is not ſo practiſed. The diſtinction exiſts, it is true, but never occaſions two cauſes; it may occaſion two different inquiries in the ſame cauſe (of which the caſe of Downton is an inſtance) and may oblige the parties to change their formular characters in the ſuit; but it extends no further. It is remarkable, that before the ſtat. 10 Geo. III. ch. 16. when the Houſe exerciſed an arbitrary power in the trial of elections, they very ſeldom practiſed this diſtinction in double returns. The whole caſe was generally referred to the Committee of privileges and elections, who conſidered the whole as *one* cauſe, though they ſometimes made partial reports to the Houſe, in the manner of interlocutory judgments, in the courſe

of

of their proceeding. But this was in compliance with the fundamental principle of repreſentation, *that the Houſe ſhall be full*, and that of two ſets of members for the ſame place, the Houſe might not loſe the ſervice of both.

The CASE of COLCHESTER is curious, becauſe it is the firſt of its kind. The queſtion is unmixed with fact, and the determination expreſſes a legal opinion upon the orders of the Houſe relating to the qualification for a ſeat in Parliament. There was an inaccuracy of expreſſion in the final reſolution of this Committee that gave occaſion for cenſure: It is much to be wiſhed, that theſe matters of form were ſo framed, as to ſecure them from objection in the Houſe. The neglect of this formality tends to give the Houſe at large an authority in controverted elections, from which, it certainly was the object of Mr. Grenville's act to exclude their moſt indirect interference.

With reſpect to the CASE of ILCHESTER, I have little to ſay; perhaps I ought to apologize for inſerting an account from whence ſo little of the cauſe can be collected; but the nature of the caſe muſt be my excuſe. As my principal object in compiling theſe Reports, has been to make them of profeſſional uſe, I have omitted

in all of them, ſuch details of evidence and arguments, as did not lead to a preciſe underſtanding of the deciſion. Some readers will perhaps hereby complain of the loſs of ſeveral uſeful and able arguments of counſel, and the curioſity of others may be diſappointed in ſearching for the hiſtory of an election: But I could not gratify either, without riſking the cenſure of thoſe for whoſe uſe my labours were chiefly intended.

I have thus gone through the ſeveral caſes now preſented to the reader: Whatever views of perſonal advantage I might have in this publication, I am willing to believe that another and higher motive has had ſome ſhare in directing it. The juſt and impartial adminiſtration of juſtice in the deciſion of thoſe claims, which give a voice in the favourite ſeat of our Legiſlature, is deeply intereſting to every Engliſh ſubject. A principal means of attaining this end, is to preſerve memorials of thoſe deciſions. Although the conſtitution of that tribunal of which I am writing is ſuch, that precedents cannot, from their nature, have the ſame authority as in other courts of juſtice, ſtill they muſt have their uſe; for according to the reſpect paid to them, will the authority of the Court be reſpected by the people. Power alone will not have this effect; it muſt be gained by degrees,

degrees, as the regularity of ſyſtem becomes eſtabliſhed; to which a conformity of judgments is abſolutely neceſſary.

It is not to be wondered at, that in the beginning of any inſtitution, its proceedings ſhould be irregular; inſtances of this have often happened in election Committees; the caſe of Pontefract is a remarkable one. But I am ſo far from thinking the number great in which a contrariety of opinion ſhews itſelf, that I rather wonder there are ſo few. It is in my mind extraordinary, that the ſhort experience of fourteen years ſhould have produced ſo much regularity. A long courſe of ages, together with a total ſeparation of law from fact, and the advantage of ſpecial pleading to aſcertain the point in judgment, were not able to preſerve our ordinary courts of juſtice from continual claſhing and contradiction, till within a century paſt. Every one converſant in our law reports, muſt have obſerved, how little certainty prevailed in the common ſubjects of litigation in Weſtminſter-Hall, till the latter end of the laſt century.

The unſettled ſtate of our government, and the dubious ſtation of the judges in former periods, contributed to this, no doubt: But now that both theſe are durably fixed, and the ordinary adminiſtration of juſtice is become certain and uniform, what ſhould prevent the ſame

uniformity from communicating to every branch of the judicial ſyſtem?

In our conſtitution, the adminiſtration of juſtice is an integral part. Although that branch of it which belongs to Committees of the Houſe of Commons, is ſeparated from the general ſyſtem; yet as it gives admiſſion into one order of the legiſlature, it is intimately connected with the conſtitution, and ought therefore to be directed by conſtitutional principles. How important then is the duty to which members of the Houſe of Commons are called in the exerciſe of this judicature? To preſerve and ſtrengthen the ſpirit of the ſtatute by which it was created, ſhould be a primary object with every man who wiſhes to ſecure the freedom of Parliament. A ſenſe of the benefits reſulting from a collection of the deciſions in this judicature, operated ſtrongly upon my mind; and induced me, though unequal to the taſk, to undertake it, when declined by others of greater abilities.

Mr. De Lolme, in his admirable book upon the Engliſh conſtitution, calls Mr. Grenville's Act "*one of thoſe victories which the Parliament, from time to time, gains over itſelf; in which the members, forgetting all views of private ambition, only think of their intereſt as ſubjects.*" There is no reaſon to fear that the ſame principle will not direct the additions which,

which, it is ſaid, are intended to be made to this ſtatute in the courſe of the preſent ſeſſion. I hope it will not be deemed preſumption, if, upon this occaſion, I venture to ſuggeſt a few hints for its improvement; whatever opinion they may raiſe of my judgment, I am conſcious that they proceed from a good intention.

1. I have heard many perſons object to that part of the inſtitution of ſelect Committees, which allows of Nominees. Perhaps the mode of nominating them by the parties is defective: But the inſtitution itſelf ſeems admirably calculated for inſuring the preſence of ſome experienced perſons in the court. Without it, a whole Committee, or the greater part, might often be formed of young members; more eſpecially when it is conſidered that thoſe members, (much to their honour) are the moſt regular in their attendance.

2. According to the ſtatute in queſtion (ſect. 6.) no member who has voted at an election complained of by petition, can make one of the fifty-one members out of whom a Committee is choſen: It would be difficult in this manner to obtain a Committee for a Weſtminſter election, in which city ſo many of the members reſide and poſſeſs the right of voting. Hereby the bu-

ſineſs of the Houſe might be ſuſpended many days. Thus the neceſſity of the caſe ſeems to require an exception in this inſtance to a very juſt regulation.

3. The power given to the Committees for preſerving order and inforcing obedience is indirect, and to be exerted by means of a ſpecial report to the Houſe for the purpoſe. If a witneſs ſhould appear to be groſsly perjured in their preſence, they cannot ſend him to priſon without applying to the Houſe for an order: In the mean time the witneſs may run away and ſecrete himſelf. I am not aware of any objection to an exerciſe of the power of committing for contempts, directly, and in the firſt inſtance by the committee. I think they might be truſted with this power as ſafely as commiſſioners of bankrupts.

4. If the Committee ſhould determine a petition to be vexatious and frivolous, they cannot redreſs the party grieved, otherwiſe than by a ſpecial report to the Houſe. The method for obtaining ſatisfaction by a vote of the Houſe is troubleſome and uncertain; beſides which, it tends to open the proceedings of the Committee to an examination in the Houſe, and thus indirectly to give the Houſe at large a juriſdiction over

over the election. It ſeems to me that the Committee itſelf would exerciſe the power of awarding coſts to the party grieved, with more regularity and ſatisfaction.

5. On thoſe days which are appointed for the ballotting for a ſelect Committee, the Houſe cannot previouſly enter on any buſineſs beſides the ſwearing of members. It might be convenient to add to this exception, the receiving reports from other Committees, and giving the orders which they may require of the Houſe for the conduct of their buſineſs. I have known ſome very injurious delays occaſioned by the want of an opportunity to make particular reports to the Houſe on thoſe appointed days, when the Houſe has adjourned for defect of members.

6. Although no bad conſequence has yet happened from the regulation of ſect. 24. of the ſtatute, whereby, 'in caſe the members of the Committee be reduced unavoidably by death or otherwiſe, to a number leſs than thirteen, and ſo ſhall continue for three ſitting days, the Committee becomes *ipſo facto* diſſolved and all its proceedings void;' yet I cannot help thinking it would be proper to moderate the rigour of this clauſe. In the courſe of a long trial (in which

the inconvenience would be the moſt ſeverely felt) this diſſolution might eaſily happen. In the caſe of Worceſter it was very much apprehended, when the inquiry, which had laſted ſeven weeks, was near concluding *. I ſhould think the parties in ſuch caſe would prefer the inconvenience of a contracted number of judges, to the enormous expence of renewing a long conteſt.

7. During the preſent ſtate of parties, and while 'griefs are green,' it might be dangerous to enter upon ſuch an improvement of the ſtatute, as the Weſtminſter Petition in the beginning of this Parliament ſhews to be neceſſary. It cannot be denied, that the firſt principle of the ſtatute and the main deſign of its author, were to exclude the Houſe at large from the cognizance of elections. The unprecedented return for this city has at once ſet aſide the act: At leaſt, the Court to which the right of interpretation belonged, underſtood it ſo. The operative words of the firſt ſection of the ſtatute being "election or return *of a member*," it was ſaid that as no "*member*" *was returned*, the ſtatute had no operation. Yet when theſe words are compared with thoſe of the 18th ſection, "the Committee —ſhall try the merits of the *return, or* election, or both"—a different conſtruction ſeems capa-

* See 3 Doug. Elect. 380.

ble

ble of fair argument. This circumſtance reſtored the old juriſdiction in ſome meaſure to the Houſe, at a time of all others moſt unfit for it; when the ferment of parties was at the higheſt, and particularly directed to the point in queſtion.

The conſtitutional freedom of Parliament calls for ſome method of reſcuing Mr. Grenville's act from the *veto* of a returning officer.

The conſequence of this interpretation has produced a nugatory Court of Eaſe to the election judicature, in which the changes of three ſeaſons have paſſed away in unremitted conteſt, without effecting any real change in the ſtate of the election; and leave the candidates in the beginning of a ſecond ſeſſion, in the ſame uncertainty with which they began the firſt.

8. It is much to be wiſhed that ſome method were taken to prevent a declaration of the opinion of the Houſe upon election petitions, before they are duly opened in the proper judicature. The Caſe of Bedfordſhire will certainly ſuggeſt a proper remedy for this defect: But on this ſubject too, I am fearful to enlarge, for the reaſon above ſaid to be applicable to the caſe of Weſtminſter.

9. It muſt have occurred frequently to thoſe who have attended election Committees, that

Perſons not verſed in parliamentary hiſtory, who judge of the Houſe of Commons by their own experience, will hardly believe that the name originally given to the election Committees was occaſioned by their being obliged to contend for the liberty to try their own elections; a right which the King and Lords at that time denied them, and therefore they called the court κατ' ἐξοχην "a Committee of *privileges*."

Many of thoſe diſputes which in the laſt century diſturbed the whole tranquillity of the ſtate, are not intereſting enough to engage even the curioſity of the preſent generation. But the effects of them remain in daily practice, in forms and ceremonies almoſt unobſerved by the perſons who are continually engaged in them. Thus the Commons in the beginning of every Seſſion, ſtill appoint a grand Committee for *Religion*, a ſecond for *Grievances*, a third for *Courts of Juſtice*, and a fourth for *Trade*, to ſit regularly four days in the week; though I believe very few beſides the Speaker and Clerk of the Houſe, know that ſuch Committees exiſt.

10. Perhaps the preſent and next following obſervation, may be thought to relate more properly to the orders of the Houſe, than to the ſtatute. I believe in every ſeſſion next after a general

general election, groundleſs petitions have been preſented, merely for the purpoſe of blocking up ſeats; for no member can vacate his ſeat, when his election is complained of by petition. The petitioners in ſuch caſe run the chance of a ſubſequent compromiſe, or of the expiration of the ſeſſion before their appointed day arrives. The proſpect of a reſolution determining the petition to be vexatious, is too remote to prevent this evil: Perhaps it might be prevented by making an order, impowering the ſitting member to call upon a petitioner under ſuſpicious circumſtances, to give ſecurity for the coſts in caſe of a future reſolution of vexation; or to renew his petition in the ſubſequent ſeſſion, if not heard in the firſt. The Houſe has expreſsly reſolved, that a petitioner may be a candidate for any other place; in which reſpect he has an advantage over the ſitting member petitioned againſt.

11. There is a reſolution of the Houſe annually paſſed, whereby liſts of voters objected to muſt be mutually exchanged between the parties in *county* elections; the principle of this regulation extends equally to boroughs, of which ſome contain a greater number of voters than many populous counties. I have heard of

of caſes in which the order has been evaded by delivering liſts of double or treble the number of perſons really objected to. It might be proper, not only to extend the rule to boroughs, but alſo to impower Committees to puniſh an evaſive compliance with it, by an allowance of coſts to the party grieved. There are inſtances in the Journals, in which the Houſe has made an order for the exchange of liſts in *borough* elections, and has inſiſted upon a *bonâ fide* obedience to it; as in the caſe of Harwich, 8 June 1714. in 17 Journ. 672.

I fear I ſhould juſtly incur cenſure, if with my ſlight experience, I were to extend my obſervations further. The foregoing are a few only of thoſe which have occurred to me on this ſubject. I have ventured to ſtate them with the more confidence, becauſe they are not my opinions alone, but thoſe of others to whoſe authority reſpect is due.

As I have ſaid before, ſome time muſt neceſſarily elapſe before this new Inſtitution can form a regular ſyſtem for its direction. In the mean time nothing can tend ſo effectually to give dignity and reſpect to it, as a regular attendance of the members. The ſervice on election Committees is often difficult, and ſometimes burthenſome;

ſome; but the labour muſt be amply repaid to a generous mind, by reflecting, that a proper diſcharge of it, tends more than any other, to ſtrengthen that branch of the legiſlature from which the conſtitution has derived all its force and beauty.

Jan. 25, 1785.

ERRORS OF THE PRESS.

Page 44. line 17. read *by which this*
101. line 5. from the bottom, read *illuſtrations of*
148. line 19. read *Deviſees*
157. line 6. read *in poſſibility only*
253. line 2. from the bottom, read *grantor*
254. line 3. from ditto, read *grantor*
299. line 18. read *Kaims's*
348. line 1. read *amendment there,*

At the bottom of Page 263. add the following reference, viz. *See the Caſe of Cardigan,* 3 *Doug. Elect.* 188, 206. *and the following pages.*

I.

THE

CASE

Of the BOROUGH of

PONTEFRACT,

In the County of YORK.

The Committee was choſen on Thurſday, the 18th of June, and conſiſted of the following Members:

Sir William Leman, Bart. Chairman.
Lord Apſley.
Sir James Langham, Bart.
Watkin Williams Wynne, Eſq;
Hon. John Somers Cocks.
Clement Tudway, Eſq;
Lionel Darrell, Eſq;
Sir Edward Littleton, Bart.
Harry Burrard, Eſq;
Robert Fanſhaw, Eſq;
Lord Compton.
Right Hon. William Pitt.
Penn Aſheton Curzon, Eſq;

NOMINEES,

Of the Petitioners,

Lord Mulgrave.

Of the Sitting Members,

Right Hon. William Windham Grenville.

PETITIONERS,

Hon. William Cockayne, and John Walſh, Eſq; and certain Electors of the Borough of Pontefract.

Sitting Members,

John Smyth and William Southeron, Eſqrs.

COUNSEL,

For the Candidates Petitioners,

Mr. Wilſon and Mr. Piggott.

For the Electors,

Mr. Chambre.

For the Sitting Members.

Mr. Cowper, and Hon. Mr. Erſkine.

THE

CASE

Of the BOROUGH of

PONTEFRACT.

WHEN the Committee met on friday, the 9th of june, the petitions were read *; as they originated with the party oppoſite to thoſe who had been the petitioners in the preceding conteſts for this borough, they ſet forth the contrary claim to that of the former petitions; but, the queſtion was the ſame, and was ſo conſidered by the counſel in their arguments, in which they endeavoured to enforce and illuſtrate thoſe formerly employed. As theſe are fully ſtated in Mr. Douglas's Report † of the caſe of Ponte-

* See Votes 25 May, p. 28, 29.

† 1 Doug. Elect. 379.

fract, I have thought it more proper to omit a particular account of them, than to fill my pages with matter which muſt look like a repetition of what the public has already received from an abler pen. The circumſtances of the caſe, as delivered in evidence, were the ſame (with an exception of no great moment hereafter mentioned) and the concluſion was drawn from the ſame premiſes.

The deciſion of the Committee who tried this cauſe in 1775 (A), having confirmed the burgage right of voting, that right was not diſputed at the general election next following in 1780; but a vacancy having happened in the beginning of the year 1783 *, the election to ſupply it †, was conteſted by two candidates upon the ſtrength of the two intereſts, which had contended in 1774; Mr. Nathaniel Smith, who ſtood upon the burgage right, was returned to Parliament; Mr. John Smyth,

* Lord Gallway, one of the members, took the Stewardſhip of the Chiltern hundreds, in order to vacate his ſeat.

† It came on February 13th, 1783.

who

who ſtood upon the right of the inhabitants; petitioned againſt his election; the committee who ſate upon this petition, determined * in favour of the petitioner and of the inhabitants, i. e. contrary to the determination of the former Committee. At the laſt election the ſame intereſts contended again; three candidates ſtood upon the right of the inhabitants, Sir Rowland Winn, and the two members returned; and Mr. Walſh and Mr. Cockayne upon the burgage right. The numbers on the poll were, for

Sir R. Winn	167	voting as inhabitants.
Smyth	362	
Southeron	197	
Walſh	128	voting as burgage tenants.
Cockayne	128	

After the reading of the petitions, when the counſel for the petitioners were preparing in the uſual courſe to addreſs the Committee, the parties were directed to withdraw, and when called in again, were aſked by the chairman, "If the entries in

* See Votes 11 April 1783.

the Journals of the 28th of May * 1624, and 6th of February † 1770, were to be read ‡:" It was hereupon agreed by the parties, that in order to prevent confuſion in the arguments, both the above reſolutions ſhould be read without prejudice to the queſtion, and without reading the ſtanding order of 16 Jan. 1735-6, that the whole caſe on each ſide might be conſidered at once.

The entries concerning the reſolution of 1624, were read and compared with the original manuſcript Journals, by a gentleman converſant in that ſort of writing of which they were compoſed §: both were found to agree (B).

That part of the evidence in which the preſent caſe differed from that decided in 1775, was in the indentures of returns to Parliament, and in the teſtimony of the mayor and town-clerk of the borough: In 1775, a ſeries of returns (C) was produced from the earlieſt times, but the re-

* 1 Journ. 714. 797. † 32 Journ. 655.
‡ See 1 Doug. Elect. 380. § See 1 Doug. Elect. 380.

turn

turn of that election which followed the determination of the Houſe in May 1624, was not then to be found in the proper office; and not being produced, it was from thence inferred in argument, that this return might probably contain ſome evidence of the right contended for by the inhabitants; and that therefore the argument drawn from the form of the returns to their prejudice, had not a ſufficient foundation. This return had been ſince found in the Rolls chapel, and was now produced to the Committee: It is dated in 1625, and is in the ſame terms with the others of that period, purporting to be made by "the mayor, aldermen, and burgeſſes (D)."

Some doubt was hinted from the Committee, whether this return, made ſo long after May 1624, was that of the election *next* following the reſolution then paſſed; the counſel for the petitioners ſaid, that no election took place in the ſeſſion in which the cauſe was decided, for the Parliament was prorogued on the 29th, the day after the reſolution of the Houſe; in the inter-

val, the King's death occaſioned a diſſolution *, and the return in queſtion was that to the new Parliament, ſummoned by Charles I. upon his acceſſion.

The return to the preſent Parliament was produced, which ſtates the election to have been made by the *inhabitants*, and is the firſt return for Pontefract in which the word *inhabitants* occurs.

Mr. Seaton the mayor, and Mr. Hepworth the town clerk of Pontefract, were examined on the part of the petitioners, in order to ſhew the conſtitution of the borough; from them it appeared, that the corporation conſiſts of mayor, aldermen †, and burgeſſes; that by the word burgeſs, they underſtand "a perſon poſſeſſed of a freehold of burgage tenure," which burgages amount to about 320 or more; that the aldermen are

* This Parliament never met again, but was continued by different prorogations till the King's death, which happened on the 27th of March 1625; the new Parliament of Charles I. was ſummoned to meet on the 7th of May following.

† Called *Comburgenſes* in the charters.

choſen

choſen out of the burgeſſes, according to the direction of the charters (E); that none but the corporation derive or claim any benefit from the rents belonging to them; that the corporation poſſeſs at this day certain market ſtalls or ſheds, which were granted to the burgeſſes of Pontefract by Henry of Laſci, earl of Lincoln, in 1268 (F).

When the counſel for the petitioners were going to call witneſſes, to prove that none but burgage tenants ever claimed to vote at elections before the year 1768, the counſel on the other ſide ſaid, they would admit this fact as far as any living witneſs could prove it.

On one ſide the minutes of the Committee, which ſate upon this queſtion in 1775 *, were read in evidence, and on the other

* This Committee, before they came to the reſolution upon the election, paſſed the following, "That the "counſel be called in, and reſtrained from offering any "evidence touching the legality of votes for members "to ſerve in Parliament for the borough of Pontefract, "contrary to the laſt determination of the Houſe of "the 6th of Feb. 1770." When the counſel were informed

other ſide the minutes of the Committee of 1783.

On Friday the 11th of June (on which day the counſel finiſhed their arguments) the Committee

Reſolved, That the reſolution of 1624 is a laſt determination, under the act of 2 Geo. II. ch. xxiv. ſ. 4.

After which they reſolved, That the ſitting members were duly elected *.

informed of this, Mr. Lee for the then petitioners told the Committee, that he had nothing further to offer on their part. After which, the Committee proceeded to determine, that the ſitting members were duly elected. The ſubſequent Committee in 1783, came to no previous reſolution.

* See Votes, June 11, p. 190.

NOTES

ON THE CASE OF

PONTEFRACT.

PAGE 4. (A) The petition of the burgeſſes electors, recited in the votes of 25 May, 1784. p. 29. ſets forth the hiſtory of the late conteſts for this borough. ——" That upon a conteſt in 1768, the return having been made by the freeholders of burgage tenure only, agreeable to the conſtitution and uninterrupted uſage of the borough, an attempt was made for the firſt time by the then petitioners, and by perſons calling themſelves electors, to overthrow the right of election in the freeholders of burgage tenure, and to eſtabliſh a right in the inhabitants, houſeholders, reſiants within the ſaid borough; and that the ſaid petition was heard at the Bar of the Houſe, on the 6th of Feb. 1770; and at the ſaid hearing, two obſcure entries in two Journals, of the 28th of May, 1624, different in expreſſion, were read, counſel on both ſides were heard thereupon, and the Houſe ſolemnly conſidered the ſame in a debate of many hours, when it was determined upon a diviſion of 161 to 32, that the ſaid two entries, appearing in two Journals of the ſame date, ſhould not be admitted to be read to the Counſel at the Bar as the laſt determination of the Houſe, touching the legality of votes for members

to

to ſerve in parliament for that borough; and thereupon the Houſe permitted evidence to be offered to eſtabliſh the right of election in the borough, and the counſel proceeded accordingly to give evidence, that the right of election for the borough of Pontefract is in perſons having a freehold of burgage tenure within the ſaid borough, paying a burgage rent; and that witneſſes were examined, returns produced, and other evidence given, to prove the ſaid right; and ſeveral entries in the Journals of the Houſe, and reports from the Committee of privileges and elections, touching elections for the borough of Pontefract, were read; and the Houſe, upon the whole, reſolved, "That the right of election for "members to ſerve in parliament for the borough of "Pontefract, in the county of York, is in perſons "having, within the ſaid borough, a freehold of burgage "tenure, paying a burgage rent;" and that at the third election, which happened after the ſaid reſolution, viz. at the general election in 1774, the inhabitants, houſeholders, reſiants within the ſaid borough, in open defiance of that clear and recent determination of the Houſe, repeated their attempt to overturn the ancient conſtitution of the ſaid borough, and deſtroy the right of election therein, by claiming a right to poll, but their votes were rejected by the returning officer; a petition was, in conſequence, preſented againſt the ſitting members, and referred to a ſelect Committee of the Houſe, when the firſt queſtion before the ſaid Committee was, whether the aforeſaid entries in the two Journals of the 28th of May, 1624, or either of them, or the reſolution of the Houſe of the 6th of February, 1770, ſhould be read, as the laſt determination of the Houſe of Commons, touching the legality of votes for members

bers to ſerve in parliament for the borough of Pontefract, within the intent and meaning of the Act of the Second of George the Second, Chapter the 24th; which queſtion was ſolemnly argued by counſel on each ſide before the ſaid Committee, who thereupon reſolved, "That the counſel be reſtrained from offering any evi- "dence touching the legality of votes for members to "ſerve in parliament for the borough of Pontefract, "contrary to the laſt determination of the Houſe of the "6th of February, 1779;" and afterwards, upon the queſtion, whether the ſitting members, who had been returned by the freeholders of burgage tenure, were duly elected, decided the ſeats in their favour, conformably to the right of election eſtabliſhed by the ſaid laſt determination in the Houſe of the 6th of February, 1770; and that at the next general election in 1780, all diſputes concerning the right of election ſeeming to be at reſt, there was no conteſt; and that, at an election for one repreſentative in 1783, the diſpute revived, a conteſt enſued, the return was made upon the burgage tenure votes only, in purſuance of the laſt determination in the Houſe of the 6th of February, 1770, and the true conſtitution of the borough; a petition upon the claim of right in the inhabitants of the houſeholders, reſiants, was preſented againſt the ſitting member, and the ſelect Committee, inſtituted upon that occaſion, decided the ſeat in favour of the petitioner, rendering nugatory, in that inſtance, the laſt determination in the Houſe of the 6th of February, 1770; from the time of which deciſion, to the late diſſolution of parliament, the two repreſentatives of Pontefract ſat in the Houſe of Commons upon two contradictory titles; and that in conſequence of that ſucceſs, the ſame perſons renewed the ſame claim at the general election."——

P. 4.

P. 6. (B.) In the caſe of Pontefract, reported by Mr. Douglas (See his firſt vol. p. 397.) and again upon the preſent occaſion, objections were raiſed againſt the reſolutions of 1624, from the apparent inaccuracy with which they are entered in the journals, and from the looſe manner of keeping the journals at that time. There are ſome entries of the proceedings of the houſe in that period, by which the effect of this objection may be removed; by them it appears, that the Houſe paid conſiderable attention to the manner in which their proceedings were regiſtered, and reviſed them frequently; ſo that it is not probable, that the clerk ſhould have preſerved any miſtakes in the ſubſtance of their reſolutions. The entries I allude to are in vol. I. p. 520, 673, 676, 683, 818, containing ſeveral orders of the Houſe during the four laſt years of King James I. and firſt of Charles I. for inſpecting their Journal; in the page firſt cited, a Committee of ſeven members is appointed "to ſurvey the clerk's book weekly;" ſome of the perſons named for this ſervice, appear to have been aſſiduous men of buſineſs in that parliament; the next entry is of a ſimilar Committee at the beginning of a ſeſſion; in the third, it is referred to the Committee of privileges to examine the manner of keeping the Journals; in the fourth, this matter is referred to "the Committee for ſurvey of the clerk's book," becauſe the Committee of privileges have not time to attend to it; in the fifth, a Committee is appointed at the beginning of the ſeſſion "to peruſe the clerk's entries every Saturday." To an attentive obſerver of the Journals of this period, the informality of the entry of the reſolution concerning Pontefract, will not appear ſingular: on the

ſame

ſame day (May *28th) in which this reſolution paſſed, Serj. Glanville made nine other reports from the Committee of privileges and elections, the account of which, and of their acceptance by the Houſe, is given in a ſimilar form to that of Pontefract.

P. 6. (C.) The forms of the returns are different, ſometimes made by "mayor, aldermen, and burgeſſes," ſometimes by "mayor and aldermen," ſometimes by "mayor and burgeſſes;" in 1722 and 1729, by "mayor, recorder, aldermen and burgeſſes:" to many of the indentures the common ſeal of the borough was affixed. The earlieſt return extant, in the 26th year of Edward I. is a curious example of the change which the character of a repreſentative has undergone: The ſheriff of the county at that time returned all the members of his bailwick in a ſchedule annexed to the writ; in this ſchedule, Robert of Bonburg, and Thomas Scot are returned for Pontefract, *per manucaptores*; the ſheriff could not truſt them without pledges for their performing the burthenſome ſervice impoſed upon them. This form was not diſuſed till the latter end of the fifteenth century.

P. 7. (D.) So many inſtances are to be found in the Journals, of the inaccuracy of thoſe who uſed formerly to draw up the indentures of return, that we may readily aſſent to the obſervation of Serjeant Glanville, in his Reports, p. 35 †. "That the form of the indentures made in the country by ignorant perſons, or tranſcripted peradventure from ſome borrowed precedent of another borough, where the election is different, are not concluſive to bind the parliament by any inference to be

* 1 Journ. 714, 797. † See alſo his obſervation in p. 56.

made

made out of the ſame." This obſervation is juſtified both by antient and modern practice. In Windſor, where a diſpute on the right of voting was kept up during almoſt the whole of the laſt century, between the corporation and the inhabitants at large, the inhabitants voted at an election in the third year of Charles I. yet the return to that Parliament was in the uſual form of their returns, *by the corporation*, and under the common ſeal. See 10 Journ. 118, 254, 419. 9 Journ. 586, 646. 8 Journ. 292. 2 Journ. 47. Some of the returns, however, purported to be made by the burgeſſes and inhabitants.

In Aldborough in Yorkſhire, the diſpute was between the inhabitants at large, and a ſelect number of the burgeſſes; and the Houſe, 15th May, 1679, had reſolved the right in favour of the former; yet the returns next after this reſolution were made in the ſame form as before "by the burgeſſes." 10 Journ. 418.

In the caſe of Preſton, before the ſelect Committee in 1781, the return of Sir H. Hoghton and General Burgoyne, who ſtood upon the right of the inhabitants againſt the ſelect number of burgeſſes, and were elected by them, was in the form of thoſe preceding, "by the mayor, bailiffs, and burgeſſes," without any mention of inhabitants. So in ſome former elections for this borough, at which the in-burgeſſes voted, the return was by "the mayor and bailiffs" only, without any mention of the burgeſſes: there were nine returns in this form produced in evidence, from the beginning of the reign of George I. to the firſt of George III.

P. 9. (E.) Glanville, in his report of the caſe of Pontefract (p. 140), mentions a charter of Henry IV. to

to this borough, which, it was alledged in the argument on the preſent occaſion, muſt have been a miſtake, as no ſuch charter exiſted; and that the charter he referred to was one of Henry the VIIth. Among the charters produced in evidence to the Committee, was one ſaid to be by Henry VII. in the fourth year of his reign, and received as ſuch; but upon my examining this charter afterwards (which I was enabled to do by the favour of Mr. Walſh) I found it to be, in truth, the charter of Henry IVth, mentioned by Glanville, and to have been recited as ſuch by inſpeximus in a charter of Edward VI. and another of James I. The miſtake aroſe from an indorſement, in a very modern hand, on the paper in which it was wrapped, calling it "A charter of Henry VII." The royal ſtile * of both theſe kings being the ſame, and the charter not having the year of our Lord in its date, nor the numerical addition of the king, it might, primâ facie, belong to either Henry. This king granted two charters to Pontefract in the ſame words, one in his capacity of Duke of Lancaſter, (to which Dutchy the town belonged) and another, as King; the charter now produced, was that under the Dutchy ſeal.

It was inferred, by the counſel for the petitioner, from this ſuppoſed miſtake of Glanville, that the ſubject then under the conſideration of the Committee of which he was chairman, had not been very attentively examined, and that their concluſion reported by him, "*there being no charter nor preſcription for choice*," had been drawn from a miſapprehenſion of the charters of the

* "Henry, by the grace of God, King of England and of France, and Lord of Ireland." But Henry VII. uſed to add the number to his name.

borough; but it appears that this Committee had inſpected the above charter, and knew its contents.

P. 9. (F.) The words in which this grant is made, are theſe; "—— confirmaſſe dilectis burgenſibus & hominibus noſtris de Pontefracto omnes ſeldas quas ipſi vel anteceſſores ſui levare poterint in foro & vaſto noſtro ejuſdem villæ uſque ad feſtum apoſtolorum Petri & Jacobi ——" to hold to them their heirs and ſucceſſors for ever, yielding yearly the accuſtomed farm.

II.

THE

CASE

Of the BOROUGH of

IPSWICH,

In the County of SUFFOLK,

The Committee was choſen on Friday, the 11th of June (there being no Houſe on the 10th for which it had been appointed) and conſiſted of the following members:

Alexander Popham, Eſq; Chairman.
John Peach Hungerford, Eſq;
Sir Robert Lawley, Bart.
William Colhoun, Eſq;
William Willberforce, Eſq;
Henry Duncombe, Eſq;
John Thomas Ellis, Eſq;
William Mainwaring, Eſq;
John Moore, Eſq;
George Bowyer, Eſq;
Robert Colt, Eſq;
Samuel Thornton, Eſq;
William Pochin, Eſq;

NOMINEE,
Of the Petitioner,
John Strutt, Eſq;

Of the Sitting Member,
Sir George Howard, K. B.

PETITIONER,
Charles Alexander Crickitt, Eſq;

Sitting Member,
John Cator, Eſq;

COUNSEL,
For the Petitioner,
Hon. Mr. Erſkine, and Mr. Piggott.

For the Sitting Member,
Mr. Cowper, and Mr. Rous.

THE

CASE

Of the BOROUGH of

IPSWICH.

THE Committee met on Saturday, the 12th of June: The petition ſtates, That Mr. Cator had by himſelf, or his agents, after the teſte of the writ, been guilty of a moſt notorious and flagrant attempt to bribe the corporation of Ipſwich to elect him, by offering a large ſum of money to them for that purpoſe: That he had in the ſame manner been guilty of bribing the electors of the borough by promiſes of preſents, and by treating; That one of the returning officers was an avowed agent of Mr. Cator, and did by his direction corrupt the electors to vote for him; in conſequence whereof, many of

them did vote for him: That by theſe means Mr. Cator had procured an illegal majority of votes over the petitioner, who would otherwiſe have been elected and returned *.

The laſt reſolution of the right of election in Ipſwich was read; It is in 16 Journ. p. 478. 3 Feb. 1710.

Reſolved, That the right of election of burgeſſes to ſerve in Parliament for the borough of Ipſwich, in the county of Suffolk, is in the bailiffs, portmen, common council †, and freemen at large not receiving alms.

Then the ſtanding order of 16 Jan. 1735-6, was read.

The ſtate of the poll, as delivered in to the Committee by the town-clerk was, for

Middleton	460
Cator	297
Crickitt	7

No objection was made to the election of Mr. Middleton. By the opening of

* See Votes 25 May, p. 34.

† The Committee had uſed the word *Commonalty*, but when the Houſe agreed to their reſolution, this word was ſubſtituted in its ſtead without a diviſion.

the caſe it appeared, that the petitioner endeavoured to avoid the election of Mr. Cator, by proceeding upon all the charges in the petition, and accordingly evidence was produced upon all of them.

Upon the firſt point the following facts were given in evidence:

The electors of this borough are two bailiffs, ten portmen, twenty-four common council men, and an indefinite number of freemen; they have been for a long time divided into two parties, diſtinguiſhed by the names of *blues* and *yellows*; at the head of the former are the common council men, the latter is headed by the portmen. The yellows had been predominant at the late elections; Mr. Wollaſton, one of the late members, had been ſupported by them, and being abroad at the time of the late election, his brother, the Rev. Dr. Wollaſton, propoſed him as a candidate upon that intereſt. Mr. Staunton, the other late member, declined this election. Mr. Middleton was ſupported by the blues, on which intereſt he had failed in the laſt conteſt.

The laſt election happened on Saturday, the 3d of April: In the preceding week, the blues had propoſed to the yellows to ſupport Wollaſton, if the yellows would ſupport Middleton, and thus ſettle their differences; but this was rejected by the yellows, who then had hopes of carrying both members, and they perſuaded Dr. Wollaſton, againſt his own inclination, to join with Cator, whom they had invited to ſtand: about the ſame time, the portmen, who were told by Dr. Wollaſton that he would ſpend no money in the election, aſked him to withdraw his brother, which he refuſed. Cator was at this time a ſtranger to the borough. On the Monday before the election, Dr. Wollaſton, by appointment, met Mr. Cator at the houſe of Mr. Cornwall, a banker in Ipſwich and partner in that buſineſs with the bailiff Spooner. Here theſe three held a converſation about the election: Cornwall, who had before been told by Dr. Wollaſton, that he would not ſpend more than 300l. on the election, and had communicated this to Mr. Cator, in this converſation

ſaid

ſaid to Dr. Wollaſton, "he had eſtimated the expence at about 2000l. that Cator was willing to advance 1700l. of this ſum, if Wollaſton would anſwer for the remaining 300l." This being agreed to by the latter, Cornwall ſaid, "if the expences were to be paid at his bank, he ſhould expect a depoſit of the money beforehand;" This was likewiſe agreed to, and then they went about the town on a joint canvas for Wollaſton and Cator; on the ſame day Cator paid 1700l. into Cornwall's banking-houſe; on the next day, at Cator's deſire, the above agreement was put in writing and ſigned; it is as follows:

"Mr. Wollaſton, by Dr. Wollaſton, "depoſits 300l. in the hands of Meſſrs. "Alexander, Cornwall, and Spooner; and "John Cator having depoſited 1700l. in "the ſame hands, for the purpoſe of pay- "ing the expences already incurred, and "which may be incurred, for their elec- "tion; and it is agreed, if the expence is "leſs than 2000l. all the money remain- "ing ſhall be returned to John Cator; "and if the expences exceed 2000l. all

above

"above that ſum is to be paid in equal "portions by Dr. Wollaſton and John "Cator. In witneſs whereof, they have "ſet their names this 30th March, 1784.

"FRED. WOLLASTON.

"JOHN CATOR.

"N. B. If the expence does not amount "to 1200l. Dr. Wollaſton is to have re-"turned the proportion of one to four."

Dr. Wollaſton in his evidence ſaid, he had no knowledge of election matters, nor of the particular expences, or the manner in which they were incurred, in an election at Ipſwich; he had heard that a great deal was incurred on account of the out-voters; and being told by Cornwall, that the expences of the former election had exceeded the above ſum, he relied on his eſtimate, as he made it, without knowing how, in particular, the money was to be applied; but he underſtood it was for the neceſſary joint expences of the election, and not to be uſed for any purpoſes in which both parties were not concerned; and that no unlawful uſe would be made of it: Cornwall was to diſburſe the money, and

to

to return the remainder, if any, with an account; he wiſhed the tranſaction to have been kept ſecret, though not from any notion of its being wrong, but found it was known to all his principal friends in the corporation.

In the courſe of the canvas, he perceived his brother's intereſt to have declined conſiderably, and hereupon determined, after conſulting one or two private friends, to withdraw his name on being indemnified the expences at that time incurred; On the thurſday before the election, at Cornwall's houſe, in the preſence of Cator, Cornwall, Spooner, Notcote the town-clerk, and one or two more of the corporation, he ſaid, he feared his brother's intereſt might fail, and aſked them "*If Middleton ſhould be at the head of the poll, whom they would deſert, Cator or his brother?*" to this queſtion no anſwer was made; upon which, he ſaid to them, "*I now ſee you would deſert my brother and ſupport Cator;*" hereupon Notcote came forward, and ſaid, "*What would our enemies ſay of us if we ſhould not, as he pays*

ſo

ſo much more than you?" No more was ſaid on the ſubject. In the afternoon of that day, Dr. Wollaſton offered to withdraw his brother, according to his firſt reſolution, and Mr. Cator agreed to repay him what he had laid out upon his canvaſs: As to the 300l. he had not paid it into the bank.

Mr. Cornwall * in his evidence ſaid, that he had known Mr. Cator before, and would have truſted him with any ſum, but would not have given credit to the parties jointly; for which reaſon he deſired a depoſit, as he had before found difficulties in getting the money advanced; that he believed the 1700l. was intended for the common expences of the

* When Mr. Cornwall was called to be ſworn as a witneſs on the part of the ſitting member, he ſaid, he was a Quaker, and *affirmed*; but being aſked by the counſel for the petitioner, whether he had not lately put in an anſwer in the Exchequer upon *oath*, he anſwered in the affirmative, and ſaid, his ſcruples upon this point were not ſo rigid as thoſe of the generality of his ſect; that if the Committee thought he ought to be ſworn, he would not object to the oath; hereupon the counſel for the petitioner inſiſted that he ought to be ſworn; the Committee ſeeming to be of that opinon, and he not objecting, he was then ſworn.

election,

election, jointly with the 300 l. but that it was liable to ſuch uſes as Cator might think proper, and he might have drawn for it without defraying the expences; on being aſked, "*Where then was the ſecurity of the depoſit?*" he ſaid, it was ſo, notwithſtanding, in his mind.—Being aſked if he did not know before the meeting of Cator and Wollaſton, that the former was to make a depoſit? He ſaid he could not recollect this with certainty; he was not ſure, but believed not.—He delivered in an account current of his houſe with Cator for the 1700 l. of which, about 1100 l. was ſpent, the reſt was repaid to him on a draught of the 24th of May; the diſburſement of the money was under the direction of Spooner.—Mr. Cornwall ſaid, he himſelf was no corporator.

All the expences were paid out of this fund.

In order to ſhew that the lawful expences of the election, particularly the travelling charges of the out-voters, could not require ſuch a ſum as Mr. Cator placed in Cornwall's hands, the counſel for the petitioner

titioner gave in evidence the following account of the ſituation of the voters for him, which had been examined with the poll and the diſtances proved.

Liſt of the out-voters, for Cator, and of the diſtances of their reſidence from Ipſwich.

	Miles.	Voters.
Reſident at Harwich, diſtant	11	37
Ditto, within - -	5	8
Ditto, between -	5 and 10	13
Ditto, between -	10 and 15	12
Ditto, between -	15 and 20	12
Ditto, between -	20 and 30	10
Ditto, between -	30 and 40	5
Ditto, between -	40 and 50	4
Ditto, between -	50 and 60	1
Ditto, between -	60 and 70	
(including London and its environs)		39
Ditto, between -	70 and 80	17
		158
Voters for Cator reſident at Ipſwich		139
Total		297

Upon

Upon the charge of treating the facts proved, were as follow *,

On the five days preceding the day of election, Mr. Cator had invited ſome of his friends in the corporation to dine with him at the Inn in which he lodged; the number never exceeded ten, and was ſometimes leſs; among them on ſome days were the two bailiffs, town-clerk, and ſome of the portmen: ſometimes he had friends of the party who had no votes, as Cornwall and Wollaſton. The bill for theſe dinners was leſs than 22 l.

At the ſame houſe a number, ſhort of thirty, of voters from London, were entertained for two days, including the day of election; and on the election day, a great number of the town voters; they had no liquor at Cator's expence before friday evening; and the landlord was ordered by Cator to give no liquor to the voters before the election; he had no orders for the entertainment on the day of election, but

* The teſte of the writ of election was, on Friday the 26th of March; the election was proclaimed in Ipſwich, on Tueſday the 30th following.

after

after the election Cator paid his whole bill, which amounted to 91 l. including the ſum above-mentioned for his own dinners.

One inn-keeper had a bill of 28 l. paid at the bankers *, for entertaining ſome out-voters on the evening before the election and on the election day, with victuals and drink; he had no orders for this, except as to one particular voter, whom Spooner directed him to provide for two days before; but after the election, the banker's clerk ordered his bill to be made out in Cator's name and brought to the bank.

Another inn-keeper was directed by Spooner, to entertain ſuch voters as came to his houſe from London, of whom, ſeven or eight came on the friday; he entertained them, and fifteen or twenty more freemen of the town, that evening; and on the election day, during the poll and after, fifty or ſixty of the town beſides, and twelve or fourteen more out voters added to the reſt, with ſuch victuals and drink as they choſe to call for; among them were ſeveral perſons who had no votes; his bill amounted to 59 l.

* Alexander, Cornwall, and Spooner.

which

which he carried to Cator, who paid it by draught on the bankers.

A publican at Harwich, had entertained a few freemen, reſident there, on friday evening and ſaturday morning, without any orders; his bill amounted to 3 l. 3 s. which he carried to Spooner, who paid it. Cator had canvaſſed him at Harwich on thurſday, without obtaining his promiſe.

About ſixteen perſons, chiefly voters from London, had dined at an inn in the town, on ſaturday before the poll cloſed; their bill amounted to 81. 17 s. which Cator paid in the ſame manner as the reſt, by draught on the bankers.

Another publican had entertained about thirty Harwich voters, and a few others, on ſaturday and part of ſunday; his bill amounted to 27 l. which he carried to Spooner and was paid by a clerk of his houſe: he had received orders to entertain the Harwich voters from one of the corporation, a friend of Spooner's.

Another had, without any orders, entertained about twenty Harwich voters on friday night, and till ſunday noon; his

bill was 121. 10s. which his gueſts bid him take to Spooner; he did ſo, and it was paid, but he expected payment from the gueſts, till they told him otherwiſe.

Another had entertained about twenty or thirty out-voters, chiefly from London, from friday evening till monday morning, by the order of a gentleman in Wollaſton's intereſt; his bill was 33 l. which, by the deſire of Cator, he carried to him, from whom, he received a draught for it on the bankers, which was paid.

Beſides the above, a ſupper was given to about eight or nine of the London voters, at an inn in London, on wedneſday evening, and a dinner at the ſame houſe, next day, to upwards of twenty voters, by the order of Dr. Wollaſton's brother, who came to London in order to canvaſs for Wollaſton and Cator; it did not appear in what manner the bill for this dinner and ſupper was paid (A.)

Some of the inn-keepers were freemen of Ipſwich, and others not.

On friday evening, in conſequence of Wollaſton's declining, the two parties agreed

agreed to join in ſupport of Middleton and Cator, and no conteſt was expected, till the arrival of Mr. Crickitt on that evening; many of the perſons examined in the cauſe (who were voters) did not hear of his arrival till the next morning.

Upon the charge of corrupting the electors, the facts proved were as follow.

An extenſive diſtribution of money was made, after the election, to many of the out-voters for loſs of time, with the approbation of Mr. Cator, out of the ſum in the banker's hands; thirteen voters, reſident in London or its neighbourhood, who were examined before the Committee, were paid three guineas each immediately after the election; they had all their travelling expences paid beſides; this ſum was given without inquiry into their circumſtances or the profits of their ſeveral employments, which were various; ſome being capable of earning five or ſeven ſhillings a day, and others two ſhillings; they were abſent from their buſineſs, ſome four days, ſome five; to none of them was any direct expectation

given of a reward for their votes; two or three were told, when canvaſſed by Cator's agent, Prigg, whom he had employed to canvaſs and convey voters to Ipſwich, that "they ſhould be ſatisfied for loſs of time." Some of them had voted at former elections, and had received a ſimilar gratuity, and ſaid they expected it at this; one man ſaid to the Committee, "he could not tell what the three guineas were for, unleſs for his vote."—One, when canvaſſed by Cator's agent, bargained that his ſon ſhould go and take up his freedom, and was afterwards paid five guineas by the ſame perſon, for himſelf and his ſon, though his ſon did not vote.

The greater number of theſe thirteen did not promiſe their votes to Cator before they went to Ipſwich, though they travelled there at his expence.—They voted for Middleton and Cator.

Five voters, reſident at Harwich, likewiſe gave their evidence to the Committee: Theſe men, in the ſame circumſtances as the others from London, had in the ſame manner received a guinea and a half a piece;

piece; and it appeared that the ſame ſum was given to moſt of the Harwich voters. Harwich is eleven miles diſtant from Ipſwich, and the paſſage by water (their uſual way of going thither) coſts ſix-pence: They were abſent on ſaturday and ſunday. To all theſe Cator was a ſtranger at the time of the election, and ſome of them came to Ipſwich intending to vote for Wollaſton.

It was admitted by the counſel on both ſides, that Middleton and Cator had no joint expences in the election.—And it was either proved or admitted, that all the London voters generally received three guineas apiece after the election, out of the money depoſited.

Upon the charge againſt Spooner, theſe facts appeared in evidence.

That he had a very extenſive influence in Ipſwich, that he canvaſſed the town for Wollaſton and Cator, and afterwards for Cator ſingly;—wrote letters ſoliciting votes for him, and in particular to Prigg beforementioned, in London, to canvaſs for him and Wollaſton, whoſe bills of expences he

paid, and to whom he gave or ſent money to pay ſome of the London voters the three guineas; he likewiſe told Prigg that he had given one Burney one hundred and fifty guineas for paying expences *.—In Cator's preſence, he ſent an agent to London in order to accompany the freemen to Ipſwich, and afterwards paid him for his trouble.—He gave orders at two inns for entertaining ſome of the London voters, and afterwards paid the bills.—He paid ſome of the Harwich voters a guinea and a half for

* In the courſe of Prigg's examination before the Committee, he was aſked, through what channel he received the money he diſburſed on the election account? he ſaid, Spooner bid him apply to Burney for it, and was going to relate what Burney ſaid to him on that ſubject, when Cator's counſel objected to the admiſſibility of the evidence of what Burney (a third perſon) *ſaid*, as far as it might affect Cator; on the other ſide it was ſaid, that Spooner having been proved an agent, and he referring Prigg to Burney, thereby made Burney an agent in reſpect of this reference, whatever the ſubject of it might be, and his conduct therein became a fit ſubject of evidence againſt Cator, by whom he was thus indirectly employed, through the medium of Spooner: the counſel for the ſitting member not inſiſting in their objection, the queſtion, "What did Burney ſay to you?" was allowed by the Committee to be put to the witneſs.

loſs

loſs of time; in Cator's preſence, he told one who had voted, that he ſhould have three guineas when he came to London, and paid ſeveral bills of the election expences.

Being examined himſelf, he ſaid he had done every thing in the election which one friend does for another; had voted for Cator, and, as his banker, paid his draughts for the expences.

The following evidence was given of one particular charge of bribery by Spooner.

One Reynolds, who had voted in the election in 1780, for Staunton and Wollaſton, had been employed at the ſame time in ſome election buſineſs for that party, upon whom he now had a demand of 4l. 16s. for expences then incurred and not paid. He met Spooner at Ipſwich at this laſt election, and aſked him, Why this demand had not been paid according to his (Spooner's) promiſe? Spooner told him "it ſhould be ſettled; that Wollaſton "had declined, and Cator was in his in-"tereſt:" whereupon he went to the poll and voted for Cator and Middleton. Reynolds

nolds ſaid in his evidence, he ſhould not have voted for the yellows, if he had not been made eaſy on this demand. This man went to Ipſwich on the part of Middleton, and was paid three guineas by his agent after the election.

Upon theſe facts the counſel for the petitioner argued, That the election of Mr. Cator had been obtained by corrupt influence, and muſt be declared void; they ſaid,

By the common law of Parliament, independently of the Statutes concerning bribery, no man can ſit in the Houſe of Commons who has obtained his election by the influence of money, operating generally upon the collective body, or upon any individual among them; the evidence ſhews, that the ſitting member did procure himſelf to be elected by ſuch pecuniary influence, operating in different ways.

Firſt, By a depoſit of 1700l. at the deſire of the leading part of the corporation, he acquired a ſupport from them, which, it was declared by one of them, he would not have had without it; and was by them

them preferred to Wollaſton, upon whoſe intereſt he at firſt ſtood jointly with him.

Secondly, By giving meat and drink to the electors, contrary to the treating act (A).

Thirdly, Under colour of payment for *loſs of time*, he gave, beſides all expences, uniform ſums of money to the London and Harwich voters, without inquiry into their circumſtances; which uniformity alone excludes the idea of compenſation.

Fourthly, The depoſit of ſo large a ſum for the purpoſes of the election, under all the circumſtances, is ſufficient evidence of a criminal intention in the candidate, and renders him reſponſible for the abuſes of its application.

The facts ſhew a formed deſign to obtain a ſeat in Parliament for Cator, at the expence of Wollaſton's. He was invited before the portmen had ſeen Dr. Wollaſton: If the deſign of the party had been to carry two members, why ſhould Dr. Wollaſton be deſired to withdraw his brother? If only one, their connection with Wollaſton pointed him out as that one; Middleton con-

conſented to let that party carry one, and in fact they did not attempt to carry two: But they durſt not at firſt prefer Cator to him, and therefore they join them together, in order to fix Cator in the intereſt, and to prevent oppoſition from that quarter; when this is done, they ſhake off Wollaſton, whoſe declaration with reſpect to expences ſuited not their purpoſe.

It is not poſſible to call this a free election, in which the governing part of a corporation become the agents of a candidate, in conſequence of his depoſiting money by their advice; and reſembles the well-known caſe of Long in Queen Elizabeth's time *, who gave money to the mayor of Weſtbury, in order to be returned to Parliament. The agreement in writing does not explain the original tranſaction; *that* was between Cator and the corporation; but none of theſe latter were parties to the agreement between Cator and Wollaſton; nor was Cornwall, who had propoſed the depoſit, a party to the engagement to return part of it; it was merely a private contract for the ſecurity of Dr. Wollaſton.

* 2 Doug. Elect. 401.

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The operation of this depoſit (which was no ſecret) took place viſibly, for the Harwich voters reſolved to leave Wollaſton; this Dr. Wollaſton found * on the thurſday; for this, in the caſe of a total ſtranger, as Cator was, no other cauſe can be aſſigned, than the expectations which the money had raiſed; the ſtory muſt neceſſarily have ſoon found its way through the country at the time of a general election; and the town-clerk's anſwer to Dr. Wollaſton's queſtion, ſhews what effect it had upon the corporation; it was declared as plainly as the ſubject admitted of being expreſſed.

After this, it is hardly poſſible to doubt that Mr. Cator owed the ſupport of the corporation, in preference to Wollaſton, to the influence of the depoſit, whatever the purpoſes might be for which it was ſaid to be intended; when the above anſwer was given, it was acquieſced in by all the leading men of the corporation, for ſuch the perſons preſent are allowed to be, and Spooner † himſelf had more influence

* This was part of Dr. Wollaſton's evidence.

† One of the witneſſes gave this account of him.

than

than any man in Ipſwich; Dr. Wollaſton was ſo ſenſible of it, that he thereupon determined to withdraw his brother; Cator immediately took advantage of it, by bargaining with him for his brother's reſignation, and paid his expences.

If therefore the caſe went no farther, and the money had not been miſapplied as it has been, yet the ſupport of the candidate being purchaſed by the depoſit, the Committee muſt avoid the election; ſuch a deciſion muſt neceſſarily follow upon the principles of the common law of Parliament, independently of the ſtatutes of bribery.

The fundamental maxim of repreſentation is, that elections muſt be freely made*: every act therefore by which by this freedom is interrupted is highly criminal. It has been declared in a judgment of the Court of King's Bench, that the practiſing of corrupt influence in elections, was al-

* I preſume this alludes to the ſtatute 3 Edw. I, ch. v. "Et pur ceo que elections doivent eſtre franches, "le Roi defende ſur ſa greve forfaiture que nul haut "homme, n'autre, pur poiar des armes, ne per menaces "ne diſturbe de fair franche election."

ways

ways an offence by the law of the land*; and there are caſes in the Journals, long before the time of the Treating Act, in which the Houſe of Commons has enforced this principle, by avoiding the elections ſo obtained (B): The ſtatute is in this reſpect only declaratory; it defines more exactly the crime upon which its penalties are inflicted, regulates and directs the evidence of guilt, and aſcertains the puniſhment: But as far as any act was an offence againſt the freedom of elections before the ſtatute, juſt ſo did it remain after it paſſed. In the ſame manner the ſubſequent ſtatute, 2 Geo. II. ch. xxiv. ſuperadds additional penalties againſt individuals.

But when the above conduct of Mr. Cator is conſidered upon the footing of the ſtatute 7 & 8 William III. it appears to fall directly within its proviſions; it is forbidden, "either directly or indirectly, to make any preſent, gift, or reward, or promiſe of either, for the uſe or benefit, or advantage of any individual, or of any place,

* In the caſes of Pitt, and Mead, in 3 Burr. 1338.

in

in order to be elected (A.)" Mr. Cator's depoſit was a direct benefit, proceeding from him to the perſons concerned, for the purpoſe of being elected; and what is ſtill more, was by them avowed to be ſo.

The diſtribution of the two ſums of three guineas, and a guinea and a half, to the London and Harwich voters, out of a fund which they might, or rather, muſt have known to be brought to Ipſwich for the election,—and to perſons moſt of whom had received a ſimilar payment at former elections, and expected the ſame favour now, is a deciſive proof of the intention with which the ſum was depoſited, and of the effect which the knowledge of it was expected to have: Such a ſcheme of corruption, if uncenſured, would be as pernicious as thoſe which diſgraced the names of Shafteſbury or Hindon, at the ſame time that it has the advantages of regularity and ſecurity; Cornwall, who had experience in elections at Ipſwich, could not have eſtimated the coſts at ſo much without reckoning theſe gratuities in the account, (of which, the liſt given in evidence

is

is a proof,) and his calculation was acquieſced in by Cator; the 2000l. muſt neceſſarily be for ſome unlawful expences, becauſe no ſecurity could be wanted for the lawful ones; they are recoverable by law. If every one of the out-voters had travelled to Ipſwich alone, and in the moſt expenſive manner, the expence could not have amounted to half the ſum which he required; thirty-ſeven of theſe (the Harwich voters) might be carried there and back again for a ſhilling each, and moſt of them actually took this conveyance; none travelled more than eighty miles, and only fifty-ſeven a greater diſtance than fifty miles.

It is ſaid, that when the bill, which paſſed the Houſe of Commons in the laſt Parliament, for preventing bribery at elections under colour of ſuch payments, came into the Houſe of Lords, it was oppoſed very ſtrenuouſly by a great Law Lord in that aſſembly *, who declared, that the law, as it ſtood, wanted no ſuch new prohibition; that all ſuch methods of evaſion were illegal and corrupt; and, as to the

* Earl Mansfield.

alledged

alledged difficulty of conviction, his lordſhip added, " Whenever you find me the facts, I'll find the law for them (C)."

In ſhort, the depoſit, as it has been applied, muſt be conſidered as a general direction to the candidate's friends to uſe it according to their diſcretions; his ſubſequent approbation of their abuſe of it, makes him a party to thoſe abuſes. It is plain, that the name of *compenſation for loſs of time*, now given to theſe gratuities, is colourable only; in every caſe it far exceeded any ſuch real compenſation, and in none was it given upon an eſtimate or inquiry; the loſs of time to the Harwich voters, was but one day at the utmoſt.

It ſignifies little, that there is no *direct* evidence of general expectations being given of a future gratuity, becauſe hints of this ſort may be, and generally are given with ſecrecy and perfect ſecurity, and many of the voters declared they did expect it; one of the men employed to canvaſs did actually promiſe a gratuity to a few, whom he canvaſſed; here then is reaſonable ground to believe, that they had ſome foundation

for their hopes. It cannot be expected that ſuch clear and full evidence can be produced in caſes of this criminal nature, as in caſes of civil contracts; in them, there is no occaſion for any concealment, and all the circumſtances are eaſily diſcovered; but it is not ſo, where it is ſo much the intereſt of the parties concerned to tranſact their affairs in ſecret.

Beſides, the tendency of the preſent inquiry before the Committee is not like that in an information or indictment for bribery, or an action for penalties, in which the rules of penal law require more ſtrictneſs of proof; the preſent object is only the validity of the ſeat acquired by Mr. Cator. It is a rule of evidence, that the acts of an agent ſhall affect his principal even criminally; i. e. they raiſe a violent preſumption againſt him, and if it is not rebutted by contrary evidence, it ought juſtly to be concluſive *; he may have

* Such, for inſtance, is the caſe of a bookſeller's ſervant ſelling a book, for which, the maſter may be indicted for publiſhing a libel, if the book ſhould happen

have the benefit of the agent's evidence to explain his acts; But in this caſe Mr. Cator does not call any of thoſe whom he employed in the election.

