Mr. WILLIAM HAMILTON, of Cheſter, attorney at law, (ſworn.) Examined by Mr. *Lane*.

Q. Were you preſent at the election of ſheriffs in the year 1771?

A. I was.—I was profeſſionally concerned in that election; and my clerk took the poll for Mr. Henry Ryder, junior, againſt Mr. Thomas Edwards, for the ſecond ſheriff.

Q. Do you know whether Mr. Amery voted then?

A. He did.

Q. Did Mr. John Monk vote then?

A. He did.

Q. Was it a popular election, by the people at large?

A. It was.

Q. Who did Mr. Amery and Mr. Monk vote for at that election?

A. For Mr. Edwards, and moſt of the common-council did.

Mr. BEARCROFT.

Gentlemen of the Jury,

I Muſt endeavour (a work of very great difficulty I confeſs) to put myſelf into poſſeſſion of that attention from you which my client is moſt undoubtedly entitled to; but which, if you could poſſibly believe a tenth part of that which my learned friend, the Serjeant, has repreſented concerning me, the defendant's advocate, I certainly could not expect for a moment.

Gentlemen, I have, for the purpoſes of the cauſe, been repreſented to you as the advocate of tyranny and deſpotiſm—and, as if I had been ſo abſurd and ſo profligate as to contend, in an Engliſh court of Juſtice, at this time of day, that *all* the proceedings in the latter end of the reign of Charles the IId, and of James the IId, were perfectly right and legal. I muſt appeal, therefore, to your juſtice, for myſelf in the firſt place, in order to recollect what it was I really ſaid, and that I will maintain—I did ſay that the proceedings in quo warranto, in the time of Charles the IId, were *perfectly legal*. At the ſame time your memory, probably, will carry you ſo far back as to recollect that I did alſo ſay, they were extremely *ill adviſed and ill judged*.—Things wrong, highly wrong, may be ſtrict law.—The learned Serjeant might have recollected, that our profeſſion ſtates that opinion in a maxim of the law—*ſummum jus ſumma injuria*.

Gentlemen, I have no difficulty to confeſs, that the proceedings were harſh—they were ſevere—they were in the ſpirit of

party—they were for the purpoſes—(I will ſpeak broadly out, and I am not afraid of it)—in many, many inſtances, of garbling and of altering the conſtitutions of corporations. But I do inſiſt upon it, that with reſpect to the corporation of Cheſter, the only circumſtance of the charter of Charles II. which is the ſingle point between us, and which, in truth, all the iſſues go to, was nothing new, was nothing harſh, was nothing but that which exiſted in a great number of corporations in this country—was that which exiſted for a long time previous to the charter of Charles II. in the corporation of Cheſter, and has for the moſt part, except for a few years, which proves the right, exiſted down to the preſent moment.

Gentlemen, what is it?—Is there any thing improper?—Is there any thing contrary to the general courſe of corporations in this country, that the principal officers of the corporation ſhould be choſen by a ſelect body, conſiſting themſelves of a very large number?—We all know perfectly well the extreme inconvenience of very large and perpetually repeated popular elections.—For that purpoſe it has been by legal bye-laws, in a great number of corporations, altered from the freemen to a ſmaller and more ſelect body.—That is not the caſe here, becauſe, notwithſtanding all the evidence that has been laid before you on both ſides, if you have been able to command your attention ſo many hours, you muſt have ſeen, that, except for a very few years (ſome four or five at the moſt) from the year 1692 to the year 1696, and perhaps in 1697, in the time of that frightened mayor Bennett (for that ſeems to be the hiſtory of the man) the real conſtitution and the exerciſe of the choice, in point of fact, has been by the mayor, aldermen, and common council.

Gentlemen, the learned Serjeant and I have talked to you of *twelve* iſſues, but each of us in our turns have been forced to confeſs the truth, that the real ſubſtantial queſtion between the contending parties, at the bottom of them all which you are to decide is this—whether you will by your verdict overturn the uſage, which has obtained for upwards of a century paſt, or whether you will upon the arguments which have been produced to day—the evidence of the fact—and the law, which has been ſtated to you, introduce and ſettle, as a matter of right, that they have been wrong for this century paſt, and *that the real right of chooſing of aldermen is in the freemen at large.*

The learned Serjeant has thought it neceſſary (and in ſome degree it certainly is) to take ſome notice of the ſeveral other iſſues—I will therefore take that notice of them which I think neceſſary; it will not be much, and principally for the purpoſe of

laying

aying ſome of them out of the way.—With reſpect to the *firſt* ſſue, I confeſs that I find myſelf ſituated as I never was in my ife, and I am perſuaded that my Lord too finds himſelf in that ituation a Judge never was before. Both the proſecutor and he defendant agree upon the verdict, which they conſent you hall find upon that firſt iſſue; but the learned Judge entertains ome doubt upon the verdict, which you ought to find. Now ere I will take an opportunity of ſaying, what I believe I hall almoſt always ſay, that the beſt thing a jury can do is, attend to the direction of the Judge, who preſides, in oint of law, and if his lordſhip ſhould have a clear opinion pon thoſe facts, with reſpect to the firſt iſſue, different from at of the counſel on both ſides, it will be proper, and I have o objection that you ſhould take the learned Judge's direc- ons.—If we, who are of counſel for the defendant, ſhould ntertain a doubt upon the correctneſs of that direction, in oint of law, I know the high rank of the learned Judge's bilities too well to ſuppoſe that he will entertain the leaſt of- nce, if hereafter we ſhould take an opportunity of reviewing d reviſing that opinion. I will ſtate, however, for his rdſhip's conſideration, the reaſon which moved me to ſay, that pon the firſt iſſue you muſt find your verdict for the proſe- utor: It was—the *language* of that iſſue.

On the part of the proſecution, it is contended, that the ayor and citizens, at the time of making the letters patent 37th Charles II. were not, nor had, *from time immemorial*, en a body corporate; in that therefore they admit that they re not, at that time, a body corporate *at all*. I allow, that y were not. I feel, that they were not. I have argued, t they were not. I ſhall again argue, that they were not. ſhall make it my foundation, for the whole claim of the fendant in this cauſe (which foundation I defy any man to move from me) that, at that time, and for a conſiderable time fore, they were not an immemorial corporation, or corporate dy; for they were not a corporate body *at all*: yet that in th up to the time of their diſſolution by the judgment, ther was a preſcriptive corporation—no man—no lawyer— hiſtorian—no antiquarian, can exerciſe a real doubt of.

