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T H E
TRIAL AT LARGE,

. IN SEVERAL INFORMATIONS IN THE NATURE OF A
Q U O W A R R A N T O,
T H E K I N G,

On the prosecution of JAMES TEMPLAR, Esq. his Majesty's coroner;

A G A I N S T

MR. THOMAS AMERY,
ONE OF THE TWENTY-FOUR ALDERMEN,

A N D

MR. JOHN MONK,
ONE OF THE FORTY COMMON-COUNCILMEN,
OF THE CITY OF CHESTER;

On the relation of RALPH EDDOWES, of the said city, merchant:

Before SIR JAMES EYRE, Knight, one of the Barons of his Majesty's

Court of Exchequer at Westminster,

A N D A S P E C I A L J U R Y;

At the Assizes holden at SHREWSBURY, in and for the county of Salop,

on TUESDAY the eighth of August, 1786.

T A K E N I N S H O R T - H A N D

By Mr. GURNEY, from LONDON.

C O U N S E L F O R T H E R E L A T O R :

SERJEANT ADAIR, Recorder of LONDON; Mr. MILLS,
Mr. LANE, and Mr. TOPPING.

C O U N S E L F O R T H E D E F E N D A N T S :

Mr. BEARCROFT, Mr. LEYCESTER, Mr. BOWER,
Mr. PLUMER, and Mr. MANLEY.

ATTORNEY for the Relator, Mr. SNOW, Chester.

ATTORNEY for the Defendants, Mr. HALL, Town-Clerk of Chester.

C H E S T E R :

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MDCCLXXXVI.

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NAMES OF THE SPECIAL JURORS.

EDWARD CHARLES WINDSOR, OF HARNAGE, ESQ.
ROBERT CORBETT, OF LONGKOR, ESQ.
THOMAS HARRIS, OF CRUCKMEOLE AND ARSCOT, ESQ.
JOHN GARDNER, OF WHITTON, ESQ.
MOSES LUTHER, OF ALL STRETTON, ESQ.
THOMAS KNIGHT, OF HENLEY, ESQ.
ROWLAND HUNT, OF BASCHURCH, ESQ.
THOMAS BEDDOES, OF CHENEY LONGVILLE, ESQ.
THOMAS PARDOE, OF MIDDLETON SCRIVEN, ESQ.
WILLIAM CHILDE, OF KINLET, ESQ.
ISAAC HAWKINS BROWN, OF STIRCHLEY, ESQ. MEMBER
IN PARLIAMENT FOR BRIDGENORTH, SHROPSHIRE.
JAMES EATON, OF ALSCOT, ESQ.

N. B. The like jury was taken, by consent, in the cause against Mr. John Monk.

THE FOLLOWING WERE SUBSTANTIALLY THE ISSUES TO BE TRIED.

1. Whether the mayor and citizens of Clester are a body corporate by prescription?
2. Whether Charles the Second, by the charter of the 37th of his reign, did really grant?
3. Whether that charter was accepted as to the election of aldermen?
4. Whether the persons appointed aldermen under it, did act as such?
5. Whether the mayor, aldermen, and common-council, have used to elect according to this charter?
- 6, 7, and 8. Relate to the qualification and election of the defendant to the office of alderman.
9. Whether the charter of 37th Charles II. was accepted as to all matters contained both in the plea and replication?
10. Whether the order of amoval in the time of James II. was duly signified?
11. Whether the charter of restoration of James II. was accepted?
12. Whether the charters of Henry VII. and Elizabeth, still remain in force?

Recd. May 15, 1900.

The court having directed that the defendants should begin, Mr. Manley opened the pleadings.

MR. B E A R C R O F T.

May it please your Lordship :—

Gentlemen of the jury,

YOU will favor me in this cause as counsel for the defendant, upon whom, contrary to the general custom, from the nature of these particular proceedings, it is incumbent to begin.

Gentlemen, this prosecution is in the name of the King, calling upon the defendant Mr. Thomas Amery, to set forth his title to the office of alderman of Chester; which office he exercises, and which he claims a right to exercise of course.—The proceeding on the part of the prosecution is merely,—calling upon him to state and to prove to the satisfaction of a court and jury, a complete and legal title to that office of alderman.

Gentlemen, I cannot help lamenting, what I have had perpetual occasion to feel as counsel for defendants in these cases, that after it has been determined over and over again by the court of King's-bench, (which is the only jurisdiction upon such a subject) that it should be treated as a mere question of civil right, that yet in truth the form of the proceeding—aye, and some of the substance of it too—is carried on with the exertion of some of the hardest rights of prerogative. In a dispute between subject and subject, they meet upon certain points upon which they differ, and in the course of the pleadings and preparations, before they come to decide the questions in dispute between them by a jury, neither has any advantage over the other. I can't help complaining that upon the present occasion, those who would be understood to be establishing *popular rights* and *popular privileges*, have made use of the regal prerogative, in a way that I confess never occur'd to me in my little experience—I don't mean to say, that it has not been usual, in prosecutions of this sort, to cut into slices every part of the defendant's defence, and to do what the King may, but what no subject can, to put the defendant to prove every part of it, and if he should make a
B slip,

ship, and fail in any one part, it will be against him, and he will have the whole costs to pay—I shall not complain of that, because the abuse is sanctified by a kind of custom; but I do complain here, that the prerogative, that the name of the crown is carried farther than usual, (that is to say) that though the defendant is pinn'd down to put his defence upon some single fact, and if there should be a doubt in the mind of those who advised him in point of law, they must at their peril make the choice of their defence amidst so many doubts—yet on the part of the prosecution, this popular prosecutor exercises the prerogative by saying, I don't know directly my own case on the part of the prosecution, I will exercise the prerogative of the crown, and I will put my case in four or five different ways; for so he has done; taking that great advantage over the defendant. I throw this out, that the learned gentlemen, if they think proper, may take notice of it, by and by, and tell us, why it is, that as they stand up for the privileges of the people, they so abuse the prerogative of the crown against one of the people, as the defendant is.

Gentlemen, I am afraid that we shall consume a great deal of time in the trial of this cause; and therefore I would wish in the outset, to save as much as I can; and my object will be to give you an outline of the cause; and to give you some general idea of the sort of questions, which you are to try; and as the cause goes on in proof, we will take care to mark to you the different heads of enquiry, to which the proof applies; for were I to take upon me (if I could do it) to state the whole of this case, from the beginning to the end, and all the smaller, minute circumstances of proof, that bear upon the several questions, or issues, which you are to decide upon, I am afraid it would take up many hours, and very little conduce to any thing like an understanding of the nature of the cause.

Gentlemen, I can in a very few words tell you the real, substantial question between the parties—the forms, in which that is to be got at, by your decision of no less than twelve questions, which we call issues, are the result of that general question.

The real question is this—

On the part of the defendant, we contend, that the constitution of the city of Chester, with respect to the election of aldermen, and the election of common council, is, that aldermen, and common councilmen, shall be chosen by that which is known in the city of Chester, by the name of the select body, —that select body is composed of the mayor, the aldermen (who are in number 24) and the common council-men, who are in number 40.

I will

I will state to you that which is so notorious a truth, and which the gentlemen on the other side cannot dispute, that when I have stated it, there is not one of you who will not immediately feel, that this cause ought not to have been brought here.—I state to you, that time out of mind, the usage has constantly been to elect aldermen, and to elect common council men, in the way that the defendant contends, that is, by the select body, the mayor, aldermen, and common council.

I am not standing up, though I should feel myself upon firm ground indeed if I did, to maintain a usage of 20, of 30, of 40, or of 50 years—I am not standing up to maintain simply a usage of upwards of a century, but I stand up to maintain a *uniform usage*—for I have a right to say so with a little exception, which I shall state by and by, which scarce intitles any body to quarrel with me for that word *uniform*—I say a uniform usage as far back as the history of this corporation founded in books, or even tradition, can possibly carry the enquiry—I say, with a slight exception, which has no effect against such a length of usage, as I have stated—I mean that in the year 1692, or thereabouts, during the mayoralty of a very popular gentleman (a Mr. Whitley) he did attempt for three or four years, to introduce the election of these officers, aldermen and common council-men, by the freemen at large.—From that time, about 1695 or 1696, to the present, the constant *usage, without exception*, has been agreeable to the constant usage, previous to that time, so that there was nothing but a tumultuous interruption of the custom, for three or four years.—The corporation then divided.—A great number of them protested against it. There was a majority for it—from that time to this, they have either totally deserted it, or whenever they thought proper—(for at certain times they think it proper) contended for it. It is convenient for the purpose of certain passions to do it.—They have constantly been beat, as undoubtedly they will be to day, but at what time of day, I am sorry I am not able to tell, for I fear it will take up many hours.

You have heard of late, and possibly some of you may have heard, that in former days there have been violent contests upon the choice of members of parliament for Chester; whenever the votes run pretty near, then it is that somebody or other is struck with a violent fit of patriotism; he begins to think it is of infinite consequence to the public, that the rights of the people at large, and of the freemen at large, should be preferred—that hitherto they have been over-whelmed illegally by tyranny and despotic sway—these kind of phrases

are very current in the streets of Chester—sometimes in the parlours there, I believe; and to be sure there are men to be found, who will try what they can do for their fellow-citizens—not at all thinking of themselves, no doubt; but it is a little unfortunate, and one cannot help observing it, that these notions never get into their heads when there is a great majority of freemen one way, but when they come to run a little closer, neck and neck, somebody thinks that the horse that is but a little behind, may win, and they are very apt to mount him—that is the history of the present enquiry—once in about fifty years—fifty years ago, I think the last trial was, it was decided against them—the particular circumstances of the case, and the little ground they have to go upon, is totally lost in the course of 50 years—then somebody young enough, and violent enough, to think they have got hold of a good thing, may be found out, in order to venture a very considerable expence upon the experiment—That is, I believe, the cause why you are troubled at all with this question to day.

I will now state, in the best manner I can, so much as I think will enable you to understand what the nature of the enquiry is.

I shall avoid, because it would be a loss of time, to state to you every charter which has been granted to this very ancient and undoubtedly once prescriptive corporation.

Gentlemen, all of you know that this county of Chester and the city was granted as a county palatine, with regal rights, in William the Conqueror's time, to the famous Hugh Lupus—From that time down to the time of Henry the Third (*King of England*, to distinguish him from the Earl of Chester) all grants—almost—not intirely, (for there were some royal grants during that time) were by the Counts palatine, the Earls of Chester—In the time of Henry III. that was united to the crown, and from that time to the present, it has been the property of the crown.—For certain reasons, the officers of the county palatine of Chester are preserved; but however the King has exercised his dominion over it under the great seal, and treated it in that respect as his property, as undoubtedly it is united to the crown, and not as the Duchy of Lancaster is, kept separate by a variety of acts of parliament. You will see the application of this observation by and by.

The charters, the consideration of which you will be troubled with, and with which I mean to bring you now acquainted, so far as will answer the purpose of understanding the cause, are the charters of the 21st of Henry VII. the charter of the 16th of Queen Elizabeth, confirming that charter, a charter of

37th Charles II. and a charter dated the 26th of October, the 4th of James the Second. I think that these are all the charters with which it will be necessary you should be acquainted, or pay any attention to.—If there be any others, my learned friend will introduce them on his side.—My friend seems to assent to my proposition—at this moment we certainly both mean the same thing, which is, to bring you to understand what we are going about.