If more evidence ſhould be required by the Committee than has been produced, all the laws for the purity of elections will be rendered uſeleſs, becauſe, in ſuch caſe, corrupt plans of election may be ſecurely carried on, if the authors will but guard them with a little outward covering, or ſemblance of propriety *.

With reſpect to the treating, it was notoriouſly carried on in the borough of Ipſwich; there was in London likewiſe a treating, directly contrary to the act of Parliament. This is endeavoured to be juſtified in two ways, Firſt, As not being by the orders of Mr. Cator; and Secondly, As not being done *in order to gain the election*, becauſe, when it happened there

to have a libellous tendency; the ſale by the ſervant is *evidence* of the maſter's aſſent, and becomes concluſive if not contradicted. See Almon's caſe, 5 Burr. 2688.

* I remember to have heard a learned Judge tell a jury, that "they ought not to expect evidence of the light of truth in deeds of darkneſs."

was no danger apprehended from a conteſt. But orders for treating the London voters were given by Mr. Cator's agent, and he paid the bills of all the inns where meat and drink had been given, without objecting to any article in them; they were beſides paid out of the fund intended expreſsly for *the purpoſes of the election*; this ratification of the acts of the publicans, connected with the orders that were actually given, is evidence of an antecedent authority to them; in the inſtance proved of his forbiddance of liquor before the election, the bill for expences contrary to this order was paid by him without objection or queſtion. The difficulty of obtaining more complete proof in ſuch caſes, ſuggeſted to the Houſe the terms of the ſtanding order of 21ſt October, 1678 *, "by himſelf, or by any other in his behalf, or at his charge, &c." (D) which in 7 & 8 W. III. ch. 4. ſ. 1. are thus altered to be more comprehenſive, "by himſelf, or themſelves, or by any other ways or means on his or their behalf, or at his or their charge, be-

* 9 Journ. 517. and 2 Doug. Elect. 404.

fore his or their election—give, preſent, or allow, &c." The caſe is therefore brought within the words of the ſtatute, if the Committee ſhall think this done *in order to be elected*; to prove which, it ſeems unneceſſary to urge any other fact, than that the bills were paid out of the money declared by Mr. Cator to be for the election; the ſtatute does not ſuppoſe a conteſt to be neceſſary, in order to render its proviſions effectual; but there was in fact a conteſt expected throughout, for on the friday on which Wollaſton declined, another third perſon, the petitioner, declared himſelf a candidate: Again, the Harwich voters came to Ipſwich without having promiſed Cator their votes. Theſe men * were provided for by the order of a friend of Spooner's, and treated according to their own deſires, immediately upon their arrival; this charge Cator alſo paid: In the ſame manner the greater part of the London voters were treated with a ſupper and dinner in London, and ſent down to Ipſwich without having promiſed their votes, were well fed on the road, and

* See p. 33.

enter-

entertained there: There is a difference between this ſort of entertainment, and that which is given to one whoſe vote is already promiſed.

As to the conduct of Mr. Spooner the returning officer, it is a proper caſe for the cenſure of the Committee; he appeared foremoſt in a bargain for that place, in reſpect of which he ought, as a miniſter of the law, to have been impartial and indifferent; inſtead of which, he not only became the agent of one of the parties, but in that character did all in his power to render the proviſions of the law ineffectual.

The counſel for Mr. Cator argued as follows:

The rule of evidence laid down to guide this inquiry by the counſel on the other ſide, cannot be admitted, becauſe it would be overturning the law whereby the ſame proof is required of charges of this nature, as of any other; the petitioner has the ſame means of obtaining it, and the Committee has the ſame power to compel it, as in other courts of juſtice; the charge

againſt the ſitting member is criminal in a high degree, and if eſtabliſhed, draws upon him a ſevere puniſhment, by excluſion from his ſeat in Parliament. It is therefore but juſtice to require the ſame legal certainty in the evidence, as is neceſſary in other criminal proſecutions.

With reſpect to the bribery of the corporation, occaſioned by the depoſit, the agreement ſhews its object to have been fair and honourable, unaccompanied with any of that ſecrecy with which guilt is uſually attended; the whole ſum is to be accounted for to both parties, and a return made; and in fact, that account has been produced to the Committee, by which the amount of the ſum ſpent, and of that returned to Mr. Cator, is made known: And Dr. Wollaſton (to whom nothing wrong is imputed, and who was as much concerned in the ſcheme as Mr. Cator) intended it for the common and neceſſary expences of the election; this is not illegal, and to impute any other motive to this fact, is to conclude from other grounds than the evidence in the cauſe:

The

The outvoters are neceſſary to the ſupport of that intereſt on which Mr. Cator ſtood, and the expences of bringing them to Ipſwich, heavy; Cornwall's experience made him require a ſufficient ſum, but the ſize of it affords no cauſe of ſuſpicion, becauſe he was accountable for its application: What had the corporation or its members to do with this? Cornwall himſelf is not one of them, and the tranſaction paſſed between the two candidates and their banker, without any reference to the corporation. Mr. Cator had no deſire to make a ſecret of it; Dr. Wollaſton had, and it is eaſy to diſcover his reaſon for it; he muſt have been diſpleaſed to have it known, that his brother's ſhare was ſo inferior to the other's; he declared it was not from a belief of any thing wrong in the affair; but it has been inferred, that it was intended on Cator's part to make it known; an inference not warranted by any evidence, and inconſiſtent with the other imputation by which guilt has been inferred from the intended ſecrecy.

It has been argued, that though Dr. Wollaſton's conduct was upright, yet Cator and his friends had different views, as if they meant to betray him; but they could have no motive for this, they were ſuppoſed to be the prevailing party, and derived no ſupport from him, but on the contrary, he from them; they might have propoſed Cator's name to the blues, inſtead of Wollaſton's, without any difficulty; beſides, if they had had any deſign to betray Wollaſton, they would not have admitted him into their ſchemes. The words of the town-clerk, on which ſo much ſtreſs has been laid, have no corrupt intention; they allude merely to their own notions of party honour; they meant to avoid the reproach which the blues would have caſt upon them, if they ſhould have deſerted him by whoſe means the party was enabled to maintain itſelf.

As to the treating, the defence reſts on two points:

Firſt, It was not the act of Mr. Cator.

Secondly, It is not within the proviſions of the ſtatute.

The

The only order that can be traced to the candidate is, that for the entertainment of the voters from London; this was not proved to be more than the neceſſary accommodation of travellers, which is not within the meaning of the law, at leaſt it has often appeared in evidence before other Committees, and has never been cenſured; the ſmall amount of the bills likewiſe confirms this: In the only inſtance in which Mr. Cator was informed of any treating, he directly forbade it; this ſingle fact of innocence is enough to overthrow the whole preſumption of guilt.

But ſecondly, Suppoſing Mr. Cator anſwerable for the treating, it is not contrary to the ſtatute, the ſpirit and object of which are to prevent that diſtribution of money or entertainment, by which the election may be influenced; the ſupper and dinner in London were not of this ſort, they were not meetings for entertainment, but to tranſact the election buſineſs among the friends of the candidates, who were almoſt equal in number to the voters preſent; there was no public invitation, the perſons

perſons canvaſſed had not promiſed their votes, and wanted to know the characters and circumſtances of the candidates; theſe meetings were to give them an opportunity of ſeeing the friends of the candidates, and of making their inquiries; at Ipſwich no treating took place till the friday; (for the private dinners which Mr. Cator gave to his particular friends in the town cannot fall within that deſcription, the company chiefly conſiſting of thoſe who invited him to Ipſwich) on that friday Wollaſton declined, and it appears that the voters themſelves did not expect a conteſt; the ſtate of the poll, in which are only ſeven names for the petitioner, ſhews, that corruption was uſeleſs; the treating on the election day was chiefly after the poll (D). It is not argued that there muſt be a conteſt, in order to give effect to the ſtatute, but the want of it may be urged to encounter the preſumption by which the counſel on the other ſide would make Mr. Cator *criminal* by treating; it ſhews that he could have no motive for it, and as it was done without his orders, it would be unjuſt,

juſt, either to infer guilt from the fact, or to impute that guilt to him: In order to do ſo, the Committee muſt fall into the abſurdity of ſuppoſing that the candidate, at a time in which he thought himſelf ſecure, did nevertheleſs riſk that ſecurity, in a further attempt to gain what he was already ſure of obtaining, and thus loſe the end by the means.

Before the Committee can convict the ſitting member of bribery, by the money given ſubſequent to the election, they muſt be convinced, that the voters were taught to expect it, and that Mr. Cator was privy to the expectation; the true queſtion here is, Was this lure in any manner thrown out as an inducement to vote? only one inſtance appears (and that by the evidence of a diſappointed meddler in the election) in which any promiſe was made; Prigg ſaid, he did promiſe two or three a gratuity; but he had no authority for it, being expreſsly employed *to canvaſs* only; in this act he exceeded his power, and his principal cannot therefore be anſwerable for it.

Bribery

Bribery is the corrupting a man to give or withhold his vote, it muſt precede the act done; nothing ſubſequent to the vote can effect it; this was admitted by the counſel on both ſides in the caſe of Sudbury*; although two or three of the voters did expect money, and one acknowledged that he received it for his vote, this only ſhews the guilt of their own minds, not of Mr. Cator; for want of ſuch connection between the ſubſequent act and ſomething prior, the whole evidence reſpecting the London and Harwich voters ought not to have been received, and the Committee ſhould now conſider it as a blank in their minutes. The number to whom the money was given will not vary the caſe in the leaſt, for a multitude of acts, in themſelves innocent, can never be conſtrued into guilt: Therefore, unleſs each of theſe payments is ſufficient to fix bribery upon Mr. Cator, all together cannot; even if the giving of theſe ſums were connected with any previous promiſe, it would ſtill

* 2 Doug. Elect. 137.

be

be a queſtion for the Committee, whether it was given as a compenſation for loſs of time, or as a bribe; for in ſome inſtances it appeared to be very little more than an adequate ſatisfaction for the voter's loſs, and it cannot be expected that a Committee ſhould employ their time upon an inquiry into the value of a carpenter's or ſhoe-maker's labour.

The proof offered of an attempt to bribe on the part of Spooner, amounts to no more than a promiſe to pay a juſt debt, without any reference to his vote; this requires no juſtification.

The evidence againſt Mr. Spooner ſhews no more than the legal ſupport which one friend may give to another; although he happens to have been returning officer, he did not *in that character* diſcover the leaſt partiality or abuſe of his office; he is deſcribed as a man of weight in the corporation, and it would be ſtrange to deny a man the privilege of giving a perſonal ſupport to his friend, on account of

of his accidental poſſeſſion of an office with which it has not interfered.

On the whole, if the Committee will conſider the particular periods of the ſeveral acts charged to be criminal, and the ſituations of all the parties concerned, their motives and tendencies, and compare together the whole ſtate of the evidence, ſimply and legally, without the aid of conjectures, they will find it impoſſible to ſay, that Mr. Cator has obtained his ſeat by a breach of the law.

The Committee deliberated on the remaining part of the day on which the counſel finiſhed, and on the whole of the next; on the following day (June 18th) after ſome time ſpent in deliberation, they determined,

That neither the ſitting member nor the petitioner, was duly elected, and that the laſt election was void as to Mr. Cator (E), which reſolutions the chairman reported to the Houſe on the ſame day *.

* Votes, June 18th, p. 247.

NOTES

NOTES

ON THE CASE OF

IPSWICH.

PAGE 34, and 46. (A.) It may be uſeful in this place to tranſcribe the ſtat. 7 & 8 W. 3. ch. 4. called the Treating Act: The title of it is, "For preventing charge and expence in elections."

Sect. 1. "Whereas grievous complaints are made and manifeſtly appear to be true in the kingdom, of undue elections of members to Parliament, by exceſſive and exorbitant expences contrary to the laws, and in violation of the freedom due to the election of repreſentatives for the Commons of England in Parliament, to the great ſcandal of the kingdom, diſhonourable, and, may be, deſtructive to the conſtitution of Parliament: Wherefore for remedy therein, and that all elections of members to Parliament may be hereafter freely and indifferently made without charge or expence, Be it enacted and declared by, &c. That no perſon or perſons hereafter to be elected to ſerve in Parliament for any county, city, town, borough, port, or place, within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, after the *teſte* of the writ of ſummons to Parliament, or after the *teſte* or iſſuing out or ordering of the writ or writs of election upon the calling or ſummoning of any Parliament

liament hereafter, or after any ſuch place becomes vacant hereafter, in the time of this preſent or of any other Parliament, ſhall, or do hereafter, by himſelf or themſelves, or by any other ways or means on his or their behalf, or at his or their charge, before his or their election to ſerve in Parliament for any county, city, town, borough, port, or place, within the kingdom of England, dominion of Wales, or town of Berwick upon Tweed, directly or indirectly give, preſent, or allow, to any perſon or perſons having voice or vote in ſuch election, any money, meat, drink, entertainment, or proviſion, or make any preſent, gift, reward, or entertainment, or ſhall at any time hereafter make any promiſe, agreement, obligation, or engagement to give, or allow, any money, meat, drink, proviſion, preſent, reward, or entertainment to or for any ſuch perſon or perſons in particular, or to any ſuch county, city, town, borough, port, or place in general, or to or for the uſe, advantage, benefit, employment, profit, or preferment of any ſuch perſon or perſons, place or places, in order to be elected, or for being elected to ſerve in Parliament for ſuch county, city, town, borough, port, or place.

Sect. 2. That every perſon and perſons ſo giving, preſenting or allowing, making, promiſing or engaging, doing, acting or proceeding, ſhall be, and are hereby declared and enacted, diſabled and incapacitated, upon ſuch election, to ſerve in Parliament, for ſuch county, city, town, borough, port or place; and that ſuch perſon or perſons ſhall be deemed and taken, and are hereby declared and enacted to be deemed and taken, no members in Parliament, and ſhall not act, ſit, or have any vote or place in Parliament, but ſhall be, and are hereby declared and enacted to be, to all intents, conſtructions

ſtructions and purpoſes, as if they had been never returned or elected members for the Parliament."

P. 45. (B.) I do not remember that the following caſes were mentioned in this argument: In the caſe of Bewdley, 10 March, 1676, (which was about three weeks before the paſſing of that reſolution on which the Treating Act was afterwards founded) the Committee reported, "that the chief matter on which they grounded their opinion was, the bribery of the ſitting member to procure the voices of the electors; on which they had reſolved, that he was not duly elected, and that the petitioner was," with which reſolutions the Houſe agreed. 9 Journ. 397.

The following caſes happened after the above-mentioned reſolution, (See it, 9 Journ. 411. and 2 Doug. elect. 404.) and before the Treating Act. In the caſe of Stockbridge, 15 Nov. 1689, the petitioner complained of bribery on the part of the ſitting member, who retorted the ſame charge upon the petitioner, and the Houſe declared the election void for the bribery, 10 Journ. 276, 286, 287.

In the caſe of Mitchell, 12 Nov. 1690, the ſame thing happened; as the report is ſhort, I have tranſcribed it, becauſe it ſtates the evidence on which the reſolutions of the Houſe were founded.

"The numbers on the poll were thus,

For Mr. Rowe -	31
For Mr. Courtney (petitioner)	20

But it was teſtified by Peter Stapley, that as to ſeven that polled for Mr. Rowe, they were not houſekeepers; one of which only was juſtified by Mr. Rowe.

It was further teſtified, That this election was managed by one John Atwell, on the part of Mr. Rowe,

who had offered ſix pounds apiece to thoſe that would vote for Mr. Rowe.

Thomas Riccard teſtified, That he was preſent the evening after the election, when his father and eleven others, that voted for Mr. Rowe, received five pounds apiece, i. e. 3l. 18s. 6d. in ſilver, and a guinea, which was ſaid to be for their wives.

John Soper ſaid he had 3l. 18s. 6d. and a guinea for his wife; and ſaw Richard Euſtace's wife, and Roger Nancaroe's daughter receive the like; and that this money was paid the morrow after the election.

John Atwell being examined ſaid, What money he paid was for meat, and drink, and tobacco, and many he had paid ſaid, they were not yet ſatisfied; and that he promiſed no money before the election."

Hereupon the Committee reſolved,

Firſt, That Anthony Rowe, Eſq; and his agents *were guilty of bribery*, in his endeavouring to be elected, &c.

Secondly, That he was not duly elected.

Thirdly, That the petitioner was duly elected; with all which the Houſe agreed. 10 Journ. 469, 470.

In the caſe of Wotton-Baſſet, 22 Dec. 1690, the chairman reported, That it had been ſuggeſted that the petitioner had obtained votes by bribery, whereupon the Committee had directed the counſel on both ſides, "to apply themſelves to the matter of bribery firſt;" and in concluſion, the petitioner was declared not duly elected, upon that charge, and his agent was ordered into cuſtody for diſtributing bribes to the electors. 10 Journ. 522. In the caſes of Chippenham and Ayleſbury, in 1691. 10 Journ. 638, and 644. bribery was likewiſe the ſubject of the petitions.

In

In the caſe of Stockbridge, 20 Dec. 1693, the Houſe declared the election "corrupt and void," and ordered a bill to be brought in for diſranchiſing the borough for the bribery practiſed at that election, 11 Journ. 36, 37.

Perhaps it has not eſcaped the reader's obſervation, that the caſe of Bewdley is much more appoſite to the argument to which this note refers, than the others; becauſe the latter came within the penalty of the reſolution, by which bribery was declared to be a cauſe of incapacitation; whereas the former was determined upon the general law of Parliament, without the aid of any expreſs reſolution.

P. 48. (C.) The principal object of the bill brought in by Lord Mahon at the latter end of the laſt Parliament, was, to prevent bribery at elections committed by paying electors for loſs of time and travelling expences: The firſt ſection inflicted a penalty of 500l. for giving any reward or entertainment to an elector, "on account of ſuch perſon's having voted at ſuch election, or, for or on account of, or, under pretence or colour of, any loſs of time, or any expence or expences incurred by ſuch perſon on account of ſuch election, or in or by his travelling to or from the place of election or of polling."—By the ſecond ſection, the Committee of election was directed to declare a candidate found guilty of ſo doing, incapable to ſerve for *that Parliament*. The bill had ſeveral other clauſes, and met with great oppoſition, and ſome amendment, in its paſſage through the Houſe of Commons. When it came into the Houſe of Lords, Lord Mansfield oppoſed it ſtrenuouſly, and after examining its principle and tendency through all its parts, declared, "*That the framers of*

*the bill muſt have been ignorant of the law as it now ſtands, or they never could have thought of ſuch a bill:—That the crime of bribery was already clearly and ſufficiently aſcertained by the law; for which reaſon, every bill preſcribing new modes of prevention, tended rather to weaken and contract the law, than to enforce and enlarge it:—That the palliatives of the bill by which it endeavoured to allow of ſatisfaction for real expences *, were liable to great fraud and abuſe, becauſe men's employments were ſo various, that an hour might be more valuable to one man than whole days to another, which rendered the difficulty of ſettling ſuch accounts inſurmountable:—That the laws in being were fully adequate to the puniſhment of all colourable and evaſive means of corruption, under pretence of paying electors for loſs of time:—That he had heard that a Committee of the Houſe of Commons had allowed a conduct of this ſort to paſs uncenſured †, but that if any ſuch determination had been made, it was clearly illegal."*—The Lords hereupon rejected the bill; the manner of doing it was by a motion for its being printed, which was underſtood to be an extinguiſhment, becauſe the Parliament was expected to be prorogued for diſſolution the next day (March 24).

* The bill in its amended ſtate contained a clauſe for this purpoſe; its ſupporters in the Houſe of Commons explained it to be an allowance of ſuch payments, provided they did not come to the *voter's* hands; thus, a candidate (it was ſaid) might pay a coachman for conveying his friends to the election, but not the *voters* themſelves for coach-hire.

† This was ſuppoſed to allude to the caſe of Worceſter in 1775.

P. 51. (D.) The treating act has a more comprehenſive expreſſion, than the ſtanding order of 21 Oct. 1678 *, on which it was founded; the words of that reſolution are, "if any perſon ſhall by himſelf, or by any other on his behalf, or at his charge at any time *before the day of his election*, give any perſon or perſons having vote in any ſuch election, any meat or drink exceeding in the true value of 10l. in the whole——— or *ſhall before ſuch election be made* and declared, make any other preſent, gift, or reward, &c." the ſtatute defines the time generally "*before his election*," and claſſes in one ſentence both the entertainment and the other preſents, prohibiting both equally within the ſame period.

But the greateſt difference between the reſolution and the ſtatute, conſiſts in the evidence required of the facts; the former declares the facts alone *duly proved* to be bribery, and criminal; but the latter infers the guilt from the object and intention; the ſeveral acts muſt be done *in order to be elected*, before the penalty attaches, according to the words of the firſt ſection of the ſtatute.

P. 62. (E.) In conſequence of theſe reſolutions, the Houſe ordered a new writ: Mr. Cator did not ſtand a candidate at the enſuing election: I have reaſon to think that his declining it was owing to an opinion, that he had been indirectly diſqualified by the foregoing reſolutions of the Committee. I do not know any deciſion in the Journals upon which ſuch opinion is founded, but thoſe who ſupport it argue, that when the ſubject matter of a petition againſt a ſitting member is bribery,

* 9 Journ. 517.

and his election is afterwards declared void upon that petition, it muſt neceſſarily follow, that he is thereby found guilty of the charges alledged againſt him, i. e. of bribery, and therefore becomes liable to the incapacity inflicted by the ſtatute; that this conſequence is analogous to the caſe of a judgment at law for the plaintiff, which following upon the declaration, neceſſarily convicts the defendant of the charges therein contained. But it ſhould be conſidered, that the determination of a Committee is not connected with the petition in the ſame manner as a judgment at law is with the declaration; becauſe, in the caſe ſuppoſed, by a judgment the declaration is expreſsly referred to, and the defendant is found guilty "in manner and form as the plaintiff hath alledged," whereas the deciſion of a Committee is ſeparate and independent: Again, the charges of a declaration are ſpecific and aſcertained; but in a petition of election they are generally looſe and complicated; beſides which, the eſtabliſhed method of deciſion upon it is known to be of the ſame ſort, and it is often impoſſible for the parties themſelves to diſcover with certainty the ground of the judgment from the *judgment* itſelf. Although a petition may alledge bribery only, ſpecifically and diſtinctly, it will be ſtill competent to the Committee to determine againſt the ſitting member upon grounds upon which he may be ſuppoſed innocent; thus, they may think that the votes may not have been bribed with the privity of the candidate, or, that they were, for ſeveral reaſons, reduced to an equality, or, that the petitioner himſelf may have been guilty of bribery as well as the ſitting member; theſe, and other explanations, may be given of deciſions like the preſent, and ought to be received in the favourable

favourable preſumption of innocence, under laws which eſtabliſh a maxim, that guilt is not to be preſumed. The ſimple reſolution of a void election, has no reference to the evidence in the cauſe, and it ſeems more conſonant to law to preſume, that thoſe who pronounce upon the charge, would have expreſſed their ſenſe of the ſitting member's guilt, if they had thought ſo, than the contrary.

The inſtances are numerous in which it has been expreſsly declared, that parties have been guilty of bribery; from which it might well be inferred, that where ſuch a judgment is not expreſsly given, the principle of it does not take place. I have found a variety of caſes in the Journals, in which it was competent to the loſing parties, upon ſecond elections, to have taken this objection againſt the ſitting members, yet they have not; the following are of this ſort.—Caſe of Steyning, 13 Journ. 482.—Maidſtone, 14 Journ. 73.—Boſton, 17 Journ. 145.—Newcaſtle, 14 Journ. 315.—Sudbury, 14 Journ. 119.—Reading, 18 Journ. 455.—It is not very eaſy to diſcover from the Journals what may have paſſed upon this queſtion, becauſe they do not take notice of the returns of members not petitioned againſt; ſo that many members may have ſate upon ſecond elections, whoſe former ſeats were avoided upon a charge of bribery, without our being able to diſcover this in the Journals. The laſt caſe I have met with, in which this objection was open, is the caſe of Poole in 1769: Mr. Gulſton petitioned againſt Mr. Mauger's election upon the ſole ground of bribery (32 Journ. 31), the petition much reſembled that in this caſe, no evidence of any other charge was produced, and the Houſe declared his election void (ib. 197, 198, 199).

At the election enſuing upon the new writ, Mr. Gulſton and Mr. Mauger were candidates, the latter was returned, yet the other never petitioned againſt this return.

I have heard that the contrary doctrine to that I am contending for, was eſtabliſhed by the late caſe of Kirkudbright; but I have examined the minutes of the two Committees of 1781 and 1782, and find it is quite otherwiſe: In the general election, Mr. Johnſtone was returned for this ſtewartry, and Mr. Gordon petitioned; the latter was determined by the Committee in 1781, to have had the majority of votes, but, upon the evidence of bribery brought againſt him by the ſitting member, the Committee reſolved, *That Mr. Gordon had been guilty of bribery at the laſt election for Kirkudbright**, and that the election was void. Upon the ſecond election the ſame parties became candidates, Mr. Johnſtone produced an atteſted copy of the above reſolution againſt his opponent, to the electors, and informed them of his incapacity thereby; notwithſtanding which, Gordon was elected and returned. Johnſtone petitioned againſt him upon the ground of this incapacity, and upon the trial of his petition in February, 1782, the Committee for that cauſe avoided the election of Mr. Gordon and ſeated the other who had the minority of votes. See 38 Journ. 15, 245, 415, 689.

* The chairman did not report this reſolution to the Houſe. See 38 Journ. 245.

III.

THE

CASE

Of the BOROUGH of

MITCHELL,

In the County of CORNWALL.

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

Sir Richard Hill, Bart. Chairman.
John Kynaſton, Eſq;
John Lowther, Eſq;
William Drake, jun. Eſq;
Sir John Woodhouſe, Bart.
Richard Gamon, Eſq;
Patrick Hume, Eſq;
Sir Charles Kent, Bart.
Sir John Miller, Bart.
Charles Brandling, Eſq;
Penn Aſheton Curzon, Eſq;
George Vanſittart, Eſq;
George Jennings, Eſq;

NOMINEE,
Of Mr. Wilbraham,
George Dempſter, Eſq;

Of Mr. Hawkins,
Philip Raſhleigh, Eſq;

PETITIONERS,
Roger Wilbraham, Eſq;—Chriſtopher Hawkins, Eſq;

COUNSEL,
For Mr. Wilbraham,
Mr. Morris—Mr. Batt.

For Mr. Hawkins,
Mr. Lawrence—Mr. Boſcawen.

THE CASE

Of the BOROUGH of MITCHELL.

THE Committee met on wedneſday, June 16th;

Mr. Wilbraham's petition ſet forth a charge of bribery againſt Mr. Hawkins, and alledged that a majority of perſons legally intitled to vote had tendered their votes for the petitioner, but were rejected by the returning officer, by which means there appeared on the poll, for the petitioner twenty-one votes, and the like number for Mr. Hawkins, in conſequence whereof, both were returned.

Mr. Hawkins's petition in the ſame manner complained of bribery on the part of Mr. Wilbraham, and aſſerted the majority of votes to be in his own favour; but that

that the returning officer, by rejecting votes tendered for the petitioner, had reduced the numbers for each to the equality abovementioned *.

In conſequence of this double return, the Committee directed the following ſtanding order of the Houſe to be read:

" Ordered, That in all caſes on double returns, where the ſame ſhall be controverted, either at the bar of this Houſe, or in Committees of privileges and elections, the counſel for ſuch perſon who ſhall be firſt named in ſuch double return, or whoſe return ſhall be immediately annexed to the writ or precept, ſhall proceed in the firſt place †."

Accordingly, as Mr. Wilbraham was firſt named in the return his counſel opened his caſe firſt.

The laſt determination of the right of election was next read, and is as follows:

" Reſolved, That the right of election of members to ſerve in Parliament for the

* Votes, May 25, p. 16, 17.

† 21 Journ. 89, 18 March, 1727-8.

borough

borough of St. Michell, in the county of Cornwall, is in the port-reve and lords of the manor who are capable of being port-reves, and the inhabitants of the ſaid borough paying ſcot and lot *." (A.)

Then the ſtanding order of January 16th, 1735-6, was read †, for reſtraining the counſel from offering evidence againſt the right of election declared by the laſt reſolution of the Houſe.

There were four candidates at the laſt election for this borough, for whom the numbers on the poll were as follow: For

Howell	27
Wilbraham	21
Hawkins	21
Boſcawen	15

Mr. Howell was allowed by each party to have been duly elected, and was ſo returned; the only diſpute was between the two petitioners. The port-reve, who preſided as returning officer, had voted for Mr. Wilbraham, and upon finding the numbers for him and Mr. Hawkins equal,

* 13 Journ. 416, 20 March 1700.

† 22 Journ. 498. See 1 Doug. Elect. 99.

declared,

declared, that if he poſſeſſed a caſting voice, he gave it for Mr. Wilbraham, but left the effect of it to future diſcuſſion: No argument was now uſed before the Committee to ſupport ſuch right in the returning officer; it was given up by Mr. Wilbraham's counſel (B.)

No queſtion aroſe in this cauſe on the right of election.

The counſel for Wilbraham founded his claim to the ſeat on two points:

Firſt, To give him a majority on the poll, by adding to his numbers one vote, which had been rejected by the port-reve, and by ſtriking off two from Hawkins's.

Secondly, If they ſhould fail in the firſt point, to avoid the election of Mr. Hawkins, and render him incapable of the ſeat, by proving him guilty of bribery by himſelf or agent.

The voter rejected by the port-reve was William Nancarrow; he claimed to vote as the occupier of a tenement called *Part of Swine's*, and had been rejected, becauſe the Port-reve, upon the evidence produced to him, thought the tenement in queſtion

was

was occupied by one Luke Henwood, and not by Nancarrow, and allowed Henwood to vote for it; he voted for Hawkins.

This tenement is ſituated in that part of the borough which lies in the pariſh of Newlyn; the rate of this pariſh was in the uſual form, the firſt column deſcribing the ſubject rated, the ſecond the occupier, the third the annual value, and the fourth the ſum aſſeſſed; thus,

		£.	s.	d.
Swine's tenement	R. Parker	1	1	7
Part of ditto	J. Parker	1	1	7
Another part of ditto		1	1	7

It was for this *other part of ditto* that Nancarrow claimed to vote: The counſel for Mr. Wilbraham contended, that the blank in the occupier's column was to be filled up with his name; on the other ſide it was contended, that Henwood ought to ſtand there *. Witneſſes were called to aſcer-

* There were ſome other inſtances of blanks for the occupier's name in this rate. It was determined long ago, that payment to ſuch a rating is ſufficient to gain a ſettlement; in the caſe of Heavytree, in Devonſhire, in 1696, reported, 2 Salk. 478. the ſeſſions had adjudged,

aſcertain the point, and the principal matter in diſpute ſeemed at laſt to be, whether Nancarrow had paid the rate; for in general, in ſcot and lot boroughs, a man muſt be rated *and pay*, in order to derive the privilege of voting from his occupation. As the diſpute turned on facts merely, I do no more than ſtate it generally, according to the plan I have laid down for compiling theſe Reports.

The two votes objected to on Mr. Hawkins's poll were thoſe of Luke Henwood above-mentioned, and of Joſeph Hooper; the caſe of the former depended on that of Nancarrow; as to the latter, it was admitted that he was rated by name and had paid to the rate; the objection was

judged, that a rate on the houſe without a rate on the perſon, was not ſufficient to make a ſettlement, but the Court of King's Bench quaſhed the order of ſeſſions, and this judgment has been confirmed frequently ſince; particularly in a caſe reported, Doug. 543. of the pariſh of Heckmondwick, where the occupier paid to a rate under the name of a perſon deceaſed; which caſe was founded upon one in Mic. 18 Geo. III. *The King and Walſall*, where the deſcription in the rate was, "Late Lowbridge's."

that at the time of his being rated, which was at Eaſter, 1783, he was not the occupier of the tenement for which he was rated, and did not become ſo till the July following.

When the counſel for Wilbraham were going to produce evidence of this fact, the counſel for Hawkins objected,

That the Committee ought not to receive ſuch evidence at this diſtance of time, becauſe the ſtatute 17 Geo. II. ch. 38.* ſ. 4. which empowers parties aggrieved by ſuch a rate to appeal to the quarter ſeſſions againſt it, confines the appeal to the *next* ſeſſions (C). That the objection now made to Hooper ought to have been the ſubject of an appeal

* It is in ſubſtance as follows:

"If any perſon ſhall be aggrieved by any rate or aſſeſſment made for relief of the poor, or ſhall have any material objection to any perſon's being put on or left out of ſuch rate or aſſeſſment, or to the ſum charged on any perſon or perſons therein, or to any thing done by the juſtice or overſeer, he may, giving reaſonable notice to the churchwardens or overſeers, appeal to the next ſeſſions; but if reaſonable notice be not given, then the juſtices ſhall adjourn the appeal to the next quarter ſeſſions after."

to the ſeſſions, which is the proper juriſdiction for determining ſuch caſes; and the parties not having taken that courſe, as the ſtatute directs, muſt be conſidered to have acquieſced in the rate; That the Committee under theſe circumſtances, would make the rate their guide, conformably to the practice of former Committees, particularly thoſe of St. Ives *, and Peterborough †, in which this queſtion had been very fully conſidered and very deliberately determined: That in thoſe cauſes a diſtinction had been allowed between caſes which concern the rating only, and thoſe in which the pariſh officers are charged with criminality in making the rate; in the latter a greater latitude being permitted to the parties complaining; That if ſuch a charge were now made, there might be reaſon for entering into the complaint, but that not being the caſe, the Committee ought rather to follow an eſtabliſhed rule, than open their juriſdiction to all the inquiries of a court of quarter ſeſſions.

* 2 Doug. Elect. 393, to 396.

† 3 Doug. Elect. 101, to 116.

The

The counſel for Mr. Wilbraham very candidly allowed the propriety of this argument; they ſaid, That although it was impoſſible for him to have had the benefit of an appeal againſt the rate, as not being within the act, and not having at that time any connection with Mitchell; yet, as the proper remedy by appeal had been marked out by the ſtatute, and the deciſions of the St. Ives and Peterborough Committees were directly in point to this queſtion, and had been deliberately made, they ſubmitted to their authority and renounced the objection to Hooper's vote.

The remaining part of the caſe upon the charge of bribery, conſiſted of evidence to prove Mr. Hawkins guilty, by having endeavoured to corrupt a voter by means of one Curgenven, ſaid to be his agent, and alſo by having made the ſame attempt himſelf.

As to the firſt, two witneſſes were called on the part of Wilbraham to prove the agency of Curgenven; from whom, it appeared, that he canvaſſed the town in company with Hawkins, that he alſo went

about alone to aſk votes for him, that he aſked the vote of one of the witneſſes for Mr. Hawkins in his preſence and jointly with him, that Curgenven was ſteward to Lord Falmouth, on whoſe intereſt Mr. Hawkins ſtood, and that he and Curgenven reſided together during the election in the houſe of an agent of Lord Falmouth's: After this evidence, Wilbraham's counſel called a witneſs in order to prove an act of bribery by Curgenven; this was objected to by the counſel on the other ſide, who argued,

That ſufficient evidence had not been produced of the agency of Curgenven to intitle the party accuſing to offer evidence of his acts ſo as to affect Mr. Hawkins; That they ought to ſhew that he was an agent for other purpoſes than canvaſſing, and had ſome authority for the purpoſe then carrying on; or at leaſt, for the diſpoſal of money for the expences of the election; That an agent was *one employed to act for another**, and though the modes of this employment are ſo various as to be almoſt indefinite, yet there are certain general

* See 3 Doug. Elect. 263.

prin-

principles by which judges ſhould always be directed to their concluſions upon the ſubject; one of theſe is, that ſome allowance or approbation expreſs or implied, or ſubſequent aſſent on the part of the principal to the act of the ſuppoſed agent, ought to be proved, before the guilt of that act can be imputed to the principal: That in the preſent inſtance no previous authority or ſubſequent aſſent on the part of Hawkins, had been proved as to any other acts of Curgenven than his aſking votes for him; in which he had done no more than one friend may lawfully do for another, and which is often done by perſons between whom and the candidate there is no privity or connection: That the conſequences would be monſtrous of determining that a candidate ſhould be anſwerable for the conduct of thoſe who may have accompanied him in his canvaſs or ſolicited votes for him; any man might in this manner be enabled to avoid the election of his opponent.

That it might perhaps be juſt to preſume the principal's aſſent in caſes where a previous foundation has been laid for it;

as, for inſtance, in the Shafteſbury caſe, where an inclination to ſucceed by bribery was clearly proved by the declaration of Sykes "*that he would ſpend his manor in order to get the borough* *;" ſuch evidence of general conduct is tantamount to the particular proof of perſonal aſſent in the principal; that is, it raiſes a preſumption of it ſo ſtrong, that it is incumbent on the other party to clear himſelf: In the laſt caſe of Cricklade, in 1781, ſimilar circumſtances appeared on the part of the candidates; but as nothing of this ſort has been attempted by Mr. Hawkins, and no illegal conduct has been proved againſt him, the Committee ought to reject the evidence offered to induce a preſumption of his guilt; particularly when it is in the power of the adverſe party to examine Curgenven himſelf as to the authority that Mr. Hawkins may have given him on this ſubject †.

* This expreſſion was not cited from Mr. Douglas's report of that caſe.

† See 3 Doug. Elect. 267, 272, the caſe of an agent not allowed to be called on the part of the *ſitting member*, when thus accuſed.

The

The counſel for Mr. Wilbraham argued, That if it were required in ſuch caſes to bring evidence of expreſs agency for the purpoſe of bribery, it would be almoſt impoſſible, from the nature of things, ever to prove a candidate guilty of bribery by his agents; all diſcovery from that quarter would be thereby at once ſhut out: But the rule of evidence generally practiſed in Committees has been much more liberal; *reaſonable evidence* of agency is all they have required in thoſe acts by which the principal is affected. Such was the practice in the caſe of Ilcheſter *, and the laſt caſe of Cricklade, and others that might be mentioned; in the latter the circumſtances of agency were not, as has been ſaid on the other ſide, deduced from the general conduct of the candidates, but very ſimilar to thoſe of the preſent caſe: Briſtow was there proved to be the agent of Lord Portcheſter, it was proved that Macpherſon ſtood on Lord Portcheſter's intereſt, and

* I preſume the point alluded to is that in 3 Doug. Elect. 160, 161; Mr. Morris, who in his argument referred to theſe caſes, had been counſel in both of them.

that Briſtow canvaſſed for him in company with Lord Portcheſter (who was then a commonner); under theſe circumſtances evidence of Briſtow's acts of bribery was received againſt Macpherſon.

It is not denied that there may be agents employed in different characters at elections, and that an agent for one buſineſs may have no connection with other ſchemes of the candidate; an agent may be appointed to attend the poll, to order an entertainment, &c. which employments may be diſtinct from each other, and this diſtinction is the ſubject of proof. But if a candidate will carry his friend along with him throughout the election, and be joined with him upon all occaſions, he muſt anſwer for the conſequences; common experience juſtifies the preſumption of a cloſe connection between them. As to the argument, that there ought to be ſome proof of aſſent or approbation on the part of the principal, the rule of evidence bears the contrary way; in ſuch circumſtances his *aſſent is to be preſumed* to the acts of ſuch an agent, and it is incumbent on the

candidate to prove the diſſent, as he eaſily may, if it exiſted: This is conformable to the general practice of mankind, and to the acknowledged principles of the times.

But without entering ſo minutely into the queſtion, it ſeems only neceſſary to ſay, that the objection has been taken too ſoon; if the evidence before given ſhall not be confirmed by that which is to follow, it can do no harm: Perhaps the manner in which Curgenven may appear to have acted upon this occaſion, may ſerve to prove at the ſame time his agency and the bribery compleat.

The Committee after having deliberated on the queſtion came to a reſolution, "That Curgenven's agency had not *yet* been proved."

The counſel ſeeming to have doubts as to the effect of this reſolution, the chairman afterwards explained it by ſaying, "the Committee did not mean hereby to preclude them from going into evidence of the acts of Curgenven, or any other evidence to ſupport their caſe; that they would be underſtood

ſtood only to have given an opinion on an independent fact."

The counſel for Hawkins ſtill wiſhed to have underſtood the reſolution to have required further proof of Curgenven's agency, before the admiſſion of evidence of his acts: But the Chairman ſaid it had been ſufficiently explained, and deſired that the cauſe might proceed.

I have thought proper to omit a particular ſtatement of the evidence of the bribery, for a reaſon which muſt have occurred frequently to thoſe who have been uſed to draw concluſions of fact from the teſtimony of witneſſes delivered *vivâ voce*; the great advantage which this kind of teſtimony has over written depoſitions, conſiſts in the opportunity of obſerving the manner and character with which a witneſs ſpeaks; from theſe is derived the beſt meaſure for aſcertaining the credit due to him. But this advantage is often loſt by committing it to writing; a written depoſition may have all the circumſtances of authenticity and truth, which, if delivered by the deponent before a jury, might have been

been diſregarded. It ſeemed to me, that the Committee, in forming the opinion I am about to mention, of the facts of bribery related by the witneſs (for there was but one to this point) muſt have been led by his appearance and manner, to give little credit to his evidence: It would therefore be uſeleſs to ſtate the particulars of it, ſince a written narrative of the facts might want ſome of thoſe qualities which led to the deciſion.

The Committee, at the end of the day on which Mr. Wilbraham's counſel finiſhed his caſe, after the leading counſel for Mr. Hawkins had concluded his obſervations upon it, Reſolved,

"That it is the opinion of the Committee, that no ſufficient proof of bribery has been brought againſt Mr. Hawkins, and that no evidence need be called in his juſtification on that point."

The chairman immediately communicated this reſolution to the parties.

Mr. Hawkins's caſe being thus relieved from the charge of bribery, conſiſted of three parts; which were,

Firſt, To maintain an equality with his opponent upon the evidence already produced on his part.

Secondly, To ſtrike off four of his votes upon particular objections.

Thirdly, To add one vote to his own poll whom the port-reve had rejected.

For the reaſon before-mentioned *, I ſhall give only a ſummary view of the ſeveral heads.

Upon the firſt, it was contended, that Wilbraham had not eſtabliſhed by evidence Nancarrow's right to vote, as paying to the rate for the tenement claimed by him, and that therefore he could not be added to his poll: But ſuppoſing the court to be of opinion, that Henwood's vote could not be ſupported on the other ſide, his loſs would be amply compenſated, for upon the

Second head, They objected to two, W. Saundry and W. Parkes, for not being rated: Theſe men voted for tenements in Newlyn pariſh, under the rate made at Eaſter 1783. It is uſual to make the rate annually about the time of Eaſter, for the

* Page 80.

year

year preceding, and the new rate for this pariſh had not been made at the time of the election *: The above rate therefore deſcribes the occupiers of the year 1782, or thoſe at the time of the rate: In it no occupier's names are given to the tenements for which they voted, and the counſel for Hawkins ſaid, they would prove, that neither of the two was in poſſeſſion in the year 1782, nor till Chriſtmas 1783, and conſequently could have no title to vote *.

They objected to a third, H. Treweek, junior, for occaſionality; that he was put into a colourable poſſeſſion of the tenement for which he voted, for election purpoſes; and to the fourth, J. Parker, that

* The election came on April 6th, Eaſter-day was April 11th.

* The argument uſed upon the objection to Hooper's vote by the counſel for Mr. Hawkins (ſee p. 81.) might have been urged here in favour of Mr. Wilbraham, if the names of the voters had been inſerted in the rate; but as no names are ſpecified in the rate for the tenements of theſe voters, there could be no foundation for the appeal given by 17 Geo. II. ch. 38. as to the two voters.

he was not a true inhabitant of Mitchell, but of the neighbouring village of St. Auſtle, and that his mother in fact occupied the tenement for which he voted.

Third head, Frederick Knight had tendered his vote for Hawkins for a tenement in that part of the borough which lies in the pariſh of St. Enoder, and had been rejected by the port-reve upon an objection taken on the part of Wilbraham, againſt the rate of this pariſh, made on the 26th of March 1784, for occaſionality: It was alledged to have been made before the uſual time, for the purpoſe of the election, and that therefore no right to vote could be gained under it (D): Knight's name was on this rate, but not on the former. No other objection was made to his vote, and the counſel for Mr. Hawkins undertook to prove the rate to have been duly made, and without any view to the election; but they ſaid, it would be an immaterial queſtion, and the poll would not be affected by it, becauſe, if it could be ſuppoſed that the objection ſhould prevail before the Committee, it would give effect to the

the rate of Eaſter 1783: In this rate the name of W. Henwood ſtands, who tendered his vote for Hawkins, and had been refuſed: (but his name had been ſtruck out of the rate of this year, upon an appeal to the ſeſſions *ſince* the election;) if Knight therefore ſhould be rejected, W. Henwood muſt be received in his room. This man ſtood in the ſame predicament as Joſeph Hooper before-mentioned (in p. 80.) and had been for that cauſe rejected by the Port-reve; but for the reaſon which determined Hooper's caſe, ought now to be reſtored to the poll, if the inquiry into Knight's caſe ſhould make it neceſſary *.

Upon theſe ſeveral queſtions, which conſiſted ſometimes of law mixed with fact, the Committee declared no ſeparate opinion, but determined generally, *That Mr. Hawkins was duly returned, and duly elected*; which reſolutions the chairman reported to the Houſe June 21 †.

* Upon comparing the relative dates of Eaſter and the rate of St. Enoder in former years, with thoſe of this year, the laſt rate appeared to be juſtified by precedent. See 27 Journ. 254. upon the ſame queſtion in the caſe of Mitchell in 1755.

† Votes, p. 258.

NOTES

ON THE CASE OF

MITCHELL.

PAGE 77. (A.) The right of election to Parliament in Mitchell has been various; in the firſt caſe in the Journals in which it appears to have been diſputed, the ſucceſsful candidates were choſen by perſons called *Burghers*, (a name which I do not find exiſting at preſent in the borough) to which election it is ſaid "the inhabitants alſo *condeſcended*;" the rejected candidates were choſen by *twenty-four*. 2 Journ. 10. A. D. 1640. Theſe *twenty-four* are explained in the next caſe, which was in 1660, to be "two elizors choſen by the lord of the manor, and twenty-two of the freemen choſen by the ſaid elizors." The right of election was then diſputed between them and the *commonalty at large*, and was decided to belong to the former, 8 Journ. 92. They do not appear to have claimed this right in the conteſt next following in the Journals, which was in 1689; the petitioner there contended for a right in "the inhabitants paying ſcot and lot," which appears to have been contraſted with that of *houſekeepers*, without any mention on either ſide of *lords of the manor*; however, the Houſe then came to a reſolution, declaring the right to be "in the lords of the

the manor liable to be choſen port-reves, and in the houſholders not receiving alms." See 10 Journ. 272, 306, 307. This right was agreed to in the conteſted elections next following; but in that which gave occaſion to the laſt determination, the petitioner aſſerts the right to be the ſame which the Houſe reſolve, though it does not appear that the ſitting member relied upon any other. See 13 Journ. 335, 416. Since the year 1700, I do not find any diſpute about the right of election.

The conſtitution of Mitchell is this: A ſuperior or high lord, and five meſne or deputy lords who hold of him; the port-reve who preſides in the borough, is one of the deputy lords annually choſen to that office at the court-leet of the high lord; the high lord has not the privilege of voting for members of Parliament. It is no corporation and never was, notwithſtanding the uſe of the words *commonalty* and *freemen* in the firſt reſolutions of the Houſe of Commons. Willis, in his Notitia Parliamentaria, 2d vol. p. 155, ſays, it firſt ſent members to Parliament in the ſixth year of Edward VI. in the return of that year it is called *villa Mychel*, in others ſubſequent, *burgus vel villa*. Perhaps the *freemen* alluded to in the Journal are thoſe whom Willis (p. 157.) calls *a jury of the principal inhabitants*, who, he ſays, chooſe the port-reve, and uſed to chooſe the members; in this ſenſe the word freemen is only a tranſlation of the *liberi homines*, or homagers, of the antient feudal court: In the ſame manner Willis ſpeaks of the "*freemen* of St. Germains," and "*burgeſſes* of St. Mawes;" (expreſſions likewiſe found in the Journals) though theſe boroughs are not corporations; in Weſtminſter alſo, which is no corporation, there is a court of burgeſſes.

I have been led to theſe particular obſervations on the ſtate of Mitchell, by a doubt contained in a judicious note ſubjoined by Mr. Douglas to the caſe of Poole (2 Doug. Elect. p. 298). It is there queſtioned, upon the authority of Lord Holt, whether *inhabitants* not incorporated, are legally capable of the right of ſending members to Parliament, except by preſcription; the caſe of Weſtminſter there mentioned, ſhews the author's own opinion upon the ſubject. He is confirmed by many other inſtances; Mitchell is one, the right of repreſentation commenced there in the ſame reign with that of Weſtminſter; in Callington, Newport in Cornwall, and Minehead, none of which are corporations, the right of election is in *inhabitants*, yet their repreſentation has alſo commenced within time of memory: Newport having firſt ſent members in the reign of Edward VI. the two others in the reign of Elizabeth.

The truth is, that no ſyſtem founded on maxims of modern law, can account juſtly for the wonderful variety that occurs in parliamentary repreſentation. In its origin it is entirely feudal, and its modern uſe can only be explained by tracing the changes which feudal tenures and feudal principles have undergone.

The antient hiſtory of boroughs does not confirm the opinion above referred to, which Lord Chief Juſtice Holt delivered in the caſe of Aſhby and White: For there is good reaſon to believe, that the elections in boroughs were in the beginning of repreſentation popular; yet in the reign of Edward I. there were not perhaps thirty corporations in the kingdom: Who then elected the members of boroughs not incorporated? plainly, the inhabitants, or burghers (for at that time

every inhabitant of a borough was called a burgeſs); and Hobart refers to this uſage in ſupport of his opinion in the caſe of Dungannon. Hob. 15. 12 Co. 121. The manner in which they exerciſed this right, was the ſame as that in which the inhabitants of a town, at this day, hold a right of common, or other ſuch privilege, which many poſſeſs who are not incorporated *. When I ſpeak of corporations in the foregoing paſſage, I uſe the word in that ſenſe in which it is now underſtood, to mean, bodies politic having perpetual ſucceſſion and poſſeſſing various independent powers which individuals cannot attain: But we muſt not imagine that theſe powers were conveyed to boroughs in the firſt charters which they received from their feudal ſovereign, whether king or lord. It appears, from the ſtate of the boroughs of this kingdom deſcribed in Domeſday-book, all of which are quoted by Dr. Brady in his Hiſtory of Burghs, that the inhabitants of them, in the period of that ſurvey, were the vaſſals of the lord of the borough, (who in many was the king) or villeins appendant or in groſs: They paid for their lands and dwellings different ſervices to the lord, and generally a kind of protection money for liberty of trading, for exemption from certain burthens, and for other privileges, according to the ſituation and extent of the borough. As their numbers and wealth increaſed, they became able to buy in theſe rents and ſervices, the king or lord reſerving only a chief-rent in their ſtead, and thus they procured grants that their borough ſhould be "*liber* burgus," and they themſelves became "*liberi* burgenſes," i. e. emancipated from the rigours of the feudal ſubjection, in the ſame manner as *liberi ho-*

* See Co. Lit. 110. b.

mines were contradiſtinguiſhed from bondmen. Boroughs upon the ſea-coaſt were the firſt in procuring theſe grants, from their greater ſubſtance, and from the deſire of the inhabitants to obtain the freedom of their port to themſelves. Hereby the ſovereign yielded up the immediate fruits of his lordſhip, either for a ſum of money, or certain annual rent, or in order to improve his eſtate by the encouragement of trade.

To one who does not conſider the ſubject in this point of view, the expreſſion "liber burgus" in the firſt charters to boroughs, containing the firſt and greateſt privilege in them, muſt appear unintelligible. But it will be found to have been the moſt eſſential part of the charter, for as their former ſtate was a dependent vaſſalage of the loweſt kind, they are thereby raiſed to a ſtate of freedom, and their place of reſidence, their burgh, is made free too, and exempted from the immediate juriſdiction of the lord. This is the origin of free boroughs and free burgeſſes *; in the firſt charter to Dunwich, King John grants "quod burgum de Dunewic ſit liberum burgum noſtrum;" ſo to Bridgewater, "dilecto & fideli noſtro Willielmo Briever quod bruge Walteri ſit liberum burgum & quod ibi ſit liberum mercatum & una feria——cum theloneo, paagio, pontagio, paſſagio, leſtagio, ſtellagio, & cum omnibus aliis liberis conſuetudinibus ad liberum burgum——pertinentibus. Conceſſimus etiam prædicto Willielmo quod prædicti *burgenſes ſui*——ſint liberi burgenſes, &c." Brady Hiſt. Bur. Appendix 13 & 22, the author has there printed ſeveral other charters of the ſame import. In the firſt charter to Pontefract, dated in 1194, the lord of the borough grants to his burgeſſes

* See Brady Hiſt. Bur. 100.

of

of Pontefract their *liberty and frée* burgage, and their tofts, yielding yearly for all ſervice, and for every whole toft 12d: For this and ſome other favours the burgeſſes pay their lord 300 marks. The ſtate of ſervitude in which the inhabitants of towns were held under the feudal ſyſtem, prevented them from improving their ſituation to their own benefit, or to their lord's: Conſiderations of this kind may have occaſioned the firſt grants of privileges to them. But the idea of a corporation, *corpus politicum*, the *univerſitas* of the civilians, the *communitas* of the feudiſts, is ſurely of a date long ſubſequent to that of becoming *liber burgus*. Although many towns, and particularly London, are now called corporations by preſcription *, that is not ſo well warranted by the truth of hiſtory, as by the favouring principles of our law. The conqueror's charter † to London grants indeed the privileges enjoyed under his predeceſſor, but theſe ſeem to be no more than that the citizens ſhall be freemen (*lawworthy* is the term), and be capable of the right of inheriting, a ſtate manifeſtly contraſted with that of being in *dominio domini*; it is addreſſed to the biſhop and *port-reve*, but that alone does not prove it to have been a corporation, for the port-reve was an officer employed to receive the King's port duties. Robertſon, in his proofs and illuſtrations to the firſt volume of his hiſtory of Charles V. ‡ juſtly diſtinguiſhes between the inſtitution of *communities*, and theſe charters of *immunity* or franchiſe; according to him, charters of community, or thoſe which erected corporations, were not

* See Brady Hiſt. Bur. 162. † Brady Hiſt. Bur. 28.
‡ P. 89 & 301.

common in France till the beginning of the twelfth century: And as it is allowed by our antiquarians, that England generally followed France in her political inſtitutions, it is not probable that charters of incorporation took place in England till after that period. The cruſades had made the nations of the north and weſt of Europe acquainted with the advantages which the cities of Italy derived from their independence; and (as there is room for conjecture on this ſubject) I ſhould imagine that thoſe nations may have learnt the method of conveying equal powers and privileges to their own cities, by the revival of the knowledge of the civil law in the firſt part of the twelfth century; hence they may have taken the *jura univerſitatis*, which are eſſentially different from the *libertates burgi*; and hence perhaps began a practice which has eſtabliſhed a maxim in the law of France, as well as in our own, that corporations can only derive their exiſtence from the crown; to incorporate, is a royal prerogative; but it is plain from what is ſaid above, that, to enfranchiſe, was the prerogative of every feudal lord. See Du Cange's Gloſſary on the word *Communia*: This author derives the inſtitution of corporations in France from the deſign of its Kings, firſt practiſed by Lewis VII, to raiſe them up againſt the power of his barons: If it were ſo, it well accounts for the principle by which this right became appropriated to the ſovereign.

P. 78. (B.) Glanville, in his Reports, p. 21, ſays, "of common right in caſe of equality of voices, the mayor of a town hath no caſting or over-ruling voice in the affirmative to carry an election, without the help of a cuſtom, or ſome other ſpecial matter, to enable him in that behalf.——But the electors ought to continue

continue together, or meet again by adjournment, till they can agree to an election by plurality of voices." I have met with two caſes in the Journals, wherein the Houſe have, in the firſt inſtance, and without waiting for an enquiry into the merits, or for petitions from the parties, declared the election void, on account of this equality of voices; but it is not likely that theſe precedents will be followed now. In the caſe of Tiverton in 1710, there were three candidates, all of whom had an equal number of votes, for which cauſe the Houſe avoided the election, and ordered a new writ, before the time for delivery of petitions had expired *. The ſame had been done before in the caſe of Gatton in 1660, where there were four candidates, for three of whom the votes were equal, and for the fourth there was a ſmaller number †.

P. 81. (C.) I do not know any caſe, in which it has been determined that by the conſtruction of this act, the appeal muſt be to the ſeſſions next after the *rate*: In the ſtat. 13 & 14 Charles II. ch. 12. ſ. 2. it is in the ſame manner directed, that the appeal of any perſon aggrieved by an order of removal, ſhall be to the *next* ſeſſions: It was determined in the King's Bench, that the *next* quarter ſeſſions alluded to by this act, to which the appeal muſt be brought, is the *next after the party is grieved*, 12 Mod. 336; which is not by the ſigning of the order by the juſtices, but by the removal in execution of it, 2 Stra. 831. So it might be ſaid of an appeal againſt a rate, that the party is not grieved till called upon for payment; but it ſhould be obſerved, that there is this difference between the two caſes, that

* 16 Journ. 407. † 8 Journ. 13.

a party cannot be preſumed to have notice of an order of removal till it is executed; whereas public notice of a rate is always given in the church the next ſunday after it has been allowed, (by 17 Geo. II. c. 3. ſ. 1.) of which all the pariſh are preſumed to be informed, and laches might juſtly be imputed to him who does not know it.

The ſtat. 43 Eliz. ch. 2. limits no time for an appeal authoriſed thereby, but directs generally, that if any perſon is aggrieved, the juſtices in their ſeſſions ſhall have cognizance of the matter *; and ſome perſons were of opinion, that an appeal againſt a poor-rate under that act, notwithſtanding the 17 Geo. II. ch. 38. might ſtill be preferred to any ſeſſions, indefinitely, becauſe the objects of the two ſtatutes are different †: But it was determined by the court of King's Bench in laſt Trinity term ‡, in the caſe of the borough of Penryn, that an appeal againſt a poor-rate muſt, by the 17 Geo. II. ch. 38. be brought to the *next* ſeſſions, in all caſes; and that this act is, as to that, a repeal, or rather limitation of 43 Eliz. ch. 2.

P. 94. (D.) By the report of the conteſted election for Mitchell in 1755, (27 Journ. 254, &c.) there appears to have been then a ſimilar objection taken againſt the rate: There had been, previous to that election, a *monthly* rate made on the day on which the election was proclaimed; but the party taking the objection did not rely ſolely upon that; they went into an examination of the particular articles, in order to prove not only that the rate had been unfairly made, and occaſionally, but likewiſe that this had been done for the

* Sect. 6. † See 3 Burn's Juſt. 303, 13th edit.
‡ Trin. 24 Geo. III.

purpoſe

purpoſe of giving votes to improper perſons. The ſingle objection of occaſionality, to the rate, ſeems not to be a ſufficient cauſe for avoiding a right in other reſpects lawfully acquired under it; for if a man is juſtly rated, it would be hard to involve him in the fraud of thoſe who may have abuſed their office in making the rate.

There is a manifeſt difference between this caſe, and that of derivative titles in corporations gained under preſiding officers, illegally made; becauſe in them the origin of the title is intrinſically illegal; whereas here it only becomes voidable by matter extrinſic, and to certain purpoſes only: For without queſtion ſuch a rate would be effectual to every purpoſe, but that of the election. In the caſe of St. Giles, Cripplegate, and St. Mary, Newington, in Viner's Abr. tit. *Settlement*, K. 9. it was determined by the court of King's Bench, that a man may gain a ſettlement by being rated and paying to a rate not legally made: Viner, in a marginal note to that caſe ſays, "it was held to be a contributing to the public levies of the pariſh, and the pariſh have had as much benefit of the contribution, as if it had been a good rate." In the ſame manner, the Committee, on the caſe of Milborne Port, (1 Doug. Elect. 129.) where there were two ſets of perſons claiming to be pariſh officers, determined, "That perſons rateable having paid to the rate, though that rate be made by officers illegal or doubtful, have a right to vote as inhabitants paying ſcot and lot."