Gentlemen, I feel a prodigious difficulty, and you muſt feel comfortable I am ſure, for the ſame reaſon, in the courſe of s cauſe, that of the component parts of every argument, ich is to be put to you upon the ſubject, nine parts in ten, ſt be made up of law. It will be neceſſary for me there- e to explain to you, what is meant by a corporation *by pre-* *ſcription*; what lawyers mean by *preſcription* (ſtrange as it may

ſeem)

ſeem) is this, ſome thing, ſome uſage, ſome cuſtom, which is now very near (within two or three years) ſix hundred years old. It is even ſo, for if at any time, on this ſide the 1ſt day of the reign of Richard the Firſt, it can be ſhewn by ſatisfactory evidence, that the thing, which is contended to be preſcriptive, was other than it now is, there is certainly an end of the preſcription. On the other hand, if it can be ſhewn, that for a great number of years laſt paſt, ſeventy, ſixty, fifty, or even a leſs time, ſuch a ſort of thing, or ſuch a cuſtom has obtained, and you cannot get at the commencement of it, or it does not appear, when it began to be, then from its having been ſo long, it ſhall be taken to be preſcriptive, as old, as I ſtate to you, near ſix hundred years, unleſs the contrary can be proved. Now where is the evidence in this cauſe, to prove the time, when the city of Cheſter firſt of all was created a corporation? I ſay it does not appear—My learned friend (the Serjeant) has referred to the charter, which was in the time of Henry IId. the immediate predeceſſor of the King of preſcriptions, Richard Iſt.—And at that time, my friend ſays, there was not a trace of a corporation; Why does he not call them *citizens of the city of Cheſter?* If that be not a trace of a corporation, I ſhall deſire thoſe gentlemen, who ſmile at the queſtion, to take ſome opportunity of giving a *ſerious* anſwer to it, becauſe that kind of anſwer, though immediately in my face, while I am addreſſing a jury, is ſuch an one as I certainly ſhall not hold in any eſtimation. If that learned gentleman, or any body elſe, has ever met with ſuch a thing in England, as a city, which is a corporation, and which has not been a corporation a great number of years before it became a city, he will then have a right to ſmile upon the ſubject, but till then, I beg of him to be ſo good as to receive the obſervation I made to the jury without any ſuch peculiar mark as that, which are not uſual upon this circuit, and I am perſuaded not upon any other.

I venture to ſay therefore, that there can be no difficulty in conſidering this as a corporation by preſcription, not at the time that the iſſue ſays it is not; not at the time of granting the charter of Charles IId. becauſe long before that time, notwithſtanding its antiquity, notwithſtanding the preſcription which belonged to it; it had met with its death-wound, and was departed, it was gone, it no longer exiſted as a corporation; that is my reaſon, which I ſtate for his Lordſhip's conſideration, for giving up this iſſue—If it ſhould not be ſatisfactory, I am ſure I ſhall be perfectly ready to accede to the direction which his Lordſhip ſhall give you upon that head.

Gentle-

Gentlemen, my learned friend has worked himſelf up into an imagination, that he is upon clear and ſtrong ground—that there is not a doubt or a difficulty in this caſe; he has indulged himſelf with a moſt violent rant (for it is neither more nor leſs) about this deſpotiſm and tyranny in King Charles the Second's time, and has at laſt looked you in the face, grave, ſenſible men, as I am perſuaded you are, and deſired you to kill this laſt dragon of King Charles's breed—this laſt of the infamous charters, which were promulgated in the time of Charles II.—twelve St. Georges he has made of you, at once, to kill this ſingle dragon.

My friend has no excuſe for talking in ſuch a ſtyle to you: I ſaw what miſtake led him into it: He ſtood with his back to the learned judge, and his face to that audience: He thought he was addreſſing them, and not you, when he uſed ſuch language as this. You will remember the oaths you have taken: You will remember that you are called to exerciſe a ſerious and an important truſt: You will remember this—which is never forgotten in a court of juſtice, and I truſt never will be, either by judge or jury—that there will be a leaning, an invincible diſpoſition to ſupport, if it can by any poſſibility, by any aſtutia—I had almoſt ſaid, by any twiſting of the law—that which has obtained, in point of fact, as an uſage for a century back. Theſe are not words of my own invention: I have heard the greateſt authorities perpetually make uſe of that ſort of direction to juries: I have heard them make uſe of the very phraſe, that it becomes judges to be aſtute, and to put ſuch a conſtruction upon that which has obtained in point of fact I am ſure you will feel, and the learned judge will think, that you are bound to give your verdict in favour of the defendant: But if the learned ſerjeant is really ſo much in earneſt, that he comes with a clear caſe and a piece of evidence, which makes the ſcale, in which he puts that evidence, ſtrike upon the board; why is it, that in the courſe of the cauſe, he is ſo perpetually firing ſignals of diſtreſs? What! is he clear, that in point of law and evidence, he ſhall blow away this charter of Charles II. to atoms, and not a duſt of it remain? for if a ſmall matter of it remains, it is all that I require—it is all I ſhall aim at, and it is all that is wiſhed to be ſupported at Cheſter—not the general proviſions of it, which have been gone long ago. Does he ſuppoſe that he ſhall do that? and yet he cannot let go niggling at thoſe arguments, over and over again, about the *ſeal* and the *enrolment* to the charter of Charles II. Don't you remember the time he walked in endeavouring to prove (let that charter be ever ſo good

good in point of law) that ſtill there was ſomething of ceremony that belonged to it, which was not paſſed through, either that it was neceſſary to have the ſeal of the county palatine of Cheſter, or that it was neceſſary to have it enrolled. Nay the learned Serjeant, in his fury to eſtabliſh himſelf upon this ground of the objection, to the execution of the charter, tells you it is to have two ſeals and two enrolments, otherwiſe it is to be worth nothing at all.

Now firſt of all, there is no ſuch condition upon the face of the charter—It is part of the grant, that it ſhall have to it the great ſeal of England, and the ſeal of the county palatine—They might have had the ſeal of the county palatine, moſt undoubtedly, if they pleaſed—The King died and they had it not—but have they brought any body to tell you that there ever was a ſingle determination—that ever there was an objection made becauſe it was under the *great ſeal only*—It would make rare vacancies, and ſuch as would make many lawyers mouths water if it were true—The chief juſticeſhip of Cheſter is a rare prize in the wheel.—One of my learned friends here holds a grant of attorney-general, to the palatine of Cheſter. All the grants are under the great ſeal of England, but nobody thought before of contending that that would not operate as a grant.

Where is the law book, the caſe, which has been quoted, to prove it is neceſſary to be enrolled? I have already ſaid, and I leave this for my Lord to tell you, if he thinks proper, that even the enrolment, if neceſſary, would be preſumed.—I have known 50 charters of the utmoſt importance, proved in trials of this and the like kind, and in my life, I never heard the queſtion aſked, either by judge or counſel, learned Serjeant, or other—why don't you prove it is enrolled, otherwiſe it is void. I never knew even that they went to examine the roll, to ſee whether it was enrolled or not, in order to make the objection.—Has the whole profeſſion, from the beginning of time to the preſent moment, been aſleep?—Have they all been ſuch egregious blockheads, that they never hit upon this exception, but that it was reſerved for the learned Serjeant to make it with ſucceſs, for the firſt time, in the Cheſter cauſe? I can hardly believe it.—The King muſt grant, ſays the learned Serjeant, and he uſes the words (I beg his pardon, if I miſ for the purpoſe—he does not chuſe to underſtand them)—the King muſt grant by matter of record—the King muſt recite by record. I ſay that the great ſeal of England to the King's grant, is matter of record, for it is matter, which according to courſe, ought to be recorded by the King's officers; it is a