That charter of Henry VII. is a confirmatory charter of several others; but it does likewise give some particular directions—one direction it will be material for you to bear in your memory—that is, *that the election of aldermen shall be annual.* (a)—That charter, with respect to the annual choice of aldermen, most undoubtedly never was accepted; for I defy them to shew an instance after that, except in the year 1692, which I alluded to before, and two or three years after, in the time of Whitley, that ever that was done—I don't believe even in his time, that the election of aldermen was annual,—so that I am stating to you, that notwithstanding the direction of the charter of Henry VII. with respect to the choice of aldermen, which is the matter now in question, that never was pursued—and once for all, I take the liberty, subject to my Lord's correction, to state this piece of corporation law to you, which is perfectly understood and acceded to constantly in Westminster-hall, and particularly in the court of King's-bench, where only these questions can occur in Westminster-hall—they can afterwards go to the House of Lords, but in no other court can they occur,—that is, that wherever there is a charter of creation—a maiden charter as it is called—in still plainer English, the first charter, which is granted to any set of people who are not a corporation at the time, creating and forming them into a corporation by the power and prerogative of the crown—that wherever there is such an original charter, if it is accepted at all by the objects of it, it must be accepted intirely and in every circumstance. I observe the gentlemen seem to like that position, and it is not a new discovery, because I saw upon the face of the pleadings that they themselves mean to maintain that proposition—I am very glad, therefore, because it is certainly useful, when there is any dispute, to have certain fundamental principles upon which we agree. You will, gentlemen, remember what I am stating, and don't let me be supposed to say more than I mean, that an acceptance of an original creating maiden charter, or by whatever name it shall be described, must be *in toto* in all its circumstances—not so in respect to a subsequent charter offered by the crown, because a *subsequent* charter may be accepted by
the

(a) And also of common council,

the then existing corporation *in part*, neglecting and rejecting the other part if they please.—That position is laid down in a case which was much discussed in the court of King's-bench, and much looked to by the whole profession, and great part of the world at the time, in the famous dispute between the present Lord Hardwicke and Lord Sandwich, touching the office of high-steward of the university of Cambridge. (a) It was there a ground of the determination of the court, that a *confirmatory charter* of any kind might be *accepted in part*, and *refused in part*. Whether it was so or no, will be a question of fact to determine, according to the conformity which has or has not been to the several circumstances in the second charter. You will see by and by why it is I wish to impress you with these two points of law.

Gentlemen, I stated to you a charter of Henry VII. which is a confirmatory charter, and which they might accept or refuse in part, whereby the election is directed to be annual; in that instance we contend it has never been complied with.

Of the charter of Elizabeth I need not state one article to you, as it seems to me, because it is *merely a confirmatory charter*.

I am now to state to you a very important piece of history of this corporation, as it certainly was a very important piece of public history. I mean the proceedings by quo warranto, in the latter end of the reign of Charles II.—It is a most undoubted and acknowledged matter of law, that all persons, who exercise the privileges of a corporation, are the creatures of the crown, created by the charter of the crown, and if they don't conform to the purposes of their original creation— if they are guilty of neglects—of omissions—of variances from the original charter of creation—in that case they certainly do forfeit their charter: Upon that ground it is perfectly true, and I am ready to concede it to my learned friend, who may make what use of it he pleases,—that there were proceedings *per se* legal, though *exceedingly imprudent*, in the latter end of Charles the II'd's. reign, the writ of quo warranto sufficiently proves which writ we have not seen in our time, and I dare say we never shall, for this is but a proceeding by an information under an act of parliament, (b) in the nature of it.

A writ of quo warranto issued to the city of London, the city of Chester, and a great many corporations. The city of Chester were conscious, as almost all corporations were, of a thousand faults,—omissions, and neglects, which, in point of law, most undoubtedly would forfeit their charter. This writ of quo warranto to the city of Chester issued, in the 35th and 36th year of the reign of Charles II. a year and a half before his death. The corporation called an assembly together,

(a) King v. Vice-Chancellor of Camb. 3 Bur. page 1647.

(b) Statute 13, Chap. 20.

together, of those who were the governing part of it, the mayor, aldermen, and the common council; and they determined, and determined very wisely, as it seems to me, not to enter an appearance to that writ, but to suffer judgment by default. They were conscious it was impossible to defend themselves, as I believe now, if the writ was to issue, hardly any corporation in England, except that, which has the advantage of being fortified by acts of parliament, (I mean the city of London) would be able to defend themselves—they knew they must fall, after a great expence and trouble, therefore no appearance was entered. It is *enough to state, that there was no appearance, and that there was judgment by default, as it is called.* Afterwards there was final judgment as it is called—the language of which judgment and the effect of it, no lawyer will, I believe, dispute to be this—*that there was an end of all their franchises and privileges—that the corporation was nullified, and dissolved, and ceased to exist.* I take the liberty again to state *that, as the result, in point of law, of that judgment, which I need not prove here, because it is admitted upon the record.* In that year, in the language of lawyers called the 35th and 36th of Charles II.—six or eight months, I think before his death, there was that judgment, by which I state (subject to my Lord's direction to you)—that there was a total end of the corporation of Chester—there was no mayor, alderman, nor freeman—there was not a corporation or a corporator existing—the writ of seizure of the liberties and franchises issued. Whether it did or no does not signify a farthing—the effect of the judgment is what I tell you, and the corporation of Chester was no more.

Gentlemen, if I seem to have repeated this two or three times, I do it that you may perfectly remember it, because you will find this is a main point in the cause. I say, therefore, that the persons who had been aldermen, common council men, and so forth, were reduced to the situation of mere private persons. They held the general name of *citizens* of Chester. *Inhabitants* of Chester they most undoubtedly were.

In that situation, in the common course of things, it was only in the power of the crown, to incorporate them anew. Accordingly you will find in the 37th year of the reign of Charles II.—two days only before his death (which we all know was sudden) a charter under the *great seal* was granted to the *citizens and inhabitants of Chester*, creating them anew a corporation, giving a great many provisions, creating a great many officers, conferring several important and valuable gifts and privileges, and with respect to this right of election of aldermen,

aldermen, this charter conforms itself to the ancient usage, directing the aldermen to be chosen by the mayor, aldermen, and common council (the select body) not doing what sometimes was done by charters of that time, materially altering the constitution, but preserving it, or rather creating it afresh after it was dead and gone. With respect to the election of aldermen, I state it to be so, without the least apprehension of contradiction.

One considerable point between us, and indeed the most considerable, will be, that issue which is joined by the parties,—*“ Whether or no this charter of the 3rd Charles II. was accepted in toto.”*

I have stated the law, that a charter of *creation* cannot be taken by parts, it must be taken in the whole, and in all its parts—You cannot say I will accept this only—I don't like the other—I will reject it—I maintain, and it is necessary for the defendant to maintain, *that this charter was accepted, in the whole.*

Gentlemen, I wish you to favour me with your attention here, because, subject to my Lord's correction, I shall say a word or two concerning my notion of acceptance. The acceptance of a charter I take to be a fact—an exertion of the will of those who have a right to choose at the time of the granting of the charter, and the tender of it to the objects of the charter—who were they here?—the *inhabitants* of the city of Chester, nothing else, *citizens* of Chester, inasmuch as they retained that name, not meaning to express the idea of corporators. It is competent, and I know there are cases which have decided (if it were material to look into them) where a tender of a charter of incorporation is made, for the inhabitants of a city, town, or ville, to assemble together, and the majority will decide whether they shall accept of the charter or no—but when once it is accepted, it is accepted for the whole, there can't be a *partial* acceptance—if they take it at all, they must take *the whole.*

There are many instances in many corporations, whose affairs I have happened to see in the trial of causes, where the most decisive evidence can be given, of the act of acceptance—Sometimes there is a petition asking exactly what that charter gives to them.—Sometimes they have even gone to the King's palace to receive it. Sometimes there is an act of assembly, by which it appears upon the books, that they have actually accepted it, but for the most part there can be no other evidence, than their conforming to the terms of the charter, in some of the principal articles, for if the doctrine was to be contended

for (I don't know, nor much care, whether we shall hear it to-day or no) that there never was an acceptance of a charter unless at the time it can be proved that there was a conformity to it *in every one particular*, it will make wild work indeed with the doctrine of corporations, and with corporations themselves, for it hardly ever can be proved in any instance, with which I am acquainted, that they have so conformed.

In order to prove our acceptance of this charter, in two words our case will stand thus—I shall prove that from the time of the charter they acted as a corporation—they received it in *almost every point*, though it consists of a great number. And I state this cogent and decisive answer,—they acted as a corporation (mayor, aldermen, and common council) they held courts, and did *every thing* that was granted by the charter—Nothing of this sort could they by possibility do for four years together (for such was the period between the 37th Charles II. and the 4th of James II.)—they could do none of the acts they did but by virtue of the charter of the 37th of Charles II.

Gentlemen, I undertake to prove by a body of evidence, forty times as much as can be wanted, that they accepted this charter, and if it was accepted *at all*, it was accepted *in the whole*, because the *acceptance of a part, is the acceptance of the whole*.

I say it again, the acceptance of a *part* is the acceptance of the *whole*—and if they varied from it in any instances (which it is possible that for a subsequent time they might do) these variations are irregularities—they are grounds of forfeiture if you please, but they go nothing to the question, which is the question in issue between the parties.—Was it accepted at the time of the grant?—I say for three or four years it was acted under *intirely*—Nay it is clear they could not act at all, but by the acceptance of this charter, and this must be the charter of creation, for they were gone as citizens, and become private persons, by the judgment I stated to you previous to that time.

Gentlemen, we know the history of the times, which followed. We know the variations in the mind and councils of James the Second, during the last year of his reign, with respect to corporations—sometimes he published very gracious manifests and proclamations upon the subject—According to my general memory, he was once or twice upon the eve of drawing them in again. At last, however, upon his being certain that the preparations in Holland were directed for an invasion of this country, he immediately issues a great number of charters to the several corporations, endeavoring to soothe them, and to put an end to the disputes which had been upon these subjects, in

former times,—he therefore certainly did, in the 4th year of his reign, upon the 26th of October, grant another charter to this corporation, then existing as a corporation (you see as I have stated, for the reasons that I have mentioned) under the 37th of Charles the Second,—the purport of which charter was, a release and pardon of the judgment, which disfranchised the corporation,—a restoration of them to what they were at that time, and to their ancient laws and usage.

I see by the pleadings introduced on the part of the prosecutor of this information, that they mean to contend, that that charter of the 4th James II. was accepted *in toto*,—*in every part*. They mean to consider that as having the operation to go back to the time of the judgment. They mean to contend, that the charter of the 37th Charles II. was a nullity, and that by the operation of the charter of the 4th James II. that rent (if I may so call it) which had been made in the corporation, by the judgment dissolving it, was knit and sewed together, and that things were put into a situation just as if that had never happened. I agree, that if there had been no intervening charter, it might have been so,—but there was an intervening charter, the charter of the 37th Charles II. a charter of creation, making them a corporation; it was competent to them, therefore, to accept this charter of the 4th James II. *either in whole, or in part*.

I perceive that by the pleadings on the part of the prosecutor, they mean to contend this—that the effect of this charter of the 4th James II. was to reduce them to the government, and to the disposition and directions of the charter of Harry the Seventh, (that is to say) that *aldermen* should be elected *annually*.

Gentlemen, I say that this charter of the 4th James II. (and now you will see the reason why I stated so particularly the difference between a charter of creation and a charter of confirmation) which is, that the first must be accepted altogether, the second might be accepted partially—This charter, subsequent to the 37th Charles II. was accepted only partially, for still they continue to do what they had always done, except in the time of Whitley,—for three or four years—they still continued to choose aldermen by the select body, as they do to this moment. They still adhere to the charter of the 37th Charles, I therefore deny that they ever accepted the letters patent of the 4th James II. *in toto*. They could not, because that was to turn them back to the directions of the charter of Harry the VIIth. to which they never, in any one instance, conformed, as to choosing aldermen annually. That will, I conceive, prove what I have said, that the charter of James the Second was not accepted *in toto*.

The point contended on the part of the present prosecutor, however

however well calculated to answer private purposes, and to gain a Chester huzza, is fraught with much mischief. Under the charter of Charles II. and under that charter only, is it, that the citizens of Chester enjoy very valuable franchises—and how the gentlemen, who are concerned for the prosecution, would be received at Chester, would be very doubtful indeed, if the freemen of that city knew, that the effect of the present proceeding is to rob them of one of their fairs, is to rob them of their hospital lands—and that the effect of it is, to shake the security of many hundred pounds, which have been borrowed by the corporation upon their security—and that is clearly the effect of the present proceeding,—of all which I am persuaded, the freemen are not at all aware.