IV.

THE

CASE

Of the BOROUGH of

DOWNTON,

In the County of WILTS.

The Committee was choſen on Thurſday, the 17th of June, 1784, and conſiſted of the following members:

John Parry, Eſq; Chairman.
Francis John Browne, Eſq;
George White Thomas, Eſq;
John Call, Eſq;
Filmer Honeywood, Eſq;
Lord Apſley.
Edward Miller Munday, Eſq;
Richard Slater Milnes, Eſq;
Henry Addington, Eſq;
Brooke Watſon, Eſq;
Hon. Edward James Eliot.
Sir William Leman, Bart.
John Astley Knight Esq.

NOMINEES,

Of Shafto and Conway,
Right Hon. William Eden.

Of Bouverie and Scott,
Lord Advocate of Scotland.

PETITIONERS,

The Hon. Henry Seymour Conway, and Robert Shafto, Eſq; upon one return; the Hon. Edward Bouverie, and William Scott, Eſq; LL. D. upon the other. Certain Freeholders of Downton in the Intereſt of Shafto and Conway, and James Hill and George Quinton, Freeholders of Downton, in the ſame Intereſt, by two ſeparate Petitions.

COUNSEL,

For Shafto and Conway,
Mr. Serjeant Adair, and Mr. Douglas.

For the Freeholders,
Mr. Piggott.

For Bouverie and Scott,
Mr. Wilſon, and Hon. Mr. Erſkine.

THE CASE

Of the BOROUGH of DOWNTON.

THE Committee met on Friday the 18th of June:

The petition of Shafto and Conway, and of the electors in their intereſt, alledged that Henry Harriſon, Eſq; was the legal returning officer of the borough, that his return was the legal one, and that the petitioners had the majority of legal votes; That John Dagge, gent. had, without any right, taken upon himſelf to act as returning officer, and had rejected many legal votes for the petitioners, and received many illegal ones for Bouverie and Scott, whom he had falſely returned as burgeſſes in prejudice of the petitioners.

The petition of Hill and Quinton contained

ed the ſame allegations, and alſo a complaint that their votes had been rejected by both returning officers.

The petition of Bouverie and Scott ſet forth, That the legal returning officer of the borough is the bailiff, or ſteward, of the lord of the manor and borough of Downton or his deputy; that at the laſt election, Joſeph Elderton, Eſq; was bailiff or ſteward, and appointed John Dagge, Eſq; to be his deputy for the election who was the proper returning officer, and had returned the petitioners by a great majority, but that Mr. Harriſon had uſurped the office under a deputation from ——— Serle, Eſq; and by illegally admitting and rejecting votes had procured a majority for Shafto and Conway. — That Shafto and Conway had alſo been guilty of corrupt practices * at the election, and that the former was diſqualified * from being elected by holding a place in the cuſtoms †.

** Neither of theſe charges was proceeded upon in the cauſe.

† Votes, 25 May, p. 18. 26 May, p. 54. 27 May, p. 58. 3 June, p. 134.

This

This being the caſe of a double return, the ſtanding order of 18 March, 1727-8, was referred to, which directs, "That in ſuch caſes, the party whoſe name ſtands firſt, or whoſe return is next to the writ, ſhall be conſidered as the petitioner, in the form of proceeding *."

According to this order the counſel for Shafto and Conway opened their caſe firſt, their return being immediately annexed to the writ.

There is no reſolution of the Houſe concerning the right of election in Downton, but it has been always underſtood to be a borough of burgage tenure, and the right of election to be in the freeholders of antient burgage tenements holden of the lord of the borough under the uſual conditions; and it was ſo agreed by both ſides on the preſent occaſion.

The queſtions agitated in this cauſe being very important to thoſe who are intereſted in this ſpecies of property, (perhaps more ſo than any which have yet ariſen out of the

* See the Order in p. 76.

ſubject,

ſubject) and the deciſions having been diſtinctly and deliberately given upon each, their authority as a precedent may hereafter become valuable; for which reaſon, I have, in the following report treated each queſtion ſeparately, although in the courſe of proceeding and arguments of counſel during the trial, many were blended together.

The points now in diſpute are totally different from thoſe agitated in the late conteſts for this borough, yet it may be uſeful ſhortly to ſtate the nature of thoſe conteſts. There have been three before the Houſe of Commons ſince the year 1774; the firſt of theſe being reported by Mr. Douglas, is too well known to require any particular relation: The diſpute then turned upon the *ſplitting* and the *occaſionality* of the votes, upon either or both of which points the deciſion may have been founded; but as it involved both, neither was aſcertained; the event was unfavourable to Mr. Duncombe's intereſt *. A va-

* 1 Doug. Elect. 207.

cancy,

cancy, by the death of one of the members, having occaſioned a new election in 1779, Mr. Duncombe was returned without oppoſition *: He did not live to enjoy his ſeat. Upon his death, a new election happened which was conteſted by Mr. B. Bouverie and Mr. Shafto; Mr. Bouverie was returned and Mr. Shafto petitioned againſt his election †; the merits of the caſe before the Committee which ſat upon this petition, turned upon the *occaſionality* of the votes for Mr. Shafto. Their determination was in favour of Mr. Shafto ‡, by which they in effect decided, *That the objection of occaſionality did not attach upon votes of burgage tenure* (A). In the general election of 1780, a conteſt aroſe between other parties founded ſolely upon the ſame objection of occaſionality §, which was very ſtrenuouſly argued by the petitioners' counſel before the Committee, whoſe determination confirmed the former.

* 37 Journ. 461, 499.
† See the petition, 37 Journ. 521.
‡ 37 Journ. 608.
§ See the petition, 38 Journ. 17.

Hitherto the ſtate of property of the contending parties in this borough had been different from that in which they ſtood at the laſt election. The late Anthony Duncombe, Lord Feverſham, was proprietor of the greater part of the burgages in Downton, to ſome of which he was intitled under a ſettlement of Sir Charles Duncombe, the reſt he had purchaſed: Upon his death in 1763, without male-iſſue, the ſettled eſtate deſcended to the late Mr. Duncombe; the remainder of his eſtates in Downton he by will directed to be ſold for the benefit of his two daughters, giving the refuſal of them to the Duncombe family in order to prevent diſputes: The preſent Earl of Radnor married one of the daughters, Mr. Bowater the other; Mr. Duncombe left a daughter, married to Mr. Shafto, to whom he bequeathed his Downton eſtate. The truſts of Lord Feverſham's will not having been carried into execution, the manner in which his truſtees exerted the influence of his property, occaſioned a new ſcheme of election in Downton after the diſſolution of the late Par-

cancy, by the death of one of the members, having occaſioned a new election in 1779, Mr. Duncombe was returned without oppoſition *: He did not live to enjoy his ſeat. Upon his death, a new election happened which was conteſted by Mr. B. Bouverie and Mr. Shafto; Mr. Bouverie was returned and Mr. Shafto petitioned againſt his election †; the merits of the caſe before the Committee which ſat upon this petition, turned upon the *occaſionality* of the votes for Mr. Shafto. Their determination was in favour of Mr. Shafto ‡, by which they in effect decided, *That the objection of occaſionality did not attach upon votes of burgage tenure* (A). In the general election of 1780, a conteſt aroſe between other parties founded ſolely upon the ſame objection of occaſionality §, which was very ſtrenuouſly argued by the petitioners' counſel before the Committee, whoſe determination confirmed the former.

* 37 Journ. 461, 499.
† See the petition, 37 Journ. 521.
‡ 37 Journ. 608.
§ See the petition, 38 Journ. 17.

On Dagge's poll.

For	Bouverie	44
	Scott	43
	Shafto	2
	Conway	1
Majority for	Bouverie	42
	Scott	41

Thus it became neceſſary to determine, previouſly to the examination of the merits, by which poll the Committee were to proceed in their inquiry; or in other words, which of the two returning officers was the legal one. This queſtion being entirely diſtinct from the merits of the election, the Committee, as well as the counſel, were deſirous to have it ſeparately argued and determined. It was accordingly proceeded on in the firſt place.

The facts out of which it aroſe, and which were either proved or admitted, were theſe.

The Biſhop of Wincheſter is chief lord of the hundred, manor and borough of Downton; the manor and borough are leaſed

leaſed out for lives, and have ſo been from the reign of Elizabeth, in the ordinary mode of Biſhop's leaſes; the preſent leſſee of which is Sir Philip Hales, as truſtee for the daughters of the late Lord Feverſham. The words of the leaſe deſcriptive of the premiſes granted by the Biſhop, are theſe following:

" All that his lordſhip, manor and burgh " of Downton, with Charlton Knighten- " hold, in the county of Wilts, together " with all and ſingular the rights, mem- " bers and appurtenances thereof, and all " the houſes, lands, tenements and here- " ditaments, rents, reverſions, ſervices, " views of frank pledge, leets, hundreds, " courts, perquiſites of courts, heriots, " amerciaments, waifs, eſtrays, goods of " felons, fugitives, deodands, wards, reliefs, " &c. &c. with all and ſingular their ap- " purtenances to the ſaid manor and burgh " or either of them in any wiſe belonging " or appertaining, or which have been de- " miſed or reputed, parcel, or member of " the ſaid manor and burgh."

Theſe terms have been uniformly inſerted in all former leaſes, one of which, in the reign of Elizabeth, and another in the reign of Charles I. were read.

The biſhop, as lord of the hundred, appoints a bailiff of the hundred, who holds a hundred court and collects the Biſhop's rents; the ſtile of this office is, "The office of bailiff of the bailiwick of the lordſhip of Downton;" it is at preſent held by Mr. Serle, under a patent granted by the Biſhop in 1772, to him and Mr. Duthy jointly, he being the ſurvivor (B. 1.) Mr. Harriſon acted as returning officer at the late election, under a deputation from Mr. Serle, (B. 2.)

The leſſee of the manor and borough appoints a ſteward, who holds the manor and borough courts, and collects the copyhold and burgage rents; Mr. Elderton is the preſent ſteward, from whom, Mr. Dagge received a deputation at the late election *. The manor and borough are

* Mr. Elderton's appointment to the office of ſteward, and his deputation to Mr. Dagge were both produced in evidence. See (B. 3. and 4.)

both

both within the hundred, but are diſtinct both in boundary and juriſdiction; the former is all copyhold, the latter all freehold; the hundred and the bailiwick are the ſame, extending more than twenty miles, and comprehending ſeveral towns and royalties. No perſon holds a court within the manor and borough but the ſteward of the leſſee; but in the borough of Hindon, which is likewiſe within this hundred, the Biſhop's bailiff is the returning officer.

As far back as the records of this borough can be traced, i. e. from the year 1593, to the year 1670, the returns to Parliament were made by the Biſhop's bailiff often ſtiling himſelf in the return, "bailiff of the hundred," from that period to 1780, the returns were made by the ſteward of the borough.

The evidence produced on this point by the counſel for Shafto and Conway conſiſted of

The grant to Duthy and Serle, which is in the ſame form with the former grants of the office.

Serle's deputation to Harriſon, (B 1. and 2.)

The regiſter book of the Dean and Chapter of Wincheſter, in which there is an entry dated 16 January, 1593, whereby the Biſhop grants "officium ballivi ballivatûs dominii de Downton & omnium & ſingulorum maneriorum, &c." to John and William Stockman, the father and ſon jointly.

A return to Parliament, in 1620, by William Stockman, *ball.' hund.' de Downton.*

A return in 1623; in this the name of the perſon called "ball.' hund.' de Downton," is obliterated, but it is ſigned by William Stockman.

Three other returns by the ſame William Stockman, two in 1625, and one in 1640.

An entry in the ſame regiſter, dated 7 Nov. 1660, of a grant of this office by the Biſhop, in the ſame terms as the former to Joſeph Stockman and William his ſon.

A return, dated 1 April, 1661, by Joſeph Stockman, conſiſting of two indentures of the ſame day, in one of which, one member, Gilbert Rayley, Eſq; is returned, another member, Walter Buckland, in the other (C).

The

The Commons Journal of 17 May, 1661*, which is as follows:

" Serjeant Charleton reports from the ſaid Committee, touching the double return for the borough of Downton, that Gilbert Raleigh, Eſq; and Water Buckland, Eſq; are returned by one indenture; and John Elliott, gentleman, and Giles Eyre, Eſq; by another indenture; and the opinion of the Committee, that Mr. Raleigh and Mr. Buckland being returned by the proper officer, ought to ſit until the merits of the cauſe, touching the ſaid election, be determined,

Reſolved, That this Houſe agree with the ſaid Committee, that the ſaid Mr. Raleigh and Mr. Buckland being returned by the proper officer, ought to ſit in this Houſe, until the merits of the cauſe, touching the ſaid election, be determined."

A return, dated 15th Dec. 1670, by the ſame Joſeph Stockman.

The above returns are all that are extant from 1593 to 1670. A return was pro-

* 8 Journ. 253.

duced

duced of 1684, while John Snow was ſteward of the borough, conſiſting of an indenture between the ſheriff and the *burgeſſes* only, without any mention of the returning officer; but this was conſidered by the counſel on both ſides as an irregular return, and not mentioned in argument *. The laſt piece of evidence produced, was the return in 1780, by Duthy the biſhop's bailiff; the circumſtances of which were explained in the following manner; Mr. Poore, who was the ſteward of the manor and borough, died in 1780, before the election, and no ſucceſſor to him being appointed when the election came on, the precept was delivered to Mr. Duthy, who executed it as returning officer: Mr. Blake, ſolicitor for Lord Feverſham's truſtees, attended at the poll, and on behalf of them and of Lady Radnor and Mrs. Bowater, proteſted againſt Duthy's officiating, who, before he proceeded to the election, declared he was ready to reſign the office, if any other appeared to claim it; and aſked

* The name of Snow appeared among thoſe of the burgeſſes in this indenture.

aloud

aloud if any other claimed to act as returning officer; upon no anſwer being made, he was regularly ſworn and took the poll. In the courſe of the trial of the petition upon this election there was no mention made of the returning officer, or of the legality of the return *.

The evidence produced by the counſel for Bouverie and Scott, in ſupport of the leſſee's ſteward, conſiſted of entries in the court books of the borough, of the appointments of the ſteward, and of returns to parliament: Mr. Elderton the ſteward produced the court books. The entries of the manor and borough courts are kept in the ſame book, but on ſeparate leaves, under the diſtinct titles of "Burgus de Downton," and "Manerium de Downton;" the firſt entry read was one by which John Snow, Gent. appears to have been ſteward in 1675, and from thence to 1699. — His appointment was produced. (B. 5.) He is in theſe books always called *ſteward* (*ſeneſchallus*) the term *bailiff* is not uſed. There were ſix returns produced be-

* See before, p. 113.

tween

tween the years 1678 and 1697, made by John Snow; in theſe he calls himſelf *bailiff*. Snow was ſucceeded by Samuel Foſter in 1699, and Nicholas Langley was his deputy. Three returns were produced during his ſtewardſhip in the years 1699, 1700, and 1702; two made by him, and one by his deputy—he too is called *bailiff* in the returns, but in the court books there is no appointment of a bailiff, *eo nomine*. Mawſon became ſteward in 1706; eight returns were produced made by him and his deputy; his deputation to Leonard Fletcher was produced in evidence (B. 6.); he was ſucceeded by Tarrant in 1740; two returns were produced made by him as ſteward. Poore ſucceeded him in 1745, and continued ſteward till his death, except when he himſelf was one of the members, upon which occaſion Eve was made ſteward; his appointment was produced (B. 7.): Ten returns were produced made by Poore, and two by Eve. Mr. Elderton ſaid, there were extant more antient books than thoſe produced, which go back to the reign of Elizabeth, but not regularly; he did not recol-

recollect to have ſeen the *name* of the ſteward in them.

They then read the entries of the Journal of 3 May and 9 May 1660*, to explain the entry of the Journal read on the other ſide.

The entry of 3 May is in p. 10. as follows:

" Mr. Turner alſo reports from the Committee for privileges and elections, touching the double return for the borough of Downton, in the county of Wilts, the opinion of the Committee, that Thomas Fitz James, Eſq; and William Coles, Eſq; are returned by the bailiff to whom the warrant was directed, and ought to ſit until the merits of the cauſe upon the ſaid double return be determined.

" Reſolved, &c. That this Houſe doth agree with the Committee, that the ſaid Thomas Fitz James and William Coles, Eſqrs. who are returned by the bailiff, to whom the warrant was directed, do ſit in this Houſe, until merits of the cauſe upon the ſaid double return be determined."

* 8 Journ. 10, and 18.

The

The entry of 9 May is in p. 18. as follows:

" He (the chairman, Mr. Turner) alſo reports from the ſaid Committee, touching the double return for the borough of Downton, in the county of Wilts, that upon examination of the fact it appeared to the Committee, that Giles Eyre the younger, gentleman, and John Elliott, are duly choſen to ſerve in this Parliament for the ſaid borough, and ought to ſit.

" Reſolved, That this Houſe doth agree with the Committee, that the ſaid Mr. Eyre and Mr. Elliot are duly choſen, and ought to ſit; and that the *mayor* * of Downton do amend the return †, and in-

* It was contended on one ſide, that the Houſe uſed this word, by miſtake, for that of *bailiff*. The borough of Downton is no corporation, but a *mayor* and conſtables are annually appointed at the court-leet of the borough; the office of mayor is only nominal.

† It was cuſtomary at that time for the Houſe of Commons to order the returning officers to attend the Houſe, and amend the returns; the modern practice of ordering the clerk of the crown to make the amendment, was not generally eſtabliſhed till late in the reign of Charles II.

ſert

ſert the names of the ſaid Giles Eyre and John Elliot, inſtead of Mr. Fitz James and Mr. Cole, who were returned by another Indenture."

Upon this evidence it was argued by the counſel for Shafto and Conway,

That the bailiff of the hundred is the legal returning officer of the borough. The biſhop, as lord of the bailiwick, has the right of appointing the returning officers of the boroughs within it; he is proved to have exerciſed this right in Downton beyond time of memory. The borough being by preſcription, the office muſt be ſo likewiſe, becauſe it muſt be coeval with the firſt returns: There are two modes of proving ſuch a right; either by evidence of the fact from living witneſſes, for time of memory, or by the written evidence of former periods; for if a right is proved to have exiſted once, without contradiction, the law preſumes it to have exiſted always: In the preſent inſtance, the office is proved to have been exerciſed by the bailiff of the hundred, unmoleſted, from 1620 to 1670, if not from 1593, of which alſo the evidence

dence furniſhes a fair preſumption; this therefore is ſufficient evidence of a preſcription in his favour. Added to this, there is a judgment of the higheſt authority confirming it, for the Journals ſhew that the queſtion has been agitated in the Houſe of Commons, where his right has been expreſsly recognized, and he is called *the proper officer*; this being a judgment of the proper juriſdiction, on the point, fourteen years before the commencement of the right contended for by the leſſee of the manor and borough, ought to have the greateſt reſpect paid to it, and is not to be affected by any ſubſequent practice.

As it cannot be denied that the right to appoint this officer is in the lord of the bailiwick, it muſt, in order to make out the leſſee's claim, be ſhewn, that he has parted with it by leaſing the manor and borough: Now, there are no words in the leaſe deſcribing it; it muſt therefore be by implication of law; but how can this be, when the exerciſe of this office by the bailiff of the hundred happened for ſo long a period during the exiſtence of a leaſe made in the

the ſame terms as the preſent? This ſhews clearly, that the grant at that time was not underſtood to convey this office; and if we conſider that the leaſe of that period may have been one of the firſt ever granted, (for it was in the 28th year of Elizabeth, not long after the limitation upon eccleſiaſtical grants) this *cotemporanea expoſitio* will have conſiderable weight.

The place of returning officer of a borough is not neceſſary to the grant of the lordſhip in which the borough ſtands; it is in this character that he is called *bailiff of the borough*; he holds courts, ſummons freeholders, &c. as *ſteward*, not as bailiff: But it is the *bailiff* who returns to Parliament; whereas the court books alway ſtile the perſon, whoſe claim is now depending, *ſteward*. In all election rights it is particularly neceſſary to guard againſt the effect of modern uſage, when it militates againſt the more antient, becauſe theſe rights being all of great antiquity, muſt certainly be handed down to us more pure, according as the time of their eſtabliſhment is remote.

The uſurpation by the ſteward of the manor, and the acquieſcence of the other party, are eaſily accounted for by looking into the hiſtory of Downton; from the time of the reſolution of the Houſe in 1661 to the year 1774, no conteſted election in this borough has proceeded ſo far as to be heard before the Houſe; during a great part of which time moſt of the burgage property has been poſſeſſed by one family *, which has likewiſe been leſſee of the lordſhip, ſo that it became leſs material who took the poll, and made the returns: The office then muſt have been burthenſome and unprofitable.

At preſent, however, it cannot be ſaid that the modern poſſeſſion of the office by the ſtewards has been regular or uninterrupted, for in fact the laſt undiſputed exerciſe of it was by the biſhop's bailiff, who made the return in 1780, which was a conteſted election; he has been thus, as it were, *remitted* to his antient right, having preſent poſſeſſion, and a prior title.

The counſel for Bouverie and Scott argued thus,

* The family of Aſhe.

The

The office of bailiff, or returning officer, is in the appointment of the biſhop's leſſee, who is by the leaſe made lord of the borough; it is incident to the grant of the lordſhip. If this right ſhall be eſtabliſhed on principles of law, it muſt be deemed preſcriptive, and the exerciſe of it by others, however antient, is not ſufficient to overturn it.

This claim is moſt conſonant to reaſon, for he who holds the lordſhip, and receives the rents, is the proper perſon to appoint the bailiff or ſteward; it would be abſurd in the biſhop to appoint one, after the whole lordſhip is leaſed out, and one entire ſum paid for it.

The inſtruments themſelves, upon which both ſides found their claims, are not alone ſufficient to ſupport them, for neither the grant of the manor, nor the bailiff's patent, does in terms convey the office in queſtion; but the former conveys to the leſſeee "*all the manor and lordſhip, &c. with the appurtenances,*" which words comprehend every thing annexed to it by law; the latter only conveys to the patentee, in ge-

neral terms, an authority over the bailiwick; which authority muſt be limited by others derived from the ſame ſource with which it is inconſiſtent. That there is ſuch inconſiſtency is evident from the facts in the cauſe, for the bailiff of the hundred exerciſes no internal juriſdiction whatſoever in the borough, not even by holding a court; his receiving the biſhop's rent from the leſſee is in the quality of agent, or *collector*, merely; he receives none of the lord's rents, nor does any act on the biſhop's behalf within the borough; all the borough duties are performed by the ſteward; which affords a ſtrong preſumption, that the officiating in this ſingle inſtance of the return was an encroachment upon the ſteward's office. The preſent patent gives the office in *as ample manner as Field and Frome* (two former bailiffs) *held it:* But neither of theſe ever exerciſed that branch of it now claimed; ſo far, this grant is defective in the ſupport it might derive from uſage, and in reſpect of this reference is not injurious to the claim of the ſteward.

The counſel on the other ſide reſt his claim on two points: 1. The long uſage in early times; and, 2. The reſolution of the Houſe of Commons. The very beginning of this uſage is equivocal; it is not according to the grant of the office, for that is given to two perſons jointly, both of whom make one officer (in the ſame manner as the two ſheriffs of London make one ſheriff of Middleſex), whereas one only executes it; the ſame objection might be made to the execution of the office in 1780; this renders it uncertain in what right he acted; the ſame perſon might have been at the ſame time ſteward of the manor; and this preſumption may be fairly aſked of the Committee in ſuch a caſe, until they ſhew who was the ſteward of that day. Before the lordſhip of the borough was leaſed out, there could be no objection to the claim of the biſhop's bailiff; and it is eaſy to account for the practice of the biſhops in continuing to beſtow grants of the office in the antient form, after the cauſes of it had ceaſed, by recurring to the ſtate of things at the time when this in-

quiry begins: The act, 1 Eliz. ch. 19, ſ. 5. for reſtraining the power of biſhops over their eſtates, does not extend to grants of antient offices with antient ſalaries; this power being thus preſerved, gave them an opportunity of favouring ſome friend with an annuity out of their eſtates, without diminiſhing the revenues of the ſee, and at the ſame time preſerved many of the formal appendages of grandeur which diſtinguiſhed their ſtation, and which the dignitaries of the church have been fond of maintaining (D.) There are many inſtances of this in the eſtates of other biſhopricks; a queſtion aroſe in the King's Bench in Eaſter term 1757, upon a grant of this ſort in this biſhoprick of Wincheſter: The biſhop's predeceſſor had granted to Sir John Trelawney the offices of Chief Steward of the biſhoprick, and of Conductor of the biſhop's men and tenants, with a ſalary of 100l. per annum: And the then biſhop diſputed the validity of this grant*. Now, though

* 1 Burr. 219. The biſhop had alſo granted the office of Keeper of the wild beaſts in his foreſts, or Chief Parker;

though the ſubject matter of theſe offices had long ceaſed, yet the offices and ſalaries having been found by the verdict to be *antient* ones, the court of King's Bench ſupported the grant as a matter of right, in which the biſhop might bind his ſucceſſors: It is to preſerve ſome evidence of the antiquity, that they always uſe the accuſtomed forms in their grants, for they often have no other meaning. Thus in the preſent inſtance, though all the powers granted to theſe patentees might have had their effect formerly, before ſo great a part of the bailiwick was ſeparated from it by the leaſe of the borough of Downton, yet after the leaſe of that lordſhip, part of them became unneceſſary, and could only have been continued in the grant for the reaſon aſſigned. The preſent ſtate of the borough of Hindon furniſhes an obſervation in favour of this claim; that is ſtill in the biſhop's hands not leaſed out, and therefore there has never been any objection made to the power

Parker; but this was found by the jury not to have been an *antient office*, and therefore the court held the grant of it to be void.

exerciſed there under his patent; becauſe no other perſon can have a right to appoint the bailiff of that borough.

Then as to the reſolution of the Houſe, it is by no means a deciſion on the *point*; the evidence of the ſubſequent uſage uniformly practiſed, affords an argument that it was not ſo underſtood by thoſe to whom it was given; but in the reſolution itſelf, it does not appear that there was any diſpute between the parties now contending: If it had ſtated the rejected return to have been made by the leſſee's ſteward, it would have been to the purpoſe; but there is good ground to infer the contrary in the reſolution of the preceding year, and that the *mayor* of the borough had ſet up a claim in oppoſition to the bailiff. This circumſtance leſſens the authority, which the counſel on the other ſide attribute to this entry in the Journals.

But whatever effect may be allowed to the length of poſſeſſion of this office by the bailiff of the hundred, greater muſt be given to the poſſeſſion of the other party, not from the length of time merely, but from

from all the circumſtances attending it: It began ſoon after a reſolution of the Houſe, which muſt neceſſarily have occaſioned an inquiry into the right, was continued for more than a century, and exerciſed in thirty-two inſtances, during a period in which all election rights have been carefully watched and pried into, and the powers of returning officers have been much more important, as a ſeat in Parliament has been a greater object of ambition; during the greater part of this period, a legiſlative caution has been provided againſt uſurpations of theſe offices; for by 7 & 8 W. III. ch. 25. ſ. 1. it is provided, "That the precepts ſhall be delivered to the proper officer to whom the execution thereof doth belong." When all theſe circumſtances are conſidered, they much overballance a poſſeſſion of fifty years, doubtful in its original, exerciſed only in ſeven inſtances, in a period in which the office could not have been an object of much competition.

After the relinquiſhment of the claim for a century, to revive it again by interrupting

rupting an adverſe poſſeſſion of ſuch length, is to enforce a principle deſtructive of all civil rights; the Committee will incline to adopt all the rules of legal preſumption in ſupport of ſuch poſſeſſion. Which is it more juſt to preſume in fair reaſoning on ſuch a ſubject—that the modern poſſeſſion was uſurped by the ſteward of the borough, or, that the bailiff of the hundred formerly had his concurrence? Certainly the latter.

The evidence in the cauſe warrants both theſe propoſitions.

Firſt, That if it appeared *indiſputably* that the right was in the patentees in 1670, without any evidence by which to preſume a change of title, yet the long exerciſe of the franchiſe by another would lead a court of law in a diſpute between the parties, to decide in favour of preſent poſſeſſion; or if this ſhould be thought too large,

Secondly, That from ſuch poſſeſſion, a court of law would direct a jury to preſume a conveyance or releaſe of the right.

Firſt,

Firſt, This is no claim by the crown againſt the wrongful exerciſe of a franchiſe, for no length of poſſeſſion is a bar to an inquiry by the crown in *quo warranto*, into the right of an office; but in private claims the rule of law will not ſuffer the poſſeſſion of a franchiſe for twenty years to be overturned; upon this juſt principle, that the long acquieſcence ſhall be conſidered as an admiſſion of the other's right: The court of King's Bench, in the Winchelſea caſe *, ſay, "There is an analogy between this and other limitations, confining the retroſpect to a reaſonable time."

Secondly, In caſes of antiquated claims the courts direct juries to preſume every thing neceſſary to the ſupport of preſent poſſeſſion, even againſt grants; but the grant in queſtion is uncertain at beſt. In an action for ſtopping up lights, which was tried at Worceſter in 1761, before Mr. Juſtice Wilmot †; the judge ſaid,

* See 4 Burr. M. 1963, and 1965.

† The caſe of Lewis and Price at Worceſter, ſpring aſſizes in 1761; this and the next caſe were cited from a collection of MS. notes belonging to Mr. Juſtice Buller.

"Where

" Where a houſe has been built forty years, and has had lights, if the owner of the adjoining ground build againſt them, an action lies for it; and this is founded on the ſame reaſon as when they are immemorial, for it is long enough to induce a preſumption, that there was originally ſome agreement between the parties." In another action of the ſame ſort *, before the ſame judge, when chief juſtice, he ſaid, " Poſſeſſion for ſuch length of time (which in this caſe had been fifty years) amounts to a grant of the liberty of making the lights—it is evidence of an agreement to make them; poſſeſſion for ſixty years is not to be diſturbed, even by writ of right; and if the poſſeſſion of the houſe itſelf cannot be diſturbed, it would be abſurd to ſay, that the enjoyment of the lights might."

In an action for diverting a water-courſe, tried before Lord Mansfield, in Surrey, in the ſummer of 1782, his lordſhip ſaid, " An incorporeal right, which,

* The caſe of Dougal and Wilſon—Sittings after Trinity Term, 9 Geo. III.

if

if exiſting, muſt be in conſtant uſe, ought to be decided by analogy to the Statutes of Limitation *." If in this caſe, any man ſhould aſk for the deed or evidence of an agreement between the parties, the anſwer would be, that the long relinquiſhment of a right that is valuable and in uſe, is an evidence as effectual as that of *hand and ſeal.*

An argument has been drawn from the return of 1780, as if that act had given poſſeſſion of the office to the bailiff of the hundred; but it is enough to ſtate the nature of that tranſaction in anſwer to it; the deputy of the deceaſed ſteward having refuſed the precept, it was carried to Mr. Duthy, merely in order to get ſome perſon to officiate †; his conduct had no ſymptom of a claim of right, or of oppoſition to the ſteward's authority, for he declared himſelf willing to reſign, if any other would take the office; even if it had been

* Mr. Erſkine, who cited this caſe, had been counſel in the cauſe.

† This circumſtance was not denied.

otherwiſe,

otherwiſe, ſuch an act of poſſeſſion during the vacancy of the ſtewardſhip, could not have had any effect: If the freeholders had thought proper to diſpute his authority, and of themſelves had returned the members to the ſheriff, perhaps the Houſe would have held the return good, if ſingle*.

On the part of Shafto and Conway, it was obſerved in reply, That the preſumptions aſked for by the counſel on the other ſide were neceſſarily excluded by the nature of the queſtion, which ariſes out of deeds that depend on the conſtruction of law, whereas the uſe of preſumption is to ſupply the defect of evidence. The true queſtion is, whether the Biſhop has granted the office of bailiff of the borough by his leaſe; a conſtruction of it is offered from the original uſage againſt this leaſe, this is objected to, becauſe it is ſaid the office is *incident* to the grant; but no authority has been cited in ſupport of this argument (E). They likewiſe reſort to

* The return ſtated in p. 122. as an irregular return, ſeems to have been of this ſort: There were many ſuch in the Parliaments of Charles II.

a pre-

a preſumption, that this uſage might be with the licence of the ſteward, or that the bailiff of the hundred might have been at the ſame time ſteward of the borough; but in whoſe favour is this to be preſumed? Of thoſe who have all the books and records of the borough, and could certainly give evidence of the fact if it exiſted; it would therefore be againſt all principles of law to admit ſuch a preſumption on their ſide; though if it had been wanting in favour of the oppoſite claim it would be reaſonable, becauſe capable of being rebutted by evidence of the contrary, if it exiſted, in their poſſeſſion.

The argument urged from the reference in the patent to the predeceſſor's right is an objection upon words merely; for that reference is to the *right itſelf*, not to the manner in which it may have been exerciſed: By referring to former appointments in the books, there will be found the ſame connection by reference, up to the time of the Stockmans *.

* The Regiſter was afterwards referred to, in which it was found, that Field's grant was "to hold *in tam ample modo—quam Gul. Stockman.*"

It is immaterial what the diſpute was upon which the reſolution in the Journals is founded; it is a deciſion upon the fact, and that alone at this diſtance of time when the particulars of the tranſaction are loſt, ſhall be taken to be a deciſion upon the point: It is impoſſible to ſhew who made the rejected return, becauſe having been rejected by the Houſe it was taken off the file and deſtroyed. — The bailiff of the hundred is adjudged the *proper officer*. How is this obviated? by *preſuming* an alteration of the right by the ſubſequent uſage, and they ſay that even an uſurpation ſo long acquieſced in ſhall not be defeated.—This is ſtrange doctrine, and not that of the law: It is a maxim that long poſſeſſion ſhall not be deemed uſurpation; but if it appears by the evidence to be an uſurpation, it is never ſupported: It is as natural and juſt to preſume that the ſteward of the borough had a deputation from the bailiff of the hundred, as the contrary; but neither preſumption is neceſſary to the deciſion, for they have not ſhewn the right to be out of the patentee, which they are bound to do.

The

The committee having cleared the court, after ſome time ſpent in deliberation, the counſel were called in again, when the chairman informed them that the Committee had reſolved,

" That at the laſt election for the borough of Downton, Mr. Dagge was the proper returning officer."

Hereupon the counſel for Bouverie and Scott requeſted that the Committee would report this reſolution ſpecially to the Houſe, at the ſame time with their final deciſion *.

This point being eſtabliſhed, it became neceſſary for the counſel for Shafto and Conway to go on with their caſe on the merits of the election: As their return was diſallowed, they are from this time to be conſidered as petitioners; and in the following part of this caſe, I ſhall diſtinguiſh them by that name, and the others by that of ſitting members, as thoſe terms are more conſonant to the order of proceeding.

The numbers on Mr. Dagge's poll being only two for Shafto and one for Conway,

* They did ſo. See Votes, 19 July, p. 436.

Bouverie had a majority of forty-two, Scott of forty-one over Shafto, and Bouverie forty-three, Scott forty-two over Conway.

The petitioners counſel ſtated that they ſhould add to their numbers fifty who had tendered their votes for each candidate, and were rejected by the returning officer, which would give both a majority; but if any objections from the ſitting members to theſe votes ſhould ſucceed ſo as to make it neceſſary to go further, they intended to object to thirty-two of the votes on the other ſide: They ſaid that it would be unneceſſary to bring any other proof of the voter's having tendered his vote to the returning officer, than the poll itſelf given in to the Committee by Mr. Dagge, in which the word '*Rejected*' is written oppoſite to the name of the voter: To this no objection was made by the counſel for the ſitting members.

There being ſome doubt among the counſel whether the votes offered to be ſet up by the petitioners ſhould be objected to ſeparately by the ſitting members, ſo as to obtain a deciſion from the Committee,

one by one, upon each, before entering upon another, the Committee allowed the counſel for the ſitting members to take their own courſe, and they choſe that of reſerving their objections till all the votes for the petitioners ſhould be gone through, in order to make them collectively: This method was followed with an exception to the caſe of one vote, which depended on a queſtion of law affecting ſo many others, that the deciſion, if for the ſitting members, would have been concluſive of the cauſe in their favour. It was therefore agreed to treat this queſtion firſt and ſeparately: It aroſe out of the following facts.

The late Mr. Duncombe, who died in November, 1779, by will gave his property in the borough of Downton, together with his other eſtates, "to three truſtees * and their heirs and aſſigns, to the uſe of them, their heirs and aſſigns, upon truſt, ſo ſoon as conveniently might be after his deceaſe, to convey the ſaid eſtates to the

* Sir Thomas Turner Slingſby, Mr. Charles Philip Jennings, and Mr. Mayer.

uſe of his daughter Anne Shafto, for her life, with remainder to the truſtees to preſerve contingent remainders; remainder to the uſe of Robert Shafto, ſecond ſon of his ſaid daughter Anne, in ſtrict ſettlement, with other remainders over." Mrs. Shafto died in 1783, leaving her ſecond ſon, Robert, an infant. Mr. Shafto, by the authority of the truſtees, receives the rents and manages the eſtates hereby deviſed, for his ſon's benefit. Before the laſt election the truſtees executed conveyances of Mr. Duncombe's burgages in Downton, to the ſeveral voters, by deeds of leaſe and releaſe for lives, at ſtated rents, the ſums of which were various.—Theſe deeds were all in one form, which was printed. The truſtees ſtile themſelves, in theſe conveyances, "Deviſes of the legal eſtate of inheritance in truſt named and appointed in the will of Thomas Duncombe, Eſq; of, and concerning (among other things) the lands and hereditaments hereafter-mentioned." The voter's name, upon whoſe title this queſtion aroſe, was Thomas Wornell; he voted under one of theſe conveyances to him of

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an antient burgage in the borough of Downton, for two lives, paying a rack rent, dated 20 and 21 March, 1784.

The counſel for the ſitting members contended, That this conveyance gave no title to the voter; which they argued both from the principles eſtabliſhed in Chancery, with reſpect to truſt eſtates, and from the ſtatute of the 7 and 8 Will. III. c. 25. ſ. 7. which is as follows:

" No perſon or perſons ſhall be allowed to have any vote in election of members, by reaſon of any truſt eſtate or mortgage, unleſs ſuch truſtee or mortgagee be in actual poſſeſſion or receipt of the rents and profits of the ſame eſtate; but the mortgagor or *Ceſtui que truſt* in poſſeſſion ſhall, and may vote for the ſame eſtate, notwithſtanding ſuch mortgage or truſt: And all conveyances of any meſſuages, lands, tenements and hereditaments, in any county, city, borough, town-corporate, port or place, in order to multiply voices, or to ſplit and divide the intereſt in any houſes or lands, among ſeveral perſons, to enable them to vote at elections, are hereby de-

clared to be void and of none effect, and that no more than one ſingle voice ſhall be admitted for one and the ſame houſe or tenement."—They argued thus,—

The eſtate in the truſtees is a mere legal eſtate, for the purpoſe only of obeying the will, and they have no other right but ſuch as may enable them to effectuate the deviſe of their teſtator; Theſe conveyances to truſtees are very generally made for the convenience of family ſettlements, of modern times, in order to receive the benefit of equitable conſtructions, and to avoid the difficulties which might ariſe from legal diſtinctions in carrying them into execution; the truſtees are mere inſtruments of conveyance: This doctrine has prevailed ever ſince the caſe of Leonard and the Earl of Suſſex, reported in 2. Vernon, 526 (F). On the preſent occaſion they have of themſelves (for the *Ceſtui que truſt*, an infant, could not interfere) aſſumed a power of diſpoſing of the eſtate abſolutely, and have given a freehold intereſt in it to the voter: Now, it is a principle in equity, that if a truſtee conveys to one having notice of the truſt,

truſt, the grantee thereby becomes a truſtee for the purpoſe of executing it*; which in this inſtance is to convey to the *Ceſtui que truſt*; the deed itſelf ſhews the fact here, for by the deſcription therein given of the truſtees, the other party had ſufficient notice of the truſt; or if other evidence of notice ſhould be called for, full proof of it will be given: Thus the voter has no other intereſt in the burgage, than the truſtees under whom he claims; he, like them, is a truſtee for the infant and has no beneficial intereſt in the thing conveyed.

But the firſt part of the 7th ſection of the ſtatute above cited, ſeems to put the queſtion out of doubt. This ſtatute is general in all its objects; the title of it is, "For the further regulating elections of members to ſerve in Parliament, &c."— The preamble takes notice of the injuries done to the voters in their rights of election, and to the perſons elected†; no words

* This principle may be ſeen illuſtrated in the following caſes: 2 Vern. 271. 1 Vern. 149. 484.

† The words are, "Whereas, by the evil practices

words can be more extenſive; the 7th ſection comprehends eſtates of every denomination, and in the ſecond clauſe of it expreſsly enumerates every place of repreſentation. In ſhort, there is no expreſſion that can be conſtrued to limit the proviſion to countries, or to except burgage-tenures: The reaſon of this law is obvious; the multitude of family ſettlements in truſt was ſo great, as to create much confuſion in inquiring into the legal ownerſhip of eſtates; the ſame difficulty attended mortgages, where, by the uſual failure of payment by the mortgagor, the eſtate becomes in law the property of the mortgagee, though it ſeldom is ſo in fact; the mortgagee, as well as the truſtee, being generally out of poſſeſſion; the act therefore follows the common practice of men, and in order to prevent a troubleſome inquiry

and irregular proceedings of ſheriffs, under-ſheriffs, mayors, bailiffs, and other officers, in the execution of writs and precepts for electing members to ſerve in Parliament, as well the freeholders and others in their right of election, as alſo the perſons by them elected to be their repreſentatives, have heretofore been greatly injured and abuſed, Now for remedying the ſame, &c."

into

into the legal title, gives the right of voting to the viſible and ſubſtantial owner. Truſtees having the formal and legal right to the freehold, from whence the franchiſe is derived, might, upon legal principles, exert it; but as this would be ſubverſive of the ends of their inſtitution, and contrary to the real ſtate of things, the ſtatute adapts the law to the circumſtances of the times.

This is as applicable to votes in burgage-tenure, as to thoſe in counties, between which, in the antient conſtitution, there is a cloſe connection; in both, the right of voting is real and in right of tenure, not perſonal. The act claſſes together mortgaged and truſt eſtates; yet a mortgagee ſometimes has the beneficial intereſt, but a truſtee never has, and there is therefore ſtronger reaſon againſt his voting, than a mortgagee's. Suppoſe this queſtion to ariſe at a county election upon the ſame facts, it would not be doubted, that the conveyance gave no right of voting, and if ſo, the act makes no diſtinction. It is admitted, that theſe truſtees are not in receipt

ceipt of the rents and profits; if therefore the beneficial intereſt be in another, the right muſt be derived from him, and not from the truſtees, for no derivative title can be better than the original. Suppoſe the truſtees had themſelves claimed to vote, would they have been admitted? But they claim a great deal more, for though they could not have given three votes in their own perſons, they transfer that right to a much larger number. It cannot be contended, that they act according to the inclination of the *Ceſtui que truſt*, becauſe that would be maintaining a right to vote by proxy, a right unknown to the law.

It may be urged on the other ſide, that the law is not general throughout, becauſe the ſecond clauſe of this ſection of the ſtatute has been determined not to extend to burgage-tenures *; but this is owing entirely to the ſubject matter of the clauſe: It is to prevent the multiplication of votes by ſplitting, which is an unneceſſary regulation in burgage-tenures, where it has always been the eſtabliſhed law, that no

* In the two former caſes of Downton.

more

more than one vote can be given for one burgage, which cannot from its nature be ſubdivided.

If in a caſe of poſitive law, arguments of convenience could have place, and it ſhould be urged, that the infant would ſuffer a great hardſhip here, by loſing the advantage of his property, it might be eaſily anſwered, that the diſability of the infant in this caſe, is no other than that which all infants ſuffer.

The counſel for the petitioners argued thus:—After obſerving, that it was ſtrange that this objection ſhould come from a quarter in which the ſame means * had been employed to derive advantage from a truſt-eſtate, they ſaid,

That it was an eſtabliſhed principle, both in law and equity, that the owner of the legal eſtate has a right to make what uſe he will of it againſt all perſons, except the *Ceſtui que truſt*; that till very mo-

* Lord Radnor had received a grant from the truſtees of the late Lord Feverſham, of all the burgages in their poſſeſſion, and had granted them out to the ſeveral voters.

dern

dern times, he might have been juſtified in the courts of *law*, even againſt him, and that he alone can complain even now of any miſapplication of the truſt. There is no inſtance where the courts of law have gone further, than to enforce the maxim, that a truſtee ſhall not defeat the purpoſe of his truſt; they always give effect to the legal title, conveyed by a truſtee in ejectments, or any other actions brought before them (G). The rules which prevail in the court of Chancery, in caſes of truſts, are laid down and practiſed for the benefit of the *Ceſtui que truſt*, and originate in diſputes between *him and the truſtee*; they are peculiar to ſuch diſputes: Thus it is, when a party would ſet up a conveyance from the truſtee againſt the *Ceſtui que truſt*, he ſhall derive no advantage from it as againſt him, though as to every other purpoſe it may be effectual: It would have been more to the purpoſe, to have cited a caſe in which this principle had been enforced, on the complaint of *third perſons*, but none ſuch is to be found. But further, the acts of the truſtee

tee are not void in any caſe; they are valid till queſtioned by him that right has: Now ſuppoſing all theſe deeds to be voidable by the infant when he comes of age, the Committee will ſurely not anticipate the queſtions that may, in poſſibility, only ariſe when that happens; eſpecially on this occaſion, where it would be in favour of one who is contriving thereby to overturn the future rights of the infant. At preſent there is no complaint by the *Ceſtui que truſt*, but on the contrary, there is no room to doubt that the truſtees have acted for the benefit of his eſtate.

It is argued, that as the particular object of this truſt is to convey to the infant at a future period, the truſtees therefore can have no power but for the ſimple act of conveyance; But it is the *Ceſtui que truſt* alone who can ſay this; as to all others, the eſtate is fully in the truſtees (ſubject to an account to the infant) till they do convey it; with an exception only to ſuch acts as would diſable them from executing their truſt, but even then on the complaint of the infant only, or in his behalf.

Excluſive

Excluſive of the ſtatute, there would be little difficulty in deciding this queſtion in Weſtminſter Hall: In order to clear the doubt raiſed upon the 7th ſection, it will be neceſſary to conſider the rules which have always prevailed in the conſtruction of ſtatutes, and which are as fixed as the law. One is, that the judges are to conſider the old law, the miſchief, and the remedy; Another, that a ſtatute is not to be extended beyond the miſchief to be prevented: Another, that if abſurd or dangerous conſequences would follow from the direct meaning of the words, they are not to be followed, but are to be conſtrued ſo as beſt to effectuate the object of the law; theſe are laid down in Blackſtone's Commentaries *. Each of theſe rules might be illuſtrated by the caſe in queſtion; it is not within the expreſs words of the act, nor within the miſchief to be prevented, and very dangerous conſequences would follow from deciding that it is, for it would deſtroy all the burgage property in the kingdom, and that is ſo extenſive as to be

* 1 Black. Com. ſect. iii. of the Introduction.

of

of general * concern. A little experience in legal deciſions ſhews the neceſſity of conſtruing ſtatutes by the rules of law, and of conforming to preceding determinations. It is well known to have been determined, that the ſecond clauſe of this ſection (from whence this ſtatute has received the name of the *Splitting Act*) does not extend to burgage-tenures; yet the words of that clauſe are much more extenſive than thoſe of the other, and include by name every place repreſented: This alone is ſufficient to ſhew, that ſomething beſides words is to be attended to in the conſtruction of a ſtatute. The caſe on the ſtatute, 13 Eliz. ch. 10. ſ. 3. of eccleſiaſtical leaſes, is an illuſtration of the rule †; that ſtatute enacts, that certain leaſes by eccleſiaſtical perſons *ſhall be void to all intents*; yet when the queſtion aroſe upon a leaſe for longer term than the act allowed, the judges held, that

* It is ſaid in the argument in 1 Doug. Elect. 224. that there are about twenty-nine burgage-tenure boroughs.

† This caſe is put in 1 Black. Com. p. 87. (5th edit.) who cites 3 Rep. 60. Co. Lit. 45. To which may be added 10 Rep. 58.

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as the miſchief to be prevented was that of long leaſes to the prejudice of the ſucceſſor, the leaſe was void as againſt the *ſucceſſor only*, but good for the life of the incumbent the grantor.

The property, conſiſting of burgage-tenures, could not have eſcaped the conſideration of the legiſlature at the time when this ſtatute paſſed, yet they have not included it *in words* in this clauſe; the miſchief it intended to prevent was peculiar to county elections, in which a multitude of perſons uſed to vote for freeholds, who had no intereſt whatſoever in the land; this abuſe depended on the ſeveral laws upon county elections.

The firſt legiſlative regulation of the right of voting in reſpect of freehold, (8 Henry VI. ch. 7.) reſtrains this right to freeholders in counties having an eſtate of 40s. a year; by the conſtruction of which ſtatute, it was thought, that if a man had other eſtate to that amount, with *any freehold*, it was ſufficient to juſtify his taking the oath; which the ſheriff was impowered to adminiſter. Two years afterwards, by

ſtat.

ſtat. 10 Hen. VI. ch. 2. reciting the former ſtatute, it was declared that the qualification ſhould not only conſiſt of freehold eſtate, but of freehold *in the county* for which the vote ſhould be given. Before theſe ſtatutes (H.) every freeholder claimed to vote; by them this privilege is limited to perſons receiving a certain income from the land; and this principle of repreſentation being eſtabliſhed in counties, it was deemed neceſſary to correct the perverſion of it, grown common in the ſucceeding ages in conſequence of the new-invented modes of holding real eſtates; it was thought abſurd to give this right, which is derived *out of the enjoyment of the land*, to thoſe who have no real connection with, and receive no income from it, as mortgagees out of poſſeſſion, or truſtees of a legal eſtate: Accordingly, the act in queſtion deprives them of this right, *in certain caſes*, and makes a proper diſtinction between the formal and the ſubſtantial owner (I). There is nothing in this proviſion affecting burgage tenures, nor is the principle applicable to them; the object of the ſtatute was to

correct the defects of county elections. —It is not at all eſſential to a burgage that the voter ſhould receive any profit from it; it is the quality of the ſoil to give the franchiſe, which does not depend on the circumſtances of him that holds it; the grantees of burgages are frequently known not to be in receipt of the profits of the eſtate; and if no man is to vote at theſe elections but he who receives an income from his burgage, that condition alone would, in many caſes, render the property uſeleſs. Many undoubted burgages give no profit at all, both here and in other places, as in Old Sarum, Knareſborough, &c. ſcites of houſes, deſerted ſhambles, gravel-pits, and (here in Downton,) a pool of water, give the right of voting; they have no other value but that of repreſentation: It was not the intention of the legiſlature to annul this right inherent in property, becauſe it might become unproductive: It is only in *counties* that the qualification muſt produce a profit to him who claims to exerciſe it. Now, if this ſtatute ſhould be conſtrued to extend to burgages, it will in

effect

effect deſtroy all the burgage property in the kingdom, though for upwards of ſeventy years it has never been underſtood to extend to it: Perhaps a conſideration of theſe conſequences operated in thoſe determinations by which the ſecond part of this ſection was held not to affect burgage-tenures. It is well known, that till the approach of an election, he who has the ruling intereſt in theſe places is in poſſeſſion of the burgages himſelf, and grants them out to the voters but a few days before he makes uſe of them; if, therefore, theſe words "conveyances in order to multiply voices, or to ſplit the intereſt in houſes or lands, &c." were conſidered to affect this tenure, it would give to the holder of one burgage an equal right with him who has forty (K). Upon what principles then can it be ſaid, that the firſt clauſe of the ſection is to affect burgage-tenures, when the ſecond does not? The Committee will conſider the conſtant uſage of Parliament from the time of paſſing the act, as a conſtruction of it binding upon the preſent times, and ſtronger than the moſt ingenious arguments

in ſpeculation. It is a ſtrong confirmation of the foregoing argument, that Judge Blackſtone, whoſe authority is juſtly reſpected, and who had made the law of elections his particular ſtudy *, in that part of his Commentaries in which he treats of the rights of election, (vol. 1. p. 173) enumerates the qualification given by the particular clauſe now under conſideration, among thoſe which are peculiar *to counties*.

But admitting, for argument's ſake, the force of the reaſoning urged on the other ſide, and that the queſtion had ariſen at a county election, it ought to be decided there as it is now contended for; the ſtatute does not include this caſe. It provides, that no truſtee † who is not in actual re-

* He formerly wrote a pamphlet, intitled "Conſiderations on the Queſtion, whether Tenants by Copy of Court Roll, according to the Cuſtom of the Manor, though not at the Will of the Lord, are Freeholders qualified to vote in Elections for Knights of the Shire."—This pamphlet was occaſioned by the agitation of the above queſtion in the Oxfordſhire election in 1755.

† See page 149.

ceipt

ceipt of the profits ſhall vote, but that this privilege ſhall belong to the real owner when in poſſeſſion; this is very different from enacting that there ſhall be *no vote for a truſt eſtate*. The ſtatute does not ſay the right ſhall be loſt, or not uſed, but that where there is in fact a *Ceſtui que truſt* or a mortgagor, *in poſſeſſion*, he only ſhall vote: For before this ſtatute, the owner of the *legal eſtate* might have turned the beneficial owner from the poll; till then, no *Ceſtui que truſt*, in ſtrictneſs of law, had any right to vote, and the old rules that formerly prevailed on the ſubject of Uſes, prevented him from exerciſing this act of *legal* ownerſhip over an eſtate in which he had, in contemplation of law, but a fiduciary intereſt (L.) Thus the words and ſpirit of this law are fully anſwered, when applied to thoſe caſes only in which there happens to be a mortgagor, or *Ceſtui que truſt* in poſſeſſion; where that is not the caſe, the law may be ſaid to have no operation. It will not be denied, that a woman in poſſeſſion may give a right to vote which ſhe cannot enjoy herſelf; this caſe clearly illuſ-

trates the argument, that where the right is inherent in the *property*, it does not depend upon the circumſtances of the perſon holding it; if it did, all thoſe freeholds in truſt under the diſabilities of infancy and ſex would be disfranchiſed.

By *receipt of the rents*, the ſtatute cannot be ſuppoſed to mean the hand that actually receives them,—that would be too abſurd; the *Ceſtui que truſt* is allowed by this ſtatute to vote, not becauſe he does in fact receive them, but becauſe he is intitled ſo to do: In the preſent caſe, no perſon is intitled to receive them but the truſtees, accountable hereafter to the infant, and therefore they are, according to the ſtatute, the perſons in receipt of the rents: Though no direct proof has been given of the income's coming to their hands, yet Mr. Shafto's actual receipt of them is in their right, and by their authority; and this leads to an anſwer to the queſtion, whether the truſtees could perſonally vote for this eſtate. But ſuppoſing the truſtees not to be in receipt of the rents, the counſel on the other ſide have not ſhewn that any other

perſon

perſon is, (for the infant certainly is not) and till that is done, they cannot avail themſelves of this clauſe of the ſtatute, which does not abſolutely annul the right of the truſtee, but transfers it to ſome other who has the ſubſtantial poſſeſſion, wherever ſuch perſon appears.

On the day after the counſel had finiſhed their arguments, the Committee reſolved,

"That the vote of Thomas Wornell was good:"

At the ſame time that the chairman informed the counſel of this reſolution, he told them that this was not intended to preclude any other objections to the vote, but ſimply to determine upon that which had been argued.

As ſoon as this determination was given, the counſel for the ſitting members agreed to admit twenty votes upon the poll for the petitioners, againſt whom they could make no other objection than this of a conveyance from the truſtees; likewiſe one croſs vote given for *Bouverie* and *Shafto*: So that the poll in this ſtage of the cauſe appeared to have,

For Bouverie	44	disputed.
Scott	43	
Shafto	21	allowed.
Conway	20	

Many objections were raiſed againſt the other votes of the petitioners, as their counſel were going through the evidence neceſſary to eſtabliſh them; this was done by proving the voters poſſeſſed of freeholds in antient burgages within the borough, paying the accuſtomed quit-rents to the lord: The chief inſtrument of evidence uſed for this purpoſe was a quit-rent roll in Mr. Shafto's poſſeſſion, of all the burgages in Downton; this had been copied from one belonging to Lord Feverſham, in the year 1745, by his then ſteward, for the purpoſe of collecting the chief or quit-rents payable to the lord by the burgage tenants; Lord Feverſham being at that time leſſee of the lordſhip under the biſhop: It paſſed therefore as authentic evidence againſt all perſons claiming under Lord Feverſham. In this roll all the burgages were numbered, and generally deſcribed by the name of

of the then owner, or of his predeceſſor, or ſometimes of the occupier; oppoſite to which was placed the ſum of the quit-rent due therefrom: Parole teſtimony was adduced by the counſel to identify the premiſes transferred to the voters, (the title deeds being produced) and to connect them with the quit-rent roll. This ſort of proof naturally lay open to ſuch objections as the ingenuity of counſel is ready to ſuggeſt; ſuch as, to the entirety, antiquity, or identity, of the burgage, or to the witneſſes, or the evidence; many of theſe aroſe on mere queſtions of fact, which were either ſoon diſpoſed of, or terminated in no point of law, and therefore I have not thought them worth reporting. All thoſe from which any legal queſtion aroſe I have preſerved, and I hope faithfully.

The number of votes to which ſubſtantial objections were made on the part of the ſitting members, was at length reduced to ſeventeen, as following:

To eleven, that their tenements were only ſubdivided, and uncertain parts of burgages.

To

To two (one of whom was likewiſe included in the preceding eleven) that they were paupers.

To four, that the titles to their burgages were deficient, which depended on ſeveral queſtions of fact; thus,—To the firſt of theſe, that a piece of ground, making part of the burgage, had been taken from it, and was not aſſigned to the voter; To the ſecond, that it never belonged to a family from whom the title was derived; To the third, that it never was held by the perſon to whoſe name it was referred in an entry on the rent-roll; to the fourth, ſituate in the main-trench *, or bed of the canal, that the burgage meant to be deſcribed in the roll was not this burgage, but one in a ſimilar ſituation, purchaſed by the late Lord Feverſham, which gave a vote for the ſitting members: Theſe diſputed facts occaſioned much argument, and employed much time, but the deciſions upon them, from their nature, do not fall within the ſcheme of theſe Reports; for which reaſon I only give a ſummary ſtate of them.

* A canal communicating with the river Avon.

To

To another of the ſeventeen the objection was, that the burgage belonged to the truſtees of the late Lord Feverſham, having been purchaſed by him; this depended on a matter of law.

The objection to the eleven was treated in the argument as one, and they were all claſſed together, although their circumſtances were in ſome reſpects different:

Five of theſe burgages went by the name of Farr's, having been formerly ſold to Sir Charles Duncombe by one Farr. The deſcription of them in the ſeveral deeds to the voters, was in the form following, which is that of the grant to Thomas Wornell, viz.

"All that antient burgage, conſiſting of a houſe and garden behind the ſame, ſituate on the north-ſide of Downton-ſtreet, in the county of Wilts, now or late in the tenure or occupation of James Hill, yeoman, formerly Farr's."

The other four were held by different occupiers, whoſe names, with the ſituations, were inſerted in the deeds.