the ſtead of a record, it makes things operate as a record. If there be any judgment in a court—any decree in a court of equity, the great ſeal makes them ſo much matter of record, that the great ſeal alone makes it evidence, and makes it matter of record. But my learned friend having worked himſelf up to think there is ſomething in this about the great ſeal of England, and about the patent roll, in the Court of Chancery; then he plays the ſame thing with reſpect to the ſeal of the county palatine, and he ſays, oh, where is the ſeal of the county palatine?—I aſk your pardon for ſaying ſo much about it—I ſhould not have done ſo, but that the learned Serjeant, not relying ſo much when he boaſted upon the main part of his cauſe, had thought proper to argue this part ſo much as he did. —I think the beſt courſe I can take is to follow that which I have now proceeded a little way in, and to diſpoſe of the other out-lying iſſues, before I come to the main queſtion between us.—My learned friend has introduced a queſtion which it is now for you to diſpoſe of, "*Whether the order of council, in the time of James II.* (to diſmiſs no leſs than 64 perſons in number) *was ſignified under the ſeal of the privy council to each of them reſpectively?*"—that is the iſſue.—The queſtion, therefore, upon that will be, Whether there is evidence, conſidering the nature, effect, and operation it is to have (for that is always material with reſpect to evidence) to ſatisfy you of this,—*that to each one of that number of* 64 *this order was ſignified under the privy ſeal of the privy council.*—What evidence have you of it?—Does it appear in any way, which you can ſtand upon, *deciſively* that the ſeal of the council was ever annexed to the order?—Why here is a gentleman in the council office brought from London, and they have diſpatched an expreſs for another.—They were well ſet to work, indeed, to fetch the book itſelf, in order that you might learn that it is the practice of the clerks now, and was at former times, that when the order is iſſued, that is, when they had got their fees upon it (for that is the great object of all clerks in all courts) then there is a note; but if they have not, that then the old clerk uſed to write—*not iſſued*—the modern clerks ſign *vacat*. Did it never happen that a clerk made a miſtake? Are we upon the ſingle ſtrength of that being done frequently, when things are not iſſued, and its not being to be found now upon this file—upon that ſingle little bit of ground, to build this erection? Are you from that to find, not only that the order iſſued, but that it was iſſued under the ſeal of the privy council, and that it was notified by giving it to each one reſpectively, to the ſeveral different perſons? Upon my word, if, from the prac-

tice of clerks, you are to draw such consequences as that, I don't know any charter which is to prevail—I don't know any corporation rights which are safe—no private man's property will stand a moment.—Thank God that rights of consideration are not to be decided upon such matters as these, but it is important for you to consider for what purpose it is that they want you to decide the point, upon little more evidence than this; for they only prove, I think, that *ten* of them are got rid of by name; and I take leave to lay it down as clear law, that we are entitled to your verdict upon this issue, if you shall be of opinion that any one of these 64 had not this order of the privy council signified to them; but what is to be the effect of your finding that the order has been signified to them?—It is to have the effect, to have the operation, of dissolving the corporation, as completely, as the judgment did before.

Gentlemen, I did say at the beginning that this was to do mischief, that sort of operation ought to be evinced, by the strongest and most decisive proof. They ought to bring it home, so as not to leave room for a doubt, because if there is you ought not, at this distance of time, to be satisfied of the fact, by evidence of that sort, which is to have such consequences. I trust you will have no difficulty in saying, that you are not satisfied, that the order issued to each of the sixty four under the seal of the privy council—if you are not satisfied of that, under this evidence—and I trust it does not go the length, to satisfy any body, such will be your verdict.

In that way you will dispose of them, which I call the outlying issues, and which don't go to the point between the parties. I think that the other issues (that is to say) the 3d, 7th, 9th, 11th, and the 12th are all bound up together, and they depend upon consequences of law—my learned friend (the Serjeant) said they were united together—they depend, upon consequences of law well understood, upon a variety of facts, which have been laid before you; and I tell you before hand, what I consider as the true and main point between the parties. Gentlemen, observe the different points which are contended between the adverse parties: Says the prosecutor, the charter of Henry VII. has chalked out, and defined the constitution exactly from that time up to the present except in so far as the charter of the 4th of James II. may alter it (I think he contends that that does not alter it but rather restored it)—and that this was in truth and is at the present moment the constitution of Chester—Is it so?—then the consequence must be, that the aldermen of Chester must be chosen annually, but they have not been so most undoubtedly except during the time of Whitley, which I shall

ſhall obſerve upon.—They have conſtantly been choſen by the ſelect body—in the very teeth—(to follow the phraſe of the learned Serjeant as he applies it ſo often to our charter of Charles II.)—in the very teeth of the charter of Henry VII. if theſe have been always choſen in the teeth of that charter, we ought to juſtify, to legalize it, to put it upon ſome fair, ſome ſtrong, ſome tenable, ground of law.

Says my learned friend, triumphantly, in what corner of the world has this charter of Charles II. been hid?—Whenever they have been preſſed upon that point, and the freemen have inſiſted upon a right, to elect the aldermen, they have put it upon every ground whatever, except upon the charter of Charles II.

It does not become one, at this time of day to ſay, they are better adviſed than before, but I have no difficulty, to ſtate in the face of any names, however reſpectable, that thoſe, who adviſed to ſet up a bye-law, reſtraining the popular right of election,—narrowing it and putting into the power of perſons who made that bye-law, were perfectly wrong—the bye-law certainly was bad.

Why then was it, ſays the learned Serjeant, that in the year 1733, in the caſe of the King againſt Johnſon, which in truth was a cauſe againſt the whole ſelect body, for exerciſeing that right of chooſing aldermen, that this bye-law was pleaded as their juſtification? Why, ſays the learned Serjeant very triumphantly, did not they then ſet up the charter of Charles II? Why rely upon this bye-law? my anſwer is, aſk thoſe who made the leader; I am not anſwerable for it: ſo it was: and it ſeems ſo ſtrong was the feeling of that *(a)* judge (no contemptible name let me tell you) and of that jury who tried that cauſe, ſo ſtrong was their ſenſe, their common ſenſe (for ſo it is) of the effect of uſage, and cuſtom, that they ſupported it, even upon that bad bye-law, rather than not ſupport it at all.

O! ſays the learned Serjeant, I will let you into the ſecret of that,—ſomething paſſed in the court of King's-Bench, upon the motion for leave to file that information, ſome words fell from the mouth of Lord Hardwicke, which ſcouted that matter out of court, and they were afraid to take further notice of it.

Gentlemen, my Lord Hardwicke's is *clarum et venerabile nomen*;—he was, I confeſs, a great lawyer—he had a temper of mind, a decency, and a combination of judicial qualities, ſeldom given, by God, to one man. I reſpect his name, in common with every man, who ever heard it;—but my Lord Hardwicke—Solomon himſelf—could give a judgment upon

(a) The Honourable John Verney, then chief juſtice of Cheſter.

nothing but the facts which were before him.—The learned Serjeant reads a paper of what paſſed at the time; it is from no printed report, it is from no authority; but it is very poſſible that ſomething of the ſort did paſs, but in the long report of it, which he has read, is there a ſyllable by which it appears that at that time the court had the leaſt knowledge that judgment in quo warranto had been given, previous to that charter?