I challenge the counsel on the other side, to shew me by what authority it is that they have the fair called horn and hoof fair—unless it is by this charter, they have it by no other—it is of great importance—of great value to the city of Chester, for it causes a great resort of people, and a great deal of money to be expended upon the spot, much for their benefit. By what authority is it that they have an hospital, which is greatly for the benefit of the freemen of Chester, unless it is by the grant of this charter?—I say by the grant of this charter, because I will prove to you that it was given by the charter at the expiration of a certain lease, and at the expiration of that lease, possession of it was taken—I undertake to demonstrate to you that that hospital and the hospital lands that support it, which is certainly for the benefit of the citizens, was taken under this charter. It seems to me (I should be glad to be set right upon that subject if I am wrong)—it seems to me that the security for 1600l. borrowed by the present corporation, will stand in a very precarious situation, if the gentlemen should succeed in the present prosecution—all these things are to be considered—I heartily wish all these things had been known, and then it would certainly have extinguished every spark of that popularity which certainly has begot the present prosecution.

I did complain of the vast variety of issues here, which is introduced certainly by custom, in the course of the proceeding.

I shall endeavour to run over the several issues, to give you some little idea in what way they are to be disposed of by your verdict; and then I shall class the evidence, and state to what issue it applies—which is the only way of your understanding this cause.

The first issue upon which you are to give a verdict, I shall relieve you from any difficulty about, because I shall make

the gentlemen a present of it—I wish them much joy of it, if it will be the cause of any expence in blue ribbands and cockades, they are heartily welcome to it—but it is not worth a ribband, in my opinion,—That is, they contend that the mayor, and citizens, at the time of granting the letters patent of the 37th Charles II. were not, nor had not, from time immemorial, been a corporation—There is not an immemorial corporation or a prescriptive body in this kingdom, unless Chester was so up to the time of the dissolution of the corporation, at the time I state to you.

I see the gentlemen nodding to one another, and applauding their dexterity in having got this verdict, but it certainly is not worth one farthing, for thank God the law is not quite so absurd and hard in this proceeding (absurd and hard enough it is in these cases, God knows)—that because they get a verdict upon one of the issues, that they are to have a judgment,—No; the court are to give judgment upon the facts which are found—This fact is of no consequence in the cause, and upon this they shall have a verdict,—and it will be the only one, I believe, which they will have.

The next is a very important one, but on which, they have no chance of success.

They gravely insist, that by this charter of the 37 Charles II. he did not *grant*,—that is to say, in point of law, they contend, that it was totally void, and had no operation or effect.

I confess for one, I was extremely puzzled to know upon what ground it was, that this issue was taken by them, except, as I told you, it is the fashion to put every allegation that can be taken, by itself, and to dispute it on the part of the crown,—but I was told, that there were two very curious points in corporation law (both of which I have no difficulty to confess are perfectly new to me) upon which, it was meant to be contended, that this same charter of Charles II. had no operation, or validity, in point of law.

The first, I understand, is, that it is only under the *great seal* of England,—only under the great seal of England!—I take it, that that is, precisely, the way, in which the King grants. It is perfectly true, it is part of the grant, that it *may* be under the seal of the county palatine, but it is no condition, that it *shall* be so. By the authority of that charter, they might, if they had been so disposed to pay fees, have had the other little seal, appendant to this charter, but for this purpose one piece of wax, *dangling to the parchment*, is perfectly sufficient, as I take it.

I con-

I conceive, therefore, that you will now see why it was (I am afraid some three quarters of an hour ago) I mentioned to you, its being under the great seal, and that this county palatine was not like the county palatine of Lancaster. From the time of Henry III. it has been in the crown. From all times great care has been taken to keep the duchy of Lancaster separate. We know that Harry the Fourth took it into his head, to preserve it for himself in case he lost the crown, as if it was at all likely, that he who cannot keep the crown, should keep any thing else. It has been, for that reason, held separately, but not so, in the case of Chester, for that has been held under grants from the crown from Harry the Fourth's time, down to the present moment. I contend, it operated as a grant, without the seal of the county palatine.

Another conceit, I am told, is (I beg the gentlemen's pardon, if it is not so) that truly this charter is not *enrolled* upon the patent rolls of the court of Chancery,—and that therefore it is to be contended that the patent is not valid, and that (as the phrase is) Charles II. did not *grant*.

It is astonishing, that these gentlemen, in the violence of their zeal to serve the city of Chester, should attempt thus to ruin its credit, and to rob the citizens of their fair and hospital lands,—Yet this is the sort of service they tender to them! I wish the freemen knew it,—however, they will be informed about it.

They contend, that the whole of this charter is totally void, because it is not inrolled. In their zeal for the service of the city of Chester, they would destroy half the corporations in England. I venture to say, for I have no difficulty to assert, that I verily believe, there are an infinite quantity of charters, upon which some of the greatest corporations of this country depend, that never have been inrolled.

I submit to my Lord, that in point of law, it is not necessary. I take the law to be this, that the King cannot grant,—that the King cannot take but by matter of record,—but when the King grants, by the great seal, he has granted, by matter of record. When he receives, it must be inrolled, because the act of the subject is not a record, till it is recorded, and I believe that will account for certain *dicta*, to be found in certain abridgers of the law, otherwise of most respectable authority, where they say, that letters patent are void, unless inrolled, but for which they quote no authority. Nay I know, that there is an act of parliament, which recites, that certain leases under the great seal, in which there is a condition that they shall be inrolled within a certain time, shall
be

be good if inrolled within a certain time, but there it is an express condition of the grant.

I trust there is nothing, in either of the objections; but with respect to the last, I conceive there is another answer, which, if my Lord finds it necessary to resort to, he will, that is, that after such a distance of time, though you cannot find an enrolment, it shall be presumed, because I know a great deal more has been presumed than enrolment. I know that my Lord Mansfield has directed, in a considerable cause, and it never was disputed to be law,—that after 60 years, you shall presume a grant under the great seal. *This* is presuming something infinitely less, though I conceive it not to be at all necessary. It is true, it ought to be recorded upon the patent roll, but when the subject has got a grant, which has gone through all the checks to the King's grants, (which are a great many, you know perfectly well, not forgetting the privy seal, among the rest,)—it would be strange indeed, that he should lose his grant and the effect of it, because the King's officers neglect their duty to enrol it.

I conceive, therefore, that this famous issue of theirs, they will not succeed upon; and that you will be bound to find, that by this charter the King did grant.

Gentlemen, I shall not trouble you with saying a word more, about the acceptance of the charter, because I have, in some short way, argued and stated to you the grounds, which will dispose of two of the issues, for the third is,—Whether it was duly accepted, *as to the election of aldermen*, and the general question whether the letters patent of the 37th Charles II. were accepted as to the other matters?—I have already stated that they were accepted, *as to the whole*, for in point of law, the acceptance of any is the acceptance of the whole—in point of fact every thing almost was, for two or three years, done under it.

That will dispose of the third issue in our favour, and I think of another, for they have thought proper in their multiplicity of disputed points, to introduce this question,—Whether the Earl of Derby, and a great number of other persons, who are named by the charter of Charles the Second, as the first aldermen, whether they did become aldermen according to the same letters patent? I take it to be consequential of the other, because I contend, that if it was a good grant, and if it was accepted, that they did by virtue of that charter become aldermen.

Here is another issue, which, I am sorry to see here—Merely for the purpose of putting us upon proof of the fact, they

they say, that the mayor, aldermen, and common council, have not exercised the franchise of electing aldermen according to the directions in the letters patent. I shall prove that fact clearly.

There is another fact they dispute. They say the defendant (Amery) was not elected by a majority of the mayor, aldermen, and common council, in common-hall, duly assembled. I will prove that fact.

They dispute too, as matter of course, that Mr. Amery was not duly admitted into the office of alderman—I shall prove that he was regularly admitted, and took the oaths,—if they put us upon it, but I don't know that they will.

Then we come to certain issues, which, my learned friend says, lie upon him, and certainly one of them does—I have already said a word or two by way of argument, as to the acceptance of the charter of James the Second—I say it was not accepted *in toto*.

They introduce this:—They say, that by the charter of Charles II. (which is true) there was a power in the crown to remove all the officers of the corporation of Chester, (that is to say, the mayor, aldermen, common council, and the other officers—for there are various ones) by an order of council, under the seal of the privy council, signified to the persons who were to be removed respectively,—And the prosecutor has taken upon him to prove this fact, that such an order of council was made, that it was signified under the privy seal of the said privy council, and that that was signified to a great number of persons who were officers, that are stated upon this record. It is incumbent upon them to prove it. The real effect of this issue, upon the whole record, I have some little doubt of, in my own mind—We shall hear, by and by, what effect it will have if found against us, but it is certainly calculated for mischief—It is intended to overturn the corporation; and, once for all, I have no difficulty to say, that I have observed, that judges, and juries, wherever there is an attempt to maintain an issue, in point of fact, for the purpose of overturning customs, and usages, which have obtained for a century past, as is the case of our election of aldermen, by the select body, they have always expected, that those, who undertake the proof, should do it by the most coercive, and indubitable proof, that there should not be a doubt about it. It is incumbent upon the prosecutor to prove, under the privy seal, a communication of this order to every person, they have stated. I will venture to say, I believe, they cannot do it, and that it was not, I believe, done in point of fact, for I shall be able to shew you, that within three weeks after that time, persons
stated

stated to be removed by this order of council, did exercise their office—And we know that in those times, almost every thing was in confusion, and that orders were made, which never were carried into execution, and in short we cannot know with any certainty what was done. It is incumbent upon them, to shew that that notice was given to each person—I defy them to do that,—It cannot be proved—The consequence of that will be, that we shall be intitled to your verdict upon that issue.

As to presumption, I conceive, there is this distinction.—In order to maintain that which has obtained in point of fact and usage, you will presume a variety of things,—but for the purpose of overturning what has obtained, I take the rule to be the direct reverse,—to presume nothing, but to put the party upon absolute, decisive, pointed, and indubitable proof.—That does not exist on the present occasion.—Nay, I very much doubt, whether notice was, in point of fact, given to any one person.

I here is another issue, which is consequential upon some of the instruments, whether the charter of Henry VII. confirmed by the charter of Elizabeth (so much of it as relates to the election of aldermen) continued in full force, until the making of the letters patent of 37 Charles II.—I say, at that time, they were not in force, because, for the reasons I have already stated, the effect of the judgment in Charles the Second's time, put an end to them, and all the rest of the charters.

You observe, gentlemen, that you have a great many issues to give your verdict upon, but you see the substantial question between the parties is no more nor less than this,—*Have they a right, at Chyter, to go on to abuse officers in the way in which they have abused them for these hundred years?*—I may add too for these three hundred years.—That is substantially the question you have to decide.

I shall now sit down, and proceed upon the evidence—We shall take the issues as they stand—and we shall state to you in what way we apply the evidence.

Evidence for the defendant.

The charter of 37 Charles II. put into court.

It was admitted by the counsel for the defendant, that there was not any enrolment, nor the seal of the county palatine.

Court. I never remember an instance of a party producing a charter under the great seal being called upon to prove that it was enrolled.

You

You will make the best you can of your objection to it, on account of its want of enrolment. It is no doubt the duty of the public officers to enrol these charters; the great seal is their authority.

Mr. Wm. Hall sworn. Examined by Mr. Leycester.

Q. What office do you hold in the corporation of Chester?

A. Town-cleik.

[Mr. Hall produced the books of the corporation.]

Court. You have doubtless, on both sides, inspected the books: Is there, or not, any contrariety, as far as the entries go, as to the mode of election?

Mr. Serj. Adair. The entries are not invariable: there are entries between the time of the charter of Hen. 7th, and the 7th of Hen. 8, which I shall adduce to shew that the charter of Hen. 7th was then acted under *as to the election of aldermen in particular*.—Then, I believe, in point of fact, from the 7th of Hen. 8, or thereabouts, the election of aldermen was by the select body down to the time of the quo warranto. Save one instance in 1517, and another in 1567.

Mr. Leycester. Had you not better admit the election to be as we state, and then shew your exceptions?

Mr. Serj. Adair. I think it will save time, so to do.

Court. I suppose your admission is also, that elections have been made in the same manner, since the charter of Charles 2d?

Mr. Serj. Adair. Since the year 1698 the elections have been by the select body.

Mr. Leycester. Have you any entries, prior to Henry 8th?

Mr. Hall. I think not of the election of aldermen.

Mr. Leycester. From what time does it appear that they have acted as a corporation? Refer to the earliest entries in the books.