The

The Court-book of the borough was referred to, in order to prove the title to theſe burgages: In an entry of the 10th of April, 1706, there is a preſentment of the deſcent of five burgages and a half from Nicholas Farr to Roger Farr, the rent five ſhillings and ſix-pence: On the 21ſt of April, 1708, is a preſentment of the alienation, by R. Farr to Sir Charles Duncombe, of theſe five burgages and a half; the entry in the quit-rent-roll, to which they were applied, is thus: "For that which was Farr's—5s. 6d." Farr's at preſent conſiſts of five houſes, with gardens adjoining to them, three are ſituated on the north-ſide of the ſtreet, and two on the ſouth *: A ſurveyor called on the part of

* Theſe burgages are mentioned in Mr. Douglas's caſe of Downton, vol. 1. p. 220. which has given me occaſion to do that which, perhaps, will happen but once,—to correct a miſtake (a trivial one) in that book: It is there ſaid, that theſe tenements conſiſt of *land, without diviſions*; So of Legg's farm hereafter mentioned: The nature of the queſtion then agitated did not make it neceſſary to attend to this minuteneſs of deſcription, and the miſtake might perhaps be in the evidence, not in the author,

the

the ſitting members*, who made a ſurvey of the borough in 1745, by Lord Feverſham's directions, in order to aſcertain his burgages, produced the plan he then made, the names and deſcriptions of which he took from a rent-roll kept by his lordſhip's ſteward; his plan deſcribes them in two articles, thoſe on the north-ſide in one, and the burgage-rent three ſhillings and ſix-pence; and thoſe on the ſouth-ſide in another, and the burgage-rent two ſhillings: He made three diviſions of this laſt, becauſe it was then intended to make three tenements of them in future. It had always conſiſted of five ſeparate tenements in the memory of the oldeſt perſon living.

The truſtees of Mr. Duncombe had granted five burgages out of Farr's, for which five perſons tendered their votes: No evidence was produced on either ſide, on the ſubject of the half-burgage included in theſe tenements.

Four burgages had been granted by the truſtees out of ſome meadow land that went by the name of the White Horſe;

* But not for this purpoſe.

the

the deſcription of the premiſes in the deeds, under which the voters claimed, was the ſame in all the four, viz. "All that antient burgage, ſituate or being within the borough of Downton, in the county of Wilts, part of the land belonging to the White Horſe." The entry in the quit-rent-roll for this land is thus, "G. Eyre, for part of that land belonging to the White Horſe,—19s. 6d." which is the rent of nineteen burgages and a half; whatever the antient diviſions may have been, it has not now ſo many. On the ſide of the ſitting members it was denied, that there were any diviſions at all, and this point occaſioned ſome diſpute in evidence, which however did not alter the line of argument on the principal queſtion. Mr. Bell, a ſurveyor, called on the part of the petitioners, who had known Downton about four years, and had ſurveyed Mr. Shafto's property there, ſaid, there appeared plain traces of fourteen diviſions in this land by large bound-ſtones, called there *Meer-ſtones*, which were placed 20, 40, and 50 yards aſunder, and ſeemed very antient; and

that

that eleven of theſe diviſions were made by fences (but, on comparing the evidence of both ſides, I find a doubt, whether ſix of theſe meer-ſtones belonged to the White Horſe, or to an adjoining meadow called Bulham Mead.) He ſaid, a bound-ſtone is always a guide to a ſurveyor in making his plan, who draws a line from ſtone to ſtone: While making his ſurvey, he derived the information he wanted from friends of Mr. Shafto, but had been accompanied by ſome others, for it had been publicly made, and employed him for ſome weeks.

John Smith, aged 73, who had lived all his life in Downton, a witneſs called on the part of the petitioners, remembered theſe meer-ſtones from his childhood, and had heard old people formerly ſay, they had always known them; but he could not tell how many diviſions there were in this land, nor how many burgages; he had heard there were nineteen.

Mr. Webb, a ſurveyor, called on the part of the ſitting members, who had taken a haſty ſurvey of the place in queſtion by their

their direction while this inquiry was going on, ſaid, he had no doubt but that ten of theſe ſtones had been placed there to mark out an old ditch, and five of them for the boundary of a ſtream of the river called the Trench. He had been accompanied in his ſurvey (which he made in two hours) by friends of Lord Radnor.

John Fanſtone, an old inhabitant of Downton, aged upwards of 70, ſaid, he always underſtood that they were the boundaries of the ditch, not of the burgages.

Samuel Bailey, an inhabitant of Downton, aged about 40, examined on the ſame ſide, ſaid, he had always heard that theſe ſtones were to mark the water-courſe. On the ſame ſide a deed was produced, dated 20 March, 1673, by which part of this land had been leaſed by Mr. Eyre to Mr. Aſh for 1500 years, wherein theſe ſtones are deſcribed as the boundary between their reſpective lands.

Two burgages had been granted by the truſtees out of land called Legg's Farm; the deſcription of the premiſes in both

deeds was as follows: "An antient burgage, ſituate or being within the borough of Downton, in the county of Wilts, part of Legg's Farm, formerly in the poſſeſſion of J. Plaſket*."

The entry in the quit-rent roll for this is thus, "Anthony Duncombe, Eſq; for that which was Legg's, in J. Plaſket's poſſeſſion—10s."

Mr. Bell, the ſurveyor, ſaid, there appeared marks of this land's having been antiently divided into ten parts, ſome of which diviſions were more plain than others.

There was no evidence of more than one vote's having been given and allowed for either of theſe three eſtates of Farr's, the White Horſe, and Legg's, at any former election†.

Under

* In the election of 1774, Mr. Duncombe had granted *quarters of burgages*, out of Farr's and Legg's, for each of which a vote was claimed; this occaſioned a very different inquiry from the preſent, and the fact being, that there were no marks of diviſions into *quarter burgages* in this land, the queſtion was eaſily determined.

† In fact, more votes have been given for them, but they were of the irregular ſort brought forward in

Under theſe circumſtances, it was contended by the counſel for the ſitting members,

That theſe eleven votes ought to be rejected, as not being for entire burgages, but for parts only; That the property granted was not in itſelf capable of giving the right of voting, but that if it were, the terms of the grants were ſuch, that this right did not thereby paſs: They defined * a burgage to be *an entire indiviſible tenement, holden of the ſuperior Lord of a borough by an immemorial, certain rent, diſtinctly reſerved, to which the right of voting is incident* (M).

That if burgage-tenure be the conſtitution of the borough of Downton, the right of voting muſt be in the freeholders of ſuch tenements; if *one* entire rent be paid to the lord of the borough for the tenement, there can be but one vote given for it. But even if the rent could be divided with-

1774, conſiſting of *new* diviſions into halves and quarters of burgages.

* See 1 Doug. Elect. 217.

in time of memory, and burgages could be granted out by a diviſion of that property for which the entire rent is paid, yet no ſuch diviſion has been made here, for the rent is not apportioned, nor even ſubdivided, in the grants. The voters in queſtion are not ſeverally poſſeſſed of burgages, for no rent is ſpecifically due for the premiſes ſeverally conveyed to them, but generally for all the eſtate taken together.

If there are five houſes upon land that pays a rent of 5s. 6d. the rent of each houſe is not aſcertained; the attempt therefore to raiſe five votes from ſuch a tenement, is to ſplit the entire burgage.

The origin of theſe burgages was by a lord's granting out his lands to his tenants, for the purpoſe of their dwelling together in one ſociety or town*, and each tenant thereby became a tenant in burgage, whether the property he held was great or ſmall, or conſiſting of one houſe, or twenty, or of none at all; for if one burgage has twenty houſes on it, that does not alter the right

* See before, p. 99, 100.

of voting, which allows one vote for a burgage; and the franchiſe being annexed to the ſoil, is invariable, though the tenement may change its appearances. A grant* has been produced in the courſe of this cauſe, which conveys "All that antient burgage, conſiſting of *three houſes, &c.*" which ſhews, that there ought to be no reliance on a diviſion of votes, according to the number of houſes or tenements on a burgage. This is alſo evident from Littleton's Tenures, ſect. 162, and 163. "Tenure in burgage, is where an antient borough is, of which the King is lord, and they that have tenements within the borough, hold of the King their tenements; that every tenant for his *tenement* ought to pay to the King a certain rent by year, &c. and ſuch tenure is but tenure in ſoccage.

"The ſame it is when any other lord is lord, &c."

The rent-roll ſhews theſe rents to be entire rents; if they had ever been ſeparated, is it to be conceived, that the owners

* The caſe of Theoph. Lewis; there were others of the ſame kind.

would

would not have preſerved the evidence of the ſeparation? It has been done in one caſe in this cauſe; two burgages, held by perſons of the names of Warden and Adams, were ſeparate burgages united by one occupation, and ſo continued long, but are now ſeparated again: Here the fact is aſcertained by evidence, and the ſame thing might have been done in theſe eſtates. Though in Farr's there are ſeparate tenements, and on different ſides of the ſtreet, yet the rent is not apportioned; it is an undivided rent of what is called in the Court-books, *five burgages and a half.* It is agreed, that in this borough the right of voting is annexed to ſome eſtates called *half*-burgages and *quarter*-burgages; but it is likewiſe agreed, that theſe are irregular and improper terms, deſcribing in a ſingular manner the *quantum* of the rent*, without any reference to a ſimilar diviſion of that property which gives a vote. Theſe houſes may be of different values, or if they were equal, the tenants cannot apportion the rent, for the lord may take it

* See 1 Doug. Elect. 218.

from which of the five he pleaſes. Rents cannot be apportioned, nor ſervices divided, without the leave of the lord; but a ſeparate burgage rent is not even reſerved in any of theſe grants. It is contended, that a ſhilling rent makes a burgage, that there are as many burgages as ſhilling rents, and that till the ſubdiviſion runs lower, it is a lawful multiplication, becauſe ten ſhillings rent muſt neceſſarily make ten burgages; but the ſtate of the borough contradicts this, for the *half* and *quarter*-burgages, which give the right of voting, are allowed to be good burgages. If theſe are entire burgages, and only called otherwiſe from paying ſmaller rents, why may not that be one burgage only which pays a larger rent, when it is an entirety? The one is above, the other below the common reſervation. Beſides, there is an inſurmountable difficulty in the preſent caſe, in the odd ſix-pence of the rent for the half-burgage in the farms of the White Horſe and Farr's; theſe ſix-pences muſt be diſpoſed of, or accounted for, before the coun-

ſel

ſel for the petitioners can eſtabliſh this diviſion on their own principles.

There is no ſubſtantial difference between the diviſions made at the laſt election and thoſe of the year 1774*, which the Committee of that time determined to be bad; the diviſion then made into quarter-burgages was no other in principle than this, viz. a diviſion into parcels, which parcels were not proved ever to have had the right of voting annexed to them; in which view it ſignifies little, whether the diviſion be called a burgage or a quarter-burgage; in both caſes, it wants the eſſential qualities of an entirety of rent, and local ſeparation.

Theſe obſervations are applicable to all the eleven, but the three claſſes are different: The conveyances of the White Horſe, and Legg's, are deficient; they give no deſcription of the ſubject conveyed, that can be affixed to one place more than another. This is ſuch an abſurdity as no argument can ſupport. It may be ſaid, that the grantees might, by their own acts, remedy this defect, and aſcertain, by their own

* 1 Doug. Elect. 219, 220.

election, that which the deeds leave at large; but this rule cannot have place here, becauſe there is no doubt on the *face of the deed*, the doubt ariſes from matter *dehors*, viz. that there may be more than one burgage in each of theſe farms; and if ſo, neither is properly deſcribed. But admitting this rule for argument's ſake, and that the uncertainty of the grant might be cured by the election of the grantees, they ought to have proved the order of priority of the ſeveral grants, to enable them to make this election with effect. There is a ſtill further objection to this argument which is unanſwerable; according to this rule, the grantee has no burgage till his election; therefore an election ought to have been made before the time of voting under the grant, and to have been proved in this cauſe; for the want of this, moſt clearly theſe votes are bad, or it muſt follow that a man may vote for a burgage without any title to it.

Where a thing lies *in grant*, as if a man grants to another "an acre of wood out of his great wood at D." without particularly deſcribing

deſcribing the acre, the grantee is to do the firſt act, and may take what acre he pleaſes, but till this election, the grantor may ſtill cut the wood in any part; but it is otherwiſe after the grantee has elected his acre: The caſe before us is of this ſort, and till ſuch election made, the whole of theſe burgages remained in the grantor: Which leads to another objection to theſe votes: The grants in queſtion are of land, and by the ſtatute conveyance of leaſe and releaſe (N.), in which there is no livery of ſeiſin, the grantee being ſuppoſed in poſſeſſion under the leaſe: But no poſſeſſion can poſſibly be had under a leaſe which does not deſcribe the ſubject to be poſſeſſed, and here is therefore nothing upon which the releaſe can operate, and ſo both are ineffectual and void.

The evidence upon the White Horſe votes only makes fourteen diviſions at moſt, but the argument requires at leaſt nineteen; and of theſe fourteen, ſix are by ſome ſuppoſed to belong to Bulham mead: Now if they affect to know the boundaries of the burgages, why are they not deſcribed? The

ſame

ſame method of diviſion that makes four in the White Horſe, can make 19 there, and ten in Legg's.

The counſel for the petitioners did not deny the definitions and poſitions on which the foregoing argument had proceeded, but the concluſions drawn from them: They argued thus,

It is not neceſſary in the conſtitution of a burgage, that the rent ſhould have been always *diſtinctly and ſeparately paid*; this is certain, and proved by the uſage in Downton, and in every other burgage-tenure borough; for if it were, all the great eſtates in them muſt ſoon be reduced to the right of one vote only, becauſe the principal owners always pay the rent of all their burgages in one ſum to the ſuperior lord: Thus, as Farr formerly paid 5s. 6d. the rent of his five burgages and a half, in one ſum, ſo Mr. Shafto pays the aggregate ſum for his fifty or ſixty (or whatever the number may be) to the lord of the borough: The mode of paying the rent is therefore not concluſive evidence of the union or ſeparation of the burgage: It is ſufficient, that

that evidence of the ſeparation *in fact* remains; and upon this the queſtion principally turns.

As much ſtreſs has been laid upon the evidence of the quit-rent roll, it is neceſſary to caution the Committee againſt giving into that uſe which the counſel for the ſitting members have made of it: It ſhould be remembered, that this roll is no more than the rule of collection given by the lord of the borough to his ſteward for collecting the quit-rents; that the object of it is to aſcertain the *quantum* to be received by him, without regard to the quality or proportion of the different rents; that it is evidence of ſuch a nature as could not have been produced by the oppoſite party, but only by thoſe contending with them, and being made by their predeceſſor, *whoſe eſtate they have*, ſhould be conſtrued leſs favourably for them *, who are like-

* The irregularity of theſe expreſſions *they* and *them*, made uſe of on this occaſion, and in other parts of the cauſe, as applied to contending repreſentatives, was tacitly acquieſced in on both ſides, and is juſtifiable only on the principle of conſidering this cauſe, what in fact it was, a diſpute between two families, rather than between two repreſentatives.

wiſe

wiſe in poſſeſſion of the lordſhip, and moſt probably of other more authentic evidence of the ſubject in diſpute.

If the acts of the lord of a borough, who in his receipt joins together a number of rents, were to determine the quality of the rents, it would be in the power of the lord to regulate the majority as he pleaſed. It has been determined, that a tenant cannot compel his landlord to give him a receipt (O.); but if he does give one, he may dictate it in his own terms. This rent-roll is to be conſidered in this character, when relied upon by the heirs of Lord Feverſham; that alone does not ſufficiently diſtinguiſh the ſeveral burgages, but the other evidence connected with it is ſufficient. The reputation in the borough is, that the rent of a burgage is a ſhilling; but to this there are a few exceptions, which probably were in their origin an abuſe, but have ſtrengthened into preſcription by length of uſage, and are now too ſtrong to be called in queſtion. Notwithſtanding this, it is natural to ſuppoſe that there were in the beginning as many burgages as ſhilling rents,

and

and it cannot be doubted, that every burgage gave a right of voting. Conformably to this idea, Farr's eſtate is called in the borough books *five burgages and a half*; it is proved by the oldeſt inhabitant of the borough to have conſiſted always of five ſeparate tenements *, and Lord Feverſham intended to have made ſix of them; the ſurveyor † produced on the other ſide proves, that in a roll more antient than that from which the preſent was taken, the eſtate was entered in two diviſions, and the rent apportioned accordingly, one part paying 2s. and the other 3s. 6d. This circumſtance alone ſhews, how inconcluſive the rent-roll is on the preſent queſtion. This is the evidence produced from Lord Feverſham's papers, and the effect of it is equally applicable to all the three eſtates: Why ſhould the Committee be more convinced of the entirety of the rents of 10s. and 19s. 6d. than of the rent of 5s. 6d.? The rent-roll is now proved to be undeciſive as to one of them, and may therefore be ſuppoſed ſo in the other two; it is at

* John Smith's evidence. † See p. 173.

leaſt

leaſt juſt to ſuppoſe it in favour of Mr. Shafto, who has not the means of diſcovering the fact with more certainty, as thoſe who oppoſe him have.

It is as true that a plurality of burgages cannot make *one*, as that one cannot make a *plurality*; therefore, if there is *any* evidence of the ſeveralty of the burgages, it is to be preſumed that they have been always ſo held, and that the unity of the rents has ariſen merely from the unity of poſſeſſion, for the convenience of both parties paying and receiving them.

As to the votes for the White Horſe, and Legg's, the evidence is of a conſiderable diviſion in the former, in the latter, of a diviſion according to the number of burgage rents; the parole evidence, as far as it goes, is in confirmation of this diviſion, and there is none to the contrary, except by inference from the rent-roll. A right of voting does not depend on the ſtate of the burgage,—if a houſe or wall falls down, and is not rebuilt, or the remains of it are removed, the *tenement* is ſtill the ſame; in ſuch caſes what can be better evidence than

that which is furniſhed by antient bound-ſtones? Little credit will be given to a ſurvey haſtily made for the purpoſe of one party, while this queſtion was in agitation, when compared with one deliberately taken without any view to this diſpute; nor will the ſubject admit of the opinion given by Webb upon the bound-ſtones*: A water-courſe was never known to be bounded by meer-ſtones, it marks and bounds itſelf.

The antient ſtate of the White Horſe farm is now unknown; it probably was an inn, the owners of which, as their buſineſs increaſed, extended their premiſes by purchaſing the adjoining land, piece by piece, which they incorporated with their own; and this being done at a time when the value of burgages was not more than that of other land, no great care was taken to preſerve the marks of the boundaries. In this manner nineteen are got together; do they therefore become *one?* No, each preſerves its burgage qualities, of which nothing but an act of Parliament can deprive it.

* See p. 175.

It is ſaid, the deeds do not aſcertain the burgages by boundaries;—it is not neceſſary: If there is but one burgage in the White Horſe, he who received the firſt deed of the four became intitled to it, the ſecond to another if there is more than one, according as he might chooſe, and ſo of the reſt; and their choice would be good againſt the grantors, and every other perſon.

This obſervation is equally applicable, and *a fortiori*, to Legg's farm.

The difference between eſtabliſhing the diviſion of aggregate burgages, and the entirety of thoſe whoſe names import a diviſion, conſiſts in a rule of evidence which the ſtate of this borough, and the proofs in this cauſe require the Committee to follow; It is this—Where one rent includes a *number of burgages*, it is to be preſumed, that the burgages are ſeparate, as the name imports, till the contrary be ſhewn; but where a divided rent is paid for the nominal *diviſion of a burgage*, there it is to be preſumed to be a real diviſion of the burgage, till proof be made of its entirety.

It

It is ſaid to be the ſame queſtion as that in 1775, but it is not poſſible to ſhew a reſemblance between the two caſes; Mr. Duncombe had then granted quarters of burgages *eo nomine* out of theſe lands, but there was no proof or reaſon to preſume, that they had been ever ſo divided, or that votes had been given for ſuch eſtates; and there can be no doubt, that a vote cannot be given for a *part* of a burgage.

The Committee reſolved—Not to admit theſe eleven votes *.

The objections to the two paupers were different: To one that he had received pariſh and other charitable relief, to the other that he had partaken of the diſtribution of a private charity, called *Stockman's charity*; the former was one of the above eleven which the Committee rejected upon the

* Before the Committee proceeded to deliberate on theſe votes, they deſired to ſee the conveyance from Farr to Sir Charles Duncombe, as far as concerned the deſcription of the premiſes now called Farr's; but they were told, that ſearch had been made made for it, and it could not then be found.

other objections*; it is therefore unneceſſary to enter upon the ſtate of this objection. The caſe of the latter was as follows:

In the year 1626, one William Stockman, of Downton, by a deed of feoffment, gave certain lands to ſeven feoffees, to the uſes and truſts named in a ſchedule making part of the deed; in this ſchedule are ſeveral *Items*. The firſt provides for perpetuating the truſt; the ſecond directs, "That the rents ſhall be diſtributed yearly among ſuch poor craftſmen and poor labourers as ſhall be ſurcharged by children within the ſaid pariſh, and for their relief, as ſhall ſeem beſt to the feoffees, with the conſent of the vicar or curate of the pariſh; *and not to go or be employed to the increaſe of the church-box of the ſaid pariſh.*" By the fourth *Item* it is directed,

* The circumſtances of the caſe leave no room to doubt this, although the Committee did not expreſs any thing particular upon the votes in their reſolution, which was generally given upon all the ſeventeen votes objected to at the ſame time: Thus, "Reſolve to admit A B, C D, &c.—To reject E F, G H, &c."

"That this proviſion ſhall not be accounted any abatement of the collection for the church-box, or any other relief of the poor, uſually provided for the poor of the pariſh."

According to the uniform practice in the execution of this truſt, theſe words have been underſtood to direct, that this charity ſhall not be given to thoſe who receive pariſh relief, and the preſent truſtees who manage the charity never give it to any ſuch: It is a temporary relief; and the cuſtom is to diſtribute it annually in different ſums of money to thoſe whom the truſtees think in want of it. The voter, John Edſal, had received it for three years, and within a year before the election.

Againſt this vote the counſel for the ſitting members argued,

That the receipt of this charity ſhewed the perſon accepting it to be in a ſtate of dependent poverty; that ſuch perſons are always held to be diſqualified by the law of Parliament, becauſe, at the time when repreſentatives received wages, it could not be ſuppoſed that ſuch perſons were able to

contribute to the payment of thoſe wages; That there is no reſolution of the Houſe concerning any place, that a pauper may vote; on the contrary, whenever the queſtion has occurred, there has paſſed a reſotion to diſqualify them; That there could be no difference in this reſpect, between the votes of burgage-tenure and thoſe in other rights, for the right, though annexed to the ſoil, is ſubject to the legal diſqualifications, as women, infants, &c. are held incapable of exerciſing it. That the caſe of the borough of Weſtbury *, 1 June 1715, went a great way to determine this, for in that reſolution which is concerning a borough of burgage-tenure, paupers are diſqualified. It is thus:

" Reſolved, That the right of election of members to ſerve in Parliament for the borough of Weſtbury, in the county of Wilts, is in every tenant of any burgage-tenement in fee, for life, or ninety-nine years determinable on lives, or by copies of court-roll, paying a burgage-rent of

* 18 Journ. 154.

four-

four-pence or two-pence yearly, being reſident within the borough, and not receiving alms."

The counſel for the petitioners argued in ſupport of this vote,

That the objection, whenever made, was conſidered as an unfavourable one, and the determinations have generally reſtrained the diſqualification inſtead of extending it; that the Journals contain numerous reſolutions of rights of election, qualified by the addition of "*not receiving alms*;" from which it is plain, that the receipt of alms is not a general diſqualification; if it were, ſuch particular reſolutions would be uſeleſs: That it is not in any caſe a diſqualification, where the right of voting is not *perſonal*, as it is in ſcot and lot, or corporation rights of election; that there is no reſolution to diſqualify freeholders of a county by receipt of alms, and *à fortiori*, it cannot hold in burgage-tenures; that the counſel on the other ſide, who had argued in the former queſtion on the ground of this being a territorial right of voting, as annexed to the ſoil,

could not now deſert this ground, and deprive it of one of its incident privileges by the uncertain accidents of the poſſeſſor's fortune; That the caſe of Weſtbury was not applicable, becauſe the right of voting there was was not properly in burgage-tenures, but a mixed right; beſides, that reſolution paſſed on the receipt of *pariſh relief*: That "by receipt of alms" is always underſtood "pariſh relief;" but that the nature of this charity was ſuch, that even if this were not a burgage right, or if receipt of alms were a diſqualification in Downton, the acceptance of it would not diſqualify. In the caſe of Bedford, reported in 2 Doug. Elect. 94. 113. this matter was fully diſcuſſed before the Committee *, and after elaborate arguments of counſel, it was determined, that Harpur's and Hawes's charities did not diſqualify †;

* It is hardly neceſſary to inform the reader, that the arguments in the Bedford caſe contain all that can be ſaid on this ſubject. It ſhould be obſerved, that the deciſion there paſſed on a borough where *receipt of alms* makes an expreſs exception in the reſolution of the Houſe upon the right of voting.

† See 2 Doug. Elect. 110; 122.

the

the latter of which was a diſtribution in addition to the pariſh relief, and in eaſe of the pariſh, the former more reſembling Stockman's. This deciſion is much more than in point to the preſent argument, for it paſſed on a right of voting that is *perſonal*, viz. in burgeſſes and freemen: That even ſuppoſing the objection well-founded, the party making it ſhould have proved the charity to have been received by the voter after he had acquired the right of voting, which had not been done.

The Committee reſolved—To admit the vote.

The remaining vote objected to, the circumſtances of which made a queſtion of law, was that of Moſes Wiltſhire. The queſtion was, whether the burgage for which he voted, (which was a quarter-burgage, paying the rent of three-pence) was the property of Mr. Duncombe or of Lord Feverſham. It was proved to have been in Mr. Duncombe's poſſeſſion from the month of October 1764: A receipt

was produced, ſigned by Lord Feverſham's ſteward, for an arrear of twelve years quit-rents and for reliefs due to the eſtate of Lord Feverſham, as lord of the borough under the biſhop, at Michaelmas 1775, for the burgages which came into Mr. Duncombe's poſſeſſion on the death of Lord Feverſham, under Sir Charles Duncombe's ſettlement. The receipt was dated January 31, 1776, and after expreſſing the particulars of the ſums therein contained, concluded thus, "In which ſeveral ſums, the quit-rent of three-pence a year for the burgage tenement, *late Longfield's* is included; which tenement, it is apprehended by the truſtees of the ſaid late Lord Feverſham, will eventually turn out to have been purchaſed by the ſaid late Lord Feverſham, and not by Sir Charles Duncombe, and therefore the ſaid ſums are received without prejudice to the right of the ſaid burgage."

This was the burgage in diſpute. The form of the receipt was ſettled by one of the truſtees of Lord Feverſham and Mr. Duncombe's agent. If this tenement had been

been purchaſed by Lord Feverſham, it was clear that it would not have deſcended with the ſettled eſtate to Mr. Duncombe; and the counſel for the ſitting members offered evidence to prove this purchaſe.

On the part of the petitioners it was contended, that the poſſeſſion of twenty years in their favour, would make a good vote at a county election, and was a ſufficient title in this cauſe againſt all claims; therefore they hoped the Committee would ſtop the inquiry *in limine*, by rejecting all evidence of a title which could not be ſucceſsful in an action of ejectment. This point was much debated on both ſides; but as the caſe in its then ſtate was ſomewhat entangled with diſputed facts, the Committee reſolved to hear the whole evidence upon it *de bene eſſe*, and without prejudice to the point contended for on the part of the petitioners; I have therefore thought it better to ſtate all the arguments together upon the whole caſe, though in the proceedings of the cauſe they were divided into two parts.

Lord Feverſham's will, as far as it relates to this ſubject, is in ſubſtance thus: He deviſes all his real eſtate, ſubject to certain annuities and legacies, to three truſtees, upon truſt, in caſe of one child only, to convey to ſuch child, on his or her attaining twenty-one; and after providing for the event of more ſons than one, he wills, that in caſe he ſhould leave daughters only, and more than one, his truſtees ſhall convey to them, on their attaining twenty-one. In the codicil, dated in 1761, he wills, "that in caſe of no ſon, and more daughters than one, his truſtees ſhall make ſale of his eſtates in Wiltſhire and Middleſex, for the advantage of his daughters, and to prevent diſputes; and that his kinſman, Thomas Duncombe, Eſq; or thoſe who may be intitled to his eſtate after his deceaſe, may have the refuſal of them; and in caſe he or they ſhall not accept the terms to be propoſed by the truſtees, they are then to ſell them to the beſt purchaſer."

Upon his lordſhip's death, leaving two daughters, and without male iſſue, the truſtees did not make the offer to Mr. Duncombe,

combe, nor ſince his death to Mr. Shafto. A ſuit in Chancery is depending between him and them upon this deviſe.

Mr. Duncombe, in Eaſter term 1764, levied a fine of all the lands which came to him from Lord Feverſham: His will has been already ſtated in the former part of this cauſe *.

The counſel for the ſitting members produced a conveyance, dated 23 May, 1724, from *Charles Longville* to Lord Feverſham, of a burgage, conſiſting of three meſſuages, with the appurtenances, ſituate in a part of Downton, called *The Iſlands*, paying 3d. rent, deſcribed to be in the occupation of John Nott, John Snelgar, and Richard Snelgar.

Two witneſſes proved, that *Longville's*, or *Longfield's*, (for they ſeemed to make no difference between the two words) was the name given to three houſes lately held by tenants whom they named, which were now conveyed to the voter, and that the ſame houſe had been called *Nott's*.

* See p. 147.

Lord

Lord Feverſham's dying ſeiſed, the infancy of his daughters at the time, and that * ten years had not elapſed ſince their attaining majority, were facts admitted.

Since the election an ejectment was brought for this burgage, on the demiſe of the truſtees of Lord Feverſham, and of his daughters and their huſbands.

The counſel for the petitioners applied to this burgage the following entry of the quit-rent roll:

" For *Longfield's*, in the poſſeſſion of R. Humby,—3 d."

John Smith, (the ſame old perſon mentioned in p. 175.) who had known Downton from his infancy, did not remember any perſon inhabiting theſe houſes of the name of *Nott* or *Snelgar*.

* 21 James I. c. 16. ſ. 2, enacts, That if any perſon intitled to ſuch writ (*as in ſect.* 1.) or having ſuch right of entry, be, at the time of the ſaid right firſt accrued, within the age of twenty-one years, &c. ſuch perſon and his heirs, may, notwithſtanding the ſaid twenty years be expired, (*the limitation in ſect.* 1.) bring his action, or make entry, as he might have done before this act; ſo as ſuch perſon ſhall, within ten years next after his full age, &c. take benefit of the ſame.

The

The counſel for the ſitting members argued,

That the property was proved to be Lord Feverſham's; that there was no doubt about the ſituation, and as to the variance between the names of *Longville* and *Longfield*, the latter was the common vulgar pronunciation, and therefore moſt followed; it was plain they mean the ſame here, becauſe no evidence was offered of any other *Longfield*.

That if this was admitted to be the purchaſed property of Lord Feverſham, there was nothing to prevent his heirs from recovering it now, and therefore the Committee would not allow the voter to derive a title to it from any other; That the twenty years poſſeſſion, ſupported by the ſtatute of limitations *, meant an *adverſe poſſeſſion*; but the receipt ſhews directly the contrary of this, and that the poſſeſſion

* By ſect. 1ſt of the ſtat. 21 James I. ch. 16. No perſon ſhall at any time hereafter make any entry into any lands, &c. but within twenty years next after his title accrued; and in default thereof, ſuch perſon ſo not entering and his heirs, ſhall be utterly excluded from ſuch entry.

of

of Mr. Duncombe, was licenced by the truſtees of Lord Feverſham, upon condition that it ſhould never operate againſt his heirs. But ſuppoſing it otherwiſe, and that the ſtatute of limitations did affect the claim, yet this caſe is within the exceptions of that ſtatute, the parties claiming being infants at the time when their title accrued, and the time allowed them after the removal of that diſability not being yet expired: Therefore they could recover now in the ejectment which has been brought. Though the legal eſtate is in the truſtees, yet an infant is not to be barred by any laches of his truſtee, his diſability is ſo far privileged. Under this truſt the infants are the ſubſtantial owners, and in ſuch caſe the *Ceſtui que truſt* might eject even his own truſtee; an infant cannot compel his truſtee to make an entry, or to ſue for him.

The counſel for the petitioners argued,

That as the facts ſtand, the claim of right is far from being made out, neither the name of the ſuppoſed owner, nor of the occupier, being ſatisfactorily proved; and this

this defect alone, in a caſe of twenty years poſſeſſion, would be ſufficient to ſtop any inquiry into the merits of ſuch poſſeſſion. But without entering into the claim of right, the poſſeſſion is ſuch as muſt obtain a deciſion in favour of the petitioners. The receipt is ſo far from ſhewing the poſſeſſion to be with licence, or *conditional*, that it proves all that Mr. Shafto can require from it, i. e. a clear poſſeſſion by his family for the time required: What is that, as between him and the preſent claimants, but *adverſe?* Poſſeſſion that is not adverſe is either, under another, or for the benefit of another, as in caſes of tenancy in common, &c. neither of theſe is the preſent caſe (P). The effect of the receipt is miſunderſtood, when ſuch an argument is drawn from it; the exception has nothing to do with the *poſſeſſion*, but with the *right*; it is made in order to prevent the operation of the receipt as an acknowledgment of the right, as it would be without this exception; therefore they are permitted to conteſt the *right*, but having allowed it to lie dormant for twenty years, the ſtatute of limitation interferes,

interferes, and prevents their proſecuting this right in certain forms of action: They may ſtill, notwithſtanding the receipt, bring a *writ of entry* or *of right*, but not an ejectment; and that is a ſufficient bar to any inquiry before a Committee of the Houſe of Commons, who ought not to enter upon a cauſe which the court of King's Bench itſelf could not receive, for that court cannot entertain a *real* action. The counſel for the ſitting member would hardly venture to give this receipt in evidence on the trial of the ejectment; but there is another objection to it,—It is uſed as the entry of a claim, ſo as to avoid the effect of an adverſe poſſeſſion; but this is never effectual, unleſs followed up with an action or actual entry: That alone can prevent the operation of the ſtatute, according to the caſe in Buller's Niſi Prius, p. 100 *. "If a declaration in ejectment be delivered within twenty years, and a trial had, whereby

* Edition of 1772: It was objected on the other ſide, that this caſe was omitted in the ſubſequent edition of the book, but upon a reference to the laſt edition, it was found in that.

there

there is leaſe, entry, and ouſter confeſſed, yet if the plaintiff being nonſuited in that action bring another after the twenty years, that will not be proof of an entry, to bring it out of the ſtatute of limitations, for that muſt be an *actual entry* *."

The receipt cannot be conſidered as any agreement on the part of Mr. Duncombe, not to ſecure his own title; it is no more than a declaration of the party giving the receipt, (who has power to dictate it in his own terms) which, however, he does not act upon or proſecute: Within the eight years which have elapſed ſince, no ſtep has been taken to proſecute the eventual right, which the exception looks for. Add to theſe arguments, that Mr. Duncombe levied a fine of the eſtate in queſtion, ſince which five years have paſſed, ſo that not only the poſſeſſory remedy is gone, but all others, for the *right* is barred thereby.

* In the caſe of Naunton and Leman, 2 Black. Rep. 994. it was determined, that even a bill filed in Chancery is no bar to the Statute of Limitations, and that the claim muſt always be of the ſame nature as the eſtate: This was the caſe of a Fine and non-claim. See more on this ſubject, Doug. Rep. 468.

Againſt this is urged the infancy of Lady Radnor and Mrs. Bowater. This opens two queſtions: 1. Whether they are the *Ceſtui que truſts* of this deviſe; and, 2. If ſo, whether, even as ſuch, they are not barred.

No man who reads the will can ſay that Lord Feverſham gives the eſtate, *eo nomine*, to his daughters: It is given to the truſtees, under an expreſs direction to them, to offer it on terms of ſale to the owner of the ſettled eſtate of the Duncombe family, i. e. to the infant of Shafto *: It ſeems to be directed by an anxiety to unite all the family property of the borough in one intereſt. None but the infant Shafto can call upon the truſtees for a conveyance of the legal eſtate, becauſe any other application would be to make them break their truſt; and though they have not yet made the offer they will be obliged to do it. Therefore the beneficial intereſt in this truſt, *quâ* truſt, is in the infant Shafto, and if there is any *Ceſtui que truſt*, it is he: The

* See page 202.

daughters

daughters are only intitled to the money derived from the ſale, and not to the eſtate itſelf (Q). This diſtinction between the two truſts is admitted in the caſe of Alſton and Wells, Doug. Rep. 741; and Lade's Caſe, 3 Burr. 1416.

Upon the ſecond point, admitting that the daughters of Lord Feverſham are the beneficial owners of the eſtate, it is unneceſſary to argue the queſtion, for it has been already decided in the court of Chancery. The truſtees, having the legal eſtate, muſt bring the ejectment, and the demiſe ought to be laid in their names; in that which is brought, though demiſes are laid from Lord and Lady Radnor and Mr. and Mrs. Bowater, together with that of the truſtees, yet they are unneceſſary. The truſtees were under no diſability, and their neglect is concluſive as to the infants; the remedy againſt them muſt be in Chancery. In the caſe of Wyche and the Eaſt-India Company, in 3 P. Williams 309. an adminiſtrator in truſt for an infant had neglected to ſue in his behalf within the time; upon a bill filled by the infant when he came of

age, Lord Chancellor Talbot ſaid, "The adminiſtrator, during the infancy of the plaintiff, had a right to ſue; though the *Ceſtui que truſt* was an infant, yet he muſt be bound by the truſtee's not ſuing in time, for I cannot take away the benefit of the Statute of Limitations from the Company, who are in no default;—and as to the truſt, that is only between the adminiſtrator and the infant, and does not affect the company. So where there is an executor in truſt for another, and the executor neglects to bring his action within the time preſcribed by the ſtatute, the *Ceſtui que truſt*, or reſiduary legatee, will be barred (R)." The above caſe refers to another before Lord Chancellor Parker equally ſtrong; And thus the claim, on the part of the ſitting members, ſeems to lie under every objection that can be made to it.

The counſel for the ſitting members obſerved in reply,

That the caſe cited from Buller's *Niſi Prius* did not relate to this queſtion, becauſe that only ſhews that a fiction of law, ſuch

as the entry *confeſſed* in an ejectment ſhall not prejudice the right of any man*; it is only an illuſtration of the well known maxim, *In fictione juris ſubſiſtit equitas.* But the queſtion here is, whether the evidence by which the poſſeſſion is proved, does not, at the ſame time, prove it to be inſufficient to eſtabliſh a title †.

With reſpect to the truſt, that ſubject is depending in Chancery, and the event uncertain; in the mean time it may be argued, that there is no perſon anſwering the deſcription in Lord Feverſham's will, as the poſſeſſor of the *ſettled eſtate* of the

* If any of my readers wiſh to ſee this ſubject more fully diſcuſſed, they may conſult the caſe of Wigfall and Brydon, in 3 Burr. 1895. and the caſes there cited.

† In the caſe of Hare and Jones in the King's Bench, Mich. 23 Geo. III. (which is very juſtly reported in the *Eſſay on the Nature and Operation of Fines*, p. 187.) it was determined, that no poſſeſſion with the conſent or conſiſtent with the right of another, ſhall work a title: At leaſt this is a neceſſary corollary from the doctrine eſtabliſhed in that cauſe; but the point *immediately* adjudged there turned upon the operation of a fine, upon a right not adverſe to his who levied the fine.

Duncombe family, becauſe Mr. Duncombe, by levying a fine of the eſtate, has defeated the ſettlement; for which reaſon the truſtees muſt exerciſe a diſcretion in this part of their truſt; but at any rate, till the offer made, or the eſtate ſold, Lord Feverſham's daughters are to be conſidered as the owners of it.

The Committee reſolved—To admit the vote.

The petitioners had now finiſhed that part of their caſe which concerned their own votes; The deciſions of the Committee upon the ſeveral objections had reduced their numbers to

41 for Shafto,
40 for Conway,

i. e. 20 diſputed votes for each had been eſtabliſhed, by evidence or argument.

It therefore became neceſſary for them to diſqualify five votes for the ſitting members, in order to obtain a majority over both. In going through this part of the cauſe, the ſame courſe was followed as in the

the former; all the objections were gone through on one ſide firſt, and then received a general anſwer from the other; this was done at the requeſt of the counſel for the ſitting members, who ſaid they were not then prepared with the evidence neceſſary to anſwer the objections vote by vote: By this courſe the deciſion of the Committee, on the particular caſes, was not made till the concluſion of the whole cauſe *.

The counſel for the petitioners ſtated particular objections, which extended to 15 votes: There was beſides a general one, which extended to 21, viz. that it did not appear that the burgages paid a quit-rent; but this being afterwards eſtabliſhed to their ſatisfaction by evidence on the other ſide, of a conformity with the quit-rent roll, there remained only the 15 to be conſidered by the Committee. Theſe I ſhall ſtate ſeparately.

* Much time was loſt by this method, but as it tended to a more particular inveſtigation of the rights of the parties, they are under great obligations to the Committee for their compliance.

1. Reverend James Foſter—The objection aroſe from the form of expreſſion in his conveyance; his burgage (being one of thoſe called *quarter-burgages*, and held by the quit-rent of 3d.) was conveyed to him in theſe words, "All that cottage, meſſuage, tenement, and dwelling-houſe, paying 3d. and commonly called *one quarter of a burgage, &c.*" This laſt phraſe was ſaid to be improper, and *ex vi termini* importing it to be no burgage; for though the irregular burgages, called *half* and *quarter*-burgages, were allowed and eſtabliſhed in Downton, yet this being an exception to a general rule, the expreſſion ought to be adhered to ſtrictly; that this tenement not being deſcribed in the common form, but as a quarter *of a* burgage *, it was incumbent on the counſel to prove in fact, that the ſubject of the grant, for

* According to the entries in the borough books, when they were kept in Latin, there ſeems little foundation for this diſtinction. Thoſe entries (which I have examined) uniformly deſcribe ſuch burgages by the terms "*dimidium burgagii*,—*quarta pars burgagii*—*octava pars burgagii*—"

which

which the vote was given, was an entire burgage; that the contrary being a negative, was incapable of proof. This, after ſome little debate, was agreed to by the Committee, and the fact was eſtabliſhed to the ſatisfaction of the petitioner's counſel: But the evidence produced for this purpoſe furniſhed the petitioners with another objection, which they inſiſted upon: This was to the title under which the voter held the premiſes. The entry for this burgage in the rent-roll* is thus: "John Stride, for his own land, late H. Cotton's;" deeds were produced, by which Stride and his wife conveyed, in 1738, to J. Ruſſell; in 1741, Ruſſell to John Beves and John Gibbs, as joint-tenants in fee; on 26th April, 1764, Gibbs conveyed to Reeves, he to Lord Radnor in Feb. 1783, and Lord Radnor, in June 1783, to Foſter. In the deeds ſubſequent to the year 1741, the premiſes are deſcribed to be "ſituate in that part of Downton, called the Iſlands," which was the ſituation of the voter's burgage;

* The time of making it is before ſtated to have been in 1745. See p. 168.

but

but the deſcription in the deeds of 1738 and 1741, is only "in the borough of Downton:" A deed was produced on the part of the petitioners, dated in 1737, by which Stride mortgaged a tenement and about four luggs of ground, "ſituate *in the iſlands* at Downton," to John Beves for 500 years. Reeves was in poſſeſſion of the burgage from the date of his deed, and voted for it in 1774 and 1779 as his own. The conveyance to Foſter deſcribes it as "formerly bought of John Stride and his wife, now in the occupation of William Reeves:" This had belonged to Cotton before Stride's time, and was on the ſouth-ſide of the ſtreet; Stride rented a tenement on the north-ſide from Mr. Eyre, in which he lived. In the conveyances to Reeves and to Lord Radnor, the "four luggs of ground" make part of the deſcription.

The counſel for the ſitting members argued in ſupport of this vote,

That the voter being in peaceable poſſeſſion, it was *primâ facie* evidence of title, and all that was neceſſary to ſhew at the poll, that the title was ſuch as would ſtand againſt

againſt an ejectment, being a poſſeſſion undiſturbed for twenty years, which made it unneceſſary to enter into a minute inveſtigation of the title deeds, for a Committee would certainly inquire no further; That as the objectors do not ſhew any other perſon to be intitled, a much leſs appearance of title would be ſufficient: But here was beſides a ſtrong confirmation of the title, a voting under it in two conteſted elections. The want of a conveyance from Beves, who was joint-tenant with Gibbs, may at this diſtance of time be fairly ſupplied, by preſuming him to have been dead when Gibbs conveyed. That the puzzle endeavoured to be created by the mortgage-deed in 1737, was cleared up by the rent-roll, which in 1745 ſhews, that it had made no alteration in the ſtate of this property; it is there called *Stride's own*, in contradiſtinction to ſome land that he rented.

The counſel for the petitioners argued,

That unleſs Beves was dead at the time when Gibbs made the conveyance, only a moiety of the burgage paſſed by it; the preſumption aſked for could not be made upon a

fact ſo recent as in 1764, and therefore ſo capable of proof, if true; if the doubt aroſe upon a conveyance fifty or ſixty years old, it might be reaſonable to make the preſumption, becauſe of the difficulty of proof; but that reaſon does not hold here, and for this defect, the vote muſt be diſallowed. But there is another objection equally fatal, ariſing out of the deeds—The premiſes deſcribed in the deed in 1764, and thoſe ſubſequent, do not appear to be the ſame with thoſe in the deeds of 1738 and 1741; if they are in fact the ſame, it may be proved now; if not, theſe deeds give no title to the burgage in queſtion. The conformity in the deſcriptions contained in the mortgage-deed in 1737, and thoſe in 1764 and after, connected with the fact of Stride's being in poſſeſſion of this which is called "his own burgage," ſeven years after he is by them ſuppoſed to have ſold it, raiſes a ſtrong ſuſpicion, that this burgage is the ſubject of the mortgage, and that he continued in poſſeſſion as other mortgagors do; and that ſome other

other tenement is the ſubject of the conveyance in 1738 and 1741.

Therefore the only foundation of the title is the twenty years poſſeſſion:

But, firſt, This is not a poſſeſſion of twenty years: The date of the deed under which this poſſeſſion commenced, is 26th April, 1764, and Foſter voted on 5 April, 1784*; therefore the term was not compleated.

Secondly, If it were, it would not be effectual in this caſe, becauſe they have ſhewn this poſſeſſion to have been derived under a bad title: The principle of the Statute of Limitations, and of the rule by which it is enforced, is, that a long poſſeſſion *ſtanding alone* is evidence of a freehold title; but when more appears, as that the poſſeſſion is founded in ſomething which does not ſupport it, the preſumption ariſing from the length of poſſeſſion is then done away.

The Committee reſolved—That the vote was good.

* The day of election.

2. Alex. Forſyth: He voted for a tenement called *Worr'mead.* The objections were two:

Firſt, That it was a copyhold.

And Secondly, That it was out of the borough.

In ſupport of them, the manor books and other evidence were produced, but in the courſe of the inquiry it appeared, (ſomewhat unexpectedly to both parties) that there were *two* Worr'meads; one acknowledged in the rent-roll, the other (as ſeemed to be admitted) out of the borough. Upon this evidence a new objection was made, viz. that the tenement conveyed to the voter, and for which he voted, was in fact that Worr'mead ſaid to be out of the borough; and this made the queſtion for the deciſion of the Committee. The caſe occupied a great deal of time, but as the whole conſiſted of diſputed facts, I ſhall not trouble the reader with an account which could be uſeful only to the parties concerned, who have better means of information. The Committee held the vote to be good.

3. Joſ.

3. Joſ. Nicolas—His tenement was objected to as not being an antient burgage; and as the counſel for the ſitting members offered no evidence in ſupport of the vote, it was conſidered as given up by them, and accordingly was rejected afterwards by the Committee.

4. T. G. Atwater—His tenement was deſcribed in the conveyance to be a "burgage covered with water in the main-trench, formerly Jolliffe's;" the objection was, that there was but *one* burgage in the main-trench, and for that, one William Winter had voted on the ſide of the petitioners *, whoſe vote had been diſputed, but had been expreſsly allowed by the Committee. The ſituation of Atwater's burgage is on the north of a bridge, called Kingſton-bridge, which ſtands upon the main-trench; that for which Winter voted is on the ſouth of this bridge; the latter derived his title from Mr. Shafto, the former from Lord Radnor. On the part of the ſitting members, the counſel produced entries in the court books of the borough,

* See p. 170.

of

of the alienations of this tenement *as a burgage* before it was cut into the main-trench and ſince; they proved, that Lord Feverſham purchaſed this among other property from Mr. Wyndham Aſhe—that Aſhe's property lay on the north of Kingſton-bridge—that Mr. Shafto had no property on the north—that the tenement aſſigned to Winter was on the ſouth, and that the reputation in the borough was, that the tenement in queſtion was a burgage; a witneſs, who had been in poſſeſſion of it twenty-five years under Lord Feverſham, ſwore, that he always underſtood the entry on the roll to apply to this burgage, and in the roll (in which all the burgages belonging to one perſon are claſſed together) the burgage in the main-trench is in company with Aſhe's lands, not with Eyre's, from whom Mr. Shafto derived title.

In order to underſtand this matter more clearly, it is neceſſary to ſtate the circumſtances under which Winter's vote had been admitted. His tenement had been purchaſed of Mr. Eyre by Mr. Shafto, with

other

other burgages, and was in the occupation of Lord Feverſham's truſtees, as under-tenants to Mr. Shafto, to whom they paid the rack-rent as tenants, and from whom they had alſo received the burgage quit-rent, in right of the lordſhip. This was contended, on the part of the petitioners, to be an acknowledgment of the burgage right, deciſive in the preſent diſpute. The counſel for the ſitting members did not then oppoſe this, by the ſame ſtrength of evidence now produced; however they gave ſome evidence * to ſhew that the burgage referred to by the roll, was their's on the north of the bridge: The point in diſpute was upon matters of fact only, and the Committee upon that ſtate of the queſtion admitted the vote for the petitioners.

The counſel for the ſitting members now argued,

That there could be no doubt upon the above evidence, that the burgage mentioned in the quit-rent roll is that held by the voter T. G. Atwater; if ſo, it is an antient burgage paying quit-rent, and it is

* See p. 170.

impoſſible for the petitioners either to ſupport a vote for the ſame burgage, or to prove their own to be a *burgage*; that the admiſſion of another vote for this burgage ought not to prejudice the true proprietor in the exerciſe of his franchiſe, for the object of inquiry had been very different in going through the votes for the petitioners, from that which now occurred in their objections to the votes of the ſitting members: It was *then* the buſineſs of the ſitting members only to prevent their eſtabliſhing *their* votes; and it would have been impertinent in that ſtage, to have entered into a full defence of one of their own votes, whom the returning officer had received on the poll, and whoſe right conſequently required no defence; That the Committee would not make either party ſuffer, by complying with the order of proceeding directed by them in the cauſe, and would therefore reconſider the whole queſtion, as open to them, before they ſhould make their final reſolution; That they were not bound to have declared their judgment upon the former votes, and if they had not done

done it on the caſe of Winter's, and were now to decide upon that burgage, for whom would the deciſion be? The great ſtrength of the petitioners' caſe was the payment of the quit-rent on their part, and receipt of it by the truſtees; but ſuch payment, when the party is not in poſſeſſion of the ſubject of the rent, is no *diſſeiſin*, and the effect of it is done away by the clear evidence on the other ſide, which ſhews that it muſt have happened by miſtake; That the queſtion therefore now would be, whether Atwater, or Winter, ſhould remain upon the poll? if they thought the former juſtly entitled to that privilege, it would never be too late to do juſtice.

The counſel for the petitioners, after recurring to the ſtate of the evidence upon Winter's vote, denied that the reſult of the inquiry would be in favour of the ſitting members, if the whole queſtion were open to it; but they argued—That the queſtion was in fact already decided; and therefore any arguments on general principles came too late; to give way to them, would be

to break through all rules of judicial proceedings, and would open the door to infinite evaſions. Upon the ſame principle, the Committee might be called upon to reviſe their judgment upon the caſe of Farr's burgages, or of any other queſtion in the cauſe, by a tender of freſh evidence.

That the argument, that no *laches* is imputable to the ſitting members, in not bringing their preſent evidence forward, upon Winter's vote, is a begging of the queſtion; they might have proved every thing on that vote which they have now produced; the caſe not only called for it, but it is the very thing they attempted, for they endeavoured as fully as they *then* could, to prove the right to be in their own burgage, and the diſpute turned upon that fact (for the truth of which they referred to the minutes); and even if they had not offered ſuch proof, they ought not to be allowed to do it now, becauſe they had notice of the objection in the firſt opening of the cauſe*, and therefore all the evidence

* The day on which the objection to Atwater was ſtated by the counſel for the petitioners, was June 22; the

evidence now produced would have been pertinent then; If they had the means of eſtabliſhing the vote, and did not uſe them, the Committee will not now aſſiſt them; but as they had failed then, and ſtill muſt fail, in proving *payment of the quit-rent*, the deciſion now, by what means ſoever formed, could not be different from that before given. The parties are therefore bound by this deciſion, not only becauſe it is the judgment of the court, but becauſe it paſſed upon the merits of the caſe.

The Committee reſolved—Not to admit the vote.

5 and 6. Samuel Green and Samuel Clarke: The objection to theſe was, that the tenements for which they voted were *parts* of *one* burgage; and, (if this ſhould fail) that the ſame burgage was conveyed to each, and one vote only of the two could be allowed.

the day on which Winter's vote was oppoſed by evidence on the part of the ſitting members, was June 29.

This conſiſted in fact only, and upon the evidence produced on the part of the ſitting members, the objection was abandoned.

7. H. Barnes: He voted for a tenement which in the election of 1774 was held by two brothers of the names of John and George Ruſſell *; it then paſſed for two burgages, but was objected to for that reaſon, and now was held by the voter as one; The objection was, that no title appeared from the Ruſſells to the preſent voter; and upon the production of the title-deeds, another was raiſed, viz. that in the conveyance of the part held by G. Ruſſell, it is not deſcribed as *a burgage*, in that of J. Ruſſell it is deſcribed as *part of* an antient burgage, and therefore, upon the face of the deeds, the voter had only *part of* a burgage, for which no vote could be received.

This objection was anſwered by evidence, ſhewing that this land conſtituted an antient burgage, and that the whole of it was conveyed to the preſent voter—The

* See 1 Doug. Elect. 227.

counſel

counſel for the ſitting members ſaid, That if it ever was an entire burgage, (which could not be diſputed) it is now by the union of the two parts become entire again, and the franchiſe revives; that although ſome incorporeal rights, as certain rights of common or of eſtovers appurtenant, are loſt for ever by ſplitting the tenement to which they are appurtenant *, it is not ſo of this franchiſe annexed to a burgage, which cannot be extinguiſhed in the like manner.

The counſel for the petitioners afterwards gave up their objection to this vote.

8. John Blake—The objection was, that his tenement was not an antient burgage, but a part of the waſte got together by degrees, and built upon; but the evidence produced in ſupport of this vote, was allowed by the counſel for the petitioners to have eſtabliſhed it.

9. John Webb—His burgage was conveyed to him by one Edſal, of Truro in Cornwall; the deed was printed on a large

* The reader may ſee this ſubject fully diſcuſſed in Co. Lit. 122. and Tirringham's caſe in 4 Rep. 37, 38.

ſheet of paper, in a form common to both parties in this election, which is that of a leaſe and releaſe for lives, wherein blanks are left for inſerting the neceſſary names and deſcriptions: The words which filled the blanks of this conveyance were written with a black-lead pencil; thoſe ſo written in the *releaſe*, were the names and deſcriptions of the voter and of the perſons for whoſe lives the grant was made, who were deſcribed thus—" John Webb, of Langford, in the county of Wilts, gardener" — for the lives of " Shute, lord biſhop of Saliſbury, and Sir Roger Curtis, knight." The burgage is thus deſcribed: " All that antient burgage tenement, with the appurtenances, ſituate in the borough of Downton, in the county of Wilts, now or late in the tenure or occupation of ," without the tenant's name. The execution of the deed was atteſted by two ſubſcribing witneſſes; near the place where they ſigned their names ſome words were written with the pencil.

The Rev. Mr. Sampſon, one of the two witneſſes, was examined; who ſaid, the deeds were

were executed at his houſe in Truro; he did not obſerve any part to have been in pencil, nor that the words in ſome lines looked differently from the reſt; he thought all had been filled up in the uſual manner, and did not obſerve any thing extraordinary; if he had, he ſhould have looked at them more attentively, but he neither read nor obſerved them particularly:—He could not ſay whether they were at that time different from their preſent ſtate, nor if any date then appeared to the deed or the atteſtation: No blanks were filled up in his preſence; he believed, Edſal at the time of execution ſaid, "that the deeds had been ſent to him with the blanks filled up, all except the name," but mentioned nothing of the particular name, or of any part being in pencil.

Being ſhewn the pencil writing cloſe to his own atteſtation, he ſaid he did not take notice of it at the time.

The other ſubſcribing witneſs was not called, but the counſel for the ſitting members offered to call the Earl of Radnor and Edſal himſelf to explain the tranſaction:

The evidence of both was rejected by the Committee, after hearing the arguments of counſel *. The counſel for the ſitting members identified by evidence, Edſal's tenement, and proved, that he had only one burgage in Downton.

Under theſe circumſtances, the counſel for the petitioners, in objecting to this vote, argued to the effect following:

The ſuſpicious appearance of this deed, connected with the evidence, gives good ground to infer, that it was executed *in blank*; a man muſt have been very inattentive, to have looked on this paper without obſerving the pencil; yet the witneſs obſerved nothing remarkable, and was told by the grantor, that the *name* was omitted, —which name, it is fair to preſume, was that of the voter: It is a confirmation of this argument, that the other ſubſcribing witneſs is not called; to what can this be imputed, but a fear that his evidence would be unfavourable? in a caſe too, where every endeavour has been made to ſupport the vote, by contending for the admiſſion of

* Hereafter ſtated in p.

evidence

evidence which the Committee has rejected. If the Committee ſhould be of this opinion, the deed is void, and conſequently there is no right to vote.

But further, ſuppoſing no ground for this objection, the deed is not good in law, as being compoſed of materials which are not allowed; in Co. Lit. 229. it is ſaid, "if a writing be on a piece of wood, or upon a piece of linen, or in the bark of a tree, or on a ſtone, or the like, &c. and the ſame be ſealed or delivered, yet it is no deed; for a deed muſt be written either in parchment or paper as before is ſaid, for the writing upon theſe is leaſt ſubject to alteration or corruption."—Blackſtone in 2 Comm. 297. adds, "Wood or ſtone may be more durable, and linen leſs liable to raſures, but writing on paper or parchment unites in itſelf more perfectly than any other way, both thoſe deſirable qualities (S.);"

Now, if the reaſon for rejecting the materials before enumerated, is, that they are *liable to alteration or corruption*, by the ſame authority, that inſtrument cannot be re-

ceived for a deed, which is compoſed of a ſubſtance that a bit of bread or a finger can efface, without the riſk of diſcovery: even the ordinary changes from hand to hand would in a ſhort time obliterate it. Lord Coke himſelf ſays, that where he uſes the (*&c.*), *other things of the like ſort* are intended to be deſcribed; * and it cannot be doubted that if, when writing the paſſage above cited, he had been aſked, whether any ſuch material as pencil might be uſed for the writing of a deed, he would have claſſed it with the other ſubjects which he has enumerated. The conſequences of giving a ſanction to this mode of trifling with the ſecurities of property, may be very dangerous to civil rights.

A further objection ariſes out of this deed in the deſcription of the burgage; it contains nothing by which the grantee can diſtinguiſh his own burgage from any other in the borough; if he were to take poſſeſſion of the firſt he came to, he might defend himſelf in that as well as in any other by this deed; it gives no deſcription, no boundaries, no tenant, by which it may be

* See Co. Lit. 10. a. 17. b.

identi-

identified; it ſays no more than '*All that burgage in Downton.*' This was an objection ſtrenuouſly urged againſt the White-horſe voters *, and ought to have equal weight here.

Formerly, when deeds were compleated by livery and corporeal poſſeſſion, leſs minuteneſs of deſcription was ſufficient, and perhaps if a deed in theſe words had been ſo compleated, it might ſtand; but it ſhould be remembered, that in the preſent form of conveyance, the poſſeſſion is only nominal, and the grantee is not only not in poſſeſſion of his burgage, but may never have ſeen the place where it lies; he can know his burgage only by the deſcription his deed gives him †.