I ſay they have not any of them a report, or a dictum, that the court had the leaſt notion, at that time, of the exiſtence of the judgment which diſſolved and put an end to the corporation. Why this makes a total end of the caſe, and we have got rid of the authority of Lord Hardwicke, and all the reſt of the judges, except that I am ready now to confeſs, that what they ſaid was true; that is to ſay, that theſe charters, granted in the time of Charles IId. are very ſuſpicious; and if they queſtion it not being the charter of creation, not of neceſſity being proved to be accepted, as certainly of neceſſity they are proved to be accepted here, as I ſhall ſhew preſently by irrefragable arguments, that where it is not of neceſſity that they ſhould be accepted, Lord Hardwicke was right when he ſaid, "I ſhall require ſtrong evidence indeed to ſhew that they were:" That ſtrong evidence, that neceſſity, as you muſt take it, does exiſt upon the preſent occaſion, and that was not before Lord Hardwicke for him to make this judgment upon.

Gentlemen, I repeat it again—we ſhall hear what the learned judge, who preſides, ſays upon that judgment in 35 and 36 Charles IId, that the effect of it was an abſolute diſſolution of the corporation. That being ſo, they were mixed with the maſs, the reſt, of the engliſh ſubjects; they had no peculiar character whatever belonging to them, there was entirely an end of the city, an end of the corporation; there was no corporation, no citizens of Cheſter, till the 5th February, 1684, when the great ſeal of England was put to the charter of Charles 2d. From that time, to the 4th James 2d, was very near complete four years; during that time, have I not proved to you the exerciſe of an infinity of corporate rights? Have I not during thoſe *four*—(it has been called *three* years; I will take it ſo)—have I not during thoſe three years, ſhewn as ſtrong a conformity to that charter of Charles II. as can be proved to a charter, conſiſting of ſuch a variety of circumſtances and directions? Have we not proved that the mayor, that the aldermen, even the whole twenty-four aldermen, acted under it; for the gentlemen, in their diſtreſs, make that a ſeparate iſſue; and they ſeemed as if they felt themſelves ſtruck to the heart, when at laſt, the twenty-fourth name came out of the books: Yet

[illegible]

remember it at the time when they were pinning their hopes upon the ſuppoſition, that we ſhould make out only twenty-three of the twenty-four; at laſt it came, and they were beat out of that.

Then we have the mayor, the aldermen, the common-council, proved to be all acting during thoſe three years. We have all the officers, who are named in that charter, appearing in the courſe of thoſe three years upon the books: We get down even to the ſword-bearer; and, I have no doubt, if it had ſo happened that there had been thoſe antient officers, which I have heard have been conferred upon ſome corporations (namely) the fool and the cuſtard eater, we ſhould have heard of them too, but it does ſeem to me, that we have proved, for theſe three years together, a complete exerciſe of the corporate rights, which were granted by that charter. I ſhould be ſorry to be tedious, but this is ſo main, ſo principal, a ground, ſo incapable of receiving any thing like a denial, that I muſt, till I quit it, deſire you ſtill to keep hold of it, till the time you pronounce your verdict, and to tell me whether you don't ſee clearly that the powers under that charter were exerciſed completely *for three years*, from the time of the grant.

Says the learned Serjeant, it was not accepted by the commonalty, by the freemen—it was only accepted by the ſelect body. Freemen! commonalty! the ſelect part of a body corporate! where were they to be found? they had no exiſtence from the time of the judgment; they were ſimple ſubjects, cloathed with no character at all, as they dwelt upon the individual ſpot where the city of Cheſter was, they might be call'd citizens, but they could be no ſelect body—could be no corporators; but did not the freemen and inhabitants, did not every mortal within that diſtrict, ſubmit to the powers which were conferred upon the perſons named in that charter? Did they not hold courts from time to time? Was not juſtice adminiſtered? Could there, as you conceive, now be a doubt in the mind of any man living, contemporary with that tranſaction, that this charter had reſtored, as I contend it did, or rather created in law and fact, a new corporation of the city of Cheſter? I ſhall rely upon it, therefore, that the learned judge will think it right to tell you, *that at that time it was accepted.* Now, ſays my learned friend, it was not accepted, in the whole. I beg you will favour me here a little with your attention. I contend, and I take it to be the cleareſt plain caſe imaginable, that the acceptance of a charter is of itſelf a ſingle act. If there be a doubt whether that ſingle act, which is the will of the parties, to whom it is tendered, has been

been exercised, and whether it has been accepted or no; that, like all other ſingle acts (eſpecially if it be a queſtion of what paſſed in the will) may be a ſubject of proof, and conſiſt of a great variety of different circumſtances, for a great number of circumſtances may apply to a ſingle fact; but I ſay this, and I repeat it (altho' my learned friend choſe to treat it with contempt) that this I take to be law. I put this caſe: Suppoſe a charter of creation, granted to-day to particular perſons, who receive it upon their knees at St. James's, or with huzzas at home; and that then they meet together, and they perform any act by which they ſay we accept this charter I will be bold to ſay, that it is clear law, that after that complete act, tho' in 19 out of 20 other circumſtances they ſhould not follow that charter, they have accepted that charter. The true time to enquire whether or no it was accepted, is at the time when it was tendered; and it is to no purpoſe to tell you, that at the diſtance of ſeveral years, a great many things were not done, and at the ſame time to confeſs, as the learned Serjeant was forced to do, that for three years every thing was done, and yet to contend that this charter was not accepted. *If for three years every thing was done, which I have ſtated, that is deciſive evidence that it was accepted.*

That is the iſſue you are to try, and no other. It is another queſtion, which could not be put upon this record, becauſe it is nothing to the purpoſe, to try whether we have ſwerved from it, or whether by a ſubſequent charter, it has been altered. I take leave to ſay, that is not the queſtion. The queſtion is, (and I ſtate it ſtill more ſimply to you, whether in February 168$\frac{4}{5}$, that charter was accepted by the perſons, to whom it was offered, who were an indefinite number of perſons, by the general deſcription of inhabitants?

I ſay, once for all, that from all the circumſtances of proof, which my Lord muſt enumerate to you in ſumming up, it is clear, that it was at that time accepted, and that you are, I conceive, clearly upon this evidence to find, that it was.

As to the removal, you will remember what is ſaid upon that iſſue, ſuppoſing you could poſſibly be led upon ſuch incomplete evidence, when the moſt complete is neceſſary, to ſuppoſe, that this order under the ſeal was ſerved upon every individual, that therefore theſe ſixty four were removed, what would be the conſequence of it? I ſubmit to my Lord's conſideration, in point of law, that even that would not diſſolve the corporation.