A. Here is an entry of the 19th Hen. 7, which was an order by Mr. Mayor and *his brethren*, to burn lamps.

A charter of Edward I. was read, containing an *inspeximus* in it of a grant to the corporation, by the name of *Cives*.

A charter of Hen. III, confirming the liberties of the citizens of Chester, read.

10th April, 1 James II, Sir Peter Pinder, Bart. (one of the aldermen named in the charter, of Charles II) is appointed deputy to Sir Tho. Grosvenor, then mayor.

A roll of the session 17th April, 1 Jam. II, with a writ directed to the sheriff for summoning a jury—attested by Sir Tho. Grosvenor, mayor, and Sir Edw. Lutwych, recorder.

Note: This session roll also contained the names of 16 aldermen named in the charter.

D

And

And it mentions Thomas Simpson, as common clerk—who is likewise named in the charter.

Q. Have the corporation a common seal?

A. Yes.

do not include, p. 25.
Mr. *Bearcroft*. A common seal is granted for the first time by the charter of Charles II.

Mr. *Leicester*. You will produce the assembly books, to shew what corporate officers have acted since that time.

[*Mr. Hall produced the assembly books, and read.*]

“ An entry 7th March, 1 Jam. II. At a common hall before Sir Tho. Grosvenor, Bart. the aldermen and common council of the said city—At which assembly, Bradford Thropp, shoe-maker, is elected a common councilman, in the room of Plumley, deceased.

Note: Plumley was one of the common-council named in the charter of Charles II.

“ Also, at the same assembly, it was resolved and ordered, that whereas, several keys are lost under which the common seal of this city used to be kept, and the chest hath been broke open: that the treasurer take care that locks and keys be provided.

“ Also, at the same assembly, it was ordered by the whole assembly, that Rich Parker, deputy clerk of the pentice shall be made a freeman. Bradford Thropp took the usual oaths of a common-councilman.

“ An act of assembly 12th March, 1684. Before Sir Tho. Grosvenor, Bart. mayor, the aldermen, and common-council, of the said city, by which it was ordered, that Mr. Francis Leech, shall be made a freeman of the said city.

Ordered, “ that twenty guineas shall be presented to Dr. Owen Wynne, for the extraordinary care and pains he hath taken, in, and about, *procuring the late charter granted by his late majt gratius n. p. h. King Charles the Second, to this city.*

“ At the same assembly, it was also ordered, that a gratuity of 20 guineas be given to Mr. John Kegge, for his extraordinary care and pains in *solicitation, about the business of the late charter.*

“ At the same assembly it was ordered, that Thomas Wilcock, alderman; Thomas Simpson, alderman; William Wilme, alderman; and the treasurer for the time being, or any three of them, shall audit the accounts of the late murriners, &c.

“ At an assembly, 3 April, 1 Jam. II. before Sir Tho. Grosvenor, Bart. mayor, Sir Edw. Lutwych, Recorder, the aldermen, and common council, of the said city; it was ordered

ordered that Michael Johnson, sope-maker, shall follow his trade as if a freeman.

“ At the same assembly, it was also ordered, that the monies due *for the charge of obtaining his late majesty's gracious charter*, shall be paid by the treasurer of this city, into the hands of the mayor, to be by him paid over where it ought.—Leave-lookers were then also appointed.

“ At an assembly holden 8 Oct. 1 Jam. II. by Sir Thos. Grosvenor, Bart. mayor, the aldermen, and common-council of the said city, it was ordered, that Richard Levinge, deputy-recorder, shall be, and hereby is, elected a common-councilman, in the room of Robert Jones, deceased.

“ James Hutchinson was elected a common councilman in the room of Owen Shone, deceased.

“ It was ordered, in consequence of a petition from the yeoman of the pentice, that a fee of 2s. 6d. was to be received by him hereafter on the admission of every freeman.

“ It was also ordered, that all those *who were made aldermen by his late majesty King Charles the Second's most gracious letters patent*, and had not been aldermen before that time, and the common-council-men *who were also made by the said letters patent*, and had not been so before, did unanimously agree,—the aldermen to pay 40s. a piece, and the common-council-men 20s. a piece, to be laid out in plate for the use of this incorporation.

“ At an assembly, 16 Oct. 1 Jam. II. before Sir Thomas Grosvenor, Bart. mayor, the aldermen, and common-council, at which assembly it being put to the question, who shall be mayor for the year ensuing? it was ordered, that Wm. Wilton, shall be the mayor, and he took the oaths.

“ Also, on the nomination of the mayor, Randal Turner and Richard Oulton were elected sheriffs; Thomas Simpson and Wm Ince, aldermen, were elected murengers; Hugh Starkey and Henry Bennett, aldermen, treasurers; Edward Oulton and Francis Skellerne, aldermen, coroners; Henry Crosby and Tho. Maddox, leave-lookers: and they all respectively took the oaths.

“ At an assembly, 25 Nov. 1 Jam. II. Wm. Wilton, mayor, the question was put, who shall be a common council-man in the room of Richard Bird, deceased; it was ordered, that Richard Ashton should be.

“ At the same assembly, it was ordered by unanimous consent, that Richard Leving, Esq shall be elected alderman, in the room of Sir Edward Lutwych, Knt. who lately resigned his office of alderman, and Caldecot Aldersay, was elected a common-council-man, in the room of Richard Leving—It was ordered by unanimous consent that Richard Leving, shall

be elected recorder, in the room of Sir Edward Lutwych, Knight, who lately resigned his office of recorder—he took the oaths accordingly, together with the oath of his office.

“ At an assembly, Friday, 18 Dec. 1 Jam. II. before Wm. Wilson, Esq. mayor, the aldermen, and common council—William Starkey’s name is mentioned as an alderman.

“ The said Wm. Starkey, with several other aldermen, are appointed auditors of the treasurers’ accounts.

“ At the same assembly, the question was put, who shall be a common-council-man, in the room of Richard Francis, deceased—it was ordered, William Francis, his son, should be elected in his stead.

“ At an assembly, 20 Feb. 2 Jam. II.—It being put to the question, whether or no a glove should be hung out, according to the usual custom, at fair times, to give notice of a fair, to be held the last Thursday in February, *according to the grant of the late King Charles the Second*—ordered by unanimous consent, that a glove shall be hung out, to give notice of the said ensuing fair.

“ Officers were appointed to collect the murage duty, according to his late majesty’s grant, *by his royal charter to this city.*

“ At an assembly held on Friday 18 June, 2 Jam. II. before Wm. Wilson, mayor, the aldermen and common-council, it being put to the question who shall be common councilman, in the room of Richard Harrison, deceased?—it was by unanimous consent ordered, that, Matt. Anderton, the younger, gentleman, shall be, and he is hereby, elected a common-council man in his room, who took the usual oaths accordingly.

“ Also, at the same assembly, it being put to the question, who shall be alderman in the room of Ralph Burroughs, deceased? it is ordered unanimously, that Peter Bennett shall be alderman in his room.

“ It being put to the question, who shall be common-council-man in the room of Peter Bennett? it is ordered, that Randle Vause shall be a common-council-man in his room.

“ Also, at the same assembly, it being put to the question, who shall be common-council-man in the room of Richard Ashton, deceased? it was ordered, that Griffith Trygerne be a common-council man in his room.

“ At an assembly held on Friday, 15 Oct. 2 Jam. II. before Wm. Wilson, mayor, the aldermen, and common-council, it was put to the question, who shall be mayor for the year ensuing? it was ordered, that Edw. Oulton, Esq. shall be elected mayor for the year ensuing.

“ Ordered

“ Ordered at the same assembly, that Puleston Partington, watch-maker, and Matt. Anderton, merchant, shall be, and they are hereby, elected sheriffs.

“ Ordered, that Thomas Simpson and Wm. Ince, aldermen, shall be elected murengers.

“ Ordered, that Henry Bennett and Wm. Bennett, aldermen, shall be elected treasurers.

“ And Francis Skellerne and Wm. Allen, shall be elected coroners.”

“ That Bradford Thropp and Griffith Trygerne, shall be leave-lookers ”

Mr. Serj. *Adair*. They have now got the whole number of aldermen.

“ At an assembly, 3 April, 4 James II. before Hugh Starkey, mayor, the aldermen, and common-council-men of the said city, by unanimous consent, Wm. Darwill was elected a common council-man in the room of Ralph Poole, deceased.”

Mr. *Hall* produced a book of the portmote court.

“ Portmote court, 15 Oct. 2 Jam. II. before Edw. Oulton, mayor, and Richard Leving, recorder.”—It states, that a court was holden before the mayor, according to the usage and custom of the city of Chester, used and approved from the time whereof the memory of man runneth not to the contrary.

Another portmote court book produced for the succeeding year.

An entry of the election of a coroner, sword-bearer, and serjeant at mace; also a deputy serjeant at mace.

An entry read to prove that Simpson acted as common-clerk—his name appears to the writ, 10 April, 1 Jam. II—and to some indictments.

“ Edward Oulton and Francis Skellerne, coroners; Joseph Langley, gladifer; Powell Williams, serjeant at mace; Roger Lewis, deputy serjeant at mace; Thos. Simpson and Wm. Ince, murengers, gave in their accounts; Richard Harrison and John Johnson, sheriffs, 1 Jam. II. made returns to writs.

“ March 26, 1685. Disbursements on account of the new charter, from March 1684, to March 1685.

“ Dec. 21, 1686. A balance of £. 275 received by the succeeding treasurer, Bennett.

An entry from the portmote court book, read.

John Williamson, was yeoman of the pentice; Robert War-
ningham, cryer. Courts held by Sir Thomas Grosvenor,
mayor; Sir Thomas Grosvenor, mayor, &c. on the session's file.
And that session was held by the mayor, recorder, aldermen,
&c.

Portmote court held before Peter Pinder, deputy to Sir
Thomas

Thomas Grosvenor, according to ancient usage, 4 May, 1st Jam. II.

Another held before Sir Thos. Grosvenor, Bart. 9 March 1. James II.

Another held before Peter Pinder, deputy to Sir Thomas Grosvenor, 6th April, 1 Jam. II.

A roll of a crown-mote court and gaol delivery, 30 April, 2 Jam. II. before the mayor and recorder. The jury pannel produced, by which the sheriffs are directed to summon a jury to attend at the next crown-mote court, held before the mayor and recorder; to which the names of the jury who attend are annexed.

Another court, 12 Oct. 1 Jam. II. before the mayor and recorder. At this court there was an indictment for a capital offence.

Mr. Geo. Whitley, sworn. *Produces from the petty bag office a writ for the election of members of parliament, 24 Feb. 1 Jam. II.* By a return thereon, 9 March, 1 Jam. II. Richard Harnica and John Johnson, appear to be sheriffs, &c. &c.

Another return produced.

Mr. Hall. Examined by Mr. Leicester.

Q. Can you inform the court in what manner the recorder has been elected?

A. By the mayor, aldermen and common-council—the select body.

Q. How has the town-clerk been elected?

A. By the select body.

Q. Who holds the courts?

A. The mayor assisted by the recorder, but the mayor alone is named on the record.

Q. What gaol have you?

A. The Northgate tower.

Q. Do you know whether the sheriffs have ever held a petty court?

A. They have constantly.

Mr. Hall read an entry from the book of the petty court last held by the sheriffs.

To shew that the freemen of Chester served upon juries at the city courts, a pannel of the sheriff's court was read, 16th July, 1 Jam. II.—The names of eleven freemen who were summoned upon that jury were read.

Mr. Ewart. Now we will shew that some who served on those juries were made free after the granting the charter of Charles II.

A pannel read 10 Sept. 3d. Jam. II.

Another

Another pannel, read 28 Feb. 2 Jam. II. 1685.

[*Mr. Hall again examined.*]

Q. Do you know whether the freemen of Chester constantly serve on juries in the city?

A. I never heard of a freeman serving on juries out of the city—none but freemen serve in the city.

Q. Do you know whether the freemen are free from tolls?

A. Freemen don't pay tolls, save prize wine excepted by the charter.

A clause in the charter of Charles II. was read, in which prize wine and iron were excepted.

Q. Do the sheriffs arrest?

A. They did arrest for 40s. before the late act.

Q. What fairs have you?

A. Two, one at Midsummer, and another at Michaelmas, and one called horn-and-hoof fair—which is held the last Thursday in February.