The utmoſt that can be ſaid of ſuch a deed is, that it is good againſt the grantor himſelf; but the preſent queſtion is between *third perſons*, and there is no diſtinction in the law better known than this, that acts which bind him from whom they proceed, may be void as to others; which is derived from the principle, that no man

* See p. 183. † See on this ſubject Note (N).

ſhall,

ſhall take advantage of his own wrong? but if there be any legal defect in this grant, any other burgage-tenant of Downton may take advantage of it upon this occaſion, becauſe it tends to diminiſh his own franchiſe.

The counſel for the ſitting members anſwered theſe objections in the following manner.

The whole of the firſt objection is founded on a preſumption, drawn from facts which more fairly warrant a contrary preſumption; for if ſuch additions to the deed had really been made after its execution, they would have been made more regularly—the writer would not have been fooliſh enough to render it ſo obvious to ſuſpicion. Although the evidence by which the doubt might have been cleared up, was adjudged incompetent, yet the fact may be naturally accounted for from what has been proved; by ſuppoſing, that the diſtance of Edſal's reſidence and the early period of the election, did not allow time enough for much intercourſe with him,

him *, and therefore the deeds might have been ſent to him in this ſtate, in order to allow of his altering them if he ſhould ſee occaſion. *The name*, mentioned by Edſal to the witneſs, is more probably that which ſtill remains in blank, of the *tenant*, than that of the grantee; for many *names* muſt have been wanting, if the whole had been in blank; nor could he have ſaid, *all was filled up but the name*, if no names at all had been filled up: This, and the preſent ſtate of the deed furniſh a ſtrong argument of the innocence of the tranſaction. The witneſs's want of obſervation is no more than frequently happens to atteſting witneſſes, who are ſuppoſed to attend only to the ſealing and delivery, and to know nothing of the contents of the deed; nor is it neceſſary that they ſhould †.

But

* The late Parliament was diſſolved on the 25th of March, and the election took place on the 5th of April.

† As an authority for this poſition, the counſel cited the caſe of Peat and Ougly, in Com. Rep. 197. which aroſe upon Lord Bolingbroke's will made before the ſtatute of frauds. But the doctrine of that caſe does not go ſo far as this point; there, it is true, the teſtator *ſaid* nothing to the witneſſes, of the name or quality of the inſtrument they were atteſting; but he had writ with his

But even admitting that the words in pencil were inſerted *after* the execution, if with the conſent of the grantor, the deed is equally good: In the caſe of Tecſeira * and Evans, in an action upon a bond, tried before Lord Mansfield, at the ſittings at Guildhall, after Trinity Term 1774, the bond had been executed in blank, and the plaintiff had advanced money on it to a broker, after which the names and ſums had been inſerted in the blanks by the broker; the defendant pleaded *Non eſt factum*, and Lord Mansfield was of opinion that the bond was well executed, and that the broker was to be conſidered as the attorney authorized by the defendant to fill up the blanks; whereupon the plaintiff had a verdict. It may be ſaid that this caſe is not in point to the preſent, becauſe ariſing between the obligor and obligee; but if a deed ſo executed will paſs an intereſt, it is

his own hand, at the place of atteſtation, the words, *Signed, ſealed and publiſhed as my laſt will and teſtament.* According to 3 Burr. p. 1775, Lord Mansfield in the caſe of *Bond* and *Seawell*, ſays, "It is not neceſſary that a teſtator ſhould declare the inſtrument executed, *to be his will*;—or that the witneſſes ſhould know the *contents*."

* Cited by Mr. Wilſon from memory.

ſufficient

ſufficient for the preſent argument: If Edſal's freehold paſſed to Webb, he acquired, as incident to it, the right of voting; that it did paſs to him is evident, becauſe the grantor could not turn him out, and if he could not, no other perſon could.

The only authority for the ſecond objection is, the explanation of an (&c) of Lord Coke; but the ſubjects he mentions are of materials to receive the writing, not of the writing itſelf: Why is not pencil as good as ink if it is as legible? any writing, expreſſing the intent of the parties, is ſufficient to bind them in any matter of contract. The tranſactions of the preſent age are very differently conducted from thoſe of the age in which Lord Coke lived; if it had been the practice of his time to have tranſferred a number of freeholds for an election day, or for the uſe of a few hours only, he would have ſaid, that a grant in pencil would have laſted long enough for the purpoſe.

As to the laſt objection, the uncertainty of the deſcription in the deed, is ſupplied by the evidence produced, as by law it may

be. *Id certum eſt quod certum reddi poteſt*; a grant of "All that burgage in Downton," means "All my burgage," and if the grantor has but one, as is the caſe here, that one paſſes by this grant.

The committee were of opinion—That the vote was good.

10, 11, 12. Hon. Edward Bouverie, William Lucas and James Selfe;—Theſe three voted for burgages, the property of the Earl of Shafteſbury, who had enfeoffed Mr. Ewer of them by a deed of feoffment, dated in 1782; on which livery of ſeiſin was indorſed, dated 22 Dec. 1783: The names of the attornies impowered by the deed to deliver ſeiſin, were written on an eraſure. This deed Lord Shafteſbury executed in Italy, and two ſubſcribing witneſſes atteſted it; as they were not at this time in England their hand-writings were ſworn to before the Committee.

Mr. Ewer had transferred theſe burgages to the voters by deeds dated Dec. 23, 1783; in that to Mr. Bouverie—the date was writ—

written on an eraſure; the other two, which had been executed together with the firſt, were re-executed on the third of April on the ſame paper and ſtamps, *on account of an alteration in the chriſtian, or ſir-names, or both, of the voters*; (which was the account the witneſs gave of them.) The general objection to theſe three was, that the deed from Lord Shafteſbury had an apparent defect in it by the eraſure in the power of attorney; and the counſel contended,

That they had a right to preſume, that the attornies' names had been inſerted after the execution, unleſs the counſel on the other ſide ſhould ſhew the contrary by evidence; the abſence of the witneſſes confirmed this preſumption; That the law regarded ſome deeds with ſo much nicety, that it required an atteſtation to every eraſure in them; and in thoſe in which this nicety was not abſolutely required, the neglecting it was always ſuſpicious. In the paſſage before cited from Lord Coke, it appeared that the law paid no regard to deeds written on materials *ſubject to alteration*; here, there is in fact an alteration viſible; and therefore by

the ſame rule, it ought to be rejected from the deed. They ſaid, they had not been able to find any caſe in the reports on this ſubject, but that this doctrine is ſenſibly laid down in Erſkine's Inſtitute of the Law of Scotland, p. 433. ſect. 20. in which may be ſeen, in what manner that law enforces the general principles of good ſenſe, which are ſuppoſed to have equal place in our own *. The author, after treating of the ſolemnities of deeds, ſays, "From the obſervance of the ſolemnities above explained, a preſumptive evidence ariſes for

* Blackſtone, 2 Comm. 308. (fifth edit.) ſays, "A deed may be avoided—by raſure, interlining, or other alteration in any material part, unleſs a memorandum be made thereof at the time of the execution and atteſtation." He takes this from 11 Rep. 27. *a.* which he cites: That was an action againſt an *obligor*, who pleaded *non eſt factum*. In 5 Rep. 23. it is held that an eraſure in the date after delivery, vitiates a deed; that was likewiſe a queſtion between *obligor* and *obligee* upon the ſame plea. In the ſame manner, Rolle in his Abridgment tit. *Faits*, in deſcribing the circumſtances by which deeds are avoided, puts thoſe caſes only which have happened between *grantor* and *grantee*. But in the caſe before the Committee, ariſing between *third perſons*, the grantor might be ſuppoſed indifferent to the objection.

the genuineneſs of a deed, without which it has no legal force. Where therefore a deed is vitiated by eraſing certain words, and ſuperinducing others in their place, or by interlineations, ſuch additions or interlineations cannot bind the granter, becauſe they are deſtitute of that evidence; the preſumption is, that they have been made after the granter and witneſſes had ſigned the deed, ſince no perſon is preſumed to ſign a blotted or vitiated writing. But if it be either mentioned in the deed itſelf, or acknowledged by the granter on oath *, that thoſe alterations were made before his ſubſcription, they are obligatory on the granter. In ſome ſpecial caſes, the inſtrumentary witneſſes are admitted to prove this fact—but more frequently that manner of proof is rejected." (Z.)

The counſel for the ſitting members anſwered this by ſaying, That in ſuch deeds as thoſe in queſtion, the law did not

* It may be obſerved, that in this paſſage the author has in view thoſe caſes, in which the granter is ſuppoſed to *deny* the effect of his deed, under the circumſtances mentioned.

require writings on eraſures to be atteſted particularly; therefore the rule by which the courts required this nicety in ſome of their records and affidavits, could not with any propriety be brought into the preſent argument; That if the appearance of the deed created any ſuſpicion, it would be unjuſt to extend it to the prejudice of the preſent parties, who had no concern whatſoever in the making it; and as it was impoſſible for them to compel the appearance of the atteſting witneſſes who were beyond ſea, it would be equally unjuſt to *preſume* any thing againſt them on account of ſuch abſence, ſince they could not prevent it.

That the law of Scotland was much more exact in the execution of deeds than the law of England, and the citation from Erſkine, was to be imputed to the peculiar regulations of that law.

The Committee reſolved — To admit theſe three votes.

Beſides the above objection, there was a particular one to Lucas and Selfe, That their

their deeds having been compleated by their firſt execution, could not be changed by a re-execution, without *new ſtamps*; but this objection was not inſiſted upon afterwards, it being proved that the grantees under both executions were the *ſame perſons*, and that their names had been at firſt miſtaken.

There was alſo a particular objection to Mr. Bouverie, that the day of the date being on an eraſure in the deed, it was reaſonable to ſuſpect, that the deed was not executed on the day of that date, unleſs they ſhould clear up the doubt by ſatisfactory evidence; that it muſt have been executed by Mr. Ewer the feoffee, before the livery of ſeiſin to him, and altered afterwards, in order to be conſiſtent with that ſeiſin, without which the feoffee could make no title; that it could have no other meaning than this, becauſe it was long enough before the election.

This objection ſeemed to have been abandoned, after the counſel for the ſitting members had produced evidence to ſhew, that ſeiſin had been delivered on the morn-

ing of the 22d of December, and that Mr. Ewer had executed the deeds in the evening of the 22d or 23d.

13. Thomas Goddard—His vote was objected to for a defect like that againſt Lucas and Selfe, but this objection was done away by ſimilar evidence to theirs; another ſtill remained, viz. That it could not be proved to be an antient burgage by the quit-rent roll.

The counſel for the ſitting members anſwered this, by producing evidence to ſhew, That Lord Feverſham purchaſed 13 burgage tenements of Aſhe—that for theſe, the ſitting members had made only 12 votes—that 11 of them had been already applied to 11 entries in the quit-rent roll of Aſhe's burgages—that this burgage was one of thoſe derived from Aſhe, and conſequently muſt be one of the remaining two, but they could not aſcertain which.

One of the entries referred to in the roll was thus:

"For that late Davis's——1 s."

The other,

"For that bought of W. Snelgar and Mowlands——8 d."

An

An aged witneſs did not remember any one of the name of Davis in theſe tenements; but another witneſs reſident in Downton ſwore, that he had heard that Goddard's tenement was that named *Davis's* on the roll.

Upon this the counſel contended, that they had produced ſufficient evidence to eſtabliſh the only fact wanting, viz. that the burgage paid a quit-rent; for that it could hardly be doubted now that the voter had a burgage.

The counſel for the petitioners argued,

That as both parties had all along proceeded upon an admiſſion of the neceſſity of proving the payment of an *antient*, *certain*, quit-rent, in order to compleat a burgage title, the voter's could not be conſidered as ſuch, becauſe the utmoſt that even the counſel could ſay of it was, that the burgage muſt have paid one of two rents; i. e. either a *ſhilling* or *eight pence*. According to this rule, if there were any other entry on the quit-rent roll unapplied, they might with equal certainty make uſe of it; That they had therefore failed in this

this eſſential quality of the burgage, and conſequently it ought to be rejected.

The Committee reſolved—To admit the vote.

14, 15. Wm. Scott, John Goodfellow. Their names in the conveyances were written on eraſures. Theſe deeds had been executed to other perſons, and the execution properly atteſted; but it being diſcovered that theſe perſons lay under ſome diſqualification in regard to voting, their names were eraſed from the deeds, and the above inſerted in their ſtead; after which the deeds were re-executed in the preſence of the ſame witneſs, under the *ſame ſtamp*. The two perſons whoſe names were firſt uſed were not preſent at the execution of the deeds, nor was any evidence offered to ſhew, that they were acquainted with the tranſaction.

The conſideration of theſe votes came on before the Committee on the 6th of July, at which time, the counſel for the petitioners called for their deeds, and they were delivered in to the clerk of the Committee. It is the uſual method for the

clerk to return to the parties for their convenience, if they deſire it, ſuch inſtruments or papers as are given in evidence to the Committee, after his having made a private mark on them as a memorandum of their having been produced in evidence; the above deeds were in this manner returned to the agent for the ſitting members, after the counſel for the petitioners had read them. On the 12th of July, on which day the counſel for the ſitting members concluded their caſe, theſe deeds were produced again to the Committee, with a new ſtamp, which had been affixed to them in the interval ſince the 6th inſtant, upon payment of the Stamp-office penalty.

Upon theſe facts the counſel for the petitioners objected,

That the voters had no right at the time of the election, to the burgage for which they voted; that the perſons in whoſe names the deeds were firſt ſealed and delivered, became thereby intitled to them, and were alone capable of transferring them to others; That by the ſeveral Stamp-Acts, the conveyances to the voters were void,

as

as being written upon *old ſtamps*; and particularly by 12 Geo. III. ch. 48. no right whatever could be acquired under them: That the deeds having been produced in evidence to the Committee, the ſubſequent ſtamping was null and void.

The ſeveral Stamp Acts particularly referred to were

9 & 10 Will. III. ch. 25. ſect. 58, 59. 1 Anne, ſtat. 2. ch. 22. ſ. 2, 3. 12 Anne, ſtat. 2. ch. 9. ſ. 25. 12 Geo. I. ch. 33. ſ. 8. 30 Geo. II. ch. 19. (T).

In ſupport of theſe votes the counſel for the ſitting members argued to this effect:

Though in general the ſealing and delivery of a deed is underſtood to be *to the uſe of the grantee* therein named, yet that is becauſe of a ſuppoſed privity between the parties, ariſing from a known mutual advantage; but that in *voluntary* deeds, as thoſe in queſtion were, * the ſame privity does not hold, and the grant is not effectual, without the acceptance of the grantee; here the latter knew nothing either of the intention, or of the grant to him, (as far as

* *Qu.*—See the ſenſe in which this epithet is uſed in 1 Atk. 625. and 3 Atk. 412.

appears) and the grantor never delivered it to his uſe, or out of his own poſſeſſion. A voluntary deed may be cancelled at any time by the party making it, and when cancelled, becomes a nullity. This rule was enforced in a caſe in Chancery before Lord Northington *, where a huſband had made a voluntary ſettlement on his wife and children, and afterwards agreed to ſell the eſtate ſettled; one Stell purchaſed it, with notice of the ſettlement, and confeſſedly in order to defeat it; upon a bill filed by the wife, the chancellor directed an iſſue to try, *Whether a valuable conſideration had been given for it*; the jury found it to have been ſo, but *after notice* of the ſettlement; yet hereupon Stell's purchaſe was eſtabliſhed by the chancellor.

If the perſons firſt named in the deeds were to bring ejectments for theſe eſtates, they could neither prove poſſeſſion, nor delivery of the deeds to their uſe, nor a valuable conſideration paid, nor any privity between them and the granter, and conſequently could not recover.

* Cited by Mr. Wilſon from memory.

The practice in this and other boroughs of the ſame kind, is well known to be, to make ſuch grants merely for the purpoſe of voting, for which purpoſe the deeds are ſeldom delivered to the voters till going to the election; and till then both parties conſider them as *Eſcrows*; after the poll, the deeds are delivered back to him who gave them, and no more thought of, though no doubt the voter might keep them if he pleaſed. The intent of the parties is a very material conſideration here, becauſe in ſuch caſe the courts of equity would not decree poſſeſſion to be given to the grantee (U).

Hence it appears, that the firſt execution of theſe deeds had no effect, as between the parties; if ſo, they were not deeds, which, according to the Stamp Acts, required a ſtamp; that only became requiſite when the deeds became effectual, which was upon the *ſecond* execution and delivery, for till then nothing paſſed from the granter. The eraſures made a re-execution neceſſary, but new ſtamps could only be neceſſary to a *new grant*; whereas there

is in this caſe ſubſtantially but *one* grant. But ſuppoſing this to be otherwiſe, theſe deeds having been ſtamped anew, are now become effectual, becauſe thereby they have relation back to the time of delivery.

By the Stamp Acts it is lawful to make deeds without ſtamps; as *deeds* merely, they are good in that ſhape; the proviſion of theſe laws is, that they ſhall not be *given in evidence* in courts of law or equity, unleſs ſtamped: By all of them, ſtamping ſubſequent to the execution of deeds, is allowed, upon paying certain ſums preſcribed to the Stamp-office. In Weſtminſter-hall, if an action were brought upon a bond, and the record entered in court, before it ſhould be diſcovered that the bond was not properly ſtamped, if it ſhould receive a ſtamp *then*, it would be effectual for the purpoſe of the cauſe; even if it were ſtamped while the cauſe is trying, it would be ſufficient; and caſes have happened in which judges have directed that to be done, in order to ſupport the evidence of a deed. The only difference between the ſubſequent ſtamping and the original, conſiſts

in

in the penalty required to be paid to the Stamp-office for the omiſſion (V.)

If therefore the deeds are rendered effectual by the ſubſequent ſtamping, (which cannot be denied) the time of doing it muſt be immaterial; even though done during the ſitting of the Committee. It is enough that this happens before the court determines upon them, and this is conformable to the practice in Weſtminſter-hall.

As to their being given in evidence, and in the *cuſtody of the Committee*, it ſhould be obſerved, that this was not done on the part of the ſitting members; it was no part of their caſe; but the deeds being called for by the petitioners, they were then produced, and upon the objections being taken, the cauſe of it was removed. This was done without fraud or artifice, the deeds were in the hands of thoſe to whom they belonged, who might do with them what they thought fit. The counſel for the petitioners, in order to be conſiſtent on this point, ſhould have objected to the production of the deeds with the firſt ſtamp, the objection now comes too

too late; if they had at firſt oppoſed their being read, the deeds might then have been carried to the office to receive the new ſtamp, and with that affixed to them might have been produced again; this method, and that now under conſideration, are in ſubſtance the ſame, unleſs it can be ſuppoſed that the Committee would have interpoſed their authority to prevent it, which in juſtice they ought not to have done. The delivery of the deeds to the Committee, was the act of the petitioners, who called for them, and therefore it would be unjuſt that they ſhould have advantage of this circumſtance, by contending, that from the time of their production, they are to be conſidered as locked up in the clerk's hands, ſince, if there were any reſtraint, it was occaſioned by themſelves. (W.)

The counſel for the petitioners argued thus,

It is not pretended that the voters had any other right to a burgage in Downton, than what they derived from theſe deeds; if theſe therefore are defective, their titles fail. By the execution of a deed, the con-

tract is affirmed, for it is the *ſealing and delivery* that conſtitutes a deed, and it is not neceſſary in any caſe that the delivery ſhould be *to* the other party concerned; the execution in this caſe is proved to have been in the uſual manner, and not a *conditional* delivery, which is of itſelf an anſwer to that part of the argument, on the other ſide, in which theſe deeds are ſaid to be like *Eſcrows*, before delivery to the grantee. (X.)

In *Perkins*, chap. *on Deeds*, ſect. 137. there is a juſt and proper account of an *Eſcrow*; "And notwithſtanding a deed be ſufficiently written in my name, and ſealed by me, and is not delivered by me or by another by my aſſent, or by my agreement or commandment; the ſame ſhall not bind me for all this, while it is but an eſcrowl; and if I make ſuch eſcrowl, and let it lie by me, and a ſtranger gets it, it ſhall not bind me, for it is not yet my deed." Here an eſcrow is plainly contra-diſtinguiſhed from *a deed* (X.) Actual acceptance is never neceſſary to effectuate a deed, it is always preſumed; even trover may be brought for it without proving acceptance. In equity

if a man ſhould be made a truſtee in a deed, without his knowledge or participation, he may be compelled to convey according to the truſt: perhaps in the courſe of buſineſs, more deeds are executed in the abſence of thoſe to whom they are made, than in their preſence.

With as little reaſon can it be contended, that theſe deeds can be called *voluntary*, in the legal ſenſe of that word; they proceed upon valuable conſideration, viz. a high rack-rent to be paid by the grantee *, and he might bring trover for his conveyance. In the Downton caſe, in 1775, this point was ſtrenuouſly contended for †, and alſo that the deeds empowered the voters to take immediate poſſeſſion; an argument which was then urged as beneficial to both the parties now in conteſt. The caſe cited before the Chancellor would not affect the preſent, even if theſe were to be conſidered as voluntary conveyances; for that caſe depended entirely upon the Stat. 27 Eliz. ch.

* This was the form of all the deeds I looked at; the ſums of the rent in them were various.

† 1 Doug. Elect. 223. See Note (U.)

4. ſ. 5. There is another to the ſame purpoſe in 1 P. Williams, 577. and 1 Atk. 625. The fifth ſection of that ſtatute enacts, that a voluntary deed ſhall be void againſt purchaſers for valuable conſideration, and makes no mention of its being done with, or without *notice*; the inquiry therefore in caſes ariſing under that ſtatute, is merely of the *conſideration paid*, according to the Chancellor's direction. Now, notwithſtanding the mention of rack-rent in theſe deeds, it will not be pretended that the voters have paid a valuable conſideration for their burgages.

The practice in burgage tenures cannot affect the courſe of law, how general ſoever it may be; in the preſent inſtance it is founded on a perverſion of legal principles. But it is not uſual in this borough, as has been aſſerted, for the voters to return the deeds after the cloſing of the poll, to him from whom they received them, without any thing more; if it were ſo, moſt of the votes in this election would be bad. The uſage is for the voter to re-convey either to the grantor or ſome other, or if he votes a ſecond time for the ſame burgage, he does

it by virtue of his firſt deed; the whole of this cauſe has been conducted upon a tacit admiſſion of this principle; a particular inſtance of it is in the vote of Barnes *, to whom it was objected that another voted for his burgage in 1774, and that the preſent voter muſt therefore derive a title from that perſon; the counſel on the other ſide, in anſwer to the objection, immediately produced conveyances to this purpoſe †.

The letter and ſpirit of the ſtamp acts are miſrepreſented, when it is argued from them, that they only relate to the giving deeds in evidence; the words of 12 Ann. c. 9. ſ. 25. are "ſhall not be *available in law or equity till*, &c." Unleſs they are ſtamped therefore they operate nothing; and it is immaterial whether the voters have a freehold burgage *now* or not: The argument is, that the deeds could not give it them at the election; Firſt, becauſe it was before conveyed to another, and Secondly, becauſe the deeds were not properly ſtamp-

* See p. 230.

† I find by the minutes of the Downton Committee, in March 1781, that thirteen of the derivative voters for Mr. Shafto, voted for the ſame burgages in the elections of 1779 and 1780.

ed. The attempt to cure this defect has expoſed it more fully; for the effect of theſe deeds now, is not, that they may be lawful evidence in this court, but to give a freehold *at the time of the election*; the method taken for this purpoſe, is ſuch as the Committee are bound to diſcountenance, as it is a fraud upon their proceedings; the deeds being ſuppoſed to be in their cuſtody from the time they were firſt produced, ought therefore to be conſidered now as when firſt produced: It was impoſſible that the objection to them could have been taken ſooner than it was, becauſe upon the face of the deeds there was nothing defective, but an eraſure; and it was by the croſs-examination of the ſubſcribing witneſs, that thoſe facts were diſcovered which led to the objection.

Beſides the foregoing arguments, the ſtat. 12 Geo. III. ch. 48. furniſhes one that is concluſive, upon another ground. That ſtatute, which was made for preventing frauds in the ſtamp duties, enacts, "That after 1 Auguſt, 1772, it ſhall be *felony* to write any matter whatſoever in reſpect

reſpect whereof any ſtamp duty is payable, on any paper, &c. whereon there ſhall have been before written any matter for which a ſtamp duty was payable, before ſuch paper, &c. ſhall have been again ſtamped according to the acts; or fraudulently to eraſe or ſcrape out any thing written on ſuch ſtamped paper—," It ſhould be obſerved, that the ſecond proviſion alone takes in a *fraudulent intent*, for the firſt inflicts the puniſhment upon any commiſſion of the fact, whatever the intent may be.—Now the evidence upon theſe deeds proves a fact directly within the proviſion of this law, i. e. that a felony has been committed in making them; if the Committee ſhould be of this opinion, they certainly will not effectuate any tranſaction that is founded in a felonious act; no civil right can by law be acquired under it, and therefore theſe deeds cannot poſſibly convey a title to the voters, being thereby rendered null and void.

The Committee reſolved — That theſe votes were bad. (Y.)

The ſeveral deciſions of the Committee had brought the numbers for the candidates to the following ſtate:

For Shafto	41
Conway	40
Bouverie	40
Scott	39

In conſequence whereof they determined,

That Mr. Shafto was duly elected.

That with regard to Mr. Conway, the election was void, and the ſame with regard to Mr. Bouverie.

That Dr. Scott was not duly elected.

At the ſame time (the laſt day of their meeting) they came to the following particular reſolution:

" That John Dagge gentleman, is the legal returning officer for the borough of Downton, in the county of Wilts. (A.A.)*"

All the above reſolutions were reported to the Houſe by the Chairman, on the

* See p. 145.

19th

19th of July*; the cauſe having laſted a month.

Several queſtions of evidence aroſe in the courſe of this cauſe, which occaſioned arguments by the counſel, and deciſions upon them by the Committee; Theſe and ſome other matters I have reſerved for this place, that they might not interrupt the regular narrative of the cauſe.

Upon the queſtion relating to the returning officer, on the part of the ſitting members the counſel offered to produce from the proper office, the return made by Mawſon the borough ſteward in 1732, to certain commiſſioners *appointed by letters patent, to take a ſurvey of the officers of courts of juſtice and their fees*; in which return the ſteward ſtates among other things, "That the *ſteward* has the return of writs to Parliament."

The counſel for the petitioners contended, that this evidence was inadmiſſible;

* Votes, 19 July, p. 436.

that

that if the inquiry under which this return had been made, had related to this queſtion, it could not be received, becauſe the hand-writing of a deceaſed perſon could not be of more avail than his declaration if living; and he would not have been allowed, if living, to have proved any right or privilege of his own office; he is too much intereſted in ſuch queſtions: Beſides, this anſwer in writing was made *ex parte*, and not ſubject to a croſs examination. But they ſaid, the commiſſion under which this anſwer was given, had no concern with the *rights* or *duties* of any officer, it related merely to their conduct in reſpect of *fees*, and the ſteward of this borough went purpoſely out of his way to ſtate any part of his authority.

The counſel for the ſitting members argued,

That it was admiſſible evidence, not as evidence of the *right*, but of an acquieſcence by the bailiff of the hundred in what he now calls an uſurpation; That it was admitted in the cauſe, that the bailiff of the hundred has not exerciſed this office during

ing this period; and this return ſhews, that when a public inquiry was made into the duties of the office, he ſuffered another to claim them.

After a ſhort deliberation (without ordering the room to be cleared) the chairman informed the counſel, that the Committee had reſolved not to receive the evidence.

In order to eſtabliſh the deed (part of which was in pencil) under which John Webb claimed *, the counſel for the ſitting members, after having examined one of the two ſubſcribing witneſſes, offered to call Edſal the grantor as a witneſs †. The counſel on the other ſide contended, that he was incompetent; that no inſtance occurs of ſuch evidence being given in the courts of Weſtminſter-hall; that he was a party in the queſtion, and intereſted to ſupport his own grant under which the voter claimed a franchiſe; in which, if he failed, the grant would be ſo much leſs valuable; that the voter himſelf, it would be admitted, could not be examined, and by

* See page 231. † See p. 233.

the

the ſame reaſon, he from whom he claims ought to be rejected, becauſe it would be in effect the ſame thing as calling the voter himſelf; that in an action on a bond, the evidence of the obligor, though againſt himſelf, is not allowed to affect third perſons, in which character the preſent parties ſtood. In a caſe lately determined on a bankruptcy, it was neceſſary to prove a bond for the petitioning creditor's debt, for which purpoſe the confeſſion of the obligor was offered as evidence; but the court held this evidence, ſtanding alone, to be inſufficient; yet if it had been againſt himſelf it would have been good evidence *.

But this evidence is not only inadmiſſible, but nugatory and uſeleſs; for if examined, he could not ſay more than his hand and ſeal already declare; to aſk him whether theſe are valid, would be abſurd.

* This was the caſe of Abbott and Plumbe, Doug. Rep. 205. The judgment there did not go ſo far as this laſt poſition, tho' it had been contended for by the counſel on one ſide; the point determined was, that "the acknowledgment of the obligor does not ſuperſede the neceſſity of calling the ſubſcribing witneſs."

The

The atteſting witneſſes are the proper perſons to give evidence concerning deeds; it is peculiar to them—inſomuch, that if they die, the inquiry is not made into the hand-writing of the parties, but that of the witneſſes; this point was determined by the judges of the Common Pleas in the laſt Term (B.B.); and the reaſon given for it was, becauſe the fact to be proved by an atteſting witneſs, is, *that he ſaw the party execute*, and if he cannot be found, his hand-writing is allowed to be evidence of this fact.

Here are beſides, two witneſſes who atteſt the deed in queſtion, of whom only one is called; and it is a rule, that none can be examined as to the execution of deeds before the ſubſcribing witneſſes: Therefore, unleſs this is complied with, it is alone a ſufficient objection to this witneſs's being called now.

The counſel for the ſitting members argued,

That the witneſs did not fall within any of thoſe deſcriptions by which the law rejects evidence, either from intereſt, want of

of capacity, or infamy; as to intereſt, he was in point of law intereſted on the other ſide, to deny his grant; that as he was now called to confirm his own contract, which the law ſuppoſes men are intereſted to deny, his evidence muſt be unexceptionable, for thereby he ſupports a right againſt himſelf, viz. a grant of his freehold to another for two lives; They denied that he was a party in this queſtion, or even affected by it in law, for whether Webb had, or had not, the right of voting for his freehold, it would not alter the contract for it between him and Edſal; how valuable ſoever the franchiſe annexed to it might be to the voter, that makes no part of the conſideration in this deed: In this conſiſts the difference between the evidence of the voter himſelf and that of Edſal; the former is directly intereſted to ſupport his own right of voting, the latter is unconcerned in this incidental right. As to the rareneſs of ſuch evidence in other courts of juſtice, it is owing to the nature of the queſtions that ariſe in them; in which the maker of a deed is generally a *party* either directly

directly or indirectly in all actions concerning it, and the deed itſelf is denied in the pleadings *; but in any queſtions that ariſe collaterally upon deeds, if a man admits his own deed, ſuch admiſſion is received even to conclude others. If an ejectment were brought by Webb, founding his title on this deed, can there be a doubt that Edſal's admiſſion of it would enable him to recover in the action? It is not neceſſary that an atteſting witneſs ſhould ſubſcribe his name to the deed †, except in the caſe of a will (where the ſtatute requires it); however it is uſual to do it, and then it appears upon the face of the deed to be the beſt evidence of its execution; and this is the reaſon why no other witneſſes are called before thoſe whoſe names are ſubſcribed; but this rule does not extend to the caſe of the grantor himſelf, when he comes to acknowledge in perſon the fact to which the others bear witneſs of him,—an evidence that renders

* See Note in p. 244.

† In 4 Doug. Elect. 74. a witneſs who had been preſent at the execution of a deed produced, but was not a ſubſcribing witneſs to it, was allowed to put his name to it during his examination, and then to prove it.

theirs

theirs unneceſſary; in all caſes other witneſſes may be called to confirm the ſubſcribing witneſſes; and in the caſe of Mr. Jolliffe's will, in which there was cauſe to ſuſpect their veracity, others were allowed to be called even to contradict them, and the will in that caſe was eſtabliſhed upon ſuch teſtimony, though the ſubſcribing witneſſes denied their atteſtations. (C.C.)

In all queſtions of evidence, the true way to decide, is by inquiring what is the *end* of the proof, for evidence that is good to one purpoſe, may not be ſo to another; here, the ſubſcribing witneſs not being able to clear a doubt, ariſing on the face of the deed, it becomes neceſſary to examine further; who then can be more proper for this purpoſe than the maker of the deed, where he is not intereſted in the queſtion, as it is before ſhewn that Edſal is not?

When the arguments were ended the court was cleared, and the Committee deliberated, after which the counſel were called in and informed,

That the Committee had determined—Not to admit Mr. Edſal as a witneſs.

The

The counſel for the ſitting members likewiſe called the Earl of Radnor, for the purpoſe of eſtabliſhing Edſal's deed *. His evidence was objected to on account of intereſt: It was ſaid, that the part he had taken in the election, by directly making the titles to ſo many voters, and by attending the cauſe throughout †, ſhewed that he conſidered himſelf as a party; but the Committee thinking this no legal objection, he was ſworn. Upon being aſked whether he paid the expences of the petition, he anſwered in the affirmative: The counſel for the petitioners now contended, that there was a legal objection to his lordſhip's evidence; that in common law trials, if a witneſs has undertaken to pay the coſts, it is an allowed objection to him.

The counſel for the ſitting members anſwered,

That in order to diſqualify his evidence, the intereſt muſt be ſuch as is to be affected by the event, i. e. that in one caſe he may

* See p. 233.

† His lordſhip generally ſate at the bar-table in the Committee-room. See the note in p. 155.

gain, in the other loſe; that for this reaſon it was a good objection in common law trials, becauſe the coſts of the ſuit are paid by the loſer, and ſaved by the winner; but before Committees, each party pays his own coſts; and be the event what it may, the expence is the ſame to them: Here is therefore nothing in the event to biaſs the judgment; the criterion of competency in a witneſs, is a direct intereſt, influencing all men alike upon general principles; but the rule to which this caſe has been applied is partial, and confined to a particular judicature.

The counſel for the petitioners replied,

That the principle of their objection was a general one, for that no man who voluntarily pays all the expences of a ſuit can be ſuppoſed to have a mind unbiaſſed and impartial to the ſide he eſpouſes; That there was much more reſemblance between trials before Committees, and thoſe in the law courts, than the counſel on the other ſide allowed, for it was in the power of Committees to award coſts to be paid in

certain caſes of frivolous petitions *; and though this particular cauſe might exclude the probability of its concluding with a reſolution to that effect, yet the poſſibility of it was ground enough to argue, that the rule of other courts would hold in this.

When the counſel had ended, his lordſhip was aſked by one of the Committee, "Whether in the event of a new election, ariſing out of the preſent petitions, as, if by reducing the numbers to an equality, the Committee ſhould determine the laſt election to be void, he ſhould pay the expences of ſuch new election?"

His lordſhip anſwered in the affirmative. The Committee ordered the room to be cleared, and after deliberating, directed the counſel to be called in, when the chairman informed them,

That they were of opinion, that Lord Radnor was not a competent witneſs (DD).

* See ſeveral caſes in which this rule has been inforced, in 1 Doug. Elect. 165. But it ſeems queſtionable, whether it could take place upon a *double return*, whereon both parties have petitioned.

At the ſame time, the Committee aſked if the parties had any objection to their ſtriking out of their minutes, all the queſtions to Lord Radnor, together with his anſwers to them *? To this no anſwer was made by either party, but the Committee afterwards paſſed a reſolution for this purpoſe at the end of the day, when the counſel had withdrawn.

When the vote of Moſes Wiltſhire was under conſideration, Mr. Blake was called to prove the infancy of Lady Radnor and Mrs. Bowater; he was objected to as being a voter ſtill poſſeſſed of his burgage, and was not examined, though the counſel on the other ſide ſaid it was no objection upon this queſtion †. The fact was afterwards admitted.

During the litigation of Mr. Blake's vote, the counſel for the ſitting members in ſupport of it, offered to give in evidence a copy of the poll for the Downton

* There were many more than I have mentioned above in p. 273. but as they did not affect the legal ſtate of the queſtion, I have omitted them.

† He was examined in the former part of the cauſe relating to the returning officer. See p. 122.

election

election Aug. 21, 1727, whereby it would appear, that the owner of Mr. Blake's burgage had then voted for it; this paper was found among the deeds and papers of Lord Feverſham's eſtate, and was intitled, "A true Copy of the Poll, &c."

The counſel for the petitioners contended, That it could not be received in evidence; that it was not properly authenticated even as a copy, no hand-writing to it being proved, nor any authority annexed to it. By 7 & 8 Will. III. ch. 25. ſ. 6. copies of polls are directed to be given to thoſe who apply for them, which cannot be done unleſs originals are preſerved; but it does not appear that this copy was made by authority, as the act directs; and even if this were ſuch copy, it could not be read in evidence, being *a copy*, till the original ſhould be properly accounted for.

The counſel for the ſitting members contended, that this paper of ſo antient a date coming from a family repoſitory of deeds, poſſeſſed equal authority with title deeds; that the ſubject matter of this paper made it an exception to the rule with re-

ſpect to copies, becauſe *the poll* is the numbering of the voters, and every writing of it may be called a copy; that the act of Will. III. orders the mode of proceeding in county elections, but in boroughs they are not bound to preſerve the polls they take, *in writing* (EE.); the queſtion therefore for the Committee would be, whether they would not receive in evidence this account of the election, of which perhaps a better never exiſted.

The Committee without clearing the room, reſolved not to admit the evidence.

Upon the firſt queſtion in the cauſe relating to the returning officer, the counſel for the petitioners called Mr. Harriſon to prove the Biſhop's ſignature to the approbation of Mr. Serle's deputation to him; his evidence was objected to as incompetent on account of intereſt; the point was argued, but produced no deciſion from the Committee, as the counſel for the ſitting members afterwards dropped their objection, and he was ſworn; I have therefore thought it unneceſſary to ſtate the arguments. The counſel for the petitioners relied

relied on the caſe of the King and Bray in Rep. Temp. Hardw. 358. and Buller's Nifi Prius, 286. edit. 1772. (which ſeems to be the ſame caſe with the King and *Robins*, 2 Stra. 1069.) The point of this caſe is, that a corporator having exerciſed a corporate authority, is a competent witneſs after the expiration of it, to prove a cuſtom relating thereto *.

When the counſel for the ſitting members had concluded the opening of their caſe, they were aſked from the Committee, if they intended to ſet up three votes which appeared by the poll to have been tendered for them, and rejected by the returning officer. Mr. Wilſon anſwered, that if it ſhould be neceſſary, they might afterwards contend for them; upon which Mr. Serj. Adair ſaid, that when that ſhould be contended for, he meant to oppoſe it on this ground, *that the petition of Bouverie and Scott contained no allegation, that Mr. Dagge had rejected any of their votes* †, and

* See it in the caſe of Bedfordſhire.

† See the petition, p. 110. upon this ſubject; ſee likewiſe Doug. Elect. 4 vol. 144, 147. 3 vol. 15, 16. and 255.

therefore they were not intitled to enter upon any ſuch caſe. Nothing more was ſaid on the ſubject, and theſe votes were never afterwards mentioned.

On the 9th of July, at which time the counſel for the ſitting members were going through evidence in ſupport of their votes, they informed the Committee, that an aged witneſs on their part was then lying dangerouſly ill, and aſked the favour of them to adjourn, for the purpoſe of aſking leave of the Houſe to adjourn the Committee to the witneſs's lodgings in order to take his evidence, (which they ſaid was very material to them) or to adjourn at once to the witneſs's lodgings, if the counſel on the other ſide would conſent to that method; the latter upon being aſked, refuſed their conſent; and the Stat. 10 Geo. III. c. 16. ſ. 13. (* Mr. Grenville's Act) being read, the Committee intimated an opinion that

* "—— the Houſe ſhall order the ſaid ſelect Committee to meet at a certain time, &c.—and *the place of their meeting and ſitting* ſhall be ſome convenient room or place adjacent to the court of requeſts, properly prepared for that purpoſe."

ſuch

ſuch adjournment would be illegal, by the poſitive directions of the ſtatute: Hereupon the counſel for the ſitting members propoſed that the Committee might delegate their clerk to take the witneſs's depoſition in the preſence of perſons authoriſed by both parties, and urged the Committee to exert that inherent power, which, they ſaid, muſt neceſſarily reſide in every independent court of juſtice, of regulating their own modes of proceeding in ſuch caſes of neceſſity, upon which the law from whence they derived their inſtitution was ſilent.—One of the Committee obſerved, that they could not commit a power to their clerk to take a depoſition, and here the matter dropped.

On the ſame day (being friday) the counſel for the ſitting members having cloſed the evidence on their caſe, the Committee adjourned in order to aſk leave of the Houſe to adjourn till monday, having ſeveral queſtions of importance, and a great deal of evidence to conſider; the chairman accordingly, by the direction of the Committee, moved the Houſe for leave, which being granted, the Committee met again within

within half an hour and adjourned to monday July 12 *.

At the concluſion of the cauſe, the counſel for the petitioning electors prayed the Committee to paſs a cenſure on the conduct of the returning officer, for rejecting the votes of his clients, which, he ſaid, the deciſions of the Committee already ſhewed to have been done without any reaſonable cauſe, and betrayed exceſſive partiality and injuſtice.

* By ſect. 19. of the ſtatute above-mentioned, the Committee cannot adjourn for longer time than twenty-four hours (except ſundays and Chriſtmas day) "without leave firſt obtained from the Houſe upon motion, and ſpecial cauſe aſſigned." See Votes, July 9. p. 387.

NOTES

NOTES

ON THE CASE OF

DOWNTON.

PAGE 113. (A). Mr. Shafto's petition (ſtated in vol. 37, of the Journals, p. 521.) complained "that H. Dench, the returning officer, behaved very partially and unfairly in the execution of his office, in as much as, though he admitted on his poll the names of thoſe who voted for the petitioner, yet, contrary to the duty of his office he put *queries* on the greateſt part of the votes he ſo received, and at the end of the poll arbitrarily and illegally rejected them," and unlawfully returned Mr. Bouverie.

When the cauſe came on before the Committee (16 Feb. 1780.) Mr. Shafto's counſel confined themſelves in the opening of their caſe, to the charge againſt the returning officer, in order to obtain from the Committee a deciſion in their favour upon the matter of the *return*, previous to their entering upon the *merits of the election*; and they particularly cited the caſes of Cumberland in 1768, (32 Journ. 89, &c.) and of Shoreham in 1770, (33 Journ. 69, 70.) in the former of which, the Houſe, in the latter, the ſelect Committee, had adopted that courſe of proceeding in caſes ſimilar to the preſent. But the Committee came to a reſolution directing

recting the parties to proceed to the merits of the election; upon which they afterwards determined generally in favour of the petitioner, without adding any particular reſolution upon the return.

At the election there were for Shafto thirty-one votes, and for Bouverie eight, and the returning officer had firſt *queried* and then rejected, twenty-eight of Mr. Shafto's votes claiming under leaſes from Mr. Duncombe's truſtees.

P. 118, 123, 124. (B. 1. 2. 3. 4. 5. 6. 7.)

(B. 1.) The following is a copy of the Biſhop's patent appointing Duthy and Serle to the office of bailiff.

"To all Chriſtian people to whom theſe preſents ſhall come, John, by divine permiſſion, Biſhop of Wincheſter, greeting, Know ye, that We the Biſhop aforeſaid, for divers good cauſes and conſiderations, us thereunto ſpecially moving, Have given and granted, and by theſe preſents do give, grant, and confirm to John Duthy, Eſq; and James Serle, gent. of the city of Wincheſter, in the county of Hants, the office of bailiff of the bailiwick of our lordſhip of Downton, in the county of Wilts, and of all and ſingular manors, burghs and members of the ſaid bailiwick or lordſhip of Downton aforeſaid: Moreover, We give and grant by theſe preſents, for us and our ſucceſſors, to the ſaid John Duthy and James Serle, the office of Receiver or Collector of the rents of our whole manor or lordſhip of Downton aforeſaid, with the appurtenances, in the county of Wilts aforeſaid, with all and ſingular profits, advantages, commodities and emoluments to the ſaid office in any wiſe belonging or appertaining, with power and authority from us to proſecute, aſk and vindicate

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in all places and courts whatſoever, and in any manner whatſoever, the rights and franchiſes of the lordſhip or bailwick of Downton aforeſaid, with its members, however belonging or appertaining, and to exerciſe and expedite all and ſingular other our rights which to the aforeſaid office of bailiff have uſually belonged: And We do conſtitute, ordain and make them the ſaid J. Duthy and James Serle, bailiffs of our bailiwick aforeſaid, and our receivers or collectors of the manor or lordſhip aforeſaid, and of the rights thereof, to have, hold, occupy and enjoy the offices aforeſaid, and other the premiſes, to the ſaid J. Duthy and James Searle, by themſelves or by their ſufficient deputy or deputies, to be approved by us or our ſucceſſors, for and during the term of the natural lives of the ſaid J. Duthy and James Serle, and the life of the longeſt liver of them, together with all fees, profits, advantages, commodities, emoluments and liberties whatſoever, to the ſaid offices of bailiff of the ſaid bailiwick and receiver, or collector aforeſaid, in any wiſe belonging or appertaining, in as ample manner and form as James Field and Thomas Field, or lately Thomas Froome, or Thomas Froome Clerk his ſon, or any or either of them, or any other the ſaid officers, or either of them exerciſed, had occupied or enjoyed the ſame. We will alſo that the ſaid J. Duthy and James Serle, and their deputies do annually render and make, at due times, a true account of their receipts of the rents aforeſaid, by them and their deputies received before the auditors in our Exchequer of Wolveſey, receiving annually from us and our ſucceſſors, for the exerciſe and occupation of the ſaid offices of bailiff and receiver or collector, 10 l. of lawful money of Great-Britain; to wit, for the

ſaid

ſaid office of bailiff, 6l. 13s. 4d. and for the ſaid office of receiver or collector, 3l. 6s. 8d. which are the antient fees and annuities annually paid for the ſaid offices, to be paid annually at two uſual terms of the year, to wit, at the feaſt of St. Michael the archangel and the annunciation of the bleſſed Virgin Mary, by equal portions, and by their own hands, and by the hands of each of them longeſt living, out of the rents and profits of the manor or lordſhip, lands and tenements, and other profits of the ſaid manor or lordſhip of Downton aforeſaid, annually to be retained: And moreover, We will for us and our ſucceſſors, that if the aforeſaid fee of 10l. for the execution of the offices aforeſaid ſhall, at any time be in arrear, and not paid by the ſpace of one month after either of the feaſts aforeſaid, on which the ſame ought to be paid as aforeſaid, that then it ſhall be lawful to the ſaid J. Duthy and James Serle, and the longeſt liver of them and their aſſigns, into all the manors, burghs and lordſhips of the whole bailiwick and hundred of Downton aforeſaid, with all the appurtenances, to enter and diſtrain, and the diſtreſſes there ſo taken to lead, drive and carry away, and them to retain until the ſaid fee of 10l. and all the arrears thereof, if any be, ſhall be fully ſatisfied and paid: Wherefore We command, as well the auditors of our accounts for the time being, that of the payment or retaining of the ſaid 10l. for the exerciſe and execution of the offices aforeſaid, they annually make, in the accounts for the time being, due allowance and diſcharge, as all and ſingular bailiffs, farmers, overſeers and other miniſters, free-tenants and leaſeholders, and all inhabitants whatſoever, of and in the manor and bailiwick or lordſhip of Downton aforeſaid, with

with its members whatſoever, that they, and every of them attend on, aſſiſt, obey, counſel and anſwer as is fitting to the ſaid J. Duthy and James Serle, and the ſurvivor of them or their deputy or deputies, in the execution of the offices aforeſaid, and in all things which are known to belong to the ſaid offices. In witneſs whereof, We have to theſe preſents ſet our Epiſcopal Seal, dated 16 June, in the year of our Lord 1772, and in the 12th year of our tranſlation."

On this grant, Livery of ſeiſin of the ſaid offices according to the grant, is indorſed.

(B. 2.) The following is a copy of Mr. Serle's deputation to Mr. Harriſon.

"Know all men by theſe preſents, that I James Serle, of the city of Wincheſter, in the county of Hants, bailiff by patent of the bailiwick of the lordſhip of Downton, in the county of Wilts, have authoriſed and deputed, and by theſe preſents do authoriſe and depute Henry Harriſon, of Staple Inn, Eſq; my deputy as bailiff aforeſaid, with power to appear for me as returning officer of the borough of Downton, at the enſuing election of burgeſſes to ſerve in parliament for the ſaid borough; Giving, and by theſe preſents granting to my ſaid deputy, full power and authority to do all and every act and acts, thing and things whatſoever, belonging to the office of returning officer of the ſaid borough, and that ſhall be requiſite to be done: And I do hereby ratify and confirm all and whatſoever the ſaid Henry Harriſon ſhall legally do in the premiſes, by virtue of theſe preſents."—In witneſs whereof, &c.—dated 29 March, 1784. J. S.

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The Biſhop's approbation was indorſed in theſe words,

"I do approve of the appointment of Henry Harriſon, Eſq; as within mentioned.

B. WINTON."

(B. 3.) The following is a copy of the appointment of Mr. Elderton to the office of Steward.

"Know all men by theſe preſents, That I, Sir Philip Hales, of Brymore, in the county of Somerſet, Baronet, leſſee of the manor and borough of Downton, in the county of Wilts, have made, ordained, conſtituted and appointed, and by theſe preſents do make, ordain, conſtitute and appoint Joſeph Elderton, of the city of New Sarum, in the ſaid county of Wilts, gentleman, to be ſteward of the manor of Downton, and bailiff of the borough of Downton, To have, hold and enjoy the ſaid office of ſteward and bailiff, with the rights, perquiſites, fees and emoluments thereto belonging, and to do and execute all and whatſoever doth and may appertain and belong to the ſaid offices, or either of them, as fully and effectually, to all intents and purpoſes, as any of his predeceſſors in the ſaid offices held and enjoyed the ſame; Giving and granting unto the ſaid Joſeph Elderton, full and ample powers to execute the ſame." —In witneſs whereof, &c.—dated 22 Dec. 1783.

PHILIP HALES, (L.S.)

(B. 4.) The following is a copy of Mr. Elderton's deputation to Mr. Dagge.

"Know all men by theſe preſents, That I, Joſeph Elderton, of the city of New Sarum, in the county of Wilts, gentleman, ſteward and bailiff of the manor and

and borough of Downton, in the ſaid county of Wilts, Do hereby appoint John Dagge, of the pariſh of St. George, Bloomſbury, in the county of Middleſex, gent. to be my deputy ſteward of the ſaid manor and borough, and bailiff of the ſaid borough."——In witneſs whereof, &c.—dated the ſecond day of April, in the year of our Lord 1784.

JOSEPH ELDERTON, (L. S.)

(B. 5.) The following is a copy of the appointment of John Snow, to the office of Steward.

"To all Chriſtian people to whom theſe preſents ſhall come, I Dame Mary Aſhe, widdow and relict of Sir Joſeph Aſhe, late of Twickenham, in the county of Middleſex, Barronet, deceaſed, ſend greeting, Know yee that I, much confiding in the diligence and faithful circumſpection and due obedience of my truſty ſervant John Snowe, of Looſehanger Parke, in the pariſh of Downton, in the county of Wilts, gent. Have given and granted, and by theſe preſents doe give and grant unto the ſaid John Snowe, the office of ſteward and the ſtewardſhip of all that my mannor and borrough of Downton, in the ſaid county of Wilts, with all fees, profitts, allowances and advantages to the ſaid office belonging; and I doe by theſe preſents make, ordaine, and conſtitute him, the ſaid John Snowe, chiefe ſteward of the mannor and borrough aforeſaid, in as full, large and ample manner as by my leaſe of the mannor aforeſaid I have power to grant it, To have and to hold, and to uſe and exerciſe the ſaid office of ſteward and ſtewardſhip, together with all fees, profits, allowances and advantages to the ſame office belonging, unto the ſaid John Snowe, by himſelfe or his ſufficient deputy or deputyes,

from the day of the date hereof, for and during, and unto the full end and terme of three yeares from thence next enſuing, fully to be compleate and ended if Sir James Aſhe, of Twickenham aforeſaid, Knight, Martha Aſhe, of Twickenham aforeſaid, ſpinſter, and Chriſtofer Bedford, of London, gent. or any or either of them ſhall ſoe long live, and for and dureing the aforeſaid terme of three yeares, I have alſo ordained, and by theſe preſents have made and conſtituted and appointed him, the ſaid John Snow, my bailiff of my mannor aforeſaid, and of the ſaid borrough of Downton, and collector and receiver, as well of all and ſingular the rents, fines, amerciaments, herriots and eſtreats, which ſhall become due and payable unto me by vertue and authority of the courts, to be by him or his deputy or deputies holden within the manor or borough, as alſo for all and ſingular other my rents which now are, or hereafter ſhall be due and payable from all and every the tenants and farmers within the ſaid manor and borough, except from ſuch tenants which ſhall hold any farms, lands and tenements, at rack rent; Provided always, that if the ſaid John Snow ſhall not, within one and twenty dayes next after notice in writinge by me, my executors or adminiſtrators, to him given, make and render a true account and reckoninge to me, my executors, adminiſtrators or aſſignes, of all and every the ſaid rents, fines, amerciaments, hereiots and eſtreats, and alſo well and truly pay, or cauſe to be paid to me, my executors, adminiſtrators or aſſigns, all and every ſuch ſume and ſumes of money, as upon ſuch account ſhall appear to be due, and to have been by him collected or received, that then, and from thenceforth this my deed and inſtrument ſhall be void and of none effect;

And

And I do alſoe by theſe preſents authorize the ſaid John Snowe, to be my keeper and preſerver of all the royalties and game within the manor aforeſaid, which are granted to me, in and by my leaſe of the ſaid mannor, and noe other, and to depute any perſon or perſons under him to take care thereof, and to uſe all lawful meanes to apprehend and puniſh all ſuch perſons as ſhall, without any lycence, with gunns, netts, bowes, gunns, or doggs, come upon any parte of the ſaid mannor, to deſtroy, hunt or diſturbe the game aforeſaid, contrary to his Majeſtyes lawes in that behalfe enacted and provided;" In witneſſe whereof, &c. — dated 31 October 1696.

M. ASHE, (L. S.)

(B. 6.) The following is a Copy of Mawſon's Deputation to Fletcher.

"To all perſons to whom theſe preſents ſhall come, I Thomas Mawſon, of New Inn, in the county of Middleſex, gent. by vertue of a power, to me granted by Sir James Aſhe, Bart. lord of the borough and manor of Downton, in the county of Wilts, have deputed, and by theſe preſents doe ſubſtitute and appoint Leonard Fletcher, of the city of New Sarum, in the ſaid county, gent. my deputy ſteward of and for the ſaid borough and mannor, as to the holding and keeping of all and ſingular the courts-leet and court-baron, as ſhall be to be held and kept in and for the ſaid borough and mannor reſpectively, with power to examine any feme-covert copyholder within the ſaid mannor, who ſhall come to ſurrender her copyhold eſtate, as to her willingneſs to make ſuch ſurrender, and afterwards to take

the ſame according to the cuſtom of the ſaid mannor, rendring to the bayliffe or receiver, for the time being, of the ſaid Sir James Aſhe, an account of all fines and herriots, from time to time ariſeing, due and payable on any ſurrender or admittance made or given at the ſaid court-baron; and alſo to me his ſteward of the ſaid borough and mannor, all fees and perquiſites of courts belonging thereto. And further, I the ſaid Thomas Mawſon, by vertue of the ſaid power given to me by the ſaid Sir James Aſhe, lord of the ſaid borough of Downton, have deputed, and by theſe preſents doe ſubſtitute and appoint the ſaid Leonard Fletcher my deputy bayliffe, of and for the ſaid borough of Downton, as to the demanding and receiving of and from the high ſheriffe, of the ſaid county of Wilts, for the time being, or his deputy or underſheriffe, all and every writ or precept, directed to the bayliffe of the ſaid borough of Downton, for the electing and returning one or more burgeſs and burgeſſes to ſerve in parliament for the ſaid borough, and to give a receipt for the ſaid writ or precept, and afterwards to proceed thereon as thereby commanded, to elect and return in due form of law, ſuch burgeſs or burgeſſes to ſerve in Parliament; hereby ratifieing and confirming all and whatſoever my ſaid deputy ſhall lawfully do, or cauſe to be done in and about the premiſſes:" In witneſs whereof, &c.—dated tenth day of January, in the year of our Lord one thouſand ſeven hundred and twenty-ſix.

T. MAWSON, (L. S.)

(B. 7.) The following is a Copy of the Appointment of Mr. Eve, to the Office of Steward.

"Know all men by theſe preſents, That I, Anthony Lord Feverſham, baron of Downton, in the county of Wilts, lord of the hundred, borough and mannor of Downton aforeſaid, have made, nominated, conſtituted and appointed, and by theſe preſents do make, nominate, conſtitute and appoint John Eve, of the Cloſe of New Sarum, in the ſaid county of Wilts, gentleman, to be ſteward of the hundred and mannor of Downton, and alſoe to be ſteward and bailiff of the borough of Downton aforeſaid, to hold the ſaid office and offices of ſteward of the hundred and mannor of Downton, and alſoe ſteward and bailiff of the borough of Downton aforeſaid, with all and ſingular the rights, liberties, privileges, juriſdictons and authority thereunto, or to either of them belonging, during my will and pleaſure:" In witneſs whereof, &c.—dated 26th day of November, in the year of our Lord 1756.

FEVERSHAM, (L. S.)

P. 120. (C.) In order to explain this return it is neceſſary to mention, that during this period, it was frequently the practice to chooſe the two members ſeparately, at different times, and ſometimes on different days; which eſtabliſhed the diſtinctions of *firſt* and *ſecond* members, to be met with in the Journals and other parliamentary books: (See 1 Doug. Elect. 287.) Though this did not always appear by the indentures of return, in which the election was often formally ſtated to have taken place on one particular day, different perhaps from both the real days, as in 1 Journ. 819, 820.

This diſtinction appears in almoſt all the caſes in Glanville's Reports; in his account of the Stafford election (p. 26.) he ſays, "The ſaid precept or warrant being read, Mr. Cradock was propounded and elected in the *firſt place* by a plurality of the voices of ſuch as were then preſent, without any contradiction; but touching Sir William Walter and Mr. Dyott, for the *ſecond place*, there was ſome difference,——————" It generally happened, when there were three candidates, that the firſt member was choſen unanimouſly, and the oppoſition was made by the ſecond. In the year 1625-6, one of the members for Bury having been choſen on the 6th of January, and the other on the 11th, and a queſtion afterwards ariſing in the Houſe, upon the beginning of the time of privilege of the ſecond member, a member preſent delivered an opinion againſt *theſe ſtraggling elections*, in which however no other ſeconded him. 1 Journ. 819, 820.

P. 134. (D.) We find in the form of this appointment, an inſtance of that affectation of ſtately grandeur, which diſtinguiſhed the great Lords in the fifteenth and ſixteenth centuries. They affected to have their *councils*, their *chancellors*, *chamberlains*, &c. The offices of ſtate at preſent kept up in the dutchy of Lancaſter, and in the dutchy of Cornwall under the Prince of Wales, are no other than thoſe which formed the eſtabliſhment of every great nobleman's family. When the duke of Buckingham was accuſed of high-treaſon, under Henry VIII. his *chancellor and others of his council* were at the ſame time ſent to priſon. (See 11 State Tri. p. 4 and 5. and Stowe's Chronicle.)

In this grant of the biſhop, there is all the parade and ceremony of a royal charter; the inſtrument itſelf

is

is called a *Patent*,—he directs the accounts to be paſſed before *the auditors of our Exchequer*,—and the ſalary is to be paid, under the phraſe, *We command our auditors, &c.*

Mr. Hume, in the laſt note to the third volume of his hiſtory, has given many particulars of the houſhold eſtabliſhment of an Earl of Northumberland, in the reign of Hen. VII. upon which he ſays, "It is amuſing to obſerve the pompous and even royal ſtile, aſſumed by this tartar chief: He does not give any orders, though only for the right making of muſtard, but it is introduced with this preamble, "It ſeemeth good to us and our council."