I am not now competent to quote a variety of cases, upon that ſubject, nor will it be expected, in the ſituation, in which we are here; I know in the caſe of the Helſtone charter, which was undertaken

underwent as much conſideration, oppoſition, and ranſack, as any ſubject of the kind ever did, that notwithſtanding the loſs of almoſt all the members of that corporation, all the ſuperior ones, and a very few of the freemen left, it was thought, that the corporation was not diſſolved, and I believe that the legal opinion, upon this kind of ſubjects, is, that they are not diſſolved. They cannot exerciſe their duty, but they are capable of being renovated by the grant of a new head, and new officers, by a ſubſequent charter. I will not lay this down as law, which I can take upon me to warrant, but this is the impreſſion on my mind, and my Lord will tell you what he conceives to be the law, upon that ſubject. What would be the effect then of the charter of James II. ſuppoſing that all theſe ſixty four had been removed, but the giving them their head and ſhoulders (if I may ſo ſay) again, and tacking them again to the reſt of the body, and enabling them to proceed? I think that is not a bad way of putting it, but there is a way more agreeable to common ſenſe, a plainer, a more obvious, legal way of putting it—Gentlemen, I rely upon this fact (viz.) *that the charter of Charles II. was once accepted*; if I have not eſtabliſhed that, I have eſtabliſhed nothing.

Now let me ſay a word to reſcue this charter of Charles II. from the general imputations, which the learned Serjeant throws upon it—was this really and truly to alter the conſtitution? not as to the matter in queſtion, not as to the choice of aldermen. I ſay that the beſt King, who ever ſat upon the throne, could not, as to the right of chooſing aldermen, have granted a more fair, decent, or becoming charter, for he directed this to be, as it had been for a century before, then is it any wonder, when it is found, that a corporation is expired, that it ſhould be thought proper, to make a new one, and to give it the ſame conſtitution, as to the choice of aldermen (which is all you have to do with it upon the preſent occaſion) which it had before? therefore it ſeems to me, that no body, but thoſe, who are diſpoſed to find fault with all charters, could find fault with this.

Gentlemen, I ſhould have little to ſay for the charter, if the inſtant uſage of election had been by the freemen, and had been afterwards narrowed to the aldermen and common-council only. It would have been one of thoſe monſters, which my learned friend made you a preſent of, and deſired you would encounter, deſtroy, and cut open: but it is not of that ſort; for it gives the ſame conſtitution, with regard to the queſtion before you, as actually exiſted before. It will be aſked, what is to be the effect of the charter of the 4th James 2d? I have no difficulty

to

to anſwer that queſtion: The effect of it was to be juſt what the corporation, exiſting by the charter of Charles 2d. pleaſed, ſtill taking what that offered. I ſay, the granting of that charter was giving the corporation of Cheſter an option,—it was offering them an amendment, an improvement, *which they were intitled to take as much of, and to reject as much, as they pleaſed.* I am ſtill maintaining, you ſee, that, at this time, they were a corporation by the creative charter of Charles II; that this conſequently was a ſubſequent charter, which they might take more or leſs of, as they thought proper.

My learned friend, the Serjeant, affects to doubt upon the law on that ſubject. I did ſtate an authority—I am ſure that authority has been carried into execution in two caſes at niſi prius, which I remember; (namely) *that you may accept or reject part of any ſubſequent charter.* The Serjeant affects to doubt the law, but has not quoted any authority in ſupport of his doubt. I reſt ſatisfied I ſhall hear the learned judge tell you, that is the law. The queſtion will then be, to apply it to the fact. I am not ſtanding up, to attempt to perſuade you, that after the granting the charter of 4th James 2d. there were not very great, and, I am ready to confeſs, various alterations, if you pleaſe: There certainly were. They turned back from what they had done under the charter of Charles 2d. in a great variety of inſtances; but they could do no otherwiſe, because they muſt take the charter of Charles 2d. as it was given them. It was the charter of their creation, and the only one they had. This charter of James 2d. ſays, We will reſtore you, if you pleaſe, to your antient uſages and cuſtoms, as it was at the time of the judgment, when you were diſſolved. What was that? Why, ſays the learned Serjeant, the conſtitution given by the charter of Harry 7th. to which they turned back in a great many inſtances. They did ſo; and, in thoſe inſtances, they are bound by it: In that, which is the only queſtion for your determination, viz. *the mode of election of aldermen by the ſelect body*,—they did not; but in the teeth of it, they conſtantly exerciſed the ſame mode, which had exiſted (legally I beg to ſay) from the firſt moment of putting the great ſeal to the charter of Charles 2d. Then it ſeems to me, with great ſubmiſſion to my Lord, to come to this queſtion in point of law: What was the option? What was the advantage? What was offered and permitted them to do, by the operation of the charter of 4th James 2d? What is the language of it? Why, we reſtore you, to what you were before, to your antient cuſtom, law, and conſtitution, which belonged to you; we reſtore to you the very ſame mayor, aldermen, common-council, ſame of the officers, whom you had before.

This puts me in mind of another argument: what! are we ſeriouſly now to contend that this ſame charter of James II. was accepted, and the charter of Charles II. was not!—When the charter of James *(a)* takes notice of the charter of Cha. II. and when the very perſons are reſtored by this charter, can it be ſaid that inſtrument never operated as a charter, which is taken notice of, as to its exiſtence, in ſuch a way, that by virtue of the operation of it, that order of the privy council was made, which I ſay is not proved to have been ſerved upon all the perſons named in it. *(b)* Is all this a non-entity? Is it to be ſaid, that it never was acted upon at all? This circumſtance, therefore, proves, that both in the metropolis, in the King's court, and in the city of Cheſter, all people conſidered this charter of Charles II. as having had an operation; and yet you are aſked to ſay, that it is abſolutely nothing at all but ſo much wax and parchment. It ſeems to me, therefore, that this obſervation is an anſwer to all the inſtances which the gentlemen have conſumed ſo much time in giving, of elections agreeably to the charter of Henry 7th. There was a power to do it, in effect, granted by this charter of James II. They choſe a great deal, and part they did not chooſe. They kept the only good part of the charter of Charles II. but that they did keep, and had a right to keep.

There is a vaſt difference between ſuch a charter as this of James II. in point of law, where there has been an intervening charter, between the time of the diſſolution, and the grant of a charter, where there has been no ſuch intervention. I acknowledge that the effect of the reverſal of that judgment is to reſtore and put them in the ſtation they were before, if in the mean time, and before the charter of reſtoration, the crown had not exerciſed a power, which undoubtedly it had, of creating them a-new. Charles II. might have granted this ſame charter of releaſe, pardon, and reſtoration, but he did not;—he had a power to grant the charter which he did grant; it was accepted and proceeded upon.—What! was the operation of this charter of James II. to nullify the charter of Charles II.?—No ſuch thing.—*If the object of that charter had been to nullify the charter of Charles II. it would have ſaid ſo.*

The learned Serjeant has been pleaſed to argue, in point of law, what I don't agree with him in,—that it is impoſſible to get rid of a charter, once accepted, but by ſurrender, and that ſurrender, ſays he, muſt be enrolled.—I agree that in point of

law

(a) The learned counſel had miſtaken the fact in this aſſertion, as it does not take the leaſt notice of it.

(b) That order was to make way for a charter of 15th Sept. which was not accepted, and not for the charter of reſtoration, which was dated 26th Oct.

law a ſurrender, if there be nothing elſe, muſt be enrolled, in order to operate, becauſe it is in truth a grant to the King, and that muſt be by record.