Q. Do you know whether they have any court there?

Mr. *Bearcroft*. That is incident to a fair.

A. There are generally complaints which the mayor and magistrates redress.

Q. How is the recorder appointed?

A. He is elected by the select body, and approved by the crown.

Q. Has the mayor a sword carried before him?

A. He has.

Q. And a mace?

A. Yes.

Q. Do you know who have the goods of felons?

A. The corporation and the sheriffs, in consideration of a sum they pay for them.

Q. Who have the fines and forfeitures?

A. The sheriffs.

Q. To whose use?

A. To their own use, in consideration of paying 10l. a piece—and they also have the inspection of the river Dee.

Mr. *Bearcroft*. We will now read the clause of the grant of the reversion of the hospital lands after the expiration of the lease.

(*It was read.*)

“ 11th Oct. 1698.—At an assembly holden before William Allen, Esq. mayor, John Williams, Esq. deputy recorder, the aldermen, and common council, of the said city, ordered that Sir John Mainwaring give satisfaction, by producing his grant to hold the hospital lands after Col. Whitley's death.

“ At

“At an assembly, on 19 Aug. 1703, Johnson, mayor, Comberbach, recorder, &c. Mr. Recorder was desired to go to Lady Mainwaring for the seal of the hospital; and the recorder was intrusted with the charter which granted the hospital lands.”

[*Mr. Hall again examined.*]

Q. Are you in possession of these hospital lands now?

A. Yes; I have received the rent about twenty years.

Q. In granting leases of these hospital lands, to whose use are the fines applied?

A. There are a great many objects maintained in the almshouses; the surplus is brought into the general corporation fund.

Q. Are these funds applied to the purposes of the select body only, or to the general purposes of the citizens?

A. To general purposes.

Q. How much are the corporation in debt?

A. £. 1600 on the hospital lands, and they pay £. 200 a year annuities.

Mr. *Bearcroft*. We stop here as to the acceptance.

Mr. *Hall* cross-examined by Mr. Serj. *Adair*.

Q. How long have you been town-clerk of Chester?

A. Mr. Brock, the late town-clerk, died upon the 4th of August last; I succeeded him.

Q. How long have you acted as deputy?

A. Twenty-three years.

Q. And you have, I suppose, known the corporation of Chester even longer than that?

A. I have lived in the town about 35 years.

Q. How long, to your knowledge or belief, has the mode of electing aldermen by the select body, as it is called, been continued in the corporation?

A. I don't know of any election of aldermen by the freemen at large, except in the time of Queen Elizabeth.

Q. Then I understand the result of your answer to be, that with the exception of the instance you mention in the reign of Elizabeth, you believe the election always has been in the select body?

A. Except in the time of Whitley.

Q. Except, then, in a few instances, the mode of electing aldermen by the select body, has prevailed as far back as the reign of Elizabeth?

A. Yes.

Q. It has then prevailed before the granting the charter of Charles II?

A. There are a great number of orders in council which shew that.

Q. Were

Q. Were not the sheriffs' peers always common-council-men?

A. No: not formerly.

Q. Can you point out any instance, in which the sheriffs' peers have voted, in the select body?

A. There are many entries of their *attending* the select body. The sheriffs were *formerly* chosen out of the common-council.

Q. The election was made by the select body?

A. Yes; and there are a great number of entries, which clearly convince me, that the sheriffs were chosen out of the common-council; by which means there were two out of the forty wanting; at the next assembly, soon after the election, two persons were chosen to fill up their places in the body, in the room of the two persons chosen sheriffs. There are a great number of instances of that sort.

Q. You have spoken of an order of the 7th March, 1 Jam. II. respecting the keys, under which the common seal used to be kept?

A. I read the order.

Q. Are there not orders in the books of the corporation, prior to that date, which speak of a common seal used by the corporation?

A. I have no doubt, but they had a common seal.

Q. Have you any doubt, from your knowledge of the constitution of the corporation, and of their books, that the corporation used a common seal, long before the year 1684?

A. I have no doubt about it.

Q. On the 8th Oct. in the same year, 1 Jam. II. you read an order, by which certain fees were directed to be paid to the yeoman of the pentice?

A. Yes.

Q. You say some of these fees have been discontinued, and not paid, in pursuance of that order?

A. The fee upon the freedom continued to be paid.

Q. But the fees of aldermen and common council-men did not?

A. They did not.

Q. Has there any order been made by the corporation, for discontinuing these fees?

A. I don't know that there has.

Q. Then the truth seems to be, that the aldermen and common-council, who take the whole government of this corporation into their hands, chose to discontinue such fees as were to be paid by themselves?

A. From what I have known of the corporate body, I don't think, that they are inclinable, to take away the officers fees.

E

Q. There

Q. There is an entry, by which all the *new* aldermen and common-council, under the charter of King Charles, are directed to pay a certain sum of money, to be laid out in plate—Have you any entry, which shews the cause of the distinction, between the new and the old aldermen?

A. I believe every alderman or common-council-man upon admission, either paid a sum of money, or made a present of plate—which has been changed into a sum of money, and till within these few years, the aldermen used to pay it—they used to pay four pounds to the treasury, in lieu of any thing of that sort, and the common-council 40s.

Q. You conceive, what is most probably the distinction, that the order was made upon the new ones to pay, because the old ones had paid something, upon that account before?

A. I take it for granted, to be so.

Q. On 15th Oct. 2 Jam. II. it appears that Puleston Partington and Matthew Anderton, were elected sheriffs?

A. I am not certain of it, unless I saw the entry.

Q. You read that.—What office had Partington, in the corporation before that?

A. I don't know.

Q. Can you account, why no entry of election of city officers appears in your books, in the 3d year of Jam. the Second?

A. There is a blank leaf.

Q. And no entry appearing in that year?

A. There is no entry.

Q. Can you at all account for that blank?

A. I should suppose the officer did not do his duty.

Q. Have you known the portmote court, as long as you have been deputy town-clerk?

A. Yes.

Q. Before whom has that court been held, since you remember it?

A. Constantly before the *Mayor*, assisted by *Mr. Recorder*. The recorder attends the mayor, and does the business.

Q. The court is held before the mayor, and the recorder acts as his assessor; and so it has been ever since you have known the court?

A. Yes.

Q. The style of the court, ever since you have known it, has ran,—*Before the mayor*,—according to the ancient usage from the time whereof the memory of man is not to the contrary?

A. I received it so, and so it has continued during my time.

Q. Have you ever, in your memory of the corporation, known

known a deputy mayor discharge any of the functions of the office, or hold any court?

A. Not in my time.

Q. You have been acquainted with the crownmote court?

A. Yes.

Q. Before whom, in your time, has the crownmote court been held?

A. *Before the mayor.*

Q. The crownmote court, in your time, has been held before the mayor?

A. Yes; *the recorder assisting him.*

Q. And has not the style of that court always been "*according to the usage of the said city, from the time whereof the memory of man is not to the contrary?*"

A. Yes.

Q. Before whom has the sessions been held, in your time?

A. Before the mayor, recorder, and justices.

Q. What is the quorum in your session?

A. The mayor and the recorder *only*, as I apprehend.

Q. The recorder, I think you say, has been elected by the select body, as well as the aldermen?

A. Yes.

Q. I should wish to know, by whom, during your knowledge of the corporation, the mayor has been elected?

A. In the town-hall.

Q. My question is, *by whom?*

A. The freemen at large have, I believe, returned *two* aldermen.—

Q. I have a right to put the question thus to you (if I am wrong, you will set me right)—Has not, during all your knowledge of the corporation, the election of the mayor been made thus—that the *freemen at large, in common-hall assembled*, return two aldermen, who have not served the office of sheriff within three years?

A. That has never come in question.

Q. Then the freemen at large, in common-hall assembled, have returned two aldermen?

A. Yes; when there has been any disputed election.

Q. As far as your knowledge goes, whenever there has been a formal election, the common-hall, consisting of the freemen at large, have returned two aldermen without regard to the circumstance—*whether they have served the office of sheriff within three years before, or not*:—Out of these two, the mayor, recorder, and aldermen, have appointed one to be mayor?

A. I believe there has been no election for mayor, but in October last.

Q. And

Q. And you have always understood that to be the mode of election in the corporation?

A. Yes; it is allowed that the freemen have a right to vote for two aldermen, and those two, who have the majority of votes, are returned to the mayor and aldermen.

Q. Two are returned by the commonalty, out of whom the select body chuse one to be mayor?

A. Certainly.

Q. In what manner have the sheriffs been elected?

A. I don't know whether the mayor only names, or how; but the mayor is asked the question, and he names the *first* sheriff: Whether the aldermen have a right to concur in that, or not, I don't know; but the mayor, in fact, names the first sheriff.

Q. Who appoints the other sheriff?

A. *The freemen at large.*

Q. In what place does the mayor name the *first* sheriff?

A. In the common hall.

Q. At the common hall holden upon the election day, the mayor names one sheriff, and the freemen at large chuse the other?

A. Yes.

Q. Do you remember the contest for the election of sheriff in 1771?

A. I don't remember what year it was; but I remember one very well.

Q. Was Mr. Amery (the defendant) a member of the corporation at that time?

A. I think he was a common-council man then.

Q. Do you recollect whether he voted at that election for sheriff, or not?

A. I don't recollect. I have the poll-book here.

Q. By whom, curing your knowledge of the corporation, have the coroners been elected?

A. I don't know; the mayor names them; they have the precedent book to go by.

Q. Then as far as your knowledge goes, there has been no election of coroners in your memory; but they have been named by the mayor?

A. Yes; but I don't know in whom the right is.

Q. Do you know by whom the murengers, or surveyors of the walls, are elected?

A. They are elected on Friday next after the feast of Saint Nicholas, by the mayor and aldermen; the entry in our book is, *by the mayor and aldermen*; and I rather think they are elected

lected by those aldermen who are justices : but the entry is as I have stated it

Q. It is on the Friday next after the feast of Saint Nicholas ?

A. Generally : but I think I remember an omission.

Q. Do you know by whom the treasurers have been appointed ?

A. The mayor always names them.

Q. The leave-lookers ?

A. The mayor names them also.

Q. What person administers the oaths, directed to be taken by those who are admitted into the corporation ?

A. I and my clerk.

Q. But before whom are all those who are admitted into the corporation (the freemen, aldermen, and common-council) sworn ?

A. They are all sworn before the mayor and another justice at least.

Q. Have you never heard of their being sworn before a deputy mayor, or deputy recorder ?

A. We have had no such officer in my time, as I recollect, till very lately, when Mr. Recorder appointed Mr. Cowper his deputy.

Q. Mr Cowper, was so appointed for the purpose of trying particular cause ?

A. I believe that was the occasion of it, he did all the business then.

Q. In what court was that business conducted ?

A. In the portmote court.

Q. The recorder was not present ?

A. He was not.

Q. Was the business of the session done by Mr. Cowper, that time, instead of the recorder ?

A. The whole of it.

Q. The mayor, and one of the aldermen, I take for granted, were present as justices ?

A. There is generally a very full court—often eight or ten—sometimes more—sometimes less.

Q. Have the sheriffs always been elected out of the common-council ?

A. I believe so ; I don't recollect any otherwise ; there was no contest for sheriff. I believe they have all been elected out of the common-council.

Q. Don't you remember a person of the name of Corles ?

A. Yes ; he was a member of the common-council I think ; I am pretty clear he was : the corporation broke the rotation then.

Q. Are

Q. Are you acquainted with the sheriffs' court also?

A. Yes.

Q. At what time do they hold their court?

A. We say, they have a right to hold them upon Tuesday, Thursday, and Friday, weekly.

Q. Have they been so holden?

A. Yes, when the business requires it.

Q. I believe by the constitution of the corporation of Chester, no person can serve upon juries, in any of the courts within the city, except the freemen?

A. We never return any but freemen, if we know it.

Q. I remember a famous case in the court of King's-bench, where that was recognized?

A. I don't say, we may not have done it; there may have been mistakes; there may have been irregularities.

Q. You don't return any, intentionally, upon the pannel, who are not freemen?

A. No:—but, I believe, we don't require freemen on coroners' inquests.

Q. No freemen are regularly impanel'd to serve on juries, without the city?

A. Never that I knew; but Mr. Wilbraham is better able to speak to that.

Q. You have spoke of the exemption of the freemen from tolls: They are not exempted from *all tolls generally*: You say there is an exception of prize wine and iron?