P. 142. (E.) The reader may find ſome authorities to this effect in Com. Dig. Tit. *Grant*. E. 9, 10, 11. See alſo Co. Lit. 307. a.

P. 150. (F.) This caſe was adjudged in 1705 by Lord Keeper Cowper; there had been a deviſe of real and perſonal eſtate to truſtees, to pay debts and legacies, and then to ſettle the remainder on *the ſon and the heirs of his body*, with remainders over; with directions that care ſhould be taken in the ſettlement, that it ſhould not be in the ſon's power to dock the entail. The queſtion was, Whether the ſon ſhould have an eſtate-tail conveyed to him by the truſtees, or only an eſtate for life? The Lord Keeper decreed, that the ſettlement ſhould be of a life-eſtate only, becauſe being *executory*, the intent and meaning of the teſtatrix ſhould be purſued, which is, that the ſon ſhould not have it in his power to bar his children, as he would have, if an eſtate-tail were to be conveyed to him; but if an eſtate-tail *expreſsly* had been deviſed, the law muſt have taken place.

P. 156. (G.) In the caſe of Alſton and Wells, Doug. Rep. 747. Lord Mansfield, in delivering his opinion, ſays—" It was ſaid to be ſettled, that the court will not ſuffer a truſtee to recover in ejectment, againſt the *Ceſtui que truſt:* When this was mentioned on the trial, I ſaid, that this rule is ſubject to the qualification of its being *clearly* the caſe only of a mere truſt, for then by taking notice of it, the court prevents delay and expence; But it will not decide when there is a doubt, but leave the queſtion to a juriſdiction, which regularly takes cognizance of matters of truſt;——— it being doubtful, whether the leſſor of the plaintiff is a *mere* truſtee, he is intitled to recover at law, as he certainly has the *legal right.*"

In Buller's Niſi Prius, p. 108. (edit. 1772) it is ſaid, that in the argument of the caſe of Lade and Holford, Lord Mansfield declared, that he and many of the judges had reſolved never to ſuffer a plaintiff in ejectment to be nonſuited, by a term ſtanding out, of his own truſtee, or a ſatisfied term ſet up by a mortgagor againſt a mortgagee, but direct the jury to preſume it ſurrendered.

Both theſe caſes proceed upon a tacit admiſſion of the law laid down by the counſel for the petitioners, and of the diſtinction they contended for, between diſputes ariſing between truſtees and *Ceſtui que truſts*, and thoſe between either of them and third perſons.

P. 161. (H.) The Stat. 8 Hen. VI. ch. 7. is as follows:—" Whereas the elections of knights of the " ſhires to come to the Parliaments of our Lord the " King, in many counties of the realm of England, " have now of late been made by very great, outrage- " ous, and exceſſive number of people, dwelling within

" the ſame, of the which moſt part was of people of
" ſmall ſubſtance and of no value, whereof every of
" them pretended a vôice equivalent, as to ſuch elec-
" tions, with the moſt worthy Knights and Eſquires
" dwelling within the ſame counties, whereby man-
" ſlaughters, riots, batteries, and diviſions among the
" gentlemen and other people of the ſame counties
" ſhall very likely riſe and be, unleſs convenient and
" due remedy be provided in this behalf, Our Lord the
" King, conſidering the premiſes, hath ordained and
" eſtabliſhed by authority of this preſent Parliament,
" That the knights of the ſhires, to be choſen within
" the ſame realm of England, to come to the Parlia-
" ments of our Lord the King hereafter to be holden,
" ſhall be choſen in every county of the realm of Eng-
" land, by people dwelling and reſident in the ſame
" counties, whereof every one of them ſhall have free
" land or tenement (*frank tenement* in the original) to
" the value of forty ſhillings by the year at the leaſt
" above all charges. And that they which ſhall be
" choſen ſhall be dwelling and reſident within the ſame
" counties. And ſuch as have the greateſt number of
" them that may expend forty ſhillings by year and
" above, ſhall be returned by the ſheriffs of every
" county knights for the Parliament, by indentures
" ſealed betwixt the ſaid ſheriffs and the ſaid chooſers
" to be made. And every ſheriff ſhall have power by
" the ſaid authority to examine upon the Evangeliſts
" every ſuch chooſer, how much he may expend by
" the year. And if any ſheriff return knights to come
" to the Parliament contrary to the ſaid ordinance, the
" juſtices of Aſſizes in their ſeſſions of Aſſizes ſhall
" have power by the authority aforeſaid thereof to in-
" quire;

" quire; and if by inqueſt the ſame be found before " the juſtices, and the ſheriff thereof be duly attaint- " ed, then the ſaid ſheriff ſhall incur the pain of 100l. " to be paid to our Lord the King without being let " to bail or mainprize; and that the knights returned " contrary to the ſaid ordinance ſhall loſe their wages.

" Provided always, That he which cannot expend " forty ſhillings by year, as aforeſaid, ſhall in no wiſe " be chooſer of knights for the Parliament; And that " in every writ that ſhall hereafter go forth to the ſhe- " riffs to chooſe knights for the Parliament, mention " be made of the ſaid ordinances."

The ſtat. 10 Hen. VI. ch. 2. reciting the ſubſtance of the above ſtatute, and that it omitted to limit the qualification to the county where the election is, explains it to be " freehold to the value of forty ſhillings " by the year at leaſt above all charges, *within the ſame* " *county* where any ſuch chooſer will meddle of any " ſuch election."

The ſtatutes prior to theſe upon the ſubject of elections ſeem principally directed againſt the power and partiality of ſheriffs in making returns; as 7 Hen. IV. ch. 15. 11 Hen. IV. ch. 1. 6 Hen. VI. ch. 4. By the firſt of theſe, intitled, " The manner of election of knights, &c." the ſheriff is directed to proclaim the day of election in his full county-court, " and all they that be there preſent, as well ſuitors duly ſummoned for the ſame cauſe, *as other*, ſhall ——— in the full county, proceed to the election." Perhaps it was under the authority of theſe words, that Mr. Prynne ſaid, that " before 8 Hen. VI. every inhabitant and commoner in each county, had a voice in the election of knights, whether he were a freeholder or not." (See

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Brevia Parl. Rediv. p. 187.) but it is plain that this ſtatute means only thoſe who owed ſuit and ſervice at the county-court. The ſtat. 1 Hen. V. ch. 1. in the ſame manner ſpeaks of "Les chivalers, eſquiers, & *autres* qui ſerrount eſiſours."

It is curious to obſerve the different principles, that guided the cotemporary laws upon this ſubject in Scotland. In that kingdom, the perſonal attendance in Parliament of the King's freeholders, was but juſt then beginning to be diſpenſed with; By the Scotch Act 1427, cap. 101. the *libere tenentes* were *relieved from the burthen* of attending Parliament, upon condition of their ſending two commiſſioners from each ſhire. Perhaps their King James I. who had been priſoner in England from his youth, and received his education here, wanted to put the Parliament of Scotland upon the ſame footing with that of England. (See 1 Robertſon's Hiſt. Scot. p. 48. and Kaim's Antiq. 3d edit. p. 41.) Notwithſtanding this law, perſonal attendance continued to be enforced, and in the reign of James II. (Scotch Act 1457, cap. 75.) it was provided, "That no freeholder under 20l. ſhould be *conſtrained* to appear in Parliament." Thus in England ſervice in Parliament was contended for, and election became a *right*, at a time when in Scotland it was contended *againſt* as a *burthen*. It ſhould be obſerved, however, that the ſituation of England at this period, was that which in all ages and countries, has been peculiarly favourable to the power of the *Eſtates of the Realm*; It was the long minority of Hen. VI. that gave ſo much importance to Parliament, and conſequently to parties in the nation, from whence the diſ-

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orders in elections, provided againſt in the ſtatute, took their riſe.

By the Scotch act of James I. every freeholder had a voice in the election of commiſſioners; but in Scotland ſubinfeudations had not multiplied as in England, and their number was comparatively very ſmall, as appears from the practice of perſonal attendance continuing after this act. It was not till the reign of James VI. in 1587, that the right of election was limited to thoſe who were poſſeſſed of *forty ſhillings land in free tenantry*. Wight. Laws Elect. Scot. 33.

P. 161. (I.) Several years before the paſſing of the ſtat. 7 & 8 W. III. ch. 25. a diſtinction of the ſame ſort as that eſtabliſhed by ſect. 7. had taken place in the law of Scotland. By a Scotch ſtatute in 1681 *, Appriſers or Adjudgers, (*who reſemble our tenants by* elegit, *with this difference, that they have the freehold*) were declared to have no right to vote during the legal, (*or time allowed for redemption*) but that the heritor, (*or owner of the land*) ſhould continue to vote himſelf; after the expiration of the legal, the right devolved to the appriſer. It was neceſſary by our law to *deprive* a mortgagee of this right, but upon the ſame principle in Scotland, it was neceſſary to *give* it him; accordingly, the ſame ſtatute allows the privilege to proper wadſetters, and takes it from the reverſer (*or mortgagor*); a proper wadſetter being in fact, what our mortgagees are generally only in name, the poſſeſſor of the land.

* Wight Laws Elect. Scot. 39.

P. 163.

P. 163. (K.) The ſtat. 19 Geo. II. ch. 28. regulates the mode of election in cities or towns that are counties, and provides that in thoſe in which the right of voting is in forty-ſhilling freeholds, the perſon claiming to vote, muſt have a freehold there of that value clear, muſt have been in poſſeſſion a year before, (except in the uſual caſes, of deſcent, &c.) and that no perſon ſhall have a right to vote by a freehold granted to him fraudulently, on purpoſe to qualify him to vote: The ſtatute preſcribes the form of an oath for aſcertaining the foregoing particulars. There are ſeveral clauſes in this act for making theſe reſtrictions effectual, but the laſt ſection excepts from the above regulations, ſuch counties corporate, "where the right of voting ——is for or in reſpect of *burgage-tenure*, or where the freehold is not required to be of the value of forty ſhillings."

P. 165. (L.) Before truſts were introduced and formed into a ſyſtem, in conſequence of the ſtatute of uſes *, there were ſtatutes made to prevent ſome of the legal effects of the doctrine of uſes at common law; whereby the *Ceſtui que uſe* was inveſted with ſome of the qualities of ownerſhip, and the *feoffee to uſes*, (or *truſtee*, according to the modern phraſe) was reſtrained in the exerciſe of his legal power. Thus, the *Ceſtui que uſe*, if in actual poſſeſſion, was liable to actions †, and could make leaſes to certain purpoſes ‡; but ſtill no legal eſtate in the land, could be derived from any but the truſtee §; the land could not be extended for

* 27 Hen. VIII. ch. 10.

† By 4 Hen. IV. ch. 7. and 11 Hen. VI. ch. 3.

‡ By 1 Rich. III. ch. 1. § 1 Rep. 140. a.

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the debts of the *Ceſtui que uſe*, and eſcheated to the lord upon defect of heirs, or attainder of the truſtee.

Judge Blackſtone has made an excellent compendium and hiſtorical deduction of the law of uſes and truſts, in the ſecond book of his Commentaries *, in which he illuſtrates all the general principles which formerly governed uſes, and are at preſent practiſed in truſts. In concluſion he obſerves, "The truſtee is conſidered merely as the inſtrument of conveyance, and can in no ſhape *affect the eſtate*, unleſs by alienation for a valuable conſideration, to a purchaſer without notice." It ſeems to me that this obſervation is not to be taken abſolutely, but *ſub modo*, according to the ſubject matter of his diſcourſe, which is to explain the connection between a *Ceſtui que truſt* and his truſtee, without entering upon the principles of the connection of either, with *third perſons*. I think I am warranted in this, by the arguments in the great caſe of *Burgeſs* and *Wheate*, in the learned Judge's reports †, which contain the materials from whence he ſeems to have digeſted his commentary above referred to.

P. 178. (M.) In the caſe of Downton reported by Mr. Douglas, as well as on the preſent occaſion, this definition of a burgage was adhered to with great ſtrictneſs. However neceſſary it may be thought, upon modern principles, I am perſuaded that this notion of *entirety* and *indiviſibility*, and the diſtinction between freeholds of burgage-tenure, and other borough-freeholds, are but modern; I think this appears from the reports of conteſted elections in theſe boroughs, in the Journals of the latter part of the laſt century, and be-

* Chap. 20. p. 327, &c. † 1 Black. Rep. 123.—180.

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ginning of the preſent. It is impoſſible otherwiſe to account for the number of irregular burgage-rents in this and other boroughs of burgage-tenure, payable for tenements having an acknowledged right of voting. One of the burgages in Downton appeared to pay *ſeven pence halfpenny*. In Clithero, where the regular burgage-rent is 1s. 4d. there are burgages paying 8d. called *half-boroughs*, and others paying 6d. and 4d. In Pontefract, (which is of burgage-tenure, though not of burgage-repreſentation) where the rent is a ſhilling, and has been ſo from the time of Richard the Firſt *, there are burgages paying 6d. and 8d. In Weſtbury, either 4d. or 2d. is a burgage rent. In Berealſton, the reſolution of the Houſe allows rents of 3d. *or more*. Theſe inſtances ſufficiently confirm the obſervation of the counſel in page 188, that theſe fractions of rent were in their beginning a deviation from the entirety.

It is natural to ſuppoſe that originally in theſe boroughs all the inhabitant freeholders voted at elections; the expreſſion "inhabitants of *burgage houſes*," which frequently occurs in them, leads to this obſervation; for one burgage might be divided into many tenements, and as many freeholds, and the rent might be apportioned according to the ſubdiviſions. Entries were read to the Committee from the borough book of Downton, of ſeveral alienations of one burgage, in parts paying *three halfpence rent* each.

P. 185. (N.) The expreſſion of "*leaſe* and releaſe" now applied to this mode of conveyance, is not altogether proper, becauſe the operation of the firſt deed

* See before, p. 101.

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is not as a *leaſe*, but as a *bargain and ſale* (2 Mod. 251. 2 Black. Com. 339.) Accordingly, the original name for the conveyance was, "*bargain and ſale for a term* and releaſe." Sir Matthew Hale, in his preface to Rolle's Abridgment, uſes this as the technical and common phraſe. The words *demiſe* and *leaſe* frequently inſerted in this inſtrument, are mere ſurpluſage, and are omitted in that form of it which Blackſtone has printed as a model of the conveyance *, in which the operative words are only *bargain* and *ſell*. The doubts which are ſaid to have been entertained formerly upon this conveyance †, probably aroſe from conſidering the bargain and ſale as a *leaſe*, as it was often called; becauſe no leſſee of a term could receive a releaſe of the reverſion before his actual entry ‡, the ſtatute of uſes not operating upon ſuch a conveyance. But when the validity of this mode of conveying land was firſt eſtabliſhed, in the 18th of James I. (Cro. Jac. 604), the courts conſidered, that by a bargain and ſale made by the owner of the land *in poſſeſſion*, (this circumſtance being originally held requiſite) he became feiſed to the uſe of the bargainee for the term, and then the ſtatute veſted the poſſeſſion in him, from whence he derived a capacity to take a releaſe.

The great diſtinction of the common law between things which lie in *grant*, and things which lie in *livery* §, is almoſt reduced to be a diſtinction without a difference, by the general uſe of conveyances by leaſe and releaſe, which operate in the manner of a *grant*, upon things in livery.

* 2 Black. Comm. App. N° 2. † 2 Mod. 252.
‡ Litt. ſect. 459. § See Co. Lit. 9. a.

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Although Judge Blackſtone treats only of the conveyance by leaſe and releaſe, as derived from the ſtatute of uſes, yet it appears, from what Lord Chief Juſtice North ſays, in 2 Mod. 251, 252. that it was not an unuſual mode of conveyance at common law, the leſſee then actually taking poſſeſſion under his leaſe; from which practice, perhaps, the phraſe of "*leaſe* and releaſe" came to be applied to a mode of conveyance ſo eſſentially different from that of the common law which bore this name.

P. 188. (O.) The counſel in this part of the argument ſaid, a caſe had happened lately at *Niſi Prius*, in which it had been held, that a plea of Tender was not ſupported by evidence of an offer 'to pay, *if* the creditor would give a receipt for the money;' in which caſe it had been agreed, that you cannot compel your creditor to give a receipt. In Viner Abr. tit. *Acquittance*, A. 13. it is ſaid to have been mentioned at the Rolls in Nov. 1738, by the Maſter of the Rolls, and agreed by ſeveral of the counſel, *that in no caſe payment may be refuſed, unleſs an acquittance be given.* The caſes ſtated by Viner under this title, ſhew, that the above laying is to be underſtood of matters of *ſimple contract*; for in ſingle obligations, ſtatutes merchant, and debts from the crown, it appears that payment may be refuſed, unleſs an acquittance is given. I can ſuppoſe a ſufficient reaſon for this rule in the two latter caſes, becauſe they are debts of record, for the diſcharge of which ſome ſpecialty ſhould be averred in pleading; the ſame was formerly the law in actions on ſingle obligations: But ſince by modern ſtatutes and practice they are put upon the ſame footing with conditional

obligations, in point of pleading, there can be no reaſon *now* for diſtinguiſhing them in this reſpect. In ſimple contracts, the doctrine in queſtion ſeems to have been eſtabliſhed in very antient times, as may be ſeen in two caſes in the reign of Richard II. cited in Vin. Abr. tit. *Account*, P. pl. 6 & 7.

P. 207. (P.) This doctrine is fully eſtabliſhed: The notion of *adverſe poſſeſſion* contended for by the counſel for the ſitting members, ſeems taken from caſes of tenancy in common, in which the law *preſumes againſt* an adverſe poſſeſſion, unleſs actual ouſter be proved; as in the caſes of Empſon and Shackleton, 5 Burr. 2604. 2 Blac. 690. Davenport and Tyrrel, 1 Blac. 675. Reading and Royſton, Salk. 423. and Lord Raym. 830. and in a late caſe of Coppinger and Keating in B. R. Mic. 22 Geo. III. (not reported) in which all the former caſes were conſidered. But in other eſtates, there is no ſuch preſumption of law. Lord Mansfield in Proſſer's caſe, Cowp. 218. ſays, "Some ambiguity ſeems to have ariſen from the term '*actual ouſter*,' as if it meant ſome act accompanied by real force, and as if a turning out by the ſhoulders were neceſſary: But that is not ſo;—A man may come in by rightful title, and yet hold over *adverſely* without title: If he does, ſuch holding over, under circumſtances, will be equivalent to *actual ouſter*.——If tenant *pur autre vie* hold over for twenty years after the death of *ceſtui que vie*, it will, in ejectment, be a compleat bar to the remainder man or reverſioner, becauſe it was *adverſe* to his title." Proſſer's was the caſe of a tenancy in common.

P. 211. (Q.) Lord Hardwicke, in the caſe of Hawkins and Chapel, upon a queſtion of a reſulting truſt, ſays, "It never was allowed in equity, that truſtees by poſtponing or accelerating a ſale, ſhould make any alteration in the intereſt of the *ceſtui que truſt*; becauſe ſuch an admiſſion would be putting it in the power of the truſtees, by fraud or colluſion, to deſtroy the whole intention of a teſtator." 1 Atk. 623.

I have not been able to find any caſe eſtabliſhing the poſition laid down by the counſel for the petitioners, that under ſuch a will as Lord Feverſham's, the obligation of offering to a particular purchaſer, gives the beneficial intereſt in the truſt, to ſuch intended purchaſer.

P. 212. (R.) In the caſe of Allen and Sayer, 2 Vern. 368. a doctrine, apparently different, was eſtabliſhed by Lord Chancellor Somers. There was a deviſe of lands to truſtees to pay debts, then to the plaintiff, (an infant) and his heirs; the defendant entered on the eſtate, and levied a fine; five years paſt; the plaintiff brought an ejectment as ſoon as he attained his full age, but was barred by the fine and non-claim. He then brought his bill in Chancery for relief, where it was determined, that although the fine and non-claim was a good bar at law, the legal eſtate being in the truſtees who were of full age and ought to have entered, yet the plaintiff ought not to ſuffer for their *laches*, being then an infant, and having purſued the proper remedies ſince attaining his majority; that the fine ſhould not run upon the truſt during the minority: And therefore poſſeſſion was decreed to the plaintiff, and an account of the profits.

The above caſe is not mentioned or referred to, in that of the Eaſt India Company: The caſe referred to by Peere Williams, is that of the Earl and Counteſs of Huntingdon, in which Lord Chancellor Parker was of opinion, but did not determine the point, that a fine and non-claim ſhould, in favour of a purchaſer, bar a truſt term, though the *Ceſtui que truſt* was an infant.

Perhaps upon an examination of the true principles of theſe deciſions, it will be found that they are not contradictory. It is a principle of equity, that if a ſtranger enters upon an infant's eſtate, and receives the profits, he ſhall be looked upon as a truſtee for the infant. (2 Vern. 342. and 1 Vern. 295.) The caſe of Allen and Sayer is not fully ſtated in the report, but it ſeems to have fallen within this principle, the defendant there being ordered by the decree *to account*: It is adopted as ſuch in 1 Equity Caſes Abridged, 281. In the Earl of Huntingdon's caſe, the opinion was *in favour of a purchaſer*. In the caſe in P. Williams, the Chancellor ſays, he cannot ſet aſide the plea, *the defendants being in no default*. So that the doctrine in all of them is conſiſtent, when conſidered as eſtabliſhing the following diſtinction: viz. Where the party has not *by his own act* incroached upon the infant's eſtate, but is merely paſſive in the acquiſition of that defence which the efflux of time gives him; or if he has acquired a poſitive right of poſſeſſion by his own act, *by honeſt means*, in either caſe the title ſhall not be diſturbed, and the effect of the limitation ſhall be abſolute. But where the foundation of the title is tortious, by the party's own act, he ſhall not be allowed in equity to avail himſelf of the effect of a legal limitation in a legal eſtate, againſt the equitable or beneficial owner; i. e. He ſhall be in the ſame

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ſituation in *equity*, with reſpect to an *equitable* eſtate, as he would be in at *law*, in the ſame circumſtances, with reſpect to a *legal* eſtate; For if the infancy, (the gift of the caſe) could come properly before the court of law, in the legal queſtion, the period of limitation in ſuch caſes would be no defence. If I am right in theſe obſervations, the poſſeſſion of the burgage in queſtion, by Mr. Duncombe and his family, is within the reaſon of the judgment in P. Williams; being a poſſeſſion devolved upon him, without any tortious act of incroachment upon the infant's eſtate, and therefore capable of confirmation by length of time, even againſt the claim of infancy.

P. 235. (S.) Judge Blackſtone ſpeaks with remarkable caution on this ſubject; he ſays, "a deed muſt be written, or, *I preſume*, printed."

Lord Coke in another place, (Co. Lit. 35. b.) uſes the ſame expreſſions as thoſe cited by the counſel, and refers to caſes in the year books as his authorities for proſcribing the ſeveral materials enumerated, as wood, ſtone, leather, &c.—The caſe in which wood is proſcribed is curious, on which account, as it is ſhort, I tranſcribe it from F. N. B. 283. "If a man make a *tally*, and make bond thereupon, and ſeal and deliver it as his deed, yet it ſhall not bind him, but he may plead againſt the ſame, that he owed him nothing, or may wage his law. For an obligation ought to be made in writing in parchment or paper, and not written on any piece of wood, as a *tally* is." Fitzherbert cites the caſe from 25 Edward III. 40. and other year books of the ſame antiquity.

P. 252. (T.) By 9 & 10 Will. III. ch. 25. ſect. 58. —"All vellum parchment and paper herein before charged, ſhall, before any of the matters or things herein before mentioned, be thereupon engroſſed or written, be firſt brought to the head office for the ſaid duties to be ſtamped and marked &c" — By ſect. 59 (which alſo adds a penalty of ten pounds to any informer, on any who write on vellum &c before it be ſtamped)—"if any deed inſtrument or writing whatſoever by this act intended to be ſtamped as aforeſaid, ſhall contrary to the true intent and meaning thereof be written or engroſſed by any perſon or perſons whatſoever, upon any vellum parchment or paper not marked or ſtamped according to this act, or upon vellum parchment or paper marked or ſtamped for a lower duty as aforeſaid; That then and in every ſuch caſe there ſhall be due anſwered and paid to his majeſty his heirs or ſucceſſors, over and above the duty aforeſaid, for every ſuch deed inſtrument or writing the ſum of 10l.: And that no ſuch record deed inſtrument or writing ſhall be pleaded or given in evidence in any court or admitted in any court to be good, uſeful, or available in law or equity, until as well the ſaid duty as the ſaid ſum of ten pounds ſhall be firſt paid to the uſe of his majeſty his heirs or ſucceſſors, and a receipt produced for the ſame under the hand or hands of ſome of the officers which ſhall be appointed to receive the duties abovementioned, and until the vellum parchment or paper, on which ſuch deed inſtrument or writing ſhall be written or made, ſhall be marked or ſtamped with a lawful mark or ſtamp or with double marks or ſtamps according to this act. And the proper officers are hereby enjoined and required, upon payment or tender of the ſaid duty and

the

the ſum of 10l, to give a receipt for the ſame and to mark or ſtamp the ſaid vellum parchment or paper with the mark or ſtamp that ſhall be proper for ſuch deed inſtrument or writing reſpectively."

By the firſt ſtamp act 5 W. & M. ch. 21. ſ. 11. the penalty for writing on paper &c before it is ſtamped is 500l, and the ſubſequent penalty to the King is 5l.; in other reſpects that ſection is the ſame as that above recited.

By 1 Ann. ſtat. 2. ch. 22. ſec. 2.——" if any perſon ſhall write any matter or thing in reſpect whereof any duty is payable, on any vellum &c whereon there ſhall have been before written any other matter or thing, in reſpect whereof any duty was payable by the ſaid acts, before ſuch vellum &c ſhall have been again marked or ſtamped; or ſhall fraudulently eraſe or ſcrape out the name of any perſon or other thing written in ſuch writing as aforeſaid, or fraudulently cut tear or get off any mark or ſtamp from any vellum &c with intent to uſe ſuch ſtamp for any other writing, in reſpect whereof any duty ſhall be payable; In every ſuch caſe every perſon ſo offending ſhall forfeit the ſum of 20l. with full coſts of ſuit." By the ſection following it is declared, that the offender againſt this act ſhall likewiſe incur all other forfeitures and diſabilities which he would have incurr'd, if he had been convicted of writing contrary to the ſaid acts on any vellum &c not ſtamped according to the ſaid acts—The title of this act is " for preventing frauds in her majeſty's duties upon ſtamped vellum parchment or paper."

The ſtat. 12 Ann. ſtat. 2. ch. 9. ſect. 25. has a ſimilar proviſion, almoſt in the ſame words as 9 & 10 W. III. ch. 25.—So in the 12 Geo. I. ch. 33. ſect. 8. In

this and the preceding ſtatute, the expreſſion is "no ſuch matter or thing ſhall be available in law or equity, or be given in evidence or admitted in any court, unleſs as well the ſaid duty hereby charged" as the penalty of 5l. be paid at the ſtamp office.

The ſtat. 12 Geo. I. ch. 33. which was made for a term of years, is made perpetual by 23 Geo. II. ch. 25. ſect. 2.—By 30 Geo. II. ch. 19. ſect. 25. the powers and penalties of former acts are continued upon the duties of that act, and a ſimilar clauſe is inſerted in the ſubſequent ſtamp acts.

P. 254. (U.) It is curious to compare the line of argument followed upon this occaſion, with that of the Downton cauſe reported by Mr. Douglas (See his Vol. I. p. 222, 223). The counſel for the ſitting members now urged as an argument in their favour, thoſe circumſtances of occaſionality, which in the former caſe had been ſtrenuouſly denied in defence of the ſame ſide, or at leaſt, in defence of a ſimilar intereſt. It was then ſaid, that the grantees might take poſſeſſion of the land, recover the profits in an action for money had and received, or the deeds in trover or by bill in equity.

After having ſeen the principles here alluded to, upon which many leading points in this cauſe were conducted, and the latitude acquieſced in *, it may perhaps raiſe ſurpriſe in ſome readers to find, on the other hand, ſo great reſtriction mutually obſerved, in the exact and minute inquiries into the title of ſome of the voters. After admitting, that a conveyance may be made for no other purpoſe but that of voting, and that a poſſeſ-

* See p. 241, 259.

ſion

ſion under it is not neceſſary, it ſeems inconſiſtent to require, in the ſame cauſe, as much nicety in the proof of real title, as upon the trial of an ejectment; although in caſes of the occaſional conveyances, where no poſſeſſion is had, ſome proof of title muſt neceſſarily be given, in order to identify the burgage. Perhaps, there may be no offence in ſaying, (as the judges have ſaid upon *common recoveries*, ſince they have ventured to ſpeak out upon the ſubject) that the ſyſtem requires the *actores fabulæ* to ſuſtain their parts with propriety: Having eſtabliſhed a formal mode of repreſentation, it is neceſſary to preſerve the formalities in full force, as a compenſation for the want of ſubſtance.

If ſomething like this were not underſtood upon theſe occaſions, it might be ſaid, that as to proof of title, if the grantor and grantee of any property are ſatisfied upon the ſubject, no others can have cauſe to complain; as in caſes of corporate rights of voting, it might be ſaid in the ſame manner, that if burgeſſes are acknowledged by their corporation to be properly qualified, their defect of title can be of no concern to others in the exerciſe of an incidental right belonging to it. Yet here too, Committees of election allow of a ſtrict inquiry into title. I think Mr. Douglas, in a note upon the caſe of Peterborough *, has mentioned the true reaſon by which this practice is ſecretly directed, "the privilege of voting muſt be preſumed to be the object in contemplation at the time of acquiring the right." The natural judicature therefore for inquiring into this right, is the Committee of election, and their power being only judicial and ſubordinate, they cannot aboliſh abuſes exiſting in the law; they can

* Vol. III. p. 145.

only

only apply legal modifications; the effectual remedy muſt proceed from the legiſlature.

P. 256. (V.) In Strange's Reports, Vol. I. p. 624. the Biſhop of Cheſter's caſe, a patent produced in evidence, had not been duly ſtamped at the time of ſealing, or at the time when it was firſt produced; and the whole court were of opinion, it was proper evidence, being ſtamped at the time when it was produced at the trial: For, they ſaid, the act never intended to avoid deeds that were not ſtamped, but only to add a penalty to enforce the duty, and here the penalty had been paid.

Perhaps the expreſſion '*firſt produced*,' in the above caſe, refers to the practice mentioned by the counſel for the ſitting members in p. 255. In the ſame Reports, p. 575, and 716, are caſes which put the ſame conſtruction upon the ſtamp acts as in the Biſhop of Cheſter's caſe; in the former of theſe, the want of ſtamp at the trial, being ſupplied before the motion for a new trial, which was occaſioned by this defect, was not thought to be ſufficient cauſe for a new trial.

P. 257. (W.) By the rule of law, a man is not to ſuffer any diſadvantage by not having the poſſeſſion of a deed, which remains in court upon a *profert*, but may make any uſe of it in pleading, that his caſe requires. Litt. Sect. 375. Co. Litt. 231. b. By analogy to this rule, therefore, the ſitting members ought not to loſe any benefit they might be lawfully intitled to, by the production of theſe deeds.

P. 258.

P. 258. (X.) In Co. Litt. 171. b. a deed is defined to be "an inſtrument conſiſting of three things, viz. writing, ſealing, and delivery, comprehending a bargain or contract between party and party." It appears by Co. Litt. 36. a. that every delivery of a deed is an *abſolute* delivery, according to the tenor of the deed, unleſs the contrary be expreſſed at the time. The authorities cited in Com. Dig. tit. *Fait.* A. 3. ſhew the ſame thing. When a conditional delivery is expreſſed, that for a time ſuſpends the operation of the writing as a *deed*, and it remains an *eſcrow*. Perkins, ſect. 129. 2 Black. Com. 307.

P. 268. (Y.) The following caſe in 5 Burr. 2673. is very applicable to this queſtion. An action for the penalty given by 1 Ann. ſtat. 2. ch. 22. ſ. 2. * was brought againſt one Babb, who in 1760 executed a letter of attorney, on proper ſtamps, to two perſons for the purpoſe of receiving a debt; the execution was atteſted by two witneſſes, and one of the attornies had demanded payment without effect. Babb, in 1769, eraſed from this paper the names of the former attornies, the date, and the names of the witneſſes, and again ſealed and delivered the ſame paper with the ſame ſtamp, thereby making J. S. (a different perſon,) his attorney; which re-execution was atteſted by two other perſons, whoſe names and that of J. S. were written upon the eraſures, as was the new date of 1769.

The judges of the King's Bench were clearly of opinion, that Babb had incurred the penalty, and accordingly the plaintiff had judgment.

It ſeems to me, that the argument upon the Stamp-acts in the caſes of Scott and Goodfellow, may be re-

* See before, p. 311.

duced

duced to this ſtate: Either the firſt grant conveyed the land, or it did not; if it did, new ſtamps alone would not be ſufficient to convey the land from the original grantor, but the conveyance ſhould have proceeded from the firſt grantee. If it did not, then the firſt ſtamp was ſufficient, becauſe it was a *new grant* to the preſent voters; for the Stamp-acts can hardly be conſtrued to require payment of a new duty, for the alteration of ineffectual words in a deed.

P. 245. (Z.) In Pigot's caſe 11 Rep. 27. *a.* it was determined, that "deeds may be avoided by *eraſure, interlining, or other alteration in any material part*, unleſs a memorandum is made of it at the time." This and many other caſes there cited (in particular, Mathewſon's, in 5 Rep. 23.) lay down this law *for the benefit of an obligor*; it is ſaid, ſuch deeds *may be avoided* by pleading *non eſt factum*. The caſes ſuppoſe an obligor to take this advantage in an action brought againſt him; but I have not met with a caſe, in which, as between third perſons, this doctrine is eſtabliſhed. Perkins tit. *Deeds*, ſect. 122, and 128. ſays, theſe circumſtances are *ſuſpicious*. In the reſolution of the court in Leyfield's caſe, 10 Rep. 92. b. it is ſaid, "Every deed ought to approve itſelf———

"Firſt, As to the compoſition of the words, to be ſufficient in law; and the court ſhall judge of that.

"Secondly, That it be not razed or interlined in material points or places; and upon that alſo in antient time the judges did judge upon their view the deed to be void—but of late times the judges have left that to be tried by the jury, i. e. *whether the raſing or interlining were before the delivery.*"

The

The old law upon this ſubject was very ſtrict, as appears by Fleta, lib. 6. cap. 34. "Apparere autem debet omnis carta in primâ ſui figurâ, abſque omni vituperatione, raſurâ, vel cancellaturâ; calumnioſam verò ſcripturam in judicio proferre, non convenit. Sunt tamen quædam in ſcriptis, quæ levem inducunt præſumptionem, & hujuſmodi levia vitia vinci poterunt per veram teſtium probationem, & per patriam; ut ſi in ſcripturâ inveniatur diverſitas calami, vel atramenti, vel manûs.——"

P. 264. (AA.) By 10 Geo. III. ch. 16. ſ. 25. (Grenville's bill) it is enacted, "That if the Committee come to any reſolution beſides the final determination, they may, if they think fit, report it to the Houſe *for their opinion*, at the ſame time with the other; and the Houſe may confirm or diſagree with ſuch reſolution, and make ſuch orders thereon, as to them ſhall ſeem proper." It may be doubted, how far a reſolution like that in queſtion is within the deſcription of this ſection, becauſe it does not ſeem to be one of thoſe upon which the Houſe is to give *their opinion*. In the caſes of Shoreham in 1770, 33 Journ. 69, 70, 102.—of Shafteſbury, 2 Doug. Elect. 311. and of Hindon, 1 Doug. 177. the reſolutions were ſuch as called for the opinion of the Houſe, requiring its aſſiſtance to carry them into effect.

P. 269. (BB.) The name of this caſe was *Gough* and *Cecil:* One of the gentlemen who was counſel in this cauſe, has favoured me with the following ſtate of it: It was an action on a bond, tried at the Common Pleas ſittings after Eaſter Term 1784; the ſubſcribing

witneſs being dead, the plaintiff's counſel called a witneſs to prove his hand-writing; and the judge who tried the cauſe, being of opinion that this was not ſufficient, without proving at the ſame time the hand-writing of the obligor, called upon the counſel for ſuch proof; and upon their not being able to produce it, directed the plaintiff to be nonſuited. In Trinity Term it was moved to ſet aſide this nonſuit, and the court decided that the judge's opinion was wrong, that the plaintiff had produced the proper evidence in ſuch a caſe, and accordingly ſet aſide the nonſuit.

P. 272. (CC.) This caſe is reported under the name of *Lowe* and *Jolliffe*, though for a different point, in 1 Black. Rep. 365. At the trial the three witneſſes to the will, and two to the codicil, and the ſervants of the family, ſwore to the teſtator's inſanity at the time of making them. It does not appear in the report, that any objection was made to the examination of the counter-evidence, which finally determined the verdict; the witneſſes did not deny their atteſtations according to this report. Lord Mansfield, in the caſe of Abbott and Plumbe, Doug. Rep. p. 206. ſays, "It was doubted formerly, whether, if the ſubſcribing witneſs denies the deed, you can call other witneſſes to prove it: But it was determined by Sir Joſeph Jekyll, in a cauſe which came before him at Cheſter, that in ſuch caſe other witneſſes may be examined; and it has often been done ſince." In the caſe of Pike and Badmering (before Sir Joſeph Jekyll's time), cited in Stra. 1096, all the witneſſes to a will denied their hands, and the court admitted other evidence to contradict them, upon which the will was ſupported. In the ſtate of this caſe

in

in the law of *Niſi Prius*, 260. it is ſaid, that the court obliged the party, againſt his inclination, to call the *ſubſcribing* witneſſes firſt. Another caſe of the ſame ſort (Auſtin and Willes) is there cited.

P. 275. (DD.) While the counſel were arguing this point, they were aſked by a member of the Committee, if there was not a caſe reported in which it was held, that one who thought himſelf under an obligation, which was honorary only and not binding in law, to pay the coſts, could not be a witneſs: One of the counſel anſwered, that if there were any ſuch caſe, this law was not eſtabliſhed by modern practice. I have ſearched for the caſe alluded to, and ſuppoſe it to be that of *Fotheringham* and *Greenwood*, 1 Stra. 129. in which the above doctrine is ſaid to have been followed by Lord Chief Juſtice Pratt at *Niſi Prius*.

P. 278. (EE.) This ſtatute directs the polls of conteſted elections in *counties*, to be regularly taken by clerks appointed for the purpoſe. But there is no expreſs proviſion (that I know of) for this regularity in *towns*. The 6th ſection of this act may be conſtrued to *imply* it, by requiring all mayors and other officers, who take an election, "to give copies of *the* poll taken at ſuch election," to thoſe who deſire it, paying reaſonably for the copy. But as this clauſe inflicts a penalty of 500l. for every offence contrary to the ſtatute, it would in this reſpect be underſtood by the expreſſion "*the poll*," to require copies to be given, only when a poll was in fact *taken in writing*. The ſtat. 19 Geo. II. ch. 28. regulates only the elections for towns that are counties; but in this alſo the direction for taking a poll

poll *in writing* is by implication from ſect. 6. by which the returning officer is directed "to allow a cheque-book for every poll-book for each candidate." Perhaps it may juſtly be inferred, from the want of an expreſs proviſion for this purpoſe in the ſtatutes, coupled with the long uſage, that by law the returning officers are officially bound to take a poll in writing.

V.

THE CASE

Of the COUNTY of

BEDFORD.

The Committee was chosen on Tuesday, the 22d of June, and consisted of the following Members:

Richard Aldworth Neville, Esq; Chairman.
Thomas Kemp, Esq;
Isaac Hawkins Browne, Esq;
John M'Bride, Esq;
Hon. James Jefferies Pratt.
Hon. John Eliot.
Hon. John Levison Gower.
George Bridges Brudenell, Esq;
Paul Orchard, Esq;
Edward Phelips, Esq;
Gerard Noel Edwards, Esq;
Sir Edward Littleton, Bart.
Hon. John Charles Villiers.

NOMINEE,
Of the Petitioner,
Lord Mulgrave.

Of the Sitting Member,
Hon. Thomas Pelham.

PETITIONER,
Robert Henley Ongley—Lord Ongley, of the Kingdom of Ireland.

Sitting Member,
Hon. St. Andrew St. John.

COUNSEL,
For the Petitioner,
Mr. Rous and Mr. Douglas.

For the Sitting Member.
Mr. Graham and Mr. Le Blanc.

THE

CASE

Of the COUNTY of

BEDFORD.

THE petition ſtated, That at the laſt election for Bedfordſhire, the candidates being the petitioner, the Earl of Upper Oſſory, and Mr. St. John, the votes of two perſons who had voted for the petitioner, had been entered in the poll-book as given for the two other candidates; and the vote of a third who had voted ſingly for the petitioner was not entered at all in the poll-book; That the miſtake concerning the vote of William Lugſden, one of the two firſt, was diſcovered before the cloſe of the poll, and application was made to the ſheriff to correct it, and evidence offered to him for the purpoſe, which he

refuſed to receive; That at the cloſe of the poll he declared the numbers to be, for Lord Oſſory 1050, for Mr. St. John 974, for the petitioner 973, and falſely made the return in favour of the two former; whereas of the votes received by the ſheriff the petitioner had a greater number than Mr. St. John, and ought to have been returned in his ſtead; therefore praying that the ſaid falſe return might be amended *.

When the above petition was read in the Houſe (May 25) it produced a debate upon the effect of an order made in the beginning of the ſame day, whereby election petitions were arranged in four different claſſes, according to which they were to have priority of appointment.

1. Thoſe complaining of double returns.

2. Thoſe concerning members returned for two places.

3. Thoſe complaining of returns only.

4. All other petitions (A).

It was ſaid on one ſide of the Houſe, that the above petition was againſt the

* Votes, 25 May, p. 19.

return

return only, which was denied on the other. The debate was concluded by negativing the following motion, viz.

That the ſaid petition does not relate to the return only.

In conſequence of this deciſion, the petition was placed in the third claſs, and took its turn of appointment accordingly.

Another petition of freeholders in the intereſt of Lord Ongley againſt Mr. St. John, on the merits of the election, was preſented to the Houſe on the 3d of June, and ordered to be taken into conſideration on the 12th of October, in the regular courſe of petitions on the merits*: But this order paſſed after much debate in the Houſe, occaſioned by the deſire of Mr. St. John's friends, to obtain an order for taking the latter petition into conſideration at the ſame time with that of Lord Ongley, a motion being made for this purpoſe. It was oppoſed upon the ground of the diſtinction between trials of the *merits*, and of the *return*, which, it was ſaid, ne-

* Votes, 3 June, p. 136.

ceſſarily required a ſeparation of the cauſes (B.)

Afterwards, on the laſt day for receiving election petitions, a petition was preſented to the Houſe from certain freeholders of Bedfordſhire in the intereſt of Mr. St. John, ſetting forth, in anſwer to Lord Ongley's petition, that ſeveral votes ſpecified in their petition, which had been given for the two ſitting members, were entered on the poll to have been given for Lord Ongley—and praying redreſs. It was moved to refer this petition to the Committee upon Lord Ongley's: Some members thought it irregular to admit petitions of this ſort in behalf of *ſitting members*, and therefore oppoſed the motion, alledging that the election Committee would neceſſarily, and of courſe, allow to the ſitting member in his defence, the advantage of thoſe circumſtances contained in the petition, if they ſhould be thought proper for his defence. Others contended for receiving the petition and referring it expreſsly to the Committee, becauſe that would oblige them to inquire into the facts, and not leave the inquiry to their

their diſcretion (C). At length, the member who preſented this petition, thought proper to withdraw it.

When this cauſe came on before the Committee, the petition being read, the counſel for the petitioner opened their caſe: They inſiſted chiefly upon the circumſtances alledged with regard to Lugſden, and proceeded to call the evidence in ſupport of them. The poll-book of the hundred of Stoddon was read, in which it appeared that William Lugſden had voted for *Lord Oſſory* and *St. John*; after which they called Lord Ongley's check-clerk for that hundred, in order to prove the miſtake of the above entry: Hereupon the counſel for the ſitting member took an objection to the competency of the evidence.

They contended, That an inquiry into the ſtate of any vote *in the poll*, is an inquiry into the *merits* of the election; That therefore any evidence to that effect muſt be improper in the trial of a queſtion on the *return* only; That although this point came before the Committee with ſome ſort

of prejudication by the Houſe, yet their order of reference could not alter the nature of the caſe, nor be conſidered by the Committee as any direction in point of law, becauſe the ſtatute inveſts the Committee alone with authority to decide fully and finally, all queſtions of elections and returns.

That the diſtinction eſtabliſhed by many caſes in the Journals, between the merits of an election and the return, is this: — Queſtions upon the return only, are thoſe which depend entirely upon circumſtances *extrinſic* to the poll or ſtate of the votes; and where the matter of the petition is conſiſtent with the poll as it ſtands, but alledges the return to be bad for ſomething *collateral* to it: But to examine into the votes is, in all caſes, entering upon the merits of the election.

The queſtions upon the return, which are to be found in the Journals, may be comprehended under theſe deſcriptions:

1. When the right or power of the returning officer is diſputed.

2. Where

2. Where the officer has not duly proceeded to the election; ſuch as the caſe of Cambridgeſhire in Glanville,(p. 80.) where the ſheriff would not take a poll, but returned one party: or where due notice is not given, or votes are received after the cloſe of the poll, as the caſe of Arundel in Glanville, (p. 71.) and other caſes of the ſame ſort.

3. Where, without the default of the officer, a due election is prevented, as in the caſe of Morpeth (1 Doug. Elect. 147.) by riots.

In all theſe caſes the above diſtinction is plainly marked out.

But ſuppoſing it competent to the Committee to enter upon this queſtion, the particular circumſtances of the caſe afford a ſtrong argument againſt their receiving the evidence offered. The poll-book, which is the inſtrument from whence the ſheriff derives the information neceſſary to make his return, is the declaration of an officer upon oath to another under the ſame ſanction; there is a ſtrong legal preſumption that ſuch acts are valid, and they ought

ought not to be ſhaken till after good cauſe is ſhewn to weaken this preſumption; When the whole caſe is gone into, in a courſe of proceeding upon the merits, there will be a proper opportunity for doing this; but in the *firſt inſtance*, the poll is concluſive as to what it purports; and the Committee, who are now to determine extrinſically upon the validity of an official act, ſhould incline to ſupport one made under the ſolemnities of the law.

For this reaſon, the evidence offered cannot be ſufficient, *on the preſent occaſion*, to ſet aſide the return, becauſe it contradicts the poll, and can be no more than oath againſt oath, the aſſertion of a ſtranger againſt the act of an officer.

There are many authorities in the Journals enforcing this doctrine, in a manner pointed to the preſent queſtion. In the caſe of Rutland, in 1710. 16 Journ. 463. "One Samuel Freeman being offered to prove perſons voting on the ſitting member's behalf, who are entered on the ſheriff's poll to have polled for the petitioner,—The queſtion being put that Samuel Freeman be admitted

admitted to prove his voting—contrary to the poll then taken by the ſheriff. It paſſed in the negative."

If it ſhould be urged that this caſe might have proceeded upon any peculiar objection to the evidence of the voter *himſelf*, the caſe of Bedfordſhire, in 1715, in 18 Journ. 224. will ſhew the true ground of the deciſion; there "a witneſs being called to prove that one William Reynold voted contrary to what appears by the ſheriff's poll, which being objected to by the petitioner's counſel, and both parties being heard; Upon the queſtion, That the counſel—be admitted to examine Edward Kemp, to prove that William Reynold voted otherwiſe than he is ſet down in the ſheriff's poll, It paſſed in the negative." In the caſe of Southwark, in 1735. in 22 Journ. 554. the ſame thing was attempted, the point again argued, the two foregoing caſes were referred to, and the Houſe paſſed the like reſolution.

In the caſe of Oxfordſhire, in 1755, 27 Journ. 285. the counſel for Lord Wenman and Sir James Daſhwood, in order to rectify

tify a miſtake in an entry on the poll, in the deſcription of the freehold for which a vote had been given for them, " offered to produce one of the check-books kept by their inſpector, together with the parole evidence of *ſeveral perſons* preſent at the time when the voter was polled. The counſel on the other ſide objected to the admiſſion of evidence to contradict the ſheriff's poll." The point was fully argued, and upon putting the queſtion, " that the counſel be admitted to produce the above evidence to prove that the freehold lay in a different place from that which is entered in the original poll-book, and was in a different occupation, It paſſed in the negative."

The above authorities are much more than in point to the preſent queſtion, for the petitions in all of them were upon the *merits* of the election. They ſhew a long eſtabliſhed uſage in the proceedings of the Houſe, to give implicit credit to the entries on a ſheriff's poll.

It may be ſaid, that the petition referred to the Committee, alledges the return to be found-

founded on a palpable miſtake of the poll; but, even admitting the miſtake, this is not the *proper time* to inquire into it or correct it. The Committee muſt, conformably to the uſage, give credit to the poll in the firſt inſtance: It muſt be preſumed, that the miſtake, if it exiſted, was either not pointed out to the ſheriff at all, or not in proper time, or that the ſheriff upon inquiry believed his poll to be true. Theſe conſiderations ſhould determine the Committee to reject the proffered evidence: For the queſtion is not, whether the ſheriff did right or wrong in rejecting any inquiry into this ſuppoſed miſtake, but, whether credit is to be given to his declaration of the poll. In this view, the Committee muſt conſider the queſtion, as if the ſheriff had never heard of the miſtake till the petition was preſented.

It is a rule of law, that a deed or legal inſtrument is not to be contradicted by parole evidence, and although a poll-book cannot in the language of the law be called a *record*, yet in the proceedings of the Houſe of Commons it is ſo conſidered; there-

therefore it is not becauſe the evidence offered may not be credible, but becauſe it is not *competent*, that it is now objected to as inadmiſſible.

It is a rule of evidence in all courts of juſtice, to endeavour to prevent perjury as much as poſſible; but the point contended for by the petitioner counteracts this rule; the admiſſion of the evidence would open a great inlet to perjury. By ſtat. 7 and 8 Will. III. ch. 25. and 18 Geo. II. ch. 18. ſ. 7 and 9. (D.) the ſheriff is directed to appoint ſworn clerks to take the poll, and the parties are allowed to have check-clerks to watch their intereſts; but the latter are not ſworn. If the petitioner ſhould prevail in this point, acts of the ſworn clerk will not be more effectual than thoſe of the candidate's clerks, whom it will be lawful at any time to bring forward in order to ſwear down the poll.

The counſel for the petitioner argued,

That the Committee were bound to receive the evidence offered in ſupport of the petition. The object of it is to get the return amended according to the truth of the

the fact. It is the duty of the ſheriff to return him for whom he has received the majority of votes, and the tendency of this evidence is to ſhew, that the majority upon the poll, *received by the ſheriff*, was for the petitioner.

This queſtion is confined ſolely to the *return*, and does not interfere with the merits of the election. The diſtinction between the *return* and *merits*, in caſes of this ſort, is eſtabliſhed by ſeveral precedents in the Journals; particularly by the caſes of Colcheſter in 1741. 24 Journ. 98, 99. of Denbighſhire ib. 90, 91, 92. and of Cumberland in 1768. 32 Journ. 83, 89, 107. in which, the returning officers having returned the members contrary to the numbers which they had received on the poll, the Houſe proceeded upon the queſtion of the return firſt, and ſeparately, and afterwards directed *that* to be amended, without entering upon the merits of the election, which they reſerved for a ſubſequent petition.

The uniform practice of the Houſe is conformable to theſe caſes: It is founded on a diſtinction like that well known in the

the law, between *actions poſſeſſory*, and actions upon the *mere right:* A man may have the clear right of *poſſeſſion* of an eſtate, who notwithſtanding has no right to the *property* of it; if he has held an unlawful poſſeſſion for twenty years, and an ejectment ſhould be brought againſt him by the lawful owner, he will maintain his ground in this proceeding, though he would be turned out by a higher form of action. Such unlawful poſſeſſor, if forcibly turned out by the lawful owner, would ſtill be intitled to recover in a poſſeſſory action the poſſeſſion taken from him, even againſt the rightful proprietor; becauſe he has the *right of poſſeſſion*, though another has the right of property. In the ſame manner, the preſent petition proceeds upon the claim which the petitioner has to the return, i. e. to the preſent *poſſeſſion* of the ſeat, without entering upon the merits of the election, by which the future *right* to the ſeat will be determined.

To argue that the petition proceeds upon the merits of the election, is to confound the *election* with the *poll*, and the

poll

poll with the poll-*book*. Polls were taken before writing was common, and before ſheriffs could write, and *polling* means no more than the numbering of the voters, whoſe numbers could not be aſcertained upon the view. The point contended for is, that the return is falſe, becauſe contrary to the real poll. The petitioner does not recur to juſtice to obtain what ought to have been done, but to obtain the effect of what *is done*. A majority on the poll determines the return, which majority was in this caſe for the petitioner.

If the Committee ſhould reject the evidence of this fact, they will defeat the end of their inſtitution; becauſe it is the foundation of the petition, and they are ſworn *well and truly to try the matter of it*.

The objection, however, is ſaid to be ſupported by the eſtabliſhed rules of evidence, and by the precedents of the Houſe of Commons. The queſtion is, whether the inquiry is to be ſtopped, *in limine*, by the teſtimony of the poll-clerk's book. The objection has the appearance of a *demurrer to evidence*, in which the facts of a caſe are al-

ways admitted: But if it be admitted that the poll-book is falſe, will the Committee hear no evidence to contradict it? Yet they muſt fall into this abſurdity upon the principles of this objection. The nature of the petition itſelf preſſes ſtrongly againſt it, for that is framed upon an admiſſion that the book is clearly in favour of the ſitting member; if the authority of it is concluſive, the Committee has no juriſdiction. If the poll-book were to have the weight imputed to it by the ſitting member's counſel, it would put the return in the power of the ſheriff's clerks. But the law does not put ſuch implicit faith in an oath of office: The oath under which a ſheriff performs his office is certainly as ſtrong as that of his poll-clerk; yet his acts may be at all times examined into in the courts of law, notwithſtanding this ſanction. An inquiſition of office, formed upon the oaths of a jury, may be traverſed by the party who has cauſe to complain; this too is a judicial record of much higher authority than the writing of a poll-clerk. In the caſe of the Dutcheſs of Kingſton, the

the recorded judgment of a court of juſtice was ſubjected to an examination by evidence, and ſet aſide. The argument that no parole evidence ſhall be received againſt a deed, is inapplicable to this caſe; it is juſt, that a man ſhould not be allowed to impeach a contract to which he has ſet his hand and ſeal; but this rule is perſonal to the parties. Even ſuppoſing the poll-book to have an equal authority with a deed, the petitioner is no party to it, and it cannot ſo affect him; the judgment in the Dutcheſs of Kingſton's caſe would have been concluſive between the parties, but not in a cauſe ariſing *diverſo intuitu*: Of this nature is the cauſe now before the Committee, in regard to the ſheriff and his official duty, upon the effect of which, third perſons are now diſputing.

It is not denied that the evidence of the poll-book is *primâ facie* valid, but there is a wide difference between that and its being *concluſive*: The legiſlature itſelf has ſhewn a diſtruſt of the poll-clerks, for though the ſtat. 7 & 8 Will. III. ch. 25. ſ. 3. directed the ſheriff to depute perſons

in whoſe preſence they are to act, to ſwear them to the performance of their duty, and alſo to allow the parties an inſpector of their books, yet the 18 Geo. II. ch. 18. conſiders this proviſion as inſufficient, and directs check-clerks to be allowed to the candidates. Now, it cannot be ſuppoſed that the law allows of check-clerks for no purpoſe but to inform the candidates, for the inſpectors appointed under 7 & 8 W. III. were competent to this purpoſe before; it muſt have intended to make uſe of their books, in order to check and correct the miſtakes of the poll-book.

The doctrine of amendments at common law, affords a ſtrong argument in ſupport of the point contended for by the petitioner; the proceedings, which were *ore tenus*, being taken down in writing by the clerk of the court, became thereby the record of the court; yet they might be amended, if the clerk had been miſtaken. In modern times the courts of law allow of the ſame amendments of their records, on receiving proper evidence of an error in them, as in 1 Saund. 249. *Faulkner's*

caſe, in which the court of King's Bench allowed the record of an indictment to be amended in an error in the caption; the ſame was allowed in *Hocken-hull's* caſe in Comb. 73. and 3 Mod. 167. and lately in the caſe of the King and Atkinſon in the court of King's Bench, in which all the caſes have been conſidered: So a miſtake in a coroner's inqueſt was allowed to be amended in 1 Sid. 225. In the caſe of Richards and Brown, Doug. Rep. 109. a record was allowed to be amended even after a writ of error brought. In Doug. Rep. 361. (*Eddowes* and *Hopkins*) the record of the verdict was allowed to be amended according to the judge's notes of the trial.

If the reaſon of the thing, and the practice of Weſtminſter-hall ſhould incline the Committee to receive the evidence, they will not pay much regard to the caſes cited from the Journals. What the law is upon this ſubject, may be learnt with much more certainty in the deciſions of the judges, than in the crude reſolutions of the former judicature of elections, whoſe capricious

opinions the Houſe itſelf thought it neceſſary to prevent, by aboliſhing their own juriſdiction. It is true, the Journals being the only depoſit of the proceedings of the Houſe of Commons, muſt have weight in all queſtions relating to the *practice* and mode of proceeding there; becauſe, they are the only authorities to reſort to, and every court is abſolute in its own forms. But where queſtions of general right, or of the principles of law occur, the reſolutions in the Journals have not ſo much the authority of precedents, becauſe of their uncertainty and contrariety; in theſe caſes their authority extends no further than the reaſon and juſtice of them can be vindicated; whereas the deciſions of courts of law have an intrinſic merit as precedents. But even if this deſcription were not applicable to the caſes in the Journals, thoſe cited for the ſitting member do not eſtabliſh the point contended for; the caſes of Rutland and Bedfordſhire happened before check-books were allowed; that of Southwark is of a *borough* election, whereas check-books are directed in counties only;

—beſides,

—beſides, that too was before the 18 Geo. II. Perhaps the beſt anſwer that can be given to the Oxfordſhire reſolution, is, that it is well known, that the whole of that election was diſputed with a degree of party violence which did not allow much room for the operation of reaſon and juſtice: But if it were not ſo, inſtances might be mentioned, where reſolutions directly contrary to it have paſſed in the Houſe. In the Glouceſterſhire Committee after the general election of 1780, the ſame queſtion aroſe, and that Committee received the evidence in contradiction to the poll.

The counſel for the ſitting member obſerved in reply,

That the oath whereby the Committee were bound to try the matter of the petition, did not oblige them to make an inquiry contrary to law, or to receive illegal evidence; that if they ſhould think the petitioner's caſe tended to this, they would juſtly fulfil their duty in the trial of the petition, by excluding ſuch an inquiry: That the anſwer given to their argument was founded in a miſconception of it, as

if they had contended that the poll-clerk's book was concluſive in all caſes; whereas it had only been argued to be ſo in a queſtion of the return, when no particular caſe is made out to impeach its authority. *Primâ facie* the return is good: What circumſtances are alledged to raiſe a doubt of this? The evidence of the check-clerk. But before the Committee can receive this evidence, they ought to be previouſly convinced of ſomething wrong on the part of the ſheriff with regard to this fact; as, that the ſuppoſed miſtake was pointed out to him in proper time,—that the truth of the fact was known to him,—or that the circumſtances bound him to inquire into it before the cloſe of the poll. Till the Committee ſhall be in this manner convinced of the *neceſſity* of the caſe, the numbers on the poll are concluſively fixed, according to the return.