But there is another way, in which, in point of law, it may be nullified ;—that is, if a charter be received and acted upon which is inconſiſtent with a former one, it is *virtually a ſurrender* of ſo much of the firſt charter,—and it is upon this principle that it is ſupported, that you may accept of, or reject, what you pleaſe in any ſubſequent charter.—It ſeems that the effect of the charter of 4th James IId. was to give them an option to take as much of it as they choſe. They did chooſe a good deal, but they felt the force of cuſtom and uſage in favour of the right of election, which we inſiſt upon, and therefore they ſtill ſtood upon that.

If they reſerved that mode of election in point of fact, they could reſerve it, in point of law, by no other means but the charter of Charles II. *for there was no other legal ground upon which it could ſtand.*—I defy any lawyer to put it upon any other legal ground ;—and as they did preſerve it in point of fact, it muſt therefore be preſerved by my Lord and you, if it can be, in point of law.—I truſt I have given a legal ground upon which it may be ſupported.

My learned friend threw away a great deal of time in proving from written evidence, the thing, which in my mind carries him not a bit farther than what he had got from the evidence of Mr. Hall. I ſhall ſay little upon that written evidence: It was kept till the laſt ; why, I don't know, for it does not ſeem to me the moſt important ; a great deal of it is what paſſed in the time of Whitley—he got the huzzas of all the populace at Cheſter ; he kept the huzzas a long time, four or five years, and did what he pleaſed ; he got a majority of them to turn the conſtitution topſy turvy, and they contrived to do it during all the time Whitley was mayor. (I ſhould have been glad to hear, by what law he did that.) Nay, he contrives to leave a legacy to his ſucceſſor, Bennett ; for Bennett not being diſpoſed to do as he had done, he ſays, " I will tell the crown of you." Did you ever hear it ſtated of a man in a liberty cauſe, that he wrote to the crown to have the matter ſet right by the *power of the crown*, inſtead of the *laws ?*—to appeal to that tyranny and deſpotiſm which are now complained of ?—He writes to the Lords Juſtices, who were a regency in the abſence of King William. Bennett, trembling, his knees knocking together, does what Whitley pleaſes :—So Whitley, and his ſucceſſor, Bennett, for the courſe of five years, do, what does not appear to have been done before for two hundred years, nor ſince that

time, from the year 1696, to the preſent moment; yet that is the hiſtory of the cauſe. I have always underſtood, that interruptions of this kind, not followed up, are nothing. Neither Mr. Whitley himſelf, or any of his followers, ever dared to bring this queſtion into a court of juſtice, till the year 1733; and then they were beat—I ſay again, they were beat—upon a wrong ground, I am ready to admit; but they were beat. Why did they not point out, that that ground was wrong? Why did they not ſay, "this is a bad bye-law?" Why did they not move in arreſt of judgment? they could have done it; they had nothing to do, but to move the court, or bring a writ of error to the Houſe of Lords, and to have ſaid, "this bye-law, the exiſtence of which the jury have found, in point of fact, is, in point of law, good for nothing; and therefore does not ſtand in our way." Will any lawyer diſpute that?

I will tell you why they did not do it, they did not go on to get rid of that bad bye law, becauſe they knew they would have put us in the proper way of defending the right upon the charter of Charles IId. With all that ſpirit and encouragement, which they received from the revered expreſſions of Lord Hardwicke; they would have been bold enough to have attacked the charter of Charles IId. but no doubt, they took good and learned advice upon the ſubject; and that advice was this "It does not ſignify, notwithſtanding Lord Hardwicke did ſay this, for he did not know of this confounded judgment, in quo warranto—that alters the caſe;" they lay by from that time, and they ſuffered the uſage, which we contend for, conſtantly to proceed, and to be applied as to the election of aldermen, which is the only queſtion you have to do with now;— as to the election of mayor, ſheriffs, leave-lookers, and all that farrago of officers, they have undoubtedly a right to elect thoſe under the charter of Henry VII.

The eleventh iſſue is, "whether the mayor and citizens accepted the charter of 4 James IId."—that is, as I ſubmit to my Lord, whether they accepted it intirely and in the whole: That charter profeſſes to reſtore them to all the cuſtoms and uſages which had obtained before, which is conſtrued by the learned Serjeant, to mean the conſtitution granted by the charter of Henry VII. they did not take it in that ſenſe, they did not accept it in the whole, they only accepted it in part, and the conſequence, in point of law, is, that you muſt find that iſſue likewiſe for the defendant.

With reſpect to the twelfth iſſue I have only a word to ſay—It is, whether the charter of Henry VII. and the charter of Queen Elizabeth, confirmatory of it, are, notwithſtanding the

granting of the charter of Charles IId. in full force. I ſay they are not; and I rely upon the judgment, which was previous to the charter of Charles IId. I ſay they were both extinct, and at an end one year, before the charter of Charles IId.

Gentlemen, I have now gone through the whole of the iſſues; and I am very ſenſible that there are many ſmaller parts of the evidence, which I have left unobſerved upon; but I have ever found it not only more convenient to myſelf, but more advantageous to my client—in reply—eſpecially when the cauſe is of ſuch a nature, that the learned judge muſt, of neceſſity, ſtate all the evidence; to forbear tiring you with little petty obſervations upon every iota of the evidence. I am perſuaded I do my client more juſtice, and give you more aſſiſtance (if I may take upon me to uſe the expreſſion) when I ſtate the out-lines and the ground upon which I go—The great ground upon which I ſtand, is this—the uſage is with us, that the election of aldermen has been by the mayor, aldermen, and common-council—I ſay that was during three years, by virtue of the charter of Charles IId.—I ſay it has continued till this time, upon no other ground.—I ſay upon that ground, in point of law, I may ſtand now—And I ſay, it muſt be your inclination to do juſtice, and adminiſter the law upon the ſubject. If you make that your verdict, upon this occaſion, the effect of it will be—What? Why that we ſhall be quiet, at Cheſter, for the next 50 years—About that time, or two or three years more, there may be found ſome young gentleman, grown up, who will ſtill be young enough to fall in love with this old-faſhioned lady, at Cheſter.—Somebody may again get aſtride of this hobby-horſe, and ſpend money upon it. I truſt you will do your duty, that your verdict will ſet the diſpute at reſt; and that you will leave Cheſter as you found it—You may do it by law—and then, I am confident you will do it.

COURT,

COURT.

Gentlemen of the Jury,

SOME hours ago (a) I thought I ſhould have been able to convey to you, in tolerable clear ideas, the nature of the queſtion which you are to try, and of the leading features of it.—I am not ſure that I ſhall have ſpirits and ſtrength to do it now; however, I will do the beſt I can.

In this kind of proceeding the defendant is called upon to ſtate, by what authority he claims to be an alderman of the city of Cheſter, and to bring forward his title for public diſcuſſion.—So called upon, he ſtates in general by his plea, that the city of Cheſter is an antient corporation; that there was a charter granted to that city by King Charles the ſecond, in the 37th year of his reign, by which he veſted the right of electing the aldermen of Cheſter (there being 24 in number) in the mayor, aldermen, and common council, and that he was properly qualified, under that charter, to be choſen by thoſe perſons;—that accordingly he was duly elected:—Upon that ground he ſtands, and offers that as an anſwer to this information.