A. I know nothing of iron, but prize wine I know; the corporation, I apprehend, have a grant of the crown dues.

Q. With respect to the hospital lands, I observe in the order of 19th August, 1703, that the recorder was directed to receive the seal of the hospital from Lady Manwaring:—Is there a common seal used for the hospital, different from the general common seal of the corporation?

A. Yes, and it is here: We always seal the hospital leases, with the hospital seal.

Q. Do you know, how the hospital seal came to be used; and how there came to be an hospital seal at all?

A. I know nothing more than what the books mention.

Q. I see nothing about that hospital seal, in the charter of Charles II?

A. There is an order in the books, that the recorder shall go to Lady Manwaring, for the hospital seal.

Q. That has led me to the knowledge of the fact, that there is an hospital seal; but there is another order, that the re-

order be intrusted with the charter by which the same is granted :—I beg to know what charter that is?

A. I don't know.

Q. Is there no such charter?

A. There is a charter of Oliver Cromwell's ; and, I think, charter granted the 15th Sept. 4 James II.

Q. Then the seal was received by the recorder, and these are the charters, which the recorder was intrusted to keep?

A. He might receive it ; but I know nothing farther about than what the order states.

Q. Who are the persons, that have a right, by the charter, to demand their freedom of the corporation?

A. Every person—who has served seven years' apprenticeship—or born a freeman—or by order of the corporation.

Q. That is, *ex gratia* :—Has it ever occurred, in your knowledge of the corporation, that *any inhabitant of Chester*, who was not intitled by birth or servitude, has demanded his freedom, and that it has been allowed, under the description of *inhabitant of Chester*?

A. I never remember any person being understood, *merely an inhabitant, to have a right to his freedom.*

Mr. *Leycester*. I think you tell us, that the sheriffs were, formerly, chosen out of the common council, and their places were filled up by other persons?

A. Yes.

Q. How has that been, within this last century?

A. By the select body—the mayor, 24 aldermen, and 40 common-council-men.

Mr. *Bearcroft*. We are going now to prove, that the defendant, Mr. Amery, was one of the common-council when he was chosen alderman—that goes to the 6th, 7th, and 8th, issues.

Mr. *Serjeant Adair*. The evidence hitherto given, has been upon the 3d, 5th, and 9th, issues.

Mr. *Hall* examined by Mr. *Bower*.

Q. Was Mr. Amery a common-council-man, when he was elected an alderman?

A. He was.

Q. Were you present at the time he was elected alderman?

A. I believe I was—There have been very few corporate assemblies, at which I have not been present—I have no doubt I was present at his election.

Q. Was he elected by the majority of the mayor, aldermen, and common council?

A. Yes.

Q. Was

Q. Was he admitted into the office of alderman ?

A. Yes.

Q. Has he acted in that office ever since ?

A. Yes.

Q. Was he elected at one of the assemblies before the mayor, aldermen, and common-council ?

A. Yes.

Q. When was he elected alderman ?

The entry of Mr. Amery's election to the office of alderman read, dated 1st March, 1782.

Q. Was Mr. Amery a common-council-man at that time ?

A. He was.

The entry of Mr. Amery's election to the office of common-council-man, read, dated 17th January, 1763.

Q. What is the inner pentice room ?

A. It is an office where the magistrates meet to do business—sometimes we have our assemblies in the inner pentice—sometimes in the common-hall.

Q. Have you ever known any election of aldermen or common-council-men before this, in the inner pentice ?

A. Yes.

Q. The place for the common-hall is in the market place ?

A. Yes, which was built in King William's time.

Mr. Serjeant *Adair*. Is there no common-hall now ?

A. Yes, that, which was built in King William's time, is now the common-hall.

Mr. *Hall* cross examined by Mr. *Mills*.

Q. Do you remember Henry Ryder being a candidate, for the office of sheriff, in 1771 ?

A. I don't know what year it was, but I remember it very well.

Q. Was he a common-council man at that time ?

A. He was not.

Q. Do you remember, whether a poll was taken ?

A. Yes there was.

Q. Do you know, whether Mr. Amery voted for him ?

A. I take it for granted, that he did not.

Mr. *Mills*. Here is an order made 14 Oct. 10 William III. that all elections shall be made in the common-hall.

The order was read.

Q. When the select body meet at the common-hall, is any person admitted, who is not admitted into the inner pentice ?

A. No.

Q. Do the select body admit any one into the common-hall at their elections, but what have business ?

A. No.

Thomas

Thomas Almond, sworn. Examined by Mr. Plumer.

Q. How old are you?

A. Eighty-two.

Q. How long have you known the city of Chester?

A. I was born there and have known it ever since.

Q. Do you know of a fair held there called HORN-AND-HOOFF FAIR?

A. Yes: I can remember that fair for seventy years.

Q. When is it held?

A. The *hindmost* Thursday in February.

Q. Who receives the tolls of that fair?

A. I can't tell, I have seen a man demand the toll of the market there.

Q. Did he demand it as a toll belonging to the city?

A. Yes: I suppose so.

Q. Was there a number of horses at this fair?

A. A vast quantity.

Q. How long does it last?

A. Only one day.

Q. Do persons who buy at this fair pay any tolls?

A. If they bought a cow or a heifer, they paid a halfpenny or a penny

Thomas Almond, cross examined by Mr. Lane.

Q. Do you know how the mayors have been usually elected at Chester?

A. Yes.

Q. In what place have they been elected?

A. At the new-hall, at the foot of the shambles.

Q. Who assemble there at the election?

A. The mayor, the aldermen, and common-council; abundance of them; I have been up stairs when they have been electing the mayor.

Q. Who are the persons who chose the mayor?

A. The common-council, and the freemen. There was sometimes a great election, and a deal of fighting.

Mr. Bower. Do you remember Whitley's time?

A. No.

Mr. Lane. Do you remember Johnson's election?

A. Yes.

Q. Was that the fighting election?

A. Oh! there was several fighting elections.

Q. There was a very great poll?

A. Yes,—there came up numbers of them—ten at a time.

Q. How long did it last?

A. Some days.

The end of the evidence for the defendant.

F

MR. SERJEANT

MR. SERJEANT ADAIR.

May it please your Lordship,

Gentlemen of the Jury,

IT now comes to my turn to trouble you, on the part of the prosecutor of this information, which, as stated in the outset, calls upon Mr. Amery, an alderman of Chester, to shew, by what right he claims to exercise that office in the corporation; and, in truth, it is brought for the purpose of *trying* and *deciding*, by your verdict, under his lordship's directions, what is the real constitution of that ancient and respectable corporation.

My learned friend has complained much of a supposed abuse of prerogative, which he imputes to the prosecutor of this information, from the form of the proceedings before you; but, following my learned friend with all the attention which every thing he says, deserves, I confess I am not able to collect the foundation of that complaint; for in the very same breath that my friend uttered that complaint, he admitted that it was the *usual practice*; and he said it was not that which he complained of—"to put in issue all the allegations of the defendant in informations of this nature,"—but he alledges—"that we have abused the prerogative of the crown, in stating our right in different manners."—He admits, therefore, that in calling upon Mr. Amery, to prove his right, in every particular, alledged by him, we have done nothing but what is usual—we have done nothing but what is justifiable—nothing which my friend himself, upon consideration, can properly complain of.

Now I contend that we have not stated any right upon the record, nor is it incumbent upon us so to do: but that we have done that, which we ought to do, without which it would have been idle and absurd to come at all into a court of justice. We have stated upon this record, every material matter which appeared to us to affect the right of the defendant, Amery,—every ground of fact and of law, which tended to shew, that the claim of that right was the effect of *usurpation*;—in so doing I think we have acted candidly and wisely,—but the complaint of an abuse of the prerogative appears to me to come with a very ill grace indeed from my learned friend, when I know that upon this record the whole case of his client is founded upon one of the *grossest abuses of the royal prerogative*, which any period, in the history of this country, can afford an example of;—I mean the charter under which Mr. Amery makes title to his office—a charter granted by Charles the second, almost in his last moments, for he died within two days after—a charter, with many others, founded upon the ruins of *the rights and liberties of the kingdom!*

I shall

I shall presently have occasion to follow my learned friend a little farther into the history of those times, of which he has spoken so tenderly, and upon which he has ventured to assert, "that the proceedings were perfectly legal,"—tho' he admits them "to have been imprudent and ill-advised."—I think, therefore, when a case is brought into court, founded upon *such* an exercise of the prerogative as *this*—that those who now claim a title upon that prerogative, which was exerted to the *subversion of the rights* of every corporation, and to the *destruction of the liberties* of every subject in the kingdom, have very little reason indeed to complain of an individual, who calls upon the prerogative of the crown *to assist the rights and privileges of the subject*,—which appears to me to be the genuine operation of the King's prerogative;—I trust *that* is the operation with which we shall be always best acquainted;—*that* is the prerogative which the constitution has wisely reposed in the crown; for upon *that* depend the just and the proper rights and privileges of the subject.

My learned friend has thought fit to preface this case, which if brought immediately before you upon the strict foundation on which alone I shall show it stands, in this record, would not have come very favorably before a jury of gentlemen:—He has thought fit to introduce it with that which, if it could have been supported, would have been a much better right indeed; for he tells you that the mode of election, for which he contends, in this corporation, and under which Mr. Amery claims title to be an alderman—has been *time out of mind*:—He does not stand up, he says, to maintain an usage of twenty, thirty, or forty years, nor even of a single century; but an usage of three hundred years or more,—an usage, indeed, as antient, he tells you, as the corporation itself, which they have alledg'd to be a corporation by *prescription*.—Is it the fact, which my learned friend sets up, in support of such an usage? If it be, why has not his client stated that title upon the record? Why has he not said that, which his lordship will tell you he might have said, if the truth would have supported it; and which, if he had said and *proved*, would have given him a much better title than any he has set up in these proceedings? Having alledged that the corporation is a corporation by prescription, why did he not follow it up, by saying, that from time immemorial the usage of the election of aldermen has been as he has stated it? He would then have stood upon the best of all titles—uninterrupted and immemorial usage—which implies the acquiescence and consent of all persons interested in the transaction: But he has not thought fit to rest upon *that right*

—nor, in any one of the many instances this record is furnished with, to state, that any such usage has prevailed, —and, tho' he has thought proper to set out with claiming the benefit of such an usage, in order to recommend his case to your favour, he knows *that* is not the title his client has set up in this cause; and he knows it is a title which would have been set up, if any such had existed. I therefore can with confidence deny, that any such immemorial usage of election has existed; and you observe that in the outset my friend has even failed in proving that this was a corporation by prescription. He has, with a generosity of which you will judge, thought fit to make me a present of the first issue, and of your verdict upon it: my learned friend has always good reasons for the presents which he makes on behalf of his clients—The reason of that present was, because he knew, labour as he would, that his case would not support that issue,—he knew it was a false allegation upon the record, and clearly an allegation, contrary to the title, which he must afterwards be obliged to state; for he would shelter that admission upon this ground, that whatever this corporation might have been before, it was annihilated at a certain period; and therefore, to be sure, he could not say, that at this time, it is a corporation by prescription. But it could not escape your notice, that after my friend had made the present, he seemed, a little, to repent of it, and to wish to qualify that admission, as much as he could; for tho' he set out with stating, that your verdict must be for me, upon the first issue, yet he thought it worth while, to take up near half an hour of your time, in the outset, in endeavoring to prove (tho' he said he could not *entitle* himself to your verdict) that before this judgment, which annihilated the corporation, it was a corporation by prescription.

I know he did not mean idly to sport with your time, and that he had some reason for wishing that that proposition should be established,—whatever his reasons were, they have failed in the effect, for after turning over a number of the old books of the corporation, and all the officers of it laying their heads together, for half an hour, they have not been able to state one tittle of evidence in support of that first issue, even if the judgment, which annihilated the corporation, had been out of the way, for they have not been able to shew any instrument of incorporation, or any circumstance, which argues even the existence of a corporation, till very near the period, which I shall shew you, is a material period in the history of the corporation of Chelster; therefore the immemorial usage, which my friend

has

has thought fit to introduce his speech with, though it is not the question in this cause, has existed no where, but in his own imagination;—for he has not been able to prove, that it is a corporation by prescription, much less has he proved, that the mode of election has been immemorially used:—we shall be able to shew the converse of the latter proposition beyond a doubt, for as to the first issue, I shall dismiss it from your attention, it being admitted that I am intitled to a verdict upon it;—I shall be perfectly satisfied with that verdict, without taking up time to state upon what it is grounded.