The counſel on the other ſide ſeem to think they go far in eſtabliſhing their point, by proving, that there is an allowed diſtinction between the return and the merits; but this was unneceſſary, becauſe the rule is perfectly well known.

known. But no argument can reduce their caſe within the terms of it. The caſes of Colcheſter, Denbigh, and Cumberland, in which the diſtinction contended for is ſuppoſed to have been laid down, in circumſtances like thoſe of the preſent election, are all of them eſſentially different; in all three, the queſtion of the return was altogether extrinſic to any inquiry into the ſtate of the votes upon the poll, and depended upon the ſheriff's conduct *after the cloſe* of the poll. They tend rather to illuſtrate the poſition firſt laid down on the part of the ſitting member *. Thus, in the caſe of Colcheſter, the mayor had received and declared a majority on the poll for the petitioners; and upon ſome pretence of ſcrutiny and inquiry into queried votes, in which he proceeded *ex parte*, of his own authority, and without the conſent of the petitioners, he afterwards, without aſſigning a reaſon, declared the ſitting members duly elected. The arguments of the counſel there ſtated, likewiſe ſhew the principle of that deciſion

* See p. 328.

to

to have been, as is now contended for on behalf of the ſitting member; the counſel for the petitioners there argued as Mr. St. John's do now, "*That the poll is concluſive evidence*;" and the Committee and the Houſe determined in their favour, whereby they muſt be underſtood to have agreed with their arguments *.

The caſes of Denbigh and Cumberland are of the ſame ſort; in both, the poll was garbled by the ſheriff, after he had cloſed it with a majority on the ſide of the petitioners; in the firſt, he was likewiſe guilty of other flagrant acts of injuſtice. Theſe facts were quite independent of the entries on the poll, and accordingly the votes on the poll were not inquired into: The whole of thoſe cauſes conſiſted in the objections to the conduct of the returning officers, ſubſequent and collateral to the poll. How different are they from the preſent queſtion, in which the whole ſtrength of the petitioner's caſe reſts upon an inquiry into the ſtate of a vote in the poll? No criminal charge is made againſt the ſheriff, and the numbers on the poll

* See 24 Journ. 100.

ſtand

ſtand now, as he declared them to the county, at the cloſe of the election.

In this view, the caſes cited from the reports do not meet the argument, and might with more propriety be uſed in a cauſe upon the merits of the election. Thus it is ſaid, an inquiſition of office may be traverſed — Why? becauſe the ſubject can have no other opportunity of conteſting the right of the crown; and this is the formal method of trying the merits of the ſeveral titles: But in the firſt inſtance, the inquiſition is good againſt all claimants, and enables the crown to take poſſeſſion. The Dutcheſs of Kingſton's caſe depended on the *fraud* of the tranſaction, and on the principle that all acts are vitiated by fraud; if any fraud were alledged to have been committed in making the preſent return, it would be a ſufficient reaſon for the Committee's receiving the evidence offered.

The caſe in 1 Saund. 249. would be to the purpoſe, if the queſtion were now depending before the ſheriff, before the cloſe of the poll; but the effect of the amend-

ment,

ment, there was to *ſubſtantiate* the record which the clerk's miſtake had made defective, and not to contradict it or annul it; The ſame may be ſaid of the caſe of the King and Atkinſon; and in Hockenhull's caſe the error appeared *intrinſically*, and one part of the record was corrected by another, not by any collateral, or foreign evidence. In the caſe of 1 Sid. 225. the coroner was ordered to amend all *but the verdict*, becauſe that was the declaration of perſons on oath; in this therefore the caſe is adverſe to the poſition it is cited to ſupport: The amendments in the other caſes cited were likewiſe made to effectuate the inſtruments, not to ſet them aſide.

The principle upon which amendments were formerly made in the courts of common law, was, that the clerk's miſtakes might be amended on the ſpot, and before the proceedings became *records**; after that, it was too late; it is therefore no illuſtration of the petitioner's argument who contends that *records* may be amended.

* See Black. Comm. b. iii. ch. 25. p. 406.

The

The counſel for the petitioner imagine that a general cenſure upon the former reſolutions of the Houſe of Commons in election caſes, gives conſiderable aid to their arguments; but, as well in queſtions of parliamentary law, as of rules of practice, by what other guide are parliamentary proceedings to be governed? If contradictory precedents are cited from the Journals, or if they are contrary to the fundamental rules of juſtice, they ought not to be followed; but till theſe defects are pointed out, they muſt have the weight of authority, and thoſe which have been cited are not ſubject to this cenſure. But the obſervation comes unfavourably from thoſe, who at the ſame time rely upon precedents in the Journals, in ſupport of their own doctrine *.

After

* After the arguments of counſel were finiſhed, one of the counſel for the petitioner mentioned to the Committee, that a learned judge had from his memory informed him, that in an action againſt the ſheriff of Buckinghamſhire for a falſe return of members for Marlow, tried many years ago before Mr. Juſtice Deniſon, in which a Mr. Moore was plaintiff, that judge had

After the Committee had deliberated, the counſel were called in and informed that the Committee had reſolved,

" That the counſel for the petitioner " might proceed to call the evidence of- " fered."

The counſel for the petitioner then proceeded in their evidence.

The following relation of the circumſtances of the caſe is deduced from the evidence of both parties, in the manner which ſeemed to me moſt likely to elucidate the ſtate of the queſtion. This turned on three points of fact. 1. The general conduct and regulation of the poll. 2. The particular circumſtances of Lugſden's vote. 3. The means purſued by the petitioner for redreſs during the election.

I. The election commenced on wedneſday the 7th of April, and the poll cloſed

had admitted the evidence of a check-clerk to contradict the poll.—The particular circumſtances of the cauſe he could not ſtate, for which reaſon, and becauſe the caſe was not mentioned in the argument for the petitioner, I have omitted it in the ſtate of this cauſe.

on

on ſaturday the 17th following. The conteſt was carried on with extraordinary ſpirit on both ſides, and the ſheriff, in the latter days of the poll, finding the number of voters diminiſh conſiderably, and both parties determined to perſevere, reſolved to cloſe the poll, if poſſible, without their conſent; for which purpoſe he frequently made the uſual proclamations, the effect of which was as often prevented by the polling of freſh voters. At length, the ſheriff having of himſelf determined finally to conclude the election at ſome preciſe time, intimated his reſolution to the candidates in the evening of the 16th, and on the 17th in the morning; adding his wiſh that they would come to ſome agreement upon the ſubject among themſelves: Hereupon, in the morning of the 17th they agreed to cloſe the poll at ſix o'clock in the afternoon of that day; and the ſheriff then directed a proclamation to be made for this end, a memorandum of which he reduced into writing in the following words, to which all the candidates ſigned their names.

" Bedford,

" Bedford, Saturday, 17 Apr. 1784.

" By the conſent of the candidates, Lord Oſſory, Lord Ongley, and Mr. St. John, the ſheriff, at the ſitting of the court this morning, made proclamation for all freeholders now here preſent, who have not polled at this election, to tender themſelves to vote, and to enter their names by ſix of the clock this evening; and that no freeholder, who ſhall not have tendered himſelf, and entered his name with the ſheriff's ſworn clerks by that time, can be received to vote at this election. And that the poll will be finally cloſed as ſoon as ſuch freeholders, whoſe names ſhall have been ſo entered, ſhall have been polled.

(Signed) UPPER OSSORY.
ONGLEY.
ST. A. ST. JOHN.

Accordingly, at ſix o'clock the poll was cloſed, with an adjournment of the county court to monday the 19th, in order to conſider the rights of the votes tendered before ſix and not then accepted for want of time,

to

to diſcuſs the votes queried during the poll, and to caſt up the numbers. But two of the petitioner's agents ſwore, that they did not underſtand the adjournment to have been made with this reſtriction.

In the firſt days of the poll there was great confuſion in the admiſſion of the voters, but afterwards a degree of regularity was eſtabliſhed. Counſel attended for both parties during the whole poll, and it came to be a rule at laſt, that every point in diſpute requiring the ſheriff's deciſion, ſhould be formally mentioned to him by them, or by the candidates themſelves. Two or three days before the 17th, it often happened that not more than one voter polled in the courſe of an hour. It was a rule, that every objection to a voter ſhould be made when he was at the place of polling. When the ſheriff finally declared the numbers polled, and the names of the ſucceſsful candidates, a ſcrutiny was demanded on the part of the petitioner, and formally refuſed by the ſheriff.

The gentleman who attended the election as counſel to the ſheriff, being exa-

mined before the Committee, ſaid, he conſidered the poll as finally cloſed at ſix on the ſaturday; and that the adjournment was for the above-mentioned purpoſes only.

The following circumſtances were mentioned on the part of the ſitting member, as inſtances of the rules obſerved by the ſheriff in the conduct of the poll.

One *Boll* came to vote for Lord Oſſory and Mr. St. John, and was objected to on account of a defect in the aſſeſſment of the land-tax reſpecting his freehold; after hearing both parties, the ſheriff being of opinion that he was not properly aſſeſſed, rejected his vote. On a ſubſequent day of the poll, a friend of Lord Oſſory's produced to the ſheriff another duplicate of the land-tax aſſeſſment, containing a different deſcription of Boll's freehold, and deſired the ſheriff then to receive his vote, if he thought him properly aſſeſſed: The ſheriff (i. e. his counſel) thought the entry in this duplicate proper, and the voter thereby properly aſſeſſed, and told Lord Oſſory ſo, but ſaid "he could not, conſiſtently with the rules

rules uniformly obſerved in the poll, revive a queſtion before decided upon hearing the parties," and therefore again rejected the vote. The ſame gentleman ſaid in his evidence, that he had no doubt of Bell's right to vote, according to the laſt duplicate of the aſſeſſment, and that if this had been ſhewn him at firſt, there would have been no queſtion about it. On the 17th the ſame vote was again brought forward, in order to have his name entered in the poll-book, as a vote tendered, with the names of the candidates for whom he would have voted; but this too was refuſed, with a recommendation to have it entered in the party's check-book, as the fitter place.

The ſame gentleman informed the Committee, that during the poll many votes on both ſides were rejected, becauſe the ſheriff refuſed to enter upon the queſtions a ſecond time; and, in particular, on monday the 19th, the queſtion, "whether it had been conſidered before," having occurred upon a vote reſerved from ſaturday, one of the poll-clerks was ſent for into the country, in order to aſcertain this fact;

upon his evidence that the vote had been conſidered before, it was immediately rejected.

II. As to Lugſden's vote. —— He voted on the firſt day of the poll: Evidence was given to prove, that the check-books of both parties agreed in entering his vote for Ongley, and not for St. John, as entered by the poll-clerk; that his intentions * before the poll, and after, were in favour of Lord Ongley, on political grounds; that after the poll he ſaid * he had voted for him; that the miſtake of the clerk was diſcovered two days after by Lord Ongley's friends, and that Mr. St. John's check-book was refuſed to their requeſt of inſpecting it. The voter himſelf was not called as a witneſs, but the counſel for the petitioner ſaid, he was attending, that the ſitting member's counſel might examine him if they thought proper; that

* The counſel for the petitioner, when they produced this evidence, ſaid, they were ſenſible that this ſort of evidence was liable to ſuſpicions, and ought to be received with great caution; but that they hoped they had laid a proper ground for the admiſſion of it, by the attendant circumſtances.

they

they had reaſons for thinking it improper evidence on their part.

III. As to the means purſued for rectifying the miſtake. Witneſſes proved, that when the miſtake was diſcovered by the petitioner's agent, a memorandum of it was made in his check-book; that the poll-clerk was informed of it in a general converſation, or rather altercation, in one of the booths, in which ſomebody preſent propoſed a reference to the ſheriff on the ſubject, the clerk himſelf being willing to have made his book agree with both the check-books. Lord Ongley applied, during the poll, for leave to inſpect the poll-book of this hundred for a particular purpoſe, (not naming it) which was refuſed by the ſheriff. An agent of Lord Ongley's ſwore that he avoided bringing the caſe forward during the poll, that he might not interrupt the other buſineſs, but that he believed he mentioned it to the ſheriff's counſel (who for theſe purpoſes was conſidered as the ſheriff) on the friday or ſaturday, as a matter intended to be brought forward for his conſideration. On the monday, the

voter having been ſent for, came to Bedford, and he and other witneſſes to ſubſtantiate his vote, were there in readineſs to give evidence to the ſheriff for that purpoſe.

On monday the parties met at the ſhire-hall, and went through the buſineſs of the votes adjourned over from ſaturday, and thoſe queried; this laſted till near three o'clock, and then they agreed to retire in a ſmall party of choſen friends of each candidate, into the grand jury chamber in order to caſt up the poll. This was the period about which there was a direct contradiction in the evidence. The counſel to the ſheriff ſwore poſitively, not only that the matter was not mentioned to him before, but alſo that the firſt intimation he received of the miſtake in queſtion, was on this monday after they had left the Shire-hall; when every thing was concluded but the ſumming up of the members, and when they were going to enter upon that buſineſs in the grand jury chamber, the parties being aſſembled there and ſeated at a table for the purpoſe. On the outſide of the door of this room, this miſtake was mentioned

ſtated to him by Lord Ongley's agent, who preſſed him ſtrongly to correct the miſtake, and offered the evidence to convince him of it: He anſwered, that the application was made too late, that the ſheriff had no power to enter into the queſtion or to reviſe the poll, after having cloſed it; and concluded that it could not be done. While they were in this converſation, they were joined by another agent of Lord Ongley's who ſupported the former in his application. This converſation ſoon ending, by the declaration of the ſheriff's counſel's opinion, he retired into the grand-jury room and mentioned what had paſſed: the ſitting member's counſel expreſſed his approbation of the opinion given, the petitioner's counſel did not oppoſe it; and the converſation ſtill continuing upon the ſubject between him (the ſheriff's counſel) and the petitioner's agent, a friend of the ſitting member's ſaid warmly "Mr. Sheriff, if you are to go into that, I muſt deſire you to hear us, as to ſeveral miſtakes of the ſame ſort againſt us." About the ſame time the converſation upon this miſtake

dropped, and they entered upon the other buſineſs.

Lord Ongley's agent ſwore poſitively (beſides the previous notice above ſtated) that he mentioned this matter to the ſheriff's counſel *in the Shire-hall* before they adjourned to the jury-chamber, and that he had the witneſſes and the voter himſelf there ready for examination; another agent in the ſame intereſt ſwore, that at the time alluded to by the other, after talking with him upon their deſign to get Lugſden's vote corrected, he ſaw him go up and ſpeak to the ſheriff's counſel in the Shire-hall, but was at too great a diſtance to hear what either of them ſaid.

There was likewiſe a contrariety in the evidence of the time of the day when Lord Ongley's agent made the application to the ſheriff, which left it doubtful whether it was between two and three o'clock, or about four. This related to the point of time in which the parties were ſaid to have retired into the jury-chamber.

Upon theſe facts, the counſel for the petitioner contended,

That

That the error of the poll-book was plainly proved; that the application to correct it was made in proper time; and that the ſheriff ought to have received the evidence offered to him and to have corrected the error; conſequently, that the Committee would now do the ſame. They argued in the following manner,

The queſtion for the deciſion of the Committee involves a mixture of fact and law: The queſtions of fact are, whether Lugſden's vote was falſely entered in the book, and whether the ſheriff had due notice of the miſtake. As to the firſt, it is proved that Lugſden intended to vote for the petitioner; that his inclinations led him to that ſide, from political or party motives of favour to the particular candidate; that after polling, his ſentiments were the ſame, and that he believed he had ſerved his party by his vote. That he did actually declare his voice for the petitioner, is proved by the concurrent teſtimony of the two oppoſite check-books, and by the petitioner's check-clerk who remembered the fact. If the matter were at all doubtful, the ſuſpicious

cious refuſal of an inſpection of the ſitting member's check-book, would be ſufficient to turn the ſcale.

As to the ſecond point, the memorandum made of the miſtake at the time ſhews a formed deſign to rectify it, although it could not then be known that it would be ſo material to the party: It is fair to preſume that Lord Ongley's deſire to inſpect the poll-book, had the ſame object in view. The poll-clerk, who is the ſheriff's deputy, had notice of his miſtake two days after it happened; he ought in duty to have mentioned it to his principal, and this notice to the deputy was, in point of law, a notice to the principal; at leaſt for the object of the preſent cauſe, it may be ſo conſidered. Thus, notice of the miſtake was given early in the poll, though the requeſt to alter it came late: this may be eaſily accounted for from the hurry of the election, and the neceſſity of more important buſineſs which it would have interrupted.

" Judicis officium eſt, ut res, ita *tempora* rerum
Quærere ——— ."

But

But an objection to the *time* of the application cannot be urged by the counſel on the other ſide, conſiſtently with their poſition 'that the poll-book is concluſive evidence;' if ſo, every day during the election was equally proper or improper, and every application would have received the ſame anſwer from them; becauſe the authority of that book would have been as binding on the day after the miſtake, as at the end of the poll, and would have been uſed accordingly for their defence.

When the Committee conſider the ſeveral ſteps taken on the part of the petitioner, to prevent the operation of this miſtake againſt him, they will ſee good reaſon to preſume in his favour, upon thoſe points in which there is a contrariety in the evidence. Beſides the circumſtances already mentioned, the voter was ſent for to Bedford on monday, and attended at the Shire-hall with other witneſſes: Can it be doubted for what purpoſe he attended? The petitioner's agent was determined to bring forward the queſtion, and actually did ſet about it while the parties were in the hall:

Is

Is it probable that the end would not be purſued when the means were prepared? Then, the manner of rejecting the application ſhews, that the opinion was founded more on the authority of the poll, than the ſuppoſed impropriety of the time.

If it ſhould be urged, that by the petitioner's conſent to the minute of the proclamation for cloſing the poll, he is *eſtopped* to bring this queſtion forward, it might be anſwered, that the words of this minute will not bear ſuch a conſtruction. It only provides that *no freeholder ſhould be received* after the time limited, and declares the concluſion of the poll to be future and uncertain, "— the poll *will be* finally cloſed, as ſoon, &c*." So that in the moſt unfavourable ſenſe of the proclamation, the poll could not be conſidered as *cloſed*, when the application was made.

The queſtion of law is not difficult to determine; for if a miſtake of this ſort exiſted, and was mentioned in proper time to the ſheriff, he was bound to have corrected

* See p. 352.

it,

it, becauſe by ſo doing only, could he make a return according to the true number of votes received by him. There is a wide difference between correcting the entry of a vote *admitted* or *rejected* on a diſputed title, and that of a vote whoſe right was allowed; in the former inſtance the ſheriff acts *judicially* and his judgment is concluſive as to the return; but in the latter, he acts *miniſterially*, his duty is to ſtate the fact truly and to give effect to it. If he does not, his return is in this reſpect falſe, and the alteration of this miſtake is the only way to make the return agree with the election.

The Committee ſhould conſider themſelves upon this queſtion, as ſitting to do what the ſheriff ought to have done at the election, when the application was made to him. If, therefore, he had then made the inquiry ſuggeſted to him, he muſt have ſeen his error and corrected it; the effect of it would have been, a return of the petitioner, inſtead of the ſitting member. Upon that principle of equity, that what ought to have

have been done is to be conſidered as done, the Committee will now decide in the ſame manner. In the caſe of Derby *, a queſtion aroſe upon the right of a ſet of perſons claiming to be admitted freemen before the election; they were refuſed admiſſion, and afterwards at the election their votes were refuſed for want of this admiſſion: But the Committee who tried the cauſe, being of opinion, that they ought to have been admitted to their freedom before the election, whereby they would have acquired a compleat right to vote at that election, reſolved to allow their votes accordingly, and Mr. Coke the petitioner ſucceeded by that reſolution.

The counſel for the ſitting member argued as following.

The evidence of the miſtake is not ſuch, and ſo clearly proved, as to intitle the counſel for the petitioner to argue from it as a fact eſtabliſhed: The poll-clerk and check-clerks, ſtill rely more upon the authority of their books, than upon any other means

* 3 Doug. Elect. 366, &c.

of

of information; the former is ſworn, the others not; and it is well known that in all elections, the poll-clerk is more exact than the others, who often copy one from another. Notwithſtanding the known intention and declaration of the voter, it is ſtill fair to ſuppoſe that in the confuſion in which his vote was given, he may have made a *lapſus linguæ*, which occaſioned the entry as it ſtands; ſuch circumſtances have often happened, and it appears that the diſorder at the poll was ſo great on the firſt day of the election, that a man of good underſtanding might eaſily have forgot himſelf in ſuch a ſcene. The peculiar ſtate of this cauſe would warrant the Committee in making this ſuppoſition in a doubtful caſe, in order to ſupport a public officer in an act of duty.

But ſuppoſing the Committee to be perſuaded of the miſtake as contended for, there are many reaſons which ſhould induce them to ſupport the preſent return. Theſe reſult from a conſideration of the general tenor of the election, and from the petitioner's conduct upon this ſubject.

The

The queſtion has been fairly ſtated as depending on the time, and manner, in which the ſubject was mentioned to the ſheriff; and it is agreed on both ſides, that the Committee ought to conſider the queſtion as the ſheriff ſhould have done. As to the time, according to the evidence of the ſheriff's counſel, who from his ſituation muſt be ſuppoſed impartial, the miſtake was never ſuggeſted to him till the monday. On the other ſide it has been contended, (in order to obviate the effect of this evidence) that the ſheriff had notice of the miſtake two days after it was committed, becauſe it was notified to his deputy the poll-clerk: But if the notice alluded to had been a formal notification of the fact, it would not have warranted ſuch a concluſion from it; becauſe the election was conducted throughout on different principles, and becauſe it was not done in order to obtain an amendment of the error by ſuch notice. The only effectual notice is that which was given in order to cure the defect, and purſued accordingly. In fact, the ſuppoſed notice was only a *converſation* among perſons

perſons not authoriſed by the parties for the purpoſe, and without any view of proſecuting it, at a place where the poll-clerk happened to be preſent.

The reaſons now offered for not bringing on the queſtion ſooner, are inſufficient and contradictory; although the party had knowledge of the miſtake, it does not appear that any reſolution was taken to correct it during the poll. They would now have the Committee infer that they had determined upon an application to the ſheriff, and deſignedly poſtponed it; but the memorandum relied upon for this, is no more than a note or index (of which, no doubt, there are many on both ſides) for future uſe upon a ſcrutiny, which was talked of during the poll, and afterwards demanded. It cannot be believed that in the latter days of the poll they were afraid to interrupt more urgent buſineſs, becauſe in thoſe days there were many vacant hours, and ſometimes twenty votes was the amount of a day's poll. It was never mentioned to the oppoſite party, either as a ſubject of converſation or of buſineſs.

Theſe circumſtances induce a belief, that this application was a ſhift in the laſt reſort, when they were hard preſſed at the end of the election; the importance of it could not till then be known, nor were the witneſſes or the voter till then ſent for: Or if it was really intended to make uſe of the vote, the fact was purpoſely kept ſecret, till it would be too late for the other party to have advantages of the ſame ſort.

The Committee, in determining upon the ſheriff's deciſion, ſhould be guided by theſe conſiderations. 1. Whether he could have made the alteration aſked for, conſiſtently with his former conduct in the regulation of the poll. 2. Whether he could in law reviſe an entry on the poll, after it was *cloſed*. Upon the firſt queſtion, Mr. St. John contends, that the proper time for making the alteration, was when the voter was preſent: Without relying upon the practice of this election, this is warranted by the ſtatutes *, whereby the parties are allowed to have inſpectors and

* 7 & 8 W. III. ch. 25. and 18 Geo. II. ch. 18.

check-

check-clerks: The ſtatutes ſeem to have in view by this proviſion, the prevention of the very difficulty that now occurs. It is the duty of theſe party agents to watch the errors of the poll, and to inform their principals; if they neglect it, the latter ought to be concluded by their negligence. If it were not ſo, to what endleſs diſtraction might not the ſheriff be ſubjected? Such miſtakes happen in the courſe of every day's poll; before the end of the day, the perſons acquainted with the tranſaction may have left the town, and the ſheriff has no power to compel their return: It is therefore right, upon this account, that there ſhould be a limitation to the time of diſcuſſing ſuch queſtions. In another point of view it is equally juſt, for a contrary practice would give great encouragement to the knavery of party tools, who abound in theſe conteſts.

The manner in which the application was made to the ſheriff, (excluſive of the time) was not conformable to the regulations obſerved in the poll. It was brought forward irregularly, by an agent, and not

by the petitioner's counſel; and when mentioned in the counſel's preſence, was not taken up by him as a ſubject of argument. From this, the ſheriff might well infer, that the caſe was not deliberately brought forward, as a ſerious propoſal for his deciſion, but rather as an inſtance of hardſhip to be regretted.

Upon the ſecond queſtion, much depends on the time in which the poll may be ſaid to have been *cloſed*. It is contended for the ſitting member, that this time was when no more votes could be received, viz. at ſix o'clock on ſaturday. The *poll* is the numbring of the electors according to their voices; in this ſenſe, therefore, the poll is concluded, when all thoſe who may give their voices are received. If the counſel for the petitioner ſay that the poll was open on monday, for any other purpoſes than thoſe reſerved for that day, they muſt at the ſame time admit that it was open for *every* purpoſe, without diſtinction, and that new votes could have been received at the time when this application was made. This poſition would lead to great abſurdities, and

is not only contrary to the general law and practice of elections, but likewiſe to the very terms under which the candidates themſelves conſented to the adjournment of the county-court; the *poll* was thereby cloſed, the *court* was adjourned for the purpoſes mentioned. The diſcuſſing of the unaccepted votes was in ſubſtance the ſame buſineſs with that of thoſe queried, for their names were received, but their rights were undetermined. It may therefore be ſaid, that the only buſineſs of monday was to examine into the queries on the poll, and to caſt up the numbers;—a buſineſs which perhaps never yet took place in any election, till after the poll was underſtood to be cloſed.

If the Committee ſhould be of this opinion, the queſtion upon the *time* of the application, and the contrariety of the evidence, will not be material. The petitioner's counſel ſeem to rely principally upon the application made on monday, and to be ſure they cannot ſeriouſly urge any other; whether this took place in the ſhire-hall, or at the door of the jury-

chamber, it was in either caſe too late. This, at leaſt, is clear, that it was not till late in the day, when almoſt all the other buſineſs was finiſhed. But if the Committee ſhould think the point of time a material ſubject of inquiry, they ought in juſtice to give more credit to the evidence of an indifferent perſon, acting in a ſtation of ſome profeſſional reſponſibility, than to that of an agent of one of the parties eager in the purſuit of his object.

Under theſe circumſtances the ſheriff was juſtified in refuſing to enter upon a queſtion, which muſt have tended to open the whole election in the period of its concluſion. He muſt, in the courſe of equal juſtice, have attended to the like application at that time threatened from the ſitting member; this would have led to others, thoſe again to new diſcoveries, and thus the parties, without intending it, would have found themſelves in the midſt of a ſcrutiny. What is the uſe of a ſcrutiny but to correct the errors of a poll? A ſcrutiny was the proper, and the only lawful method for correcting ſuch errors, if they exiſted.

exiſted. It has been ſaid, that the ſitting member's caſe is founded upon perverting the diſtinctions between a poll and a poll-*book*; but it may with better reaſon be ſaid, that the argument of the petitioner's caſe confounds a poll with a ſcrutiny.

The Committee having deliberated, informed the counſel that they had paſſed the two following reſolutions:

1. "That the application to the ſheriff "was ſuch, and made in ſuch time as to "call upon him to attend to it."

2. "That the ſheriff ought to have taken "the vote of William Lugſden from the "poll of Mr. St. John, and added it to the "poll of Lord Ongley."

In the former part of the cauſe, when the counſel for the petitioner had finiſhed their evidence relating to the caſe of Lugſden, they informed the Committee, that with reſpect to the other two votes mentioned in the petition, (the circumſtances of which they had before mentioned in the opening) they could not produce evidence

that application was made to the ſheriff to correct theſe miſtakes, before the cloſe of the poll; that if the Committee ſhould think proper, they were prepared to prove the miſtakes of the poll-clerk, as ſtated in the petition. Hereupon the chairman aſked the counſel for the ſitting member if they choſe to offer any argument on this point; to which they anſwered, that the matter reſted with the Committee. The court was then cleared, and the Committee deliberated. When they met next morning, the counſel were informed that the following reſolution

"That the counſel be admitted to pro-
"duce evidence to correct miſtakes upon
"the poll-book, although no ſuch evi-
"dence was tendered to the ſheriff"

had paſſed in the negative.———

This reſolution paſſed before the counſel for the ſitting member had opened their caſe in anſwer. Its effect confined the caſe on the part of the petitioner to the vote of Lugſden only. On the other ſide, they expreſſed a wiſh that the Committee would allow

allow them to proceed, firſt and ſeparately, upon that part of the ſitting member's caſe which related to this vote, that according to the judgment given upon that point, they might or might not enter upon the other points they intended to bring forward; but this was oppoſed by the other counſel, and not approved by the Committee, who deſired them to open their whole caſe, and proceed upon it altogether, as the whole evidence for the petitioner was now cloſed.

The counſel for the ſitting member did proceed accordingly in their caſe, and ſtated that they ſhould prove that four (in which they afterwards corrected themſelves and mentioned ſix) votes had been falſely entered on the poll, by miſtake, to their prejudice, in the ſame manner as that of Lugſden for Lord Ongley.

After the abovementioned reſolutions relating to Lugſden were communicated to the bar, the counſel for the ſitting member proceeded, in ſupport of their caſe, to call evidence to ſhew, that one Thomas Eyre whoſe name was entered by the clerk as voting

voting for Lord Offory *only*, had voted for St. John likewiſe.

This evidence was objected to by the counſel on the other ſide, who ſaid, the laſt-mentioned reſolution of the Committee imported that it ought firſt to be made appear, that the caſe had been mentioned to the ſheriff during the poll.

The counſel for the ſitting member ſaid, they could not prove that notice of the miſtake had been given to the ſheriff, but they contended,

That they had a right, notwithſtanding, to enter upon this caſe now; that the reſolution alluded to was formed by the Committee *ex parte*, upon the caſe of the petitioner only, occaſioned by a requeſt from his counſel for the Committee's directions, as to their own mode of proceeding; without hearing them, and without any intimation from the Committee that any reſolution was in contemplation which would be binding upon the ſitting member. He would, indeed, be in a ſtrange ſituation, if he ſhould not be allowed the ſame means for

for his defence as had been employed againſt him.

In the former argument the opinion of the Houſe had been preſſed upon them, and therefore they reminded the Committee, that when St. John's petition had been preſented to the Houſe, it was rejected there upon the ground that he would have the benefit of it before the Committee, as a matter of courſe; They ſaid it was agreed, That the committee were to decide as the ſheriff ought to have done; and if he had thought himſelf competent to receive the application made by the petitioner, the ſitting member might have had an opportunity of bringing forward ſimilar caſes for his conſideration; but having done otherwiſe, it would have been abſurd for the ſitting member to have offered any evidence to him of a miſtake, at the ſame time that he denied his authority to correct it; or to have produced witneſſes, who, as he contended, ought not to be heard; and it was uſeleſs when the majority was declared to be in his favour; That the Committee muſt in juſtice preſume, that Mr. St. John

knew the circumſtances of his caſe and would have done what his ſituation would have required of him, if the ſheriff had decided the contrary to what he did; and therefore they would not interpret their reſolution ſo as to deprive him now of a defence, which he could not and ought not to have made before.

The counſel for the petitioner ſaid,

That all they contended for was an equal meaſure of juſtice, that one party might not have an advantage which had been refuſed to the other; That it was inconſiſtent in thoſe who admitted that the Committee were to do what the ſheriff ought to have done, to preſs them to receive evidence which they did not offer to the ſheriff: The Committee had decided what the ſheriff ought to have done, and that judgment ought not to be impeached; *now* the queſtion is, what the *party* ought to have done; — Having neglected to proffer the evidence to the ſheriff, he is precluded from doing it now by the reſolution of the court, which certainly has in terms a reference to

both

both parties; That it could not be ſaid to have been made, without hearing the counſel for the ſitting member, becauſe they had been formally aſked, whether they deſired to ſpeak upon the queſtion, and declined it; nor was there any peculiar hardſhip falling upon the ſitting member, in being reſtrained from going into the merits of the cauſe (which this caſe led to) upon a queſtion of the return only. As to the arguments which are ſaid to have been uſed in the Houſe, they could not anticipate the judgment of the Committee upon their own method of proceeding; but Mr. St. John's petition had been rejected * there, conformably to the rules of the Houſe, which never receives petitions from ſitting members on their own elections.

When the Committee met on the day following, the counſel were informed that the following reſolution

"That the counſel be admitted to "produce evidence relative to Thomas "Eyre."

had been negatived.

* It was withdrawn, not rejected, See p. 326.

Here-

Hereupon the counſel for the ſitting member propoſed to enter upon the evidence of a miſtake in the poll-book, which they ſaid was not within the reſtrictions laid down by the Committee. This was the caſe of one Edward Bennet, who had voted for *Oſſory* and *St. John*; but in the poll-book his vote was entered for *Oſſory* only. The gentleman who ſpoke the words ſtated in p. 359. to the ſheriff, when the caſe of Lugſden was preſſed upon him in the grand-jury chamber, had this miſtake particularly in view at the time when he ſpoke. He had heard of other miſtakes of the ſame ſort, but at that time knew the circumſtances only of this.

The counſel ſaid, that as the ſitting member would certainly have offered evidence of this miſtake to the ſheriff, if he had inquired into the other, they now claimed a right, conſiſtent with the rule of the Committee, to produce ſuch evidence to them, in order to obtain the neceſſary correction of the poll. They admitted that both the check-books agreed with the poll upon this vote.

The

The counſel for the petitioner objected to any inquiry into this ſuppoſed miſtake, alledging, That as all the entries of the vote agreed, no regular evidence of their error could be produced, in this ſtage of the cauſe; That the ſtatute allows inſpectors and check-clerks for the purpoſe of rectifying miſtakes in the poll, and therefore the miſtakes, if any, ought to appear by a compariſon with the check-books.

To this it was replied, That the objection was premature, as it was founded in a concluſion from the effect of the evidence, (of which alone the Committee were to judge when it ſhould be heard) and not to the evidence itſelf, the materials of which had not been ſtated: That the queſtion now was, whether the caſe ſhould be conſidered, of which their could be little doubt after the alteration of Lugſden's vote;—As to the proofs, none had yet been offered.

The Committee, after deliberating on the queſtion, Reſolved,

" That

"That the counſel be admitted to produce evidence relative to Bennet's vote."

The firſt witneſs called was the voter himſelf. He was objected to by the counſel for the petitioner, who argued, that his teſtimony was not competent.

Firſt, On account of intereſt, for although the voter has no ſuch pecuniary intereſt as is the cauſe of incompetency in other courts of juſtice, yet every voter is ſuppoſed to be intereſted in the ſupport of the party he eſpouſes; it has been often ſaid by Lord Mansfield, that queſtions of evidence always depend on the ſubject matter to which it is applied; ſuch an objection as this could not ariſe in Weſtminſter-hall, becauſe it is peculiar to the complicated nature of an election petition, in which alone the conſequences of eſtabliſhing the vote, can be conſidered as intereſting to the voter.

Secondly, The practice is uniformly in favour of the objection; The Journals do not furniſh a ſingle inſtance of a voter's being received as a witneſs in the circumſtances in which Bennet ſtands; nor can any caſe to

to the contrary be produced ſince the inſtitution of the new judicature: Now, uniform practice is the beſt evidence of the law. It is uſual at elections for a voter, whom the ſheriff may have rejected, to make a formal tender of his vote; but when the caſe comes before a Committee, the voter is never produced to prove that tender, but ſome indifferent perſon; the reaſon of this may be learned from the rules that guide the other courts of juſtice. Lord Hardwicke ſaid, that where there was a great danger of perjury, if the intereſt of the witneſs were probable, it would always lead him to allow the objection to his evidence *. Suppoſing in this caſe, Bennet were in his examination to ſpeak falſely, it would be almoſt impoſſible to convict him of perjury, becauſe in defence of the indictment it would be urged, that if he is admiſſible here, the evidence of the poll and check-books united is not concluſive:

* Perhaps the words alluded to are thoſe mentioned in the law of *Niſi Prius*, p. 286. "— Unleſs the objection appeared to carry a ſtrong danger of perjury, and ſome *apparent* advantage might accrue to the witneſs, he was always inclined to let it go to the *credit* only."

The great value of this man's vote to the ſitting member, ſhews what advantage his evidence might procure to him; here is therefore a temptation to perjury.

Thirdly, The inference to be drawn from the ſtatutes of elections, affords a ſtrong argument againſt this evidence, which, it is ſaid, is to contradict the entries in all the three books. The Legiſlature, by allowing check-books to the parties, muſt mean not only a benefit to them, but alſo to introduce regularity into the poll, and that in caſes of doubt they are not only to rely on the minutes of their own clerks, but likewiſe to be bound by them.

The ſtatute 2 Geo. II. ch. 24. provides very ſtrictly againſt bribery, and the proviſion is enforced by an oath; but it might be eaſily evaded by the opportunity which the admiſſion of this evidence would give: Corrupt the voter after the election to retract his vote, and no penalty will be incurred.

In all the caſes of *amendments* at law, it is a general principle, that the amendment of a written inſtrument, ſhould be made from ſome other written inſtrument

ment of equal authority; thus, Lugſden's poll was amended on the authority of the check-books; but in this caſe, theſe confirm the preſent ſtate of the poll.

Beſides the above arguments there is a ſtrong one *ab inconvenienti*. In a petition on the merits the inconvenience of receiving ſuch evidence would be monſtrous; it would open every vote on the poll to a freſh inquiry, which in places of popular election would render the duty of a Committee almoſt impracticable.

Theſe arguments the counſel for the ſitting member anſwered as follows:

The ground of intereſt alledged for rejecting this evidence is trifling, and not founded on any principle in law, or any caſe in the reports: Whatever ſuſpicion it might raiſe of the witneſs's credit, it can found no objection to his competency. The true teſt of ſuch an intereſt is the queſtion mentioned by Lord Hardwicke *, "Is he to get or loſe by the event?" The voter may have no further concern in the event, than a

* In the caſe of the King and Bray, Hardw. Rep. 359.

hundred others who only read of it in the public papers.

Where a right of voting is in queſtion, a voter is not allowed to give evidence; but this ariſes from a juſt exception to his intereſt, reſulting from the loſs or gain of a perſonal right; and each vote conſtitutes a cauſe as to the individual voter, in which he is a party. The preſent inquiry has nothing to do with the right of voting, and the vote of Bennet himſelf is abſolutely fixed on the poll, his right being unqueſtioned.

The counſel on the other ſide could cite no caſes in their favour, but there are two ſtrongly in point againſt their argument, which have been ſolemnly determined in the King's Bench. One is the caſe of Mountain and Adkin, where the queſtion at the trial was, whether the plaintiff or defendant had been duly elected to a curacy in Norwich: The defendant contended, that according to the agreement of the parties before the election, the right of voting, for that time, was to be allowed to *reſidents* only, and that of theſe he had a majority.

majority. In order to prove this agreement, he called witneſſes who were reſident electors, and the other ſide objected to their competency on account of intereſt: But the judges held, that as the queſtion aroſe not on the right of voting, but on the *agreement*, and that being *pro hâc vice* only, and the election being over, they were competent witneſſes, having no intereſt as to ſuch paſt election. Lord Mansfield, in giving his opinion, obſerved, that the rule of evidence with reſpect to competency, is generally carried too far, and ſaid, he was inclined to follow the practice of Lord Hardwicke, who in doubtful caſes uſed to reſtrain the objection to the *credit* only (E).

The other caſe is that of the King and Bray *, which was cited and relied upon in the argument of the above caſe; There the iſſue was upon the cuſtom of electing the mayor of Tintagel, which was ſaid to be thus: The former mayor and town-clerk chooſe each an eliſor, which two eliſors ſummon a jury, who elect the new

* Hardw. Rep. 358. and Buller's *Niſi Prius* (ed. 1772) 286. (laſt edit.) 290.

mayor; to prove this cuſtom one of the two eliſors was called, and objected to as incompetent, on account of his intereſt to ſupport his own authority. But the judges held, that as his authority was paſt, it was no ground of objection to his competency (F).

Theſe caſes go further than it is neceſſary to contend in the preſent argument, and the Committee, who in this caſe are to decide a point of general law, ought to pay great reſpect to deciſions made on ſuch authority.

As to the practice alledged from the Journals, it ſhould be remembered that the mode of examination is different in this court, from that which formerly prevailed in the Houſe of Commons, from whence the practice is cited: There witneſſes were not examined on oath, and it would have been unreaſonable to have allowed ſuch evidence to be given, in contradiction to that which was upon oath; but when the witneſſes ſpeak upon oath, that reaſon exiſts no longer. The other part of the argument, drawn from the danger of perjury, and

and proſpect of advantage, proves too much; it would go to prevent any other voter at the election from being examined on this ſubject, for to all of them the ſame objection holds in an equal degree. A witneſs was never yet rejected, from an imagined difficulty in convicting him of perjury if he ſhould ſpeak falſe; where any ſuch circumſtances appear, it may perhaps raiſe an objection to his credit, but no further.

The concluſion attempted to be drawn from the ſtatute 18 Geo. II. ch. 18. is merely ſpeculative; it is more conſonant to the general proviſions of that ſtatute, conſidering the miſchief it was intended to prevent, to ſuppoſe that the uſe of check-books is to controll the ſheriff, or his deputies, without any particular view to the contingent diſputes of the parties. The argument upon the bribery act, is not only as applicable to every other voter as to Bennet, but it is denied to be a juſt notion of the law; it certainly is *bribery* at common law, and puniſhable by fine and im-

priſonment, to corrupt a voter after an election for the purpoſe deſcribed.

The ſuppoſed inconvenience of admitting this evidence, cannot, with any propriety, be urged againſt the ſitting member, who reſiſted this ſort of inquiry, before it was authoriſed by his judges, and brought into uſe by his opponent.

The Committee having deliberated on the queſtion, Reſolved,

"That the evidence of Edward Ben-
"net be not admitted."

After the chairman had communicated this reſolution to the parties, the ſitting member's counſel propoſed to call evidence to prove the caſe of Lavender Boll, in order to prevail upon the Committee to add his vote to their poll. The circumſtances of it had been related in the former part of the cauſe, as part of the ſitting member's evidence upon Lugſden's vote *.

* See p. 354.

The

The counſel for the petitioner objected to any inquiry into this caſe; They ſaid, it could not be done without confounding the diſtinction between the *merits* and the *return*, for that it related to the merits of the election; That the ſheriff, as returning officer, exerciſes both a judicial and a miniſterial function *; in the former character, he determines upon the rights of the electors, in the latter he receives their votes and returns the writs; this miniſterial conduct therefore, may be, and generally is connected with the return only; but to reviſe any part of his judicial capacity, is to enter into the merits. The return may be good,

* Judge Blackſtone gives the following deſcription of the ſheriff's power and duty, "Theſe are, either as "a *judge*, as the keeper of the King's peace, as *a miniſterial officer of the ſuperior courts* of juſtice, or as "the King's bailiff.

"In his *judicial* capacity he is to hear and determine "all cauſes of 40s. value in his county-court;—He is "likewiſe to *decide* the elections of knights of the "ſhire,———of coroners, and of verderors; to judge "of the qualification of voters, and to return ſuch as "he ſhall *determine* to be duly elected.

"As the keeper of the King's peace, &c." See 1 Comm. 343.

although

although he was palpably wrong in judgment upon the queſtions before him; but a failure in his miniſterial duty generally occaſions a bad return. Thus in Lugſden's caſe, the ſheriff had nothing to do but to enter an elector's vote, which having not done, and when informed of his error, ſtill refuſing, the Committee amended it; becauſe the return could not correſpond with the election while this miſtake ſtood. But in the preſent caſe the return may correſpond with the election, becauſe no vote was admitted. Perhaps the ſheriff may have erred in his judgment, but ſtill, he having juriſdiction, his deciſion is binding as to the return, which is his own act; whereas in Lugſden's caſe, the Committee have determined that he had no authority knowingly to enter a vote for one candidate, that was given for another, becauſe he thereby occaſions a falſe return.

That even if the Committee were not to follow this diſtinction, they would ſee good reaſon to approve the ſheriff's deciſion upon the queſtion before him, according to the principles which are eſtabliſhed in granting new

new trials in Weſtminſter-hall; That the caſe before the ſheriff reſembled an application for a new trial in order to admit freſh evidence, which the judges never allow, unleſs it appears that the party could not have obtained ſuch additional evidence on the former trial: That if an application were to be made in the King's Bench on the ground now laid before the Committee, it would be refuſed, becauſe the new evidence exiſted and was forth-coming at the firſt trial, if the party had uſed due diligence to obtain it; the parties were intitled to inſpect and have copies of the land-tax aſſeſſments, and Mr. St. John might have produced the right duplicate when the vote firſt became the ſubject of inquiry before the ſheriff.

The counſel for the ſitting member contended,

That it was impoſſible to diſtinguiſh this caſe from that of Lugſden; that the reſolutions upon that vote directly contradict the poſition of the oppoſite counſel, *that queſtions on the return muſt be independent of*

the exerciſe of the ſheriff's judicial authority; in that caſe the ſheriff exerciſed a judicial authority; as to which it ſignifies little, according to the petitioner's counſel's own diſtinction, whether it be employed upon the *right* or the *fact* of voting; in Boll's caſe he did the ſame: It was an error of judgment in each, according to the former reſolutions of the Committee. The ſheriff having acted in both caſes by the ſame rule, it neceſſarily follows, that if one may be reviewed now, the other may likewiſe, becauſe it is now determined that his rule was wrong. If ſuch review ſhould lead into the merits of the election, the counſel for the petitioner may thank themſelves for it, as their example taught the way to ſuch inquiries; but certainly Boll's caſe goes no further than Lugſden's. The vote of the former was refuſed though the ſheriff had no doubt of his right, becauſe he was thought to have come too late; that of the latter being falſely entered, was ſo continued, becauſe he too was thought to have applied too late. If the ſheriff had no authority to refuſe the application for Lugſden,

den, the rejecting Boll was equally without authority, and the return made in conſequence, muſt be equally defective, becauſe contrary to the number of votes whoſe right was not doubted.

The caſe put of a motion for a new trial does not meet the argument for the ſitting member, which is, that the *trial* (if it may be ſo called) of Boll's vote was continued during the whole poll, according to Lugſden's caſe, and therefore the new evidence was tendered in time and before the final determination; for which reaſon it ought to be received now.

The Committee reſolved,

" That the caſe of Boll refers to the " merits and not to the return."

The counſel for the ſitting member, upon being informed of this reſolution ſaid, that the caſe of *Harriſon*, which they had likewiſe intended to bring forward, and the others, were under the ſame circumſtances as that of Boll, and therefore they would

would give the Committee no further trouble.

The court was then cleared, and the Committe after deliberation determined,

" *That the ſitting member was not duly* " *returned, and, That the petitioner ought to* " *have been returned* *.

Which reſolutions the chairman reported to the Houſe on the ſame day (1 July).

The return was amended in the Houſe on the next day, after which, the order uſual in ſuch caſes, was made, viz.

" That the honourable St. Andrew St. " John, and the freeholders of the county " of Bedford, be at liberty to petition this " Houſe to queſtion the election of the " right honourable Robert Henley Ongley, " Lord Ongley in the kingdom of Ireland, " within fourteen days next, if they think " fit †."

Mr. St. John preſented a petition accordingly on the ſeventh of July ‡, which

* Votes, 1 July, p. 329. † Votes, 2 July, p. 351. ‡ Votes, p. 378.

was

was ordered to be taken into conſideration October 12; being the day which had been before appointed for conſidering that of the freeholders, who in the beginning of the ſeſſion petitioned againſt the election of Mr. St. John.

The appointment of a day for this petition occaſioned a debate in the Houſe. A reſolution had paſſed on the 21ſt of June, to try no more election petitions in the ſeſſion, after the hearing of that from Hereford *: This period expired on the ſame day in which the Bedfordſhire return was amended, and leave was given to Mr. St. John to petition.

The debate was occaſioned by a motion to take his petition into conſideration on the 22d of July, ſeveral members contending, that the peculiar hardſhip of his caſe, intitled him to have his petition heard in the courſe of the ſeſſion. On the other ſide, the foregoing reſolution was held forth as concluſive againſt the motion: To which it was replied, that this reſolu-

* Votes, p. 262.

tion

tion related only to the petitions then depending, and could not operate upon thoſe which might ariſe from events ſubſequent to the time of paſſing it; upon which the Houſe muſt neceſſarily exerciſe its diſcretion according to circumſtances: But the debate concluded, by referring the petition to the day above-mentioned.

NOTES

NOTES

ON THE CASE OF

BEDFORDSHIRE.

PAGE 324. (A). This reſolution, as ſet forth in the votes of this day, is as follows: "Several petitions, complaining of undue elections and returns, being offered to be preſented to the houſe,"

"Reſolved,

"That whenever ſeveral petitions, complaining of "undue elections or returns of members to ſerve in "Parliament, ſhall at the ſame time be offered to be "preſented to the Houſe, Mr. Speaker ſhall direct "ſuch petitions to be all of them delivered in at the table "where they ſhall be claſſed and read in the following "order, viz. Such petitions as complain of double "returns in the firſt claſs; Such as complain of the "election or return of members returned to ſerve for "two or more places, in the ſecond claſs; Such as "complain of returns only in the third claſs; And "the reſidue of the ſaid petitions, in the fourth claſs: "And the names of the places to which ſuch petitions "(contained in the firſt claſs, if more than one) ſhall "relate, ſhall, in the firſt place, be written on ſeveral "pieces of paper of an equal ſize, and the ſame pieces "of paper ſhall be then rolled up, and put by the clerk

" into a box or glaſs, and then publicly drawn by the " clerk; and the ſaid petitions ſhall be read in the or- " der in which the ſaid names ſhall be drawn: And " then the like method ſhall be obſerved with reſpect " to the ſeveral petitions contained in the ſecond, third, " and fourth claſſes reſpectively."

The firſt ſeſſion in which the ſtatute 10 Geo. III. ch. 16. (called Grenville's bill) took place, was that which began Nov. 13, 1770; but there being few elections, and ſtill fewer conteſts, occaſioned by the accidental vacancies during a Parliament, the neceſſity of ſome regulation of election petitions, did not occur till after the general election next following: But in the firſt ſeſſion of the new Parliament called in 1774, it ſoon appeared neceſſary, and was recommended by the Speaker to the Houſe, in order to avoid the confuſion which the great number of petitions would have created in their proceedings. Accordingly, on the firſt day of petitions in this ſeſſion (6 Dec. 1774) after ſeveral had been read, the following entry appears in the Journal*:

" And ſeveral other petitions, complaining of un- " due elections and returns, being offered to be pre- " ſented to the Houſe at the ſame time; and Mr. " Speaker having recommended to the Houſe, to con- " ſider what was fit to be done upon that and ſimilar " occaſions, and to eſtabliſh ſome proper order relative " to the *method of delivering in* the ſaid petitions,

" Reſolved,

" That whenever more than one petition, complain- " ing of an undue election for the ſame, or for diffe- " rent places, ſhall at the ſame time be offered to be " preſented to the Houſe, Mr. Speaker ſhall direct

* 35 Journ. 16.

" ſuch

" ſuch petitions to be all of them delivered in at the " table; And the names of the counties, cities, bo- " roughs, or places to which ſuch petitions ſhall re- " late, ſhall be written on ſeveral pieces of paper of an " equal ſize, and the ſame pieces of paper ſhall be " then rolled up, and put by the clerk into a glaſs or " box, and then publicly drawn by the clerk; and the " ſaid ſeveral petitions ſhall be read in the order in " which the ſaid names ſhall be drawn reſpectively."

This order was directed to be followed in the next ſeſſion, with reſpect to *renewed* petitions *. In the beginning of the new Parliament called in 1780, it received a new form: The entry in the Journal † of the 7th of November is as follows:

" Several petitions, complaining of undue elections " and returns, being offered to be preſented to the " Houſe,

" Reſolved *Nemine contradicente*,

" That whenever ſeveral petitions, complaining of " undue elections or returns of members to ſerve in " Parliament, ſhall, at the ſame time, be offered to be " preſented to the Houſe, Mr. Speaker ſhall direct " ſuch petitions to be all of them delivered in at " the table, where they ſhall be claſſed, and read in " the following order, viz. Such petitions as complain " of double returns, in the firſt claſs; Such as com- " plain of the election or return of members returned " to ſerve for two or more places, in the ſecond claſs; " And the reſidue of the ſaid petitions, in the third " claſs: And the names of the places——&c." *as in the order before recited of the laſt ſeſſion.*

* 35 Journ. 407. † 38 Journ. 11.

In the ſeſſion next following, the ſame order as above-mentioned paſſed, confirming the former in reſpect of renewed petitions *. Soon after the meeting of the preſent Parliament, it was thought neceſſary to make a new ſubdiviſion in the claſſes of petitions, as before ſtated.

Theſe modes of arrangement relate only to the order in which petitions are to be *read*, when ſeveral are delivered together; the name which the Houſe may chooſe to give to the ſubject of each, cannot be ſuppoſed to operate further than is neceſſary to direct their proceeding in this reſpect; For it would be contrary to the words and ſpirit of the ſtat. 10 Geo. III. to give, by theſe orders, any inſtructions of duty to the election Committees, whoſe juriſdiction over petitions is independent of the Houſe, and concluſive upon the queſtion. Nor can it be intended for this purpoſe, as is plain from the practice in caſe of the delivery of one petition only, and in the caſe of preſenting *new* petitions in ſeſſions ſubſequent to the firſt of a Parliament; in which the above orders do not operate.

I have not been able to diſcover with certainty when the Houſe began to diſtinguiſh between the *return* and the *merits* of an election, in the trial of petitions: The general order of inſtructions to the old Committees of privileges and elections, contained no reference for this purpoſe; the only diſtinction made in that order, was that for giving a preference to the caſes of double returns. But it has been uſual, for more than a century paſt, to make ſpecial references of petitions to thoſe Committees, when the circumſtances of the caſe were thought to require it; as in the caſe of Clithero, in

* 38 Journ. 594.

1706,

1706, (15 Journ. 232.) and the caſe of Steyning in 1711, (17 Journ. 117.) "to hear the merits of the return firſt." In the caſe of Wigan, in 1713, (17 Journ. 493.) "to examine firſt into the manner of ſigning the petition," and in a great variety of caſes. However, the former mode of referring petitions can have no influence upon the preſent, any more than the former mode of trying them; the Houſe *then* acted diſcretionally, *now* it muſt follow a method preſcribed by the law of the land.

Before I quit this ſubject, it may be proper to explain how it happened, that the caſes of Pontefract and Ipſwich, were appointed to be heard, before thoſe of Mitchell and Downton, which were double returns: For though there is now no order for the priority of *hearing* caſes of double returns *, yet the Houſe has followed the antient courſe in this reſpect: So it would have happened in theſe two caſes, had not the parties themſelves intimated, that they could not be prepared by the time intended to be fixed for the hearing of the firſt petitions of the ſeſſion; the parties in the two firſt, being prepared, took their ſtation of precedence, that no time might be loſt.

P. 326. (B.) The ſame opinion prevailed in the caſe of Morpeth, in 1774: There were four candidates; one candidate and his friends, had preſented petitions againſt the *return*, for the conſideration of which, a day was appointed; afterwards, another candidate and his friends, petitioned upon the merits of the election, and theſe petitions were ordered to be taken into conſideration on the ſame day with the former: But before

* See 1 Doug. Elect. 48, 49.

that day, a motion was made for ſeparating the claims of the parties and their petitions, by putting off the petitions upon the *election* to a ſubſequent day; which after a debate (and diviſion on one part of the queſtion) was carried *.

P. 327. (C.) When I heard this argument, it ſeemed to me fallacious, and I have been confirmed in my opinion by ſubſequent reflection. The great difference between the preſent and former juriſdiction and practice of the Houſe, upon theſe occaſions, has been ſlightly mentioned in p. 405. Note (A.); from this difference it follows, that any reſolution of the ſort contended for, can have no other effect upon the election Committee than that of ſhewing the opinion of the Houſe, declared extrajudicially; which has no more binding force, than a reſolution of the Houſe of Lords for the ſame purpoſe. It ſeems to me that no petition ought to be referred to an election Committee, or to occaſion a ballot, but ſuch as is deſcribed by the ſtat. 10 Geo. III. and upon which the Houſe exerciſes no other diſcretion than that which forms require; and likewiſe, that no reference ſhould be conſidered by thoſe Committees as binding, but ſuch as that act makes the foundation of their juriſdiction.

The Houſe itſelf appears to have conſidered the ſubject in this view, by a reſolution in the beginning of the Parliament of 1774, the entry of which in the Journal is as follows:

(An election petition being preſented) "The Houſe "was moved, that an act made in the 10th year of "his preſent Majeſty, intitled, '*An Act to regulate the*

* 35 Journ. 61.

"*trials*

" *trials of controverted elections, or returns of members* " *to ſerve in Parliament,*' might be read.

" And the ſame being read accordingly,

" Reſolved,

" That according to the true conſtruction of the " ſaid act, whenever a petition, complaining of an " undue election or return of a member to ſerve in " Parliament, ſhall be offered to be preſented to the " Houſe, within the time limited by the order of the " Houſe for queſtioning the returns of members to " ſerve in Parliament, the ſaid petition ſhall be deli- " vered in at the table, and read, *without a queſtion* " *being put thereon* *."

Thoſe who contended for referring the petition in queſtion, for the purpoſe mentioned, would perhaps in the event have been deceived in their expectations. This Committee in fact rejected two points of Lord Ongley's petition. By the reſolution ſtated in p. 376. it appears, that they muſt have judged of their competency to enter upon thoſe parts of it, though the Houſe had referred to them the *whole* petition as againſt the *return only*. This power is a neceſſary conſequence of the juriſdiction. The firſt argument in the cauſe, on the part of the ſitting member, had very much the appearance of a plea to the juriſdiction, founded in the impropriety of the reſolution of the Houſe; but it was not on that account diſcountenanced by the Committee: Nor does it at all follow from their deciſion, that they were guided to it, by the vote of prejudication in the Houſe.

The Houſe formerly could, and often did, refer *parts* of petitions to the Committees of privileges and

* See 35 Journ. 10.

elections; but they cannot follow this courſe now: When an election petition is read, a day muſt be appointed for balloting for the ſelect committee to try it. This inſtance alone is ſufficient to illuſtrate the obſervation above made, that the power I am contending for is a neceſſary conſequence of the new juriſdiction.

The argument uſed by the counſel for the petitioner in p. 337. 'that the oath binds them to try the matter of the petition,' is, in the ſenſe in which they urged it, equally applicable to juries, when ſworn *to try the iſſue*; who, notwithſtanding, are very well ſatisfied with the diſcharge of their duty, when they give themſelves no concern about the iſſue, if the judge ſhould inform them that in law they ought not to try it. But it ſeems to me, that according to the true conſtruction of the oath, the petition would be *tried*, and the duty would be fully diſcharged, conſcientiouſly as well as legally, by declining to enter upon the matter of a petition, if the members ſhould be of opinion that it was not in point of law fit for their conſideration.

P. 334 (D.) By the third ſection of ſtat. 7 and 8 Will. III. ch. 25. It is enacted, That in caſe a poll ſhall be required at a county election, "the ſheriff, or, in his abſence, his underſheriff with ſuch others as ſhall be deputed by him, ſhall forthwith there proceed to take the ſaid poll, in ſome open or public place or places, by the ſame ſheriff, or his underſheriff as aforeſaid in his abſence, or others as aforeſaid, appointed for the taking thereof. And for the more due and orderly proceeding in the ſaid poll, the ſaid ſheriff, or, in his abſence his underſheriff or ſuch as he ſhall depute, ſhall

appoint ſuch number of clerks as to him ſhall ſeem meet and convenient, for taking thereof: Which clerks ſhall all take the ſaid poll in the preſence of the ſaid ſheriff, or his underſheriff, or ſuch as he ſhall depute. And before they begin to take the ſaid poll, every clerk ſo appointed, ſhall by the ſaid ſheriff, or his underſheriff as aforeſaid, be ſworn truly and indifferently to take the ſame poll, and to ſet down the names of each freeholder, and the place of his freehold, and for whom he ſhall poll; and to poll no freeholder who is not ſworn, if ſo required by the candidates or any of them: (which oath of the ſaid clerks, the ſaid ſheriff, or his underſheriff, or ſuch as he ſhall depute, are hereby impowered to adminiſter) And the ſheriff, or in his abſence his underſheriff as aforeſaid, ſhall appoint for each candidate ſuch one perſon as ſhall be nominated to him by each candidate, to be inſpectors of every clerk who ſhall be appointed for taking the poll."