It is the privilege of thoſe, who ſtand in the place of the crown, inſtituting ſuits of this nature, not to content themſelves with denying any one point, which is alledged by the defendant in his plea, but they have a right to traverſe, as it is called, every allegation in that plea—and have alſo a right to ſtate, by way of reply, different grounds, which may avoid the effect of that plea.—There has been a very full uſe made of this right upon the preſent occaſion, for out of theſe few and ſimple allegations (namely) that the city of Cheſter is an antient corporation—that it was ſo at the time King Charles the 2d granted his charter to them—and that charter having been granted veſting the right of election in the mayor, aldermen, and common council—that the defendant was a qualified man to be choſen, and having in fact been choſen upon a vacancy—there are no leſs than twelve different points, upon which the parties have joined iſſue before you, and upon which you are to decide. They are, as you may eaſily ſuppoſe, in ſome degree connected with each other.—Many of them are not totally diſtinct and independent queſtions; but, however, they are numerous enough to diſtract and divide one's attention, and they neceſſarily introduce a monſtrous confuſion in the evidence, which is laid before you, not with perfect arrangement, and which applies, in ſome parts of it, to one of theſe points, and in other parts of it, to others. In thoſe points it is neceſſarily

(a) The court had, at this time, ſat upwards of ſeventeen hours,

farily a very confuſed maſs. Thus much is certain, that this defendant ſtands upon an uſage, which has ſubſiſted in this corporation of Cheſter a great number of years; and I profeſs myſelf to be ſo much a friend to poſſeſſary rights, and ſo deſirous, in all caſes, of ſupporting them, that I ſhould have been very glad to have found that the defendant could have reſted his caſe upon a clear and ſatisfactory ground, having ſuch a length of poſſeſſion to induce a preſumption in his favour—in favour too of the whole place; becauſe, undoubtedly, this queſtion muſt ſet a great number of other queſtions afloat;—indeed I don't ſee how it can be avoided—that the fate of the whole corporation is at ſtake, if this election ſhall be found, unfortunately, to be a bad one,—that they have not a mayor, an alderman, a common council-man, a ſingle officer, whoſe election will be good. What is to become of the corporation in that caſe?

However, it does ſo happen, that after the defendant, and thoſe who have adviſed him, have examined, as carefully as they could, into the grounds upon which they might reſt this election, they have, at length, been obliged to make choice of a very unfortunate one; for it is impoſſible not to ſee, that this charter of Charles 2d. granted in ſo inauſpicious a time, and under ſuch very unfavorable circumſtances, is a ſort of ground, that it is the laſt which any one would have reſorted to, but in a caſe of abſolute neceſſity. I take it for granted, that after they had fully examined all the circumſtances of the caſe, looked into all their charters, all their bye-laws, and had ſeen exactly what could be done, and where the caſe preſſed; that they have found themſelves abſolutely reduced to the neceſſity of reſting it upon this charter. A very unfavorable thing, undoubtedly, from what you have heard, you muſt conclude it is; for you have heard, that this corporation, having clear and undoubted rights under a great number of charters, probably under a title older than charter, a title by preſcription;—being, as far as I can judge, in quiet and peaceable poſſeſſion of their privileges, towards the latter end of the reign of Chas. 2d. they were one of thoſe againſt whom that unfortunate meaſure was put in practice, of filing an information, in the nature of a quo warranto, with a view to procure, by ſome means or other, either the abſolute deſtruction of the corporation, or to enforce a ſurrender of it,—and, in ſhort, to get the power of this corporation, among others, into the hands of the crown. It appears, that the meaſure ſucceeded in the caſe of this corporation, who did not appear to defend themſelves; the conſequence was, that there was a judgment (as I

is called) by default againſt them, for not appearing: their franchiſes were then ſeized into the king's hands: that certainly did not produce a diſſolution of it; but in the term following, there was (what is called) a final judgment entered up againſt them, by which they were ouſted (in the language of the law) of that franchiſe, which they were accuſed of having uſurped (that is) the franchiſe of being the corporation of Cheſter; ſo that they were, as far as they could be by a legal judgment, deprived of their franchiſe. It appears that they remained in this ſituation for a conſiderable time; this final judgment having been filed in Trinity term, the 36th of Charles 2d; on 4th of February following, this new charter was granted. It has been ſaid, it was in ſome reſpects fair; it might; but unqueſtionably when you recollect one clauſe (namely) that clauſe which gave the crown an option, at its will and pleaſure, to amove every one of the officers of the corporation, by a mere ſignification of that pleaſure by an order under the ſeal of the privy council,—it is impoſſible to ſay, that that was not abſolutely reducing this corporation to be the mere creature of the crown. It appears, however, that inconvenient and dangerous in a public view, as the ſituation of the new corporators was, to be under ſuch new charter, that it certainly was received by certain perſons inhabiting within Cheſter; that the privileges, which it purported to give, were aſſumed by them, and acted upon by them, for a conſiderable time; and that for three or four years, in the earlieſt of King James the ſecond's time (King Cha. the ſecond having dropped almoſt immediately after the charter was granted) that there was a corporation in Cheſter under this charter, acting and taking full poſſeſſion of all the franchiſes of the old corporation, all its privileges, and all its benefits, all its eſtates; and, in ſhort, that it was in the full and intire poſſeſſion of the franchiſe of being the corporation of Cheſter.

This continued till 12 Auguſt, 1688, when probably even the power, which the crown had over this corporation, was not thought ſufficient to anſwer all the purpoſes, which it was the object of the crown in thoſe days to carry, but there was, on a ſudden, an order of the privy council for amoving, I believe, all the members of this corporation, it certainly was a very great proportion of them if not all; there is ſome doubt whether one of them was not omitted, but there could not, I believe, have been more than one. There is a doubt in point of fact, about the formal notification of that order of King James 2d. to thoſe perſons who then were acting as the corporators within this city, but it is very certain, that in the courſe of the month

month of October 1688, (when things drew to a criſis with that unhappy prince, and when he found it neceſſary to alter his meaſures, and to endeavour to recover that ground which he had ſo much reaſon to lament the loſs of afterwards) after having firſt ſignified by a proclamation, his intention to reſtore corporations in general, paſſed an order in council, for reſtoring the old corporation of Cheſter, and accordingly upon the 26th of that month, iſſued a charter under the great ſeal, to the old corporation of Cheſter, which not only purported to pardon and to releaſe to them all benefit and advantage of that judgment, in quo warranto, which had been obtained againſt them, but alſo, to reſtore the old officers to their reſpective ſituations in the corporation; to reſtore to them all their poſſeſſions and in ſhort to put them exactly upon the ſame footing as they were upon before the judgment of ouſter had been obtained againſt them.

It appears in point of fact, that immediately after this charter was iſſued, the old corporation were in poſſeſſion of their former franchiſes. Street (the old mayor) who was particularly reſtored by this charter, appears to have been the acting mayor; and many of thoſe perſons who were in the offices of aldermen and common-council-men at the time the judgment of ouſter was pronounced, alſo appear, by the muniments of the corperation, to be again in poſſeſſion, and to be the acting officers, in the different characters of aldermen and common-council-men.