Court. If you leave it there, it is proper for me to apprize you, that I am not satisfied with Mr. Bearcroft's admission;—I shall direct the jury, that there is evidence for their consideration, whether it is a corporation by prescription, because I can easily conceive, that the counsel on that side were willing to make you that present for a purpose, which, perhaps, I may happen not to go along with them in.

Mr. Serjt. Adair. What has just fallen from his lordship will occasion me the trouble of a very few words, for I trust, when his lordship comes to recollect the evidence upon that subject, and when you come, under his lordship's directions, to consider the effect of that evidence, you will be of opinion, that my learned friend has not conceded too much; and that you will, by your verdict, be inclined to hold him to that concession, altho' he should fail in establishing the purpose, for which it was made.

But the ground upon which I contend that he has failed, in the proof of that issue, is not that upon which he wished to make his concession,—it is not, because I consider the corporation, as wholly annihilated, in the strong terms which my friend has made use of, upon that subject; but it is, because possessed of all the records and muniments of this corporation, from the earliest in existence, my friend has not been able to rake up *one* tending to prove, that before the judgment, in *quo warranto*, it was a corporation prior, at any great distance of time at least, to the charter of Henry VII. for I am aware, that there is a recital in the charter of Henry VII. which does *imply* the existence of such a corporation, as the mayor and citizens of Chester, antecedent to that charter, but how long does not appear from any evidence in the cause.

Now his lordship will tell you, that in order to find that issue for the defendant, upon this being a corporation by prescription, you must be satisfied by evidence, that it was a corporation, consisting of *the mayor and citizens of Chester*, from before the time of the reign of Richard the First:—Now the very attempt, which they have made to prove it, goes
a great

a great way to disprove it;—had they rested singly on the recital in the charter of Henry VII. which states the existence of a corporation, it would have been stronger evidence, but when they go back to the more antient records of the corporation, and when they produce to you a charter from an earl of Chester (so early I believe as the reign of Hen. II.) who you know enjoyed all the rights of sovereignty before the union of the county palatine to the crown, and when in that charter, you find no trace of a subsisting corporation (for that is the effect of that charter) it is strong negative evidence, that, *at that time*, there was no such corporation in being,—it shews that there was a city of Chester—that there were citizens of Chester,—that there were parties capable of holding and of enjoying rights; but it shews nothing like their being formed into a *regular* corporation, with a chief magistrate, and with those forms, which are requisite for the existence of a corporation,—for the only effect of that evidence (in addition to what I have just stated) is, to shew that the earl of Chester, by charter under his seal, was pleased to declare, *that the citizens of Chester should enjoy all the privileges which they had before enjoyed*

Now is there any thing in that which bespeaks the existence of any thing like a corporation? there is nothing which they are to do in common; in their collective capacity they are described by the word *citizens*; it is in that case as low a word as *inhabitants*: they are described as citizens of Chester, and the earl declares, that they shall enjoy, under him, all the liberties and privileges which they enjoyed under any of his predecessors.

I therefore contend, that these antient instruments, in which you can find no trace of a corporation, are strong negative evidence, sufficient to rebut the recital in the charter of Hen. VII.

This leads me (before I shall follow my learned friend in the specific questions which you are to try) to go a little into the history of the corporation of Chester.

That Chester is an antient city we all know; that it existed as a corporation even prior to the reign of Henry VII. I am ready to admit. I think that is sufficiently proved by the recital in the charter; however, there is not a doubt but that the charter of Hen. VII. first reduced it into form, and gave it the constitution, under which I pledge myself to shew you, it has subsisted as a corporation from that time to the present, with *certain* interruptions, which were merely produced by the heat of the times, and the violence of power.

Henry the VIIIth, in the 21st year of his reign, granted a charter to the mayor and citizens of Chester, in which a dis-

inct constitution is pointed out; all the constituent parts of the corporation are accurately defined; all its officers are brought into existence; and the mode of electing them, is distinctly pointed out by that charter; I know of no city, which possesses a constitution more correctly, and distinctly defined than the city of Chester, under the charter of Henry VII.—By that charter the mayor and citizens are the corporate body; within that corporation is formed a select body, consisting of the mayor, aldermen, and common council, the number of whom are defined by the charter, and their powers also marked out, which undoubtedly are very considerable; but at the same time, the right of explaining doubts and of making bye laws, for the good order and government of the corporation, is vested, and wisely vested, in my opinion, in the select body. The right of election (that important right upon which both the local and general privileges of the kingdom depend) is by this charter properly reserved to the body at large.

You will be asked, presently, by my learned friend, how the body at large came to be dispossessed of that right? and to that question, I trust, I can give a satisfactory answer; for observe,—the defendant says,—I am elected by the mayor, aldermen, and common-council, who are authorized to make that election by the charter of Charles the Second; and therefore he, in support of his title, sets up no right whatever in that select body anterior to, or distinct from, the charter of Charles the Second,—And that is a point from which you must never, if you mean to decide this cause according to the law and justice of the case, suffer your attention for a moment to be called away.

In truth, the material, the real question between the parties, comes into one, tho' for the sake of distinctness split into different propositions, all tending to the same end: the real question is, whether *that right* which the defendant sets up under the charter of Charles II. is a *valid, legal, subsisting* right or not, under all the circumstances of the case; you must therefore observe that the defendant sets up no title in himself, but the election by the select body, and no right in that select body, independent of the charter of Cha. II.—Whatever opinion you might therefore have been led to form of the existence of any right in that body, *prior* to the charter of Charles II, that is not the right, which the defendant has thought proper to put his case upon,—that is not the right which will justify your verdict on the present occasion; for you are to decide, whether under the charter of Charles II. and *that alone*, the right of election is
vested

vested in *the select body* of this corporation. You will find, that there is very little evidence indeed on the part of the defendant, which is, in any sort, applicable to that question—The corporation immediately after the issuing of the charter of Henry VII. acted under it even in the particulars in which it has since been departed from; for from all the proof in this cause, already laid before you on the part of the defendant himself, I shall shew you presently, that to this moment they have acted under the charter of Henry VII. in far the greater part of the business of this corporation.

In addition to that, I shall shew you, that they have acted under it, even in the instance which has been totally departed from since that time—that is, the annual election of aldermen; for by that charter the election is not only directed to be in the freemen at large, but upon the fair construction of it (though not very clearly expressed) I think that charter meant an annual election—I will read the words—I have no doubt but that my learned friend will contend for a contrary construction, because it seems to be that which gives colour to the idea of the charter being departed from: the words are these:—“ We give and grant, for us our heirs and
 “ successors, to the above-named city and commonalty, their
 “ heirs and successors, that they and their successors for ever
 “ shall and may make and appoint, *every several year*, twenty-
 “ four citizens of the city before mentioned, aldermen; as also
 “ forty other citizens of the same city, for the common-council
 “ of the said city;—which twenty-four citizens so chosen and
 “ made, shall *have and bear the name of aldermen for ever.*”

Now some ambiguity perhaps might arise, as if from the words “ for ever,” there was a degree of perpetuity given to the alderman in his office (that is, for life, which is all the perpetuity a man can enjoy) but that the charter directs the election to be made *every year*.

There is an entry still extant, in the corporation books, and one of the oldest in them, in which you will find that the twenty four aldermen were then elected expressly *for one year*—*to continue in their office from the day of election, for one entire year*; so that there is a clear, unequivocal act, founded upon the construction of the charter of Henry VII. which is the strongest argument, as I conceive, against my learned friend, and the modern practice of election. There cannot be a doubt entertained by any man who reads that ancient entry, but that *at that time* the charter of Henry VII. was strictly and rigorously acted up to by the corporation in all its branches.

The next period in the history of this corporation, is in the reign of Henry VIII; when you will find, that the spirit of encroachment began a little to *creep* into the select body of this corporation: I believe the lust of power is natural to the mind of man; I am sure that the spirit of usurpation and encroachment is natural to the select bodies of every corporation in the kingdom (except only the one with which I have the honor to be connected, I mean the city of London)—it is a general vice complained of in all places, the few are always desirous of governing the many, and of contracting their rights, and getting them as much into their possession as they can: of all commodities in the world, there is none which mankind are more disposed to make a monopoly of, than power; and as a monopoly of all other commodities, is subversive of the true interests of trade, of commerce, and manufactures; so a monopoly of power, is completely subversive of the rights and liberties of men.—But however the citizens were prevailed upon, early in the reign of Henry VIII. to give their assent to a *bye-law*, by which they departed from the mode of election of aldermen, pointed out by their charter, and also restrained that right of election to the select body, tho' not in the terms of the charter of Charles II. and that will be material for you hereafter to attend to; but they certainly restrained that right of election to the select body. In a subsequent period, in the same reign, they made another *bye-law*, respecting the election of common-council-men; and I have not a shadow of doubt, and I believe you will not have any, that these *two bye-laws* were the foundation of that usage, which my learned friend in order to support the charter of Charles II. would have you believe was time immemorial; but which in truth had its birth at the moment I am now speaking of; that it is so, I don't rest merely upon arguments drawn from the probability and nature of the thing, for I shall shew you, that *that* has been the ground, down to the moment of the present dispute; and *that alone* has been the ground, upon which the select body of this corporation have thought fit to rest their rights, and this I will prove out of their own mouths, in a variety of instances, before this cause is over.—It was not till the other day, in the very dispute now before you, that they were advised by their lawyers, to desert those *bye-laws*, the nature of which (my learned friend near me perfectly understands) will be unnecessary to trouble you much in explaining. I say they were advised to desert them, because they were unable, and to have recourse to an experiment, which it was

necessary to make, or they must have given up the question altogether—an experiment, which, I trust, will also be found equally unsuccessful.

It is perfectly clear, that these bye-laws, tho' so long acquiesced in, were in themselves *void*, and that they could not be supported in a court of law; for one was made by the corporation at large, in whom the right of making bye-laws was not vested by the charter, which they had accepted and acted under:—the other, by the select body, was made to confine the right of election to the law-makers themselves, to the exclusion of an *integral part* of the corporation, which his lordship knows, in the case of the corporation of Maidstone, not long * ago, was *decided* to be ABSOLUTELY VOID, by the unanimous decision of all the judges of that court; which, independent of the chief magistrate who still sits there, was then filled as ably as ever it has been since, by Mr. Justice Yeates, and Mr. Justice Wilmot, who was afterwards chief justice of the Common-pleas.

Tho' the corporation have been, on this occasion, obliged to change their ground, which they have stood upon till this last year, yet I trust that the ground they have now taken, will be the most decisive evidence, that the charter of Charles the II^d. never was accepted, never was considered as a subsisting charter, or acted upon, except for two or three years after it was granted, which I shall speak upon hereafter.

Thus the second material period of the corporation is in the reign of Henry VIII. when those bye-laws were made, which have been the true foundation (tho' mistaken and untenable in point of law) of the usage which was afterwards founded upon them. While that usage rested upon the bye-law alone, the commonalty, who had assented to it, acquiesced under it; and it is very observable how much more easily men are coaxed and flattered to give up their rights, than they will suffer them to be wrested from them by others, or torn from them by the hand of power; for from the time I am speaking of, till the judgment in *quo warranto* in the reign of Charles II^d. I admit that an usage (with very little interruption) prevailed, not conformable to the charter of Charles II^d. but to the bye-laws, of which I have been speaking; however, there was a period, when the good sense of the corporation, and perhaps the advice of their law officer, led them to break through these bye-laws; for in the reign of Elizabeth, a period of good sense and the understanding of the laws, you will find, that they did resort back to their antient constitution, to the charter of
Henry

Henry VII. (notwithstanding the bye-laws which had been made) upon some disputes in the corporation, probably arising from a doubt with respect to the validity of those very bye-laws, and considering the effect of them, as an usurpation upon the rights of the commonalty. Disputes arose, and application was made to the Queen; and that Queen, by the advice of her council, granted a new charter to the corporation of Chester, confirming in every particular, *word for word and letter for letter*, the charter of Hen. VII. with the addition of a few privileges and explanations, which it seemed to require; so that there is not a doubt, but that in the reign of Elizabeth, the charter of Henry VII. was considered, both by the corporation and the crown, as the subsisting and the legitimate constitution of Chester; for without any alteration whatever, but with some addition, those privileges were re-granted by Elizabeth; and we shall shew you, that *posterior* to that grant of Elizabeth, the election was made pursuant thereto.