This proviſion is enforced by the ſeventh ſection of 18 Geo. II. ch. 18. which requires a certain number of booths to be erected for taking the election; and by ſect. 9. "The ſheriff, or in his abſence, &c. (*as before*) ſhall allow a cheque-book for every poll-book, for each candidate, to be kept by their reſpective inſpectors, at every place where the poll ſhall be taken or carried on."

P. 389. (E.) This caſe was determined in Michaelmas term, 1783. The claims of the parties had been directed by the court, to be tried upon the iſſue, "*Which of them had been duly elected*;" At the trial, the defendant admitted, that, in fact, a majority had elected the plaintiff; but contended, that, according to an agreement of the parties before the election, the right of voting

voting was conſidered for that time, to be in *reſidents* only, and that of them he had a majority. The judge rejected the defendant's witneſſes as incompetent from intereſt; but on a motion for a new trial in the court of King's Bench againſt the judge's deciſion, all the judges there agreed (though they differed upon other conſiderations, as to the propriety of granting a new trial) that the witneſſes were competent; that, the election being over, and the agreement *pro hâc vice* only, they had no intereſt but ſuch as related to their future right on another election, with which their paſt right had no connection.

The counſel who ſupported this ſide of the queſtion, relied upon the caſe of the King and Bray, which they cited from the law of *Niſi Prius* *. Mr. Juſtice Buller in delivering his opinion, ſaid, "The rule laid down by Lord Hardwicke, in that caſe, ſhould be always followed, viz. That if the intereſt be doubtful, the objection goes to the *credit* only; and this rule extends to all caſes, where it is uncertain whether there is an intereſt." Mr. Juſtice Aſhhurſt who had tried the cauſe, retracted his former opinion. Lord Mansfield ſaid, "Competency in our law has been carried to an extravagant length; as in the caſes of commoners and others, where the intereſt is hardly diſcernible: I would not draw this line tighter, but incline to the rule of Lord Hardwicke ——."

The words of Lord Hardwicke, ſtated in the book above referred to are theſe, "In doubtful caſes, he ſaid, it was his cuſtom to admit the evidence, and to give ſuch directions to the jury as the nature of the caſe might require,"

* Edit. 1772. p. 286.

P. 390.

P. 390. (F.) Lord Hardwicke, in p. 360. of the Reports of Caſes in his time, ſays, (after diſtinguiſhing between an *office* and an *authority* in the Eliſor's caſe) "I know no inſtance, where a man by having a bare authority, which gives him no intereſt, will be hindred from being a witneſs, if he is not a party in the cauſe; ſo a bailiff who executed a writ may be a witneſs, if he is not a party; but an *office* always gives an intereſt.—If we ſhould allow of ſuch doctrine, (*i. e. that the being ſubject to an information affected the witneſs's competency*) it would go too far; for it is daily experience, that perſons who have executed offices in corporations, when that office has been afterwards called in queſtion, have been allowed as witneſſes to prove, if it depends on cuſtom, what has been uſually done; Yet they are liable to informations in *quo warranto*, if the cuſtom ſhould not warrant the office——."

VI.

THE

CASE

Of the BOROUGH of

COLCHESTER,

In the County of ESSEX.

The Committee was choſen on Thurſday, the 1ſt of July, and conſiſted of the following Members:

Sir Herbert Mackworth, Bart. Chairman.
Robert Smith, Eſq;
Lord Milford.
James Amyatt, Eſq;
Sir John Trevelyan, Bart.
Sir John Jarvis, K. B.
George Jennings, Eſq;
Sir William Moleſworth, Bart,
Philip York, Eſq;
Daniel Pulteney, Eſq;
William Pochin, Eſq;
Francis Anneſley, Eſq;
Thomas Aubrey, Eſq;

NOMINEE,
Of the Petitioner,
Sir Joſeph Mawbey, Bart.
Of the Sitting Member,
John Mortlock, Eſq;

PETITIONER,
Sir Robert Smyth, Bart.
Sitting Member,
Chriſtopher Potter, Eſq;

COUNSEL,
For the Petitioner,
Mr. Piggott and Mr. Graham.
For the Sitting Member.
Hon. Mr. Erſkine and Mr. Mingay.

THE CASE

Of the BOROUGH of COLCHESTER.

THE petition alledged, That at the laſt election for the borough of Colcheſter, Sir Edmund Affleck, Bart. Chriſtopher Potter, Eſq; and the petitioner were condidates; that the petitioner had the majority of legal votes, but that the mayor, from partiality to Mr. Potter, illegally rejected rightful votes for the petitioner, and admitted illegal votes for Mr. Potter; That Mr. Potter, by theſe means, and alſo by bribery, had procured himſelf to be unlawfully returned. "And that a "Commiſſion of bankrupt was iſſued "againſt the ſaid Chriſtopher Potter, on "the 17th of April 1783, and he was "there-

" thereupon found and declared a bank-
" rupt; and on the ſecond day of the
" month of May following, an aſſignment
" of all his eſtate and effects whatſoever
" was made for the benefit of his credi-
" tors; And that at ſuch time the ſaid
" Chriſtopher Potter had no freehold eſtate
" whatſoever; and from the eſtate and ef-
" fects of the ſaid Chriſtopher Potter, the
" petitioner is informed no more than two
" ſhillings and ſix-pence in the pound has
" been paid to his creditors; And for theſe
" reaſons *, the petitioner begs leave to
" repreſent to the Houſe, that the ſaid
" Chriſtopher Potter had not, at the time
" of the ſaid election, ſuch an eſtate in law
" or equity, for his own uſe and benefit,
" of and in lands, tenements or heredita-
" ments, as qualified him to be elected
" and returned to ſerve as a member for
" the ſaid borough, according to the law
" in that behalf made and provided, and
" that the ſaid Chriſtopher Potter was not
" capable of being elected and returned †."

* The reader will ſee in the courſe of the cauſe, the reaſon for copying this part of the petition at length.

† Votes, May 25. p. 24.

Their

There is no reſolution of the Houſe of Commons of the right of election in Colcheſter: In the ſeveral controverted elections that have happened ſince the year 1628, the parties have agreed upon this point. The entries in the Journals of theſe agreements were mentioned to the Committee by the counſel: The firſt is in 11 Journ. 536. on 28 march 1696. "It was agreed to be in the ſworn burgeſſes not receiving alms:" On 27 january 1710-1, in 16 Journ. 470. "—in the mayor, aldermen, common council and burgeſſes:" On 6 may, 1714. in 17 Journ. 616. "—in the mayor, aldermen, common council and free-burgeſſes not receiving alms" (A.) No queſtion aroſe in this cauſe upon the right of election.

The due election of Sir Edmund Affleck was admitted by both parties.

The numbers on the poll for the ſeveral candidates, were

For Affleck	665
Potter	425
Smyth	416

At the election, Mr. Potter was formally called upon to ſwear to his qualification,

and he delivered in a paper containing an affidavit of a ſufficient eſtate, ſworn before the mayor.

The counſel for the petitioner in opening his caſe, ſtated, That they intended to prove that ſeventy three bad votes had been admitted on Potter's ſide, and thereby to give their client a great majority on the poll. They ſaid they would forbear to enter into particulars upon that point in the opening, becauſe they hoped to ſecure the ſeat to the petitioner, by proceeding firſt of all, upon the charge in the petition againſt the ſitting member's qualification; That in the proſecution of this charge, they ſhould prove him to be incapable of ſupporting his election, after which it would be only neceſſary to diſqualify ſo many of the oppoſite votes, as would leave the majority with Sir Robert Smyth. They did not inſiſt upon the ſuppoſed diſqualification by Mr. Potter's bankruptcy; probably they were aware of a fact that was afterwards offered to be proved on his part, viz. That he had obtained a certificate from his creditors before the time of the

election. Therefore the argument was confined to the ſtanding orders of the Houſe of Commons, as connected with the ſtatutes of qualification.

In order to underſtand this queſtion, it is neceſſary to ſtate the ſtatutes and orders of the Houſe upon the ſubject of a member's qualification by eſtate.

By ſtat. 9 Anne, ch. 5. ſect. 1. " — no perſon ſhall be capable to ſit or vote as a member of the Houſe of Commons *," for

* The remainder of this ſection is ſubſtantially as follows: " —— who ſhall not have an eſtate, freehold or copyhold, for his life or greater eſtate, for his own uſe, in lands or hereditaments, clear of incumbrances, within England or Wales, of the annual value of 600l. above reprizes for every knight of a ſhire, and of 300l. above reprizes for any other member: And if any perſon ſhall not, at the time of his election and return, be intitled to ſuch an eſtate as is reſpectively required, ſuch election and return ſhall be void." Sect. 2. excepts from this proviſion the eldeſt ſons of peers, and of perſons qualified as above to be county members. Sect. 3. excepts members for the univerſities. Sect. 4. reſtrains the qualification by mortgage to certain terms. Sect. 5. & 6. preſcribe the form of an oath for aſcertaining the qualification, which candidates are to take, if required either at the election or before the meeting of Parliament. Sect. 7. impowers the returning officer,

for any place in England or Wales, without poſſeſſing an eſtate of 600l. a year, if member for a county, and 300l. a year, if member for a town (B).

By the ſtanding orders of the Houſe for inforcing the proviſions of this ſtatute, firſt paſſed in 1713-4, and made ſtanding orders on the 21ſt of november, 1717 *,

1. "Notwithſtanding the oath taken by any candidate, at or after any election, his qualification may afterwards be examined into."

2. "The perſon whoſe qualification is expreſsly objected to in any petition relating to his election, ſhall, within fifteen days after the petition read, give to the clerk of the Houſe of Commons, a paper ſigned by himſelf, containing a rental, or

cer, or any two juſtices, to adminiſter the oath, and requires them to certify it into the Chancery, or King's Bench, under a penalty; "and if any of the ſaid candidates or perſons propoſed to be elected as aforeſaid, "ſhall wilfully refuſe, upon reaſonable requeſt to be "made at the time of the election, or at any time before the day upon which ſuch Parliament by the writ "of ſummons, is to meet, to take the oath hereby required, then the election and return of ſuch candidate or perſon ſhall be void."

* 18 Journ. 629.

particular of the lands, tenements, and hereditaments, whereby he makes out his qualification; of which any perſon concerned may have a copy."

3. "Of ſuch lands, &c. whereof the party has not been in poſſeſſion for three years before the election, he ſhall alſo inſert, in the ſame paper, from what perſon, and by what conveyance, &c.—and the names, &c.—"

4. "If any ſitting member ſhall think fit to queſtion the qualification of a petitioner, he ſhall, within fifteen days after the petition read, leave notice thereof in writing with the clerk;—and the petitioner ſhall, within fifteen days after ſuch notice, leave with the clerk the like account —of his qualification, as is required from a ſitting member (C)."

After a conſiderable experience, it was found neceſſary to guard againſt a method of evading this laſt order, which perhaps had been put in practice, by preſenting a petition in the names of the *electors*, and not from the unſucceſsful candidate. The Houſe therefore extended their reſolution

to this caſe, by paſſing another on the 6th of february, 1734-5, the entry whereof is as follows:

" The Houſe was moved, that the ſtand-
" ing orders of the Houſe, made the 21ſt
" of nov. 1717, in relation to the quali-
" fication of members, might be read.
" The ſame were read accordingly.

" Reſolved, That on the petition of any
" elector or electors, for any county, city,
" or place, ſending members to parlia-
" ment, complaining of an undue election
" and return, and alledging that ſome
" other perſon was duly elected, and ought
" to have been returned; the ſitting mem-
" ber ſo complained of, may demand and
" examine into the qualification of ſuch
" perſon ſo alledged to be duly elected, in
" the ſame manner as if ſuch perſon had
" himſelf petitioned *."

This reſolution was then made a ſtanding order.

In the year 1759, it was thought neceſſary to add further regulations by act of Parliament, to render the ſtatute of Anne

* 22 Journ. 355.

more

more effectual: This was done by ſtat. 33 Geo. II. ch. 20. wherein it is enacted that all members of the Houſe of Commons (with the former exceptions) before they preſume to vote, or ſit, in the Houſe, ſhall publicly deliver in at the table while the Houſe is ſitting, a ſchedule of their qualifications, ſpecifying the ſituation, &c. and ſhall take and ſubſcribe an oath of the truth of the ſchedule. The oath is to be enrolled, and the ſchedule filed by the clerk; And the election of a member not complying with this act, or not being duly qualified, ſhall be declared void, and a new writ ſhall iſſue.

Mr. Potter had not, at the time when this cauſe came on, taken his ſeat in the Houſe, nor delivered in the particular of his qualification required by 33 Geo. II. and the ſecond ſtanding order above recited.

The counſel for the petitioner contended, That according to the ſtatutes, and orders of the Houſe of Commons, the ſitting member was abſolutely diſqualified,

and his election void; they argued in the following manner:

No good reaſon can be aſſigned for making the ſecond ſtanding order, but for the purpoſe of excluding from the Houſe thoſe who ſhall not comply with it; it is a juſt and neceſſary concluſion, upon the legal principles of evidence, that he who diſobeys it, is incapable of complying with it, for want of the neceſſary eſtate; it is a preſumption ſo ſtrong, as to warrant a proceeding againſt ſuch member, in the ſame manner as if the fact of incapacity were affirmatively proved.

Not knowing what ground of defence may be taken for the ſitting member, there is little room for argument upon the ſubject, becauſe the reaſoning upon the premiſes, naturally and immediately leads to the concluſion contended for. It is hardly neceſſary, on the part of the petitioner, to ſhew any thing more than that the petition contains an expreſs objection to the ſitting member's qualification; this is clear upon the face of it.

The manner in which the Houſe has, in ſeveral inſtances, inforced the ſtanding order

order againſt petitioners, confirms this argument. The mode of expreſſion in this order is the ſame as in the other; they are both poſitive injunctions upon the parties concerned, and therefore the breach of both, muſt, upon the principles above-mentioned, be equally penal.

The firſt caſe in which the Houſe appears to have inforced thoſe orders, is that of Honiton in 1715, the entry of which is in theſe words;

"The Houſe being acquainted, that Sir William Courtenay, and William Yonge, Eſq; ſitting members for the borough of Honiton, did, on 29th march laſt, purſuant to the reſolution of this Houſe of the 23d of the ſame march *, leave with the clerk of the Houſe their demand of the qualification of James Sheppard, Eſq; who petitioned, complaining of an undue election and return for the ſaid borough, and that he had not delivered in to the clerk any paper of his qualification;

* All the four reſolutions had then paſſed. See 18 Journ. 20. and Note (C.)

"The

"The demand of the ſaid qualification was read; and alſo the reſolution of the Houſe of the 23d of march laſt was read. And the clerk being called upon, acquainted the Houſe, That he had not received any particular of Mr. Sheppard's qualification.

"*Ordered*, That the Committee of privileges and elections be diſcharged from proceeding upon the petition of the ſaid James Sheppard, Eſq; he having neglected to comply with the ſaid reſolution of this Houſe, in not delivering in his qualification within fifteen days after the demand thereof *."

The next proceeding of this ſort happened in 1717, in the caſe of Leominſter; the Journal of the 8th of may † of that year, contains an entry in the ſame words as the foregoing, with reſpect to both petitioners: The precedent of Honiton was then referred to and read to the Houſe, and exactly followed.

In the caſe of Shafteſbury in 1722-3 ‡, the ſame proceeding took place with reſpect

* 18 Journ. 71. † 18 Journ. 543. ‡ 20 Journ. 130.

to

to one of the petitioners, Mr. (afterwards Sir Clement) Wearg; and the Committee were diſcharged from proceeding upon ſo much of the petition as concerned him.

In the caſes of Steyning in 1724-5 * — of Minehead in 1727-8 † —and of Weſtbury in 1734-5 ‡, the Houſe paſſed the ſame reſolution againſt the petitioners.

The ſtanding order under which theſe proceedings were had, relates only to the *candidate* petitioner; but where the candidate has not petitioned, and the election has been queſtioned by the electors only, the Houſe has inforced the explanatory order of 6th feb. 1734-5, in the ſame manner as the former. Soon after the making of that order, on the 21ſt of the following march, it was put in practice in the caſe of Liverpool; in which the electors alone having petitioned in behalf of their candidate, his qualification was demanded, and not being produced, the ſame order was made againſt him as in the caſes before cited §.

* 20 Journ. 368. † 21 Journ. 66. ‡ 22 Journ. 395. § 22 Journ. 426.

The

The proceedings here mentioned, being againſt *petitioners* only, it will no doubt be urged by the oppoſite counſel, that they are not in point to the preſent caſe, and do not bear upon a ſitting member: But although there may be no precedent in which the order againſt a ſitting member has been inforced in the ſame manner as that againſt a petitioner; yet, as the principle of it is the ſame, it muſt neceſſarily have the ſame effect upon a caſe falling within the terms of it, as the preſent does: Perhaps no caſe of the ſort may have happened before; No argument alone will perſuade the Committee that there is a difference, unleſs they can add to it; an inſtance in which the Houſe has put that conſtruction upon their order. It might be argued, that the principle is applicable *a fortiori* to the caſe of ſitting members; for it is a greater offence in any member of a particular body to diſregard its inſtitutions, than in ſtrangers.

However, there are two caſes in the Journals, which are applicable to the caſe of ſitting members, and illuſtrate the point now

now contended for: In the caſe of Weymouth in 1730*, "The counſel for the petitioner inſiſted, that Mr. Betts (the ſitting member) having not complied with the act of Parliament which requires an oath of qualification, *nor with the ſtanding order of the Houſe*, which requires a particular in writing of his qualification to be left with the clerk of the Houſe, his election is therefore void; And that by conſequence the petitioner having the next majority on the poll, was duly elected."—— The counſel for Mr. Betts admitted the facts, and the Committee (and afterwards the Houſe) reſolved that he was not duly elected. It was not neceſſary to go further in that caſe, and to ſeat the petitioner, becauſe the latter did not contend (as Sir Robert Smyth now does) that he had the majority on the poll: Therefore the reſolution only went to a void election. If it ſhould be ſaid in anſwer to this caſe, that it proceeds upon the *ſtatute* as well as the order, it may be replied, that the evidence

* 21 Journ. 574.

ſtated

ſtated in the report, ſhews that Mr. Betts could not have been preſent at the election; ſo that he was not within the purview of the ſtatute: Therefore the effect of this reſolutition is derived from the ſtanding order only (D).

In the caſe of Malden, in 1715*, the Houſe reſolved, "That John Comyns, ſerjeant at law, having at the late election of members to ſerve in Parliament, for the borough of Malden, in the county of Eſſex, wilfully refuſed to take the oath of qualification as is directed by an act of parliament of the 9th year of the late Queen Anne, intitled, 'An act for ſecuring the freedom of parliaments, by the farther qualifying the members to ſit in the Houſe of Commons,' though duly required ſo to do; and not having at any time before the meeting of this Parliament taken the ſaid oath; his election is thereby void."

This caſe, it is true, proceeds altogether upon the ſtatute; but the principle of the

* 18 Journ. 129.

ſtanding

ſtanding order, is to effectuate the regulation of the ſtatute, and in this reſpect the ſame as that of the ſtatute. The only difference between them is this; the ſtatute preſcribes one method of aſcertaining the qualification, the ſtanding order another: The concluſion of both is the ſame; by refuſing to take the oath, the ſtatute infers the deficiency; the order of the Houſe infers it from the neglect to deliver a rental.

If the Committee ſhould be of opinion that the ſitting member, after his diſobedience of the order, cannot retain his ſeat, they will declare that opinion; for the petitioner has a right to call for it from them, in this ſtage of the cauſe; becauſe it will follow, that the ſitting member cannot after that ſtand before them, as an opponent to the petitioner, in making out his claim; he thereby forfeits every pretenſion to a ſeat in the Houſe upon this election, and conſequently ought not to interfere with the claim of another. In this caſe it will be only neceſſary for the petitioner to diſqualify ten votes on the part of the ſitting member, to obtain the ſeat; for the petitioner

tioner admits that he ought to ſhew a majority on his ſide. This inquiry, it may be ſaid, will be *ex parte*, and a hard caſe; but it is warranted by the practice of the Houſe in ſuch circumſtances: In the caſe of Boſſiney, 18 march, 1741-2 *, the ſitting members not attending by counſel, the Houſe allowed the petitioners to proceed in ſuch an *ex parte* objection to the majority. No wrong will happen to the electors of Colcheſter, by this mode of proceeding, becauſe if the petitioner ſhould be ſeated, they may then, if they chooſe, petition the Houſe againſt his election (E).

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

The whole argument for the petitioner is confined to the ſtanding order of the Houſe; it is therefore admitted that the ſitting member has not diſobeyed either of the ſtatutes; ſo far his ſeat is ſecured by the law of the land. In fact, he complied with the ſtatute of Anne, by ſwearing to his qualification when requeſted: The

* 24 Journ. 135.

ſtat.

ſtat. of Geo. II. only lays down a rule for members, *when they take their ſeats*; he has not yet taken his ſeat, and is therefore free likewiſe from the penalty of that act.

Before the Committee can take the courſe deſired in behalf of the petitioner, they muſt be perſuaded, both that the petitioner has duly performed the part required of him in the ſtanding order, by making an *expreſs* objection to the qualification; and alſo, that the Houſe of Commons, by their own orders, can make a diſqualification not known to the law.

Firſt, the ſtanding order does not attach upon the ſitting member, for the objection is not *expreſs*; the petition does not directly aver the incapacity, but is argumentative, and ſuppoſes it by inference from the facts alledged, viz. "Having been a bankrupt, and not having at that time a ſufficient eſtate,—*for theſe reaſons*, &c. the ſaid Chriſtopher Potter is not qualified *." Now all theſe facts may be true and yet the concluſion does not follow. He *was* a bankrupt,

* See the petition, p. 416.

and might not have then had a qualification, but he was afterwards enabled by a certificate to acquire ſuch property as gave him a qualification at the election; and the production of that certificate would be a ſufficient anſwer to the charge of the petition, if it had been inſiſted upon now. The allegation ought to have been ſuch, as if true, would have convicted the ſitting member of perjury in his affidavit; becauſe that alone would prove the incapacity.

The ſtanding order could not mean to require more of a ſitting member, than to diſprove the petition; therefore where the want of eſtate is charged, he muſt ſhew one ſufficient: But it would be abſurd to put him to this trouble, when the charge, if true, would not prove him deficient in the eſtate required. Therefore the ſitting member cannot be ſaid to have diſobeyed the ſtanding order. More eſpecially, the Committee ought to put this conſtruction upon it, when it is contended that the contrary is to have the effect of expulſion.

But, ſecondly, ſuppoſing the ſitting member to have diſobeyed the ſtanding order,

order, the point contended for, will not be the conſequence of this conſtruction, for the Houſe of Commons *cannot make a legal diſqualification*; the Legiſlature alone can do that.

The caſes that have been mentioned to the Committee, do not eſtabliſh this point; they are all juſt examples of practice reſpecting the order they depend on, but no more. If any one inſtance were produced, in which the Houſe had inforced the order upon *ſitting members* in the ſame manner, the Committee might follow it, without oppoſition from Mr. Potter. But it is impoſſible to find ſuch a caſe.

There is a wide difference between the two caſes: All ſuitors for juſtice muſt neceſſarily be ſubject to the rules and orders of the court in which they ſue; its juriſdiction over them is abſolute. The caſes cited from the Journals are only illuſtrations of this rule, and of the manner in which the Houſe of Commons has rejected claims, that were not regularly and juſtly made.

But a ſitting member derives his place from a power without the juriſdiction of

the Houſe;—from the original ſource of authority in his conſtituents. Their election inveſts him with an office of which nothing but the law of the land can deprive him, and by the return he becomes legally fixed in it. Now the argument on the other ſide tends to this: Although a man is lawfully poſſeſſed of this right, has diſobeyed no law in acquiring it, and is duly qualified to hold it according to the *ſtatutes*, yet it ſhall be taken from him by reaſon of a conſtructive diſability, deduced from a rule of practice of the Houſe of Commons. To inforce this doctrine, would be to revive the precedent of the Middleſex election, of which the Houſe itſelf was afterwards aſhamed, and by a public vote has expunged it from the Journals *. The Committee therefore will not aſſume a power which the whole Houſe does not poſſeſs, and which it has never attempted to exerciſe in circumſtances like the preſent.

But the counſel on the other ſide, not ſatisfied with the expectation of a deciſion declaring the election void, claim to be admitted

* See 38 Journ. 977. 3 May, 1782.

mitted to the ſitting member's ſeat. Their authorities for this point fall very ſhort of it: The caſe of Weymouth, rather leads to a contrary concluſion, for it recites expreſsly that Mr. Betts *had not complied with the ſtatute*; ſo that he was abſolutely diſqualified by law. It is ſaid, the report ſhews he was not preſent at the poll; Be it ſo: The penalty is inflicted by the ſtatute, upon a refuſal to take the oath *at any time before the meeting of Parliament*; and it appears that the petitioner's counſel objected that Mr. Betts had not complied *with the ſtatute*. The evidence there produced to the Committee, ſeems to have been of a requeſt made to him at his own houſe after the election (D).

In the caſe of Malden, the queſtion aroſe entirely on the ſtatute of Anne; but even there the cauſe was regularly carried on between the incapable candidate and the petitioner, and the former was allowed to maintain the merits of the election againſt the latter; nor did the petitioner's counſel attempt to exclude him from it. Perhaps in this reſpect, the Houſe did not go far

enough; for Serjeant Comyns, when the act was read to him at the poll, before the election, and in the preſence of the electors, refuſed to comply with the act, and to take the oath. When the Houſe afterwards reſolved that this was a *wilful refuſal* (F), they might very juſtly have ſeated the other candidate; upon the principle, that the electors who voted for him after this public refuſal, knowingly threw away their votes*.

But Mr. Potter, at the election complied with the ſtatute, and regularly ſwore to a qualification.

The caſe of Boſſiney does not at all affect the preſent, becauſe the ſitting members there did not attempt to defend themſelves; the entry in the Journal ſtates expreſsly "that they deſired not to give the Houſe any further trouble †."

The counſel for the petitioner obſerved in reply,

* The petitioner was ſeated in this caſe; but it is made doubtful by the report, whether the reſolution for this purpoſe proceeded upon the effect of the ſitting member's diſqualification, or upon the majority of the petitioner's votes.

† See the beginning of col. 2. of p. 135. vol. 24.

That

That the counſel for the ſitting member had failed in eſtabliſhing a difference between the caſes of ſitting member and petitioner, as affected by the ſtanding order; That they had not weakened the principle upon which their argument for the petitioner had proceeded, which was, that the order in both caſes preſcribed a *rule of evidence* in aid of the regulations in the ſtatute, by which the legiſlative diſqualification was to be proved. It is not *making* a diſqualification in one caſe, more than in the other; for the candidate who is not returned, if elected by the majority, acquires the ſame lawful right, from which it is ſaid, nothing but the law of the land can deprive a ſitting member: A return, diſputed, does not affect the right one way or other. A reſolution of the Houſe, therefore, can no more deprive a petitioner of this right, than a ſitting member. In both caſes, while the petition is depending, this *right* is *ſub judice*; and therefore, ſuppoſing the ſtanding orders to be *rules of practice* only,

they are equally applicable to both parties: They are both, parts of one ſyſtem.

The words of the order "*expreſsly* objected to" evidently mean to deſcribe ſuch an objection, as muſt inform the ſitting member that his qualification *by eſtate*, is diſputed; —— to deſcribe this, in contradiſtinction to other grounds of diſqualification, by office, by minority, &c (G). Now, though the petition here ſtates a great deal more than neceſſary, it is impoſſible to read it without ſeeing an abſolute denial of the ſitting member's qualification *by eſtate*, in plain terms: It may be in part argumentative, but it is alſo *expreſs*. The *form* of the petition will not prevent its operation, while it has ſubſtance enough.

If the juſt and neceſſary concluſion from the breach of the order, be, as is contended for by the petitioner, that the ſitting member is not duly qualified, the Committee ought to determine his election to be void. Their next inquiry muſt be into the election of the petitioner; this is a neceſſary conſequence of ſuch a deciſion; for if a candidate has a majority of votes, his election

election can never be avoided. As to the argument, that a majority over Mr. Potter's numbers, may not be a *true* majority, that can only take place as between the electors and the petitioner; Mr. Potter cannot uſe it. The electors may *afterwards* *, if they chooſe, make this objection. The queſtion here (if the Committee ſhall decide againſt the ſitting member) will be the ſame as if he had died. But, at preſent, it is unneceſſary to enter upon this point, which will come to be conſidered, after the Committee ſhall have formed their opinion upon the firſt.

After the Committee had deliberated, the chairman informed the counſel that they had

" Reſolved, *That the petition preſented by Sir Robert Smyth, Bart. does contain an expreſs charge of want of qualification, againſt the ſitting member.*"

" Reſolved, *That Chriſtopher Potter, Eſq; has not complied with the ſtanding order of the Houſe of the 21ſt of November 1717, which requires,* ' that the perſon whoſe qua-

* See Note (E).

lification

'lification is expreſsly objected to in any pe-
'tition relating to his election, ſhall, within
'fifteen days after the petition read, give to
'the clerk of the Houſe of Commons a
'paper, ſigned by himſelf, containing a
'rental or particular of the lands, tenements,
'and hereditaments, whereby he makes out
'his qualification."

"Determined, *That the laſt election of members to ſerve in parliament for the borough of Colcheſter, in the county of Eſſex, is, ſo far as relates to Chriſtopher Potter, Eſq; a void election.*"

After theſe reſolutions were communicated to the bar, the counſel for the petitioner reſumed that part of their caſe by which they claimed the ſeat for their client; and propoſed to ſhew that he had a majority over Mr. Potter, by diſqualifying ten of his votes, which would leave the numbers for Mr. Potter 415, for Sir Robert Smyth 416. They ſaid,

The election of the ſitting member being declared void, he could have no pretence to maintain his ſtation in the Committee, in oppoſition to the petitioner; if that were

were to be permitted, there would be no difference between perſons qualified and diſqualified, and the difficulty of oppoſing an incapable perſon would be the ſame as if the moſt capable had ſtood in the ſame place. If the objection to the ſitting member had never been made, the utmoſt privilege of his ſituation would not have enabled him to do more than is now contended for in his behalf, after his incapacity is recorded.

The effect of the Committee's deciſion, is to put the ſitting member in the ſame ſituation with reſpect to the petitioner, as if he were outlawed or dead; and it would be unreaſonable to allow a perſon in that character, to carry on a cauſe in which he can have no intereſt (I). The only character in which he ought to appear before the Committee is annihilated; to allow of his remaining in the cauſe, is to inveſt him with a new one, for the ſole purpoſe of oppoſing the petitioner.

It may be ſaid, to be a hard caſe upon the electors, but if they will make their repreſentative one who is unworthy of the

place, they muſt ſuffer for their folly. The caſe of Boſſiney has been mentioned, upon which it has been obſerved, that the ſitting members did not conteſt the point; but nothing of this appears, till *after* the Houſe had allowed the petitioners to go through their whole caſe *ex parte*: It is therefore a precedent to warrant this proceeding. In the caſe of Callington, 17 feb. 1772 *, the petitioner having died after preſenting his petition, and before the time appointed for the hearing, the Houſe diſcharged the order for hearing it; thereby in effect adjudging the ſitting member duly elected: In this there was the ſame diſregard of the electors which has been imputed to the preſent claim, where mere accident, and no default of theirs, prevented the inquiry into the election.

The counſel for the ſitting member contended,

That the Committee muſt, from neceſſity, either admit the ſitting member to ſupport the rights of thoſe electors who ſent him to Parliament, in oppoſition to the petitioner, or elſe, give the electors an

* 33 Journ. 481.

oppor-

opportunity of exerciſing their franchiſe again, by the declaration of a void election without any further proceeding. There is no petition from theſe electors, nor could there be one, becauſe their candidate had ſucceeded, and poſſeſſed the ſeat.

The counſel cannot produce any inſtance from the Journals to warrant their mode of proceeding: It is ſaid, that in the caſe of Boſſiney, the proceedings were *finiſhed*, before it appeared that the ſitting members did not conteſt the ſeats; but the only material part of the proceedings, came *after this declaration* on the part of the ſitting members. The Journal ſtates the evidence on the ſide of the petitioners, then ſtates that the ſitting members were abſent, and had authorized a member preſent, in their names, to give up the point; *after* which follow the reſolutions, *adjudging the ſeats to the petitioners* *.

The Committee cannot in juſtice accede to the petitioner's propoſition, unleſs they ſhould be of opinion that the electors

* 24 Journ. 135.

threw

threw away their votes, when they gave them to Mr. Potter: Now this is impoſſible, becauſe he went through every neceſſary requiſite at the election, and was a lawful candidate; they could not foreſee that he would afterwards diſobey the order of the Houſe, and thereby incur a diſability. To annul their votes on account of this diſability, is to make them ſuffer by a judgment *ex poſt facto*. Where votes are held to be thrown away, it is always owing to ſome diſqualification apparent at the time, and known to the electors; which if they diſregard, they wilfully incur the loſs of their votes. This happened in the caſes of Fife in 1780, and Kirkudbright in 1781; and upon this principle the petitioners were ſeated in thoſe caſes (H).

The caſe of Callington does not affect the preſent; the whole circumſtances of it muſt be reverſed in order to ſuit the petitioner's purpoſe: If he could ſhew a caſe in which, upon the death of a *ſitting member*, the houſe had allowed a *petitioner* to take his ſeat without oppoſition, it would ſupport the argument (I). But the caſe of

of Callington ſhews only, that upon the death of a petitioner, his petition muſt neceſſarily drop with him.

On monday, July 5th, the Committee reſolved,

"*That the election of Chriſtopher Potter, Eſq; for the borough of Colcheſter, having been declared void, the counſel be reſtrained from entering into any examination, relative to the diſqualification of votes on the poll for the ſaid borough of Colcheſter.*"

On the ſame day the chairman reported to the Houſe, "That the Committe had determined——*" (*in the words of the reſolution ſtated in p.* 442), in conſequence whereof a new writ was ordered (K).

* Votes, 5 July, p. 363.

NOTES

NOTES

ON THE CASE OF

COLCHESTER.

PAGE 417. (A.) In the elections in 1710 and 1714, the diſpute chiefly depended upon the right of making freemen of the borough, which in each of them occaſioned reſolutions from the Committees, acceded to by the Houſe, declaring to whom it belonged.

There is an entry in the Journal of 28 march, 1628, that ſeems to have ſettled the right of election, as it is now underſtood, though it has not been referred to in any of the late conteſts: It amounts only to a reſolution of the Committee, not expreſsly confirmed by the Houſe, and therefore is not within the meaning of ſtat. 2 Geo. II. ch. 24. ſ. 4. The whole of this entry is as follows:

" Report made from the Committee of privileges by " Mr. Hackwill.

" I. For Colcheſter: — Only one return made by " the bailiffs, in which Sir Thomas Cheeke and Mr. " Alford returned. That the bailiffs, aldermen, and " common-council, conſiſting of 42, in an upper room " read the writ, and there elected Sir Thomas Cheeke " and Mr. Alford. In a lower room, the common " ſort

"ſort of burgeſſes in general elected Sir Thomas "Cheeke and Sir William Maſham.——

"That the bailiffs, &c. made their election *by pre-* "*ſcription*, as they now made it.——

"Againſt this—alledged, that till Rich. I. no bai- "liffs;—from thence till Edw. IV. no common-coun- "cil: Then 16 appointed by a new charter, which by "conſtitutions ſithence they have increaſed to.....

"Upon this, the preſcription holden inſufficient— "That the Committee alſo of opinion, that the elec- "tion of Sir William Maſham—good; and Sir W. "Maſham's name to be put in by the bailiff, inſtead of "Mr. Alford.

"Upon queſtion, Sir W. Maſham duly elected, and "Sir W. Maſham his name to be by one of the bailiffs "now in town inſerted in the indenture of return in "the place of Mr. Alford: Which accordingly pre- "ſently done at the board *."

P. 420. (B.) According to the true ſpirit of this ſtatute, no perſon ought to have been elected, who was out of the kingdom at the time of his election: At leaſt, the principal proviſion of the ſtatute might have been evaded by a member's abſence from the kingdom, till after the meeting of Parliament. This defect is now remedied by the regulation of 33 Geo. II. ch. 20. whereby the member's oath is made a preliminary to the acquiſition of a ſeat in the Houſe upon his election. The ſtatute is alſo defective in not requiring an oath of the truth of thoſe facts, which except certain perſons from the neceſſity of taking the oath of qualification.

* 1 Journ. 876.

P. 421. (C.) The firſt general election after the paſſing of the ſtatute of Anne, was that for the Parliament called in 1713; and theſe four reſolutions were firſt made in the beginning of that parliament. The Houſe, on the third day after they had entered on public buſineſs, reſolved to take the ſtatute into conſideration *; and in a Committee of the whole Houſe, the reſolutions were formed, and upon report to the Houſe, agreed to †: Another day was at the ſame time appointed for a further conſideration of the act, but no other reſolution paſſed ‡. In the beginning of the next new Parliament, 1 Geo. I. the Houſe paſſed the ſame reſolutions again §, but they were not made ſtanding orders till 21 nov. 1717.

P. 430. (D.) The entry in the Journal is as follows (next after the paſſage recited by the counſel in p. 429.)

" To prove the demand of the oath of qualification, the petitioner's counſel called

Robert Loder, who produced a copy of the demand made by Mr. John Ward, ſigned by four electors, viz. John Ward and three others; and ſaid he believed Mr. Betts was not at Weymouth at the time of the election.

John Savage ſaid he delivered to Mr. Betts, at *Epſom*, a paper ſigned by four of the electors, demanding his qualification, and acquainted him that it came from Mr. John Ward; to which Mr. Betts anſwered, that he never had any thing to do with Mr. Ward, nor ever would. This demand the witneſs made and delivered

* 17 Journ. 482. † Ib. 489, 491. ‡ Ib. 492.
§ 18 Journ. 20. 23d March, 1714-5.

to Mr. Betts, the 4th of october, 1727. Being croſs-examined, he ſaid, that Mr. Betts told him he was not obliged to give an anſwer: That he laid it down on the table and did not read it:——

The counſel for Mr. Betts admitted, that his qualification is not ſworn to, nor a particular of it delivered; although they alledged, that he is qualified, and had ſerved in former Parliaments; but is now grown infirm and not able to attend the ſervice of the Houſe: And inſiſted that the electors, *being not apprized of this, ought to have an opportunity of making another choice.*"

Then follow the reſolutions, that neither party was duly elected, and that the election was void as to Betts.

There can be little doubt, upon this report, (from the mention of Mr. Betts's *infirmity*, the delivering the demand *at Epſom*, and the evidence of the petitioner's witneſs that *he believed he was not preſent* at the election) but that the demand of the qualification was made at Mr. Betts's own houſe after the election, according to the argument of the counſel in p. 437.

The writs for this Parliament bore *teſte* on 10 aug. and were returnable 28 nov. 1727*. The demand was made on Mr. Betts 4 *october:* It is very improbable, that a borough election ſhould have taken place, ſo long after the date of the writ.

P. 432. (E.) This is queſtionable: The common annual order of the Houſe, that parties may petition "within fourteen days after any *new* return ſhall be brought in," is not conſidered even to extend to the caſe of a determination upon the *return only*, after a ſpecial reference of the Houſe for that purpoſe; but a

* See 21 Journ. 16.

particular order is always made, for permiſſion to the electors to queſtion the election, at the time when ſuch determination is recorded in the Houſe; an inſtance of which may be ſeen in the caſe of Bedfordſhire, p. 398. Yet, according to the equitable conſtruction of that annual order, a determination of this ſort, altering the ſheriff's return in favour of another candidate, might very fairly have been conſidered as a *new* return.

I own I ſee no objection, upon the principles upon which the Houſe make the particular order alluded to, to the courſe of proceeding ſuppoſed by the counſel for the petitioner. Where the merits of a diſputed election have not been heard, it is juſt that the electors ſhould have an opportunity of queſtioning it; of this they are expreſsly deprived, by the partial inquiry which takes place upon the ſpecial reference, and therefore another order becomes neceſſary afterwards, expreſsly to give it them. But it may happen, that though the *merits of an election* be referred to a Committee, their deciſion may be formed partially, from circumſtances extrinſic to the election, as in the caſe here contended for by the counſel. In ſuch caſe, it would be as reaſonable to allow the electors, the ſame opportunity of queſtioning the election afterwards, as in the other caſe of the return.

It is true, the Houſe never make the order for leave to petition, where a petition has been referred upon the merits of the election; At leaſt, they never uſed to make it, under the old judicature. But, it ſhould be conſidered, that a change has happened in this reſpect, by the erection of the new judicature: Formerly, the Committees of elections acted under the controll of the Houſe, by whom their power of inquiry

was

was either limited or extended, their proceedings were liable to be interrupted or directed in their courſe, or finally to be ſet aſide after their concluſion. All their reſolutions were ſubject to reviſion, and the Houſe could carry them into effect accordingly; and could regulate its own proceedings, conformably to thoſe which had paſſed in the election Committees, with little ceremony. But it is not ſo now; the Houſe cannot know the grounds upon which a judgment of the ſelect Committee may have been formed, and can neither receive it in part, nor reject it: It becomes abſolute by the report to the Houſe. If any ſupplemental proceeding ſhould be wanting, the Houſe cannot enter upon it, without a particular application for the purpoſe from the ſelect committee, ſtating their reaſons.

The method which occurs to me, as likely to obtain the end, if it ſhould ever be thought neceſſary to allow electors to queſtion an election, after the judgment given by a Committee on a petition upon the merits, would be for the chairman to make a ſpecial report of their judgment, recommending to the Houſe to make an order for leave to petition, for the reaſons they may think proper to give.

If in the caſe of Callington, mentioned in p. 444. the electors had preſented a petition to the Houſe, ſtating the death of Mr. Buller, by which accident they were deprived of the ordinary method of queſtioning the election, and therefore praying leave to petition upon the grounds of Mr. Buller's petition, I can hardly ſuppoſe, that ſuch an application, fairly made, would have been rejected. (See the concluſion of Note (I). in p. 457.)

P. 438. (F.) The deciſion againſt Serjeant Comyns ſeems to have been a very ſevere one; for there was good reaſon, upon the evidence ſtated in the report, to have believed that the demand of the qualification was afterwards diſpenſed with, by thoſe who made it. (See 18 Journ. 127, 128.) But all the proceedings that I have met with in the Journals, both with reſpect to the ſtatute, and the ſtanding orders, have been very ſtrict. Inſtances of this may be ſeen in the caſes of Shafteſbury, 18 Journ. 69. — of Wendover, 22 Journ. 466, 467, 468.—and of Huntingdon, 23 Journ. 413, 414.

P. 440. (G.) The juſtice of this obſervation cannot be doubted: It is therefore remarkable, that in the caſe of Weymouth, the words of the petition (if *fully* ſet forth in the Journal) were, "*That Mr. Betts is not qualified to ſit in Parliament*," without any thing further *. The counſel for the ſitting member did not object to the form of the petition, on this account; but it was not neceſſary, becauſe they admitted that their client had not complied with the *act of Parliament*; and the breach of the ſtanding order, thereby became an unneceſſary conſideration.

But it is more remarkable, that this objection was not taken in the caſe of Huntingdonſhire (23 Journ. 403, 413, 414.) where the words of the petition were, "*That at the time of the election, the ſaid Mr. Clarke was not qualified according to law, to ſit and vote in the Houſe of Commons as a knight of the ſhire for the ſaid county.*" In this caſe the whole proceeding depended upon the ſtanding order, and the only queſtion aroſe

* See the petition, 21 Journ. 47.—renewed, ib. 203.—and renewed again, ib. 399.

upon

upon the rental delivered in by the ſitting member in purſuance of it.

P. 446. (H.) The caſe of Kirkudbright here alluded to, has been mentioned in the former part of this book, upon a different ſubject. (See p. 72.) In the caſe of Fife, General Skene and Mr. (now Sir John) Henderſon were candidates; the former was returned; the latter petitioned, and alledged, "That General Skene the ſitting member was ineligible, under the ſtat. 6 Ann. ch. 7. by holding the places of Baggage-maſter of the Forces, and Inſpector of the roads in Scotland; one or both of which were new offices of profit created ſubſequent to 25 oct. 1705: That at the election the petitioner appriſed the freeholders, of General Skene's poſſeſſion of theſe places, of his conſequent incapacity, and that they would throw away their votes, if they elected him*." At the meeting, General Skene admitted his holding the offices in queſtion, but denied that the diſqualification created by the ſtatute of Anne attached upon either of them, becauſe they were *military* offices, and *old* ones. He was elected by the majority. The Committee before whom the petition was tried, being of opinion, that the novel creation of one of the offices was notorious, and that it was within the ſtatute of Anne, held that under the circumſtances before-mentioned, the electors who voted for the ſitting member had thrown away their votes, and adjudged the ſeat to the petitioner, who had the minority on the poll †.

* See 37 Journ. 500. 9 Dec. 1779.

† See 37 Journ. 560, 561. 7 Feb. 1789.

P. 446. (I.) In the caſe of Mitchell, in 1696, the ſitting member died after the election, and before the petition againſt his election was preſented. When the Committee of elections proceeded upon the cauſe, they made the petitioner prove, that he had given notice to the electors in oppoſition to him, of the time appointed for trying the petition. However, nobody appearing to ſupport the election of the deceaſed member, the Committee proceeded *ex parte*, and determined the petitioner to be duly elected. But this courſe of proceeding was diſliked by the Houſe; for as ſoon as the chairman had reported the caſe, a reſolution immediately paſſed for *recommitting the merits of the election*. (See 11 Journ. 603.) Upon the ſecond hearing in conſequence of this reſolution, the cauſe of the deceaſed member was ſupported before the Committee, and in concluſion they reſolved, that he had been duly elected, with which the Houſe afterwards agreed. See p. 690. in the ſame vol.

In the caſe of Shrewſbury, in 1774, (1 Doug. Elect. 461, 462.) Mr. Pulteney petitioned againſt both ſitting members; before the time appointed for trial, one of them (Lord Clive) died. Mr. Pulteney afterwards had leave to withdraw his petition. The cauſe heard before the Committee, was between the electors and Mr. Leighton the other ſitting member, againſt whom alone they had petitioned; but certainly, if Mr. Pulteney's petition had not been withdrawn, the Committee muſt have received parties to ſupport Lord Clive's election.

In the caſe of Milborn Port, in 1708, (16 Journ. 12.) a petition was preſented and read; after which, the Houſe was informed that the petitioner was dead, and

and had intended before his death to drop the petition. But the Houſe, even then, did not reject the petition, but ordered it to *lie on the table.* So in the caſe of Callington, they did no more than *diſcharge the order* for taking the petition into conſideration; after which, it would have been competent, if circumſtances ſhould have made it neceſſary, to have paſſed a new order for the ſame purpoſe.

The argument of the counſel in p. 428. "that it is a greater offence in a member than in a ſtranger, to diſobey the orders of the Houſe," is certainly juſt; but then it ſhould be conſidered that the Houſe has a controll over its own Members, which it does not poſſeſs over ſtrangers, and can inflict other puniſhments upon them for contempts, beſides that of excluſion from their ſeats, which ſhould be uſed only in the laſt reſort. With reſpect to *petitioners*, it is perhaps the *only* effectual method to inſure their obedience to the order.

P. 447. (K.) The report of this reſolution occaſioned an irregular debate in the Houſe. Some members pointed out its defect in not determining upon the election of the other candidates; becauſe, though Mr. Potter's election was declared void, it might not be neceſſary to iſſue out a new writ, till it was known whether Sir Robert Smyth had been duly elected, or not; and a member who ſpoke in this debate, doubted whether the Committee ſhould not be reſumed for aſcertaining this fact.

It muſt be allowed, that the reſolution, as reported to the Houſe, is not in form explicit enough; but when it is conſidered that the petition complained of Mr. Potter's election *only*, and that there could be no queſtion before the Committee but as between Sir Robert Smyth and him, there can be little doubt, but that the

the report of a void election as to Mr. Potter, authorized the Houſe, to iſſue a new writ. If the Houſe had doubted upon the queſtion, perhaps they might, under the words of ſtat. 10 Geo. III. ch. 16. ſ. 18*. have directed the Committee to be reſumed, for the purpoſe of making a more particular report; but this point may be queſtionable. The method which ſeems more regular in ſuch caſe, would be to order the proceedings of the Committee to be laid before the Houſe.

In the debate upon this queſtion, the caſe of St. Ives, in 1775, was alluded to (See 2 Doug. Elect. 398. and 35 Journ. 357.) as containing a report from the ſelect Committee, defective in the ſame point as this of Colcheſter; but it was ſaid, that there, the ſeveral reſolutions *taken together*, plainly pointed out the propriety of a new writ. The petition in that caſe was againſt *both* ſitting members; the Committee determined one to be duly elected, the other not, and the election to be void "with reſpect to *one* of the burgeſſes;" whereas they ought, according to the accuſtomed form, to have named that *one*.

In the caſe of Shafteſbury, (18 Journ. 72, 74.) which was heard at the bar of the Houſe, a defect of this kind having been made in the final reſolutions, there is a ſpecial entry in the Journal of a ſubſequent day, before the ordering of a new writ, in the following words:

* ——— "the Houſe on being informed of the Committee's determination by their chairman, ſhall order the ſame to be entered in their Journals, and give the *neceſſary directions* for confirming or altering the return, or for the iſſuing a new writ for a new election, or *for carrying the ſaid determination into execution, as the caſe may require.*"

"The

" The Houſe, having upon the hearing of the me-
" rits of the election for the borough of Shafteſbury
" ——— at the bar of this Houſe, upon tueſday laſt,
" adjudged only one burgeſs to be duly elected for the
" ſaid borough;

" Ordered, &c."

In general, there is no preface to the order of a new writ. In the caſe of Coventry, 22 Journ. 819. the reſolution was the ſame as the preſent, and the Houſe ordered a new writ without any queſtion, and without any introductory entry to the order. But this caſe was alſo heard before the Houſe.

The debate above-mentioned was ſoon concluded by an intimation from the Speaker, that it was improper, *in the Houſe*, to enter into a conſideration of what might have paſſed in the ſelect Committee; the queſtion was then put upon a motion which had been made by the chairman, for ordering a new writ in the room of Mr. Potter, which paſſed *nemine contradicente*.

VII.

THE

CASE

Of the BOROUGH of

Ivelcheſter, otherwiſe Ilcheſter,

In the County of SOMERSET.

The Committee was choſen on Tueſday, the 29th of June, and conſiſted of the following Members:

John Baring Eſq; Chairman.

Thomas Powis, Eſq; } Nominees appointed by the Committee, according to 11 Geo. III. ch. 42. ſ. 6.
Earl of Mornington. }

Sir William Manſel, Bart.
John Langſton, Eſq;
Philip Metcalf, Eſq;
George Oſbaldiſton, Eſq;
Charles Lefevre, Eſq;
John Moore, Eſq;
Hon. Richard Howard.
Henry James Pye, Eſq;
Barne Barne, Eſq;
Alexander Hood, Eſq;
Sir Charles Kent, Bart.
Thomas B. Parkyns, Eſq;

PETITIONERS,

Sir Samuel Hannay, Bart. and John Harcourt, Eſq; and certain Electors of the Borough of Ilcheſter.

SITTING MEMBERS,

Peregrine Cuſt, and Benjamin Bond Hopkins, Eſqrs;

COUNSEL,

For the Candidates Petitioners,

Mr. Batt, and Mr. Lawrence.

For the Electors,

Mr. Franklin.

For Mr. Cuſt,

Mr. Piggott, and Mr. Partridge.

For Mr. Hopkins,

Hon. Mr. Erſkine, and Mr. G. Bond.

THE CASE

Of the BOROUGH of ILCHESTER.

THE petition of Sir Samuel Hannay and Mr. Harcourt contained a charge of bribery againſt the ſitting members, previouſly to and during the election; and that the returning officer had admitted many perſons to vote for them who had no right; by which means they had procured a colourable majority, and were returned in prejudice of the petitioners, who had the majority of legal votes.

The petition of the electors contained ſimilar charges againſt the ſitting members *.

* Votes, 25 May, p. 23, 24.

There

There is no reſolution of the Houſe aſcertaining the right of election in this borough: It has been underſtood to be in the bailiff, capital burgeſſes, and inhabitants, not receiving alms *. On the preſent occaſion, *inhabitants* were explained to be *houſholders, legally ſettled* in the borough; in this both parties agreed.

The numbers on the poll were,

For Cuſt	95
Hopkins	89
Harcourt	70
Hannay	58

The counſel for the petitioners propoſed not only to avoid the election of the ſitting members for bribery, but alſo to diſqualify ſo many of their votes on account of bribes received by the voters, and by other objections, as would prove the legal majority to be in favour of their clients, and give them the ſeats.

The trial laſted from the 30th of june, (the day in which the cauſe was opened) to

* See 14 Journ. 147. and 3 Doug. Elect. 153, 154.

the

the 21ſt of july. The greater part of this time was employed in hearing evidence. The queſtion conſiſted entirely of fact; for which reaſon, and becauſe the final deciſion contained no opinion upon the legal effect of the evidence, I have not pretended to give more than a general view of it.

The ground-work of the petitioners' caſe, as related by the witneſſes, was as follows:

In october 1782, at which time a diſſolution of Parliament was expected in many places, a general diſtribution of money was made to the voters on three ſucceſſive days, at the Houſe of a Mr. Lockyer, a gentleman of great property in the borough and its neighbourhood: The manner of doing it was this: The voters were invited to Lockyer's Houſe (which was inhabited by one of his relations) and when aſſembled in the court-yard, were admitted one by one into the garden, by a man diſguiſed in a woman's dreſs, and directed to go to a window of the Houſe; from this window, a hand (no other part of the perſon being viſible) diſtributed to every one the ſum of 30l. Many of the voters were Lockyer's

tenants, and theſe received in ſtead of ſo much money, a diſcharge for rent then due, with as much money beſides as made the whole preſent amount to 30 l.

The diſtribution on the third day was made with more diſtinction; a liſt of thoſe who had been omitted on the two firſt, was marked by Lockyer upon an inquiry into their circumſtances: He expunged from it a pauper, and an exciſeman, becauſe they would have no votes, and others for different reaſons, and the next money was given according to the liſt ſo corrected.

Beſides this diſtribution, ſome voters who were not mixed with the herd in the garden, received letters by the poſt from London incloſing bank notes for 30 l. and others received notes of that amount privately from an agent of Lockyer's and Cuſt's.

This was the principal fact of bribery: A great deal of evidence was produced to ſhew that this diſtribution of money, actually procured ſucceſs to the ſitting members at the laſt election; from whence it was argued, that their ſeats being *gained by corruption*, whether *their* act or not, could not be maintained: — To ſhew likewiſe that

that theſe preſents were not retroſpective, for *paſt* favours in the preceding general election, but proſpective and with a view to the next election, whenever that might come: — Likewiſe to connect the ſitting members with this alledged bribery; Cuſt, by a participation in the preſents of 30 l. and Hopkins (who had nothing to do with the borough till the week before the election) by becoming acceſſary after the fact to all Lockyer's conduct; by canvaſſing upon his recommendation with his agents and tenants, and by an avowed acquieſcence in the effect of his money ſo diſtributed.

Evidence was alſo produced to prove perſonal acts of bribery at the time of the election by each of the ſitting members.

It ſeemed to me, that the petitioners made no great account of any other objections to the ſitting members' votes beſides that of bribery; upon this ſubject, their evidence (if believed and allowed) extended to a number more than ſufficient to have reduced the votes for the ſitting members to a minority.

Mr. Cuſt's defence conſiſted in a denial of any participation in the preſents of 30l. and in ſhewing that, if he were concerned in it, it was retroſpective and not criminal; and that it had no effect upon this election.

Mr. Hopkins, beſides this mode of juſtification, diſclaimed all connection with the conduct both of Cuſt and Lockyer, as far as either might have affected the election.

The Committee determined in favour of the ſitting members. Their opinion therefore may have been, either that the diſtribution of the money in 1782, under all the circumſtances, was not bribery, or not ſuch as to affect the election in 1784; or, that the proof did not ſufficiently connect the ſitting members with the tranſactions mentioned. They muſt at the ſame time have diſbelieved the evidence of the perſonal acts of bribery.

The final reſolutions were reported to the Houſe on the 21ſt of july *.

* Votes, p. 455.

☞ When

☞ When this Committee was appointed in the Houſe, the appearance of the ſitting members as ſeparate parties by different counſel, occaſioned an application from the Speaker to the counſel for the petitioners, to know if they objected to it; the latter ſaid they relied upon the candour of the other counſel, who had alledged a real ſeparation of intereſts between the two ſitting members in their defence*: Accordingly they ſtruck out ſeparately from the liſt of forty nine members in forming the Committee†. The petitioning electors did not pretend to ſeparate their intereſt from that of their candidates.

In the beginning of this cauſe, the queſtions of evidence ſo often debated in Committees where bribery has made part of the inquiry, reſpecting *agency*‡, were agitated by the counſel. The Committee laid down a rule upon this ſubject, con-

* See 1 Doug. Elect. 86. † According to ſect. 6. of 11 Geo. III. ch. 42.

‡ See the caſes of Briſtol, Hindon, Shafteſbury, Worceſter and Ilcheſter, in Doug. Elect.

formable

formable to that practiſed in the caſe of Ilcheſter, 3 Doug. Elect. 161-2. where the Committee proceeded upon a conſideration of the practice in many former caſes. This rule was, upon queſtions concerning the acts of a ſuppoſed agent, not to inſiſt upon proof of his being an agent, *previous* to the inquiry into his acts.

On the 16th of july the chairman, by the direction of the Committee, reported to the Houſe, that one Thomas Withy (a witneſs called on the part of Mr. Cuſt) had groſsly prevaricated in giving his evidence to the Committee: The Journal of 27th nov. 1775 *, was referred to by the Houſe for a precedent, and read, and an order paſſed for committing Withy to Newgate †. That precedent had been made upon the authority of one of the ſame ſort, in the caſe of Milborne Port in 1772 ‡.

Withy afterwards petitioned the Houſe to forgive him, and was diſcharged on the

* 35 Journ. 462. and 3 Doug. Elect. 166. Caſe of Ilcheſter. † Votes, p. 422. ‡ 33 Journ. 746, and 1 Doug. Elect. 88.

22d of july, the day after the concluſion of the cauſe; the Houſe being informed of his ill ſtate of health, and that his life was in danger *.

☞ On the 10th of july, when the petitioners cloſed their caſe, the counſel for Mr. Hopkins mentioned to the Committee a few of the principal circumſtances of their caſe, and aſked permiſſion to abſent themſelves from the court, while Mr. Cuſt's counſel were going through his defence, which, they ſaid, had no relation to, and could not affect Mr. Hopkins; they propoſed this in order to relieve their client from a great deal of unneceſſary expence and trouble. The counſel for the petitioners objected to this propoſal, as a ſcheme to obtain a partial opinion from the Committee in favour of Mr. Hopkins; and the Committee hereupon aſked Mr. Cuſt's counſel, if they had any objection to Mr. Hopkins's going through his caſe firſt, as it was likely to be much ſhorter than the other; to this the counſel begged leave to

* Votes, p. 436, 460.

decline

decline anſwering, and here the matter ended. However, on the next day, and during the whole time employed in Mr. Cuſt's defence, Mr. Hopkins, his counſel and agent, did not appear in court.

I do not recollect that in any of the election Committees, it has ever been neceſſary to determine the reſpective precedence of the ſitting members; it might perhaps have been ſo in this caſe, if Mr. Hopkins had diſputed Mr. Cuſt's claim of priority in the defence. If the queſtion were to ariſe, perhaps the rule of the Houſe reſpecting double returns * would furniſh a proper guide to the deciſion; by analogy to this rule, the member firſt named in the petition ſhould have the precedence. This ſeems a more certain method than one I have heard ſuggeſted, for ranking the parties according to the profeſſional rank of their counſel.

* See before p. 76.

THE END OF THE FIRST VOLUME.