Again, the select body, which will ever have the advantage in point of management and address (except, as in the present instance, some public-spirited individual shall stand forth in support of the rights of his fellow-citizens)—Again, I say, the select body *crept* into the *old usage* founded upon these bye-laws, and for a considerable period, down to the reign of Charles II. I believe, elections were made in conformity to them.

We then come to that memorable æra, as my friend stated it, not only in the history of the corporation of Chester, but of the whole kingdom: My learned friend has spoken of that in very gentle terms indeed; he says it is a very important period in the history of this corporation, and of the whole kingdom, meaning the proceedings in quo warranto at the end of Charles the II. d's. reign—proceedings "*perfectly legal*" my friend says, though "*very imprudent and ill advised.*"

Recollect one moment (for I am sure I need not state *de novo* to you facts which you are perhaps better acquainted with than myself) and recal to your remembrance what those proceedings were: They were neither more nor less than an attempt to *subvert the liberties of the whole kingdom*, by striking at the very foundation of those liberties, by getting into the hands of the crown, or surreptitiously procuring surrenders of *all* the charters, of *all* the corporations, in the kingdom; by which means the crown assumed the power of re-granting them, with such *terms* and upon such *conditions*, as should make them its absolute creatures (as I shall shew you was the case with this charter of Charles II.) in order to secure, by that management, a majority of *all* the electors of members

of parliament ; so that it was at once the most daring, and the most effectual stride, that arbitrary measures ever made towards despotism, in this country. The circumstances, which had given rise to the fatal and calamitous civil war in the preceding reign, important as they were, were trifling to this ; and from the known spirit of this country, no doubt, if that King, who dared to take these measures, had survived and persevered in them, they would have lost him his crown, as they had done his father's : I hope so ; and from the spirit of this country, there is every reason to believe it.

These measures, my learned friend says, were “ perfectly legal, though very ill-advised.” Was it perfectly legal for the chief justice of the kingdom, and the judges in their circuits, to go about the country calling upon corporations for the surrender of their charters—stating it in charges to grand juries—threatening them with the power and vengeance of the crown, if they did not comply ? Was that “ perfectly legal” and only “ imprudent ?” I defy the history of this or any other country to shew a period more big with tyranny and violence.

These were the times and the transactions from whence this notable charter, under which Mr. Amery sets up his title, was derived. Hatched and brought forth in despotism, that charter has lain a dead letter, and never seen the light, except for the moment when the select body of the corporation of Chester have been driven to the last push, and called upon to justify their usurpations : They have been then obliged to have recourse to this instrument of tyranny ; and you will have the honour, to-day, of extinguishing, for ever, this last seed of despotism—this last dragon of King Charles's breed ; for I believe the charter now in question before you, is one of the last which exists of those infamous charters granted by Charles II. at the period I am now speaking of ; and I don't know whether it is not the first, that has been ventured, in better times, to be set up in a court of justice : This however is the nature and history of the charter, upon which you are now to decide.

Then my friend admits the wisdom, and I am sure you will applaud the spirit, of the conduct of the citizens of Chester, upon that memorable occasion ; for when numbers of the corporations of the kingdom, even the great city of London, were terrified by the threats of the crown, into an implied surrender of their rights, the city of Chester held out infinitely to their honour : They said,—We will not appear to your quo warranto—exert your power—take what strides of despotism you will, we will not betray our own rights and those of the rest of our fellow subjects—we will lie by, and wait

or better times—take judgment by default—do as you please, we will not appear to such an information!—That was the conduct of the citizens of Chester; and their example will, I trust, be followed with effect, by those who wish to assert the rights of themselves and their fellow-citizens: However, the crown was not discouraged by such a resistance; they proceeded to judgment by default, and that was soon followed up by a final judgment.

Here, then, we come to a material period indeed: for with respect to this judgment in quo warranto, the tenor of which was to seize into the hands of the crown all the franchises, without exception, of the city of Chester, I confess I was at a loss to conjecture in what light my friend would bring it forward, or what use he could apply it to in his client's case. He seemed to me, to be in a dilemma; and in the point of view, in which I considered the cause, I confess I was not extremely anxious which side of the dilemma he should take; because it seemed to me, that either would be equally subversive of the title of his client. There certainly were but two sides to be taken upon this question: either this judgment, the creature of violence and despotism, was absolutely null and void, and had no operation at all—or it went all the length, which my friend has said it did; for if it was a legal judgment, however “imprudent and ill-advised;” and if the franchises of the city of Chester had really been forfeited, and were seizable into the hands of the crown, it had all the effect, till reversed, which my friend imputes to it, and which amounted, as he states, to a total annihilation of the corporation.

If he had taken the other side, it seems to me, that his case could not have stood a moment; for if this judgment was to be considered as a mere act of violence, and as a nullity, then the charter of Henry VII. would be still subsisting, for his Lordship will tell you, that as rights granted by letters patent of the crown, and standing upon matter of record, cannot be surrendered by less formal means than those by which they were granted; that this charter remaining in the hands of the citizens of Chester, uncanceled and unsurrendered, the crown could not grant a charter inconsistent and incompatible with it; and therefore this famous charter of 37 Charles II. would have been in point of law a mere nullity.—So it would have stood, if my friend had taken the *other side* of the dilemma: His good sense has already foreseen all I have now stated; and I dare say, a great deal more than I can state to you upon the subject.

But it remains with me to shew, that the side of the dilemma, which he *has* taken, will be just as effectually destructive of

his case. The language and effect of the judgment were, that there was an end of all their privileges—the corporation itself, says my friend, was perfectly nullified and dissolved—there was a total dissolution of the corporation of Chester—there was no mayor, no aldermen, no common-council-men, no freemen, not a corporation nor a corporator existing: These are the terms, the emphatical terms, in which my learned friend has thought fit to speak of the effect of that judgment.

Let us now, therefore, come to the consequences. I must here state a little corporation law, with respect to the acceptance of charters. My friend has advanced, as a proposition, that where there is a charter of creation—a *maiden* charter, as he calls it—it must, if accepted at all, be accepted *entirely*:—Not so, says my friend, of a *subsequent* charter granted to a corporation already in existence; for that may be accepted in part, and rejected in part.

Now I must say a word or two upon these two propositions. As to the first of them, tho' I might perhaps in terms agree with my learned friend, yet I by no means approve of his manner of putting and *applying* that proposition. On the contrary, I take the very reverse of it to be true. My learned friend states what I conceive (stated in those terms) to be good law, and upon which we shall both agree; that is, a new charter of creation must be accepted *in toto*, or not at all. But observe how he puts it: “If it must be accepted *in toto* or “not at all, and if I can shew it has been acted conformably “to in any *one* instance, the consequence is, they have accepted it *all*”. That is an application of the principle, which I with both my hands deny; and which I am sure your own good sense will revolt at: The converse of the proposition is true, and is such as arises from the known and just prerogative of the crown. The crown has a right to say, “Here I hold forth a bundle of privileges to you, accompanied with “certain conditions; take them or leave them: You shall not “take some, and leave others.” It is not, “If you take one, “I cram all the rest down your throat.” Common sense—the principles of the law—the principles of freedom—revolt at the idea. But if a person says, “I will thank you for this— “I will accept this, that, and the other, but not all;” the answer is—“No! if you do not take all, you take none.”—I trust I shall have an opinion of infinitely greater authority than myself, and coming from a place of infinitely greater authority than that in which we stand, that this is a principle of the law.

With respect to the other proposition, that a charter granted to a corporation in *esse* may be accepted *in part*, and rejected *in part*; I confess I entertain great doubts: I know of nothing like a judicial authority, which can go to support that proposition: I know there have been dicta to that effect, which my friend cited; but if ever that becomes a material question in this, or any other cause, in which I may have the honour to be concerned, I shall not despair of maintaining the reverse of that proposition. I conceive it is expressly contrary to the prerogative of the crown; which says, “*If you refuse the condition, the privilege shall be void:*” However, in this instance, it does not seem to me, that such a question will occur; or if it does, it must be ultimately decided in another place. Then the application of the law, as my friend and I have both agreed in terms, is, that a new charter of incorporation must be accepted *in toto* or *not at all*. You observe I contend that the effect of this proposition is, that a *partial* acceptance is *no* acceptance.

Then comes the charter of Charles II. In what state does it find the city of Chester? for I dare not call it the *corporation* of Chester, after the emphatical terms of my friend, “that there was no corporation nor corporator.” In what state then does the charter of Charles II. find the city of Chester? It finds it inhabited by certain people, who had *before* been members of a corporation; and by others, who *had not* been members at all: and to *all* these people *collectively* the charter is granted; for it is granted to the *citizens and inhabitants* of the city of Chester: so that the description of the new corporation is different perfectly in terms and in *effect* from the old one; for by the charter of Charles II. *every inhabitant* of Chester is incorporated, who chuses to accept of it.

We come now to the question of acceptance:—Says my learned friend, “we will shew you it was accepted beyond a doubt, for every person named in it took upon him to act under it, and you will find that for *three whole years* they acted under it.”—No doubt an usage of three years, or one year, is evidence, *such as it is*; but consider a moment *by whom* the acts are done, which are contended to amount to an acceptance of the charter. I have already stated, to whom the charter was granted—it was granted to the *citizens and inhabitants* of Chester, that they should have a mayor—that they should be a corporation consisting of such and such members. Then who are to accept this?—to be sure there is not much difficulty in answering that question—the people to whom it is granted, or others can accept it. Who have accepted it? Have the ci-
tizens

citizens and inhabitants of Chester accepted it? Has my friend shewn one act? Can he shew one act of this kind? I defy him to do it. I throw down the challenge, and will wave all objections to the regularity of the acceptance, which he contends for. Has he proved, or can he prove, a *single* act, done by the *citizens* or *inhabitants* of Chester, either testifying their acceptance of this charter, or of their acting under it? *Not one.* But I will tell you what he has proved: He has proved that the *little junto*,—the *select body*, who applied for this charter—who joined with the crown to betray the rights of their fellow citizens—that *they* accepted it—there was not much difficulty in proving that the party who asked for a charter would accept it,—that this *little junto*, concurring with the minister of the crown, accepted such a charter as the crown thought fit to give them. Does the proof go one tittle beyond that? for all the acts, which have been proved for *three years*, are the acts of the very persons named to be the mayor, aldermen, and common council, and of such as they chose pursuant to the directions of the charter. Is it to be wondered at, that immediately upon the granting of that charter, the very people who applied for it—who had been at the expence of it—(for they produce the orders to pay for it)—that *they* should accept of it? But did the *citizens* and *inhabitants* of Chester accept of it? I venture to say, No; and I will prove that assertion. In this notable charter, there is a clause by which the King very graciously grants, that all the late freemen of Chester may, if they please, be readmitted under that charter to their freedom—Now, gentlemen, you will not forget what my friend has told you, that there was at this time *no freeman, no corporator*, existing in Chester; but the King thought fit graciously to allow those, who had formerly been freemen and corporators, to resume that character under his new charter. This was palpably holding forth a *bribe* to the honest citizens of Chester, to join with the others, in betraying their own rights, and that of the kingdom. They had virtue enough to refuse it; and out of nine hundred and thirteen freemen, of whom the *late* corporation of Chester (for so I must call it in compliance with my friend's statement) consisted,—I say, out of NINE HUNDRED AND THIRTEEN freemen, there were but TWENTY-ONE who could be found base enough to accept of the bribe; the other eight hundred and ninety-two, like honest men and good citizens, refused to resume the exercise of rights, which they were to hold *at the pleasure of the crown*; for those were the sort of rights which they were called upon to exercise under the new charter, as I shall shew you presently.