It is under this general hiſtory of the tranſaction that the defendant is obliged to inſiſt, that he has a right, under the charter of Charles II. and that he is duly elected an alderman of this corporation, under powers derived from that charter. In canvaſſing this title they have, as I ſtated to you, come to twelve different iſſues, in point of fact. Undoubtedly, a great many of them are involved in legal conſideration; but ſtill the ſhape, in which they appear before you is ſuch, that you muſt pronounce a verdict upon them, as a matter properly within your province.

The firſt point which is inſiſted upon by this ſuit, is,—"*that* "*this corporation of Cheſter was not, and particularly was not at the* "*time of granting the charter of Charles 2d, a body corporate; and* "*had not been ſo from time immemorial.*"

I ſhall poſtpone the particular conſideration of that firſt point, till I have ſtated to you ſome things which occur to me upon ſome of the ſubſequent points, and then you will better underſtand what I think you ought to do with that firſt iſſue.

The next iſſue, which is joined between theſe parties, is upon the mere legal effect, and operation of this charter of the 37th Charles II. for the proſecutor has taken upon himſelf to

lay,

ſay, that in the truth, notwithſtanding there was the ceremony of a charter, yet that *nothing paſſed by it*—that it had no operation, in point of law. I don't find, that this objection reſts upon any other ground, than the circumſtance of this charter not having been duly enrolled in any court of record, and alſo, not having the ſeal of the county palatine of Cheſter.

I hold both thoſe points to be inſufficient to warrant you to conclude, that nothing paſſed by this charter. The charter appearing under the great ſeal, there is reaſon from that authentication of it, for you and me to conclude, that every thing which is neceſſary, by way of ceremony, to give effect to that charter, has been ſufficiently complied with; and that it is a proper inſtrument, conveying every thing, which the crown, under the circumſtances of the caſe, had a right to convey—And therefore I have no difficulty about that ſecond iſſue, in ſaying that the verdict, as to that, ought to be with the defendant, who inſiſts upon the benefit of this charter.

The third iſſue, and a very material one in this caſe, is "*that the charter of Charles IId. was not accepted, as to the election of the office of aldermen.*"

Had the caſe ſtood upon that iſſue ſimply—I mean as to the point of acceptance; you would, in all probability, have been ſaved from a great deal of entanglement, and a very long enquiry; but there has been introduced, and coupled with this iſſue, another, which takes in a much wider field. This you ſee is confined to the ſimple point of accepting the charter, as to one ſingle part of it—Whether ſuch a charter could legally be accepted in part or no, I don't think at preſent it is neceſſary to trouble you with the conſideration of, becauſe if it cannot, the conſequence will be, that this plea, and the iſſues, will be void, and there will be an end of it, in that reſpect; and you will be only to determine, in point of fact, whether it was accepted or no, as to this point.

But you will be to decide another iſſue, not only whether it has been accepted as to *this fact*, but in a great number of other particulars, which have been introduced into theſe pleadings, and upon which an allegation has been ſtated, which is, "*that as to all thoſe particulars, the charter never was accepted.*" They have on the part of the defendant, taken up the challenge, and have undertaken to maintain, that it not only was accepted in this one point, (namely) "*the election of aldermen,*" but alſo has been accepted with reſpect to *all* thoſe other matters of election, (namely) the election of mayor, of ſheriffs, of ſtrangers, or leavelookers, of coroners, of treaſurers, and a variety of other particulars, which are ſtated in the pleadings.

Theſe

Theſe are the third and ninth iſſues, which will require a particular and ſeparate diſcuſſion.

The fourth iſſue joined between theſe parties is, "*Whether the perſons named in the charter of Charles II. to whom the office of aldermen was granted by that charter, did become aldermen, in conſequence of it or no?*"

We may diſmiſs that intirely, becauſe it has been fully proved, in the courſe of the evidence, that every one of thoſe perſons did act under that charter, and were in the poſſeſſion of the office of aldermen during thoſe *three* years, in which this charter had its effect in Cheſter, before the month of Auguſt, 1688, which I take to be a ſufficient proof of that iſſue.

Therefore as to the *ſecond* iſſue, and as to the *fourth* iſſue, we may lay them out of the caſe, as being clearly for the defendant.

The fifth iſſue is, "*that the mayor, aldermen, and common-council, have not exerciſed the franchiſe of electing aldermen according to the intention of theſe letters patent.*"

That they have, in point of fact, exerciſed this franchiſe, for a conſiderable number of years, there can be no doubt,—but whether they have exerciſed it *under this charter, and with reference to this charter*, ſo as that the exerciſe of it ſhall be a lawful exerciſe or no, (which is the ſubſtance of the point contained in this iſſue) will depend, you ſee, upon the queſtion, whether the charter was accepted, ſo as to give it an effect binding at this time; and therefore this *fifth* iſſue is neceſſarily involved with the third and ninth, and to be taken together with them.

The ſixth, ſeventh, and eighth iſſues, all go to the next point of the *qualification* of this gentleman to be an alderman, to the fact of his having been *duly elected*, and to his having been *duly admitted*, into the office of alderman.—I will diſmiſs all theſe iſſues, becauſe they appear to me to be ſatisfactorily proved, on the part of the defendant, only thus far, if it ſhould be found, that the charter was not duly accepted, and that therefore the corporation had *no right* to make that election, the conſequence will be, that theſe iſſues, tho' they ſhould be nominally found for the defendant, will be of no uſe to him, becauſe they are conſequential upon the right to elect, being in the ſelect body of the corporation, in whom, it is now ſaid, it reſides; ſo theſe are in ſome ſort, you ſee, conſequential upon the deciſion of the main queſtion.

The tenth iſſue, proceeds upon that part of the hiſtory of the caſe, which I before ſtated to you; that is, that King Charles 2d, having by his charter referred to himſelf and ſucceſſors, a power

power at any time " *at his pleaſure, by an order in council, to a-* *ter all the members of the corporation*; " in point of fact, upon 12 Auguſt, 1688, an order to that effect did iſſue, which it is ſtated, was regularly ſignified to the members of this corpora-on, who were then in poſſeſſion. The iſſue now before you on his point is; *Whether in truth, that order was ſignified or not, to he perſons named in it?* It is ſtrongly preſſed on you, that that der is not ſufficiently proved to have been ſignified to them; it as alſo been obſerved, that there is great difficulty in ſuppoſing hat all thoſe perſons ſhould have had *regular* notice of this or-er, without which, it would not have the immediate effect *to ſuſpend* and *to deſtroy* all the power which was veſted in *them*. I hink, there is this evidence, of the order having been ſignified, hich it will be extremely difficult to get over, that is, that ry ſoon after this order, the charter of James 2d, intirely ſtrip-g all theſe people of their power, conferring it upon, and reſ-oring every thing to, the *old officers*, iſſued, and in point of fact, appears from the evidence now before you, that the *old* officers re *immediately* afterwards in poſſeſſion, and were acting in heir different ſtations. Now it is difficult to imagine, that that ould have happened without the new officers (the perſons ho were in poſſeſſion till that order iſſued) having had it regu-rly and ſufficiently notified to them, that they were to give p, when it appears in point of fact, that they did give way their old corporators; ſo it does ſeem to me, as if there was idence proper to be ſubmitted to your conſideration, to prove at iſſue (namely) *that there was a ſufficient notification of this der of the 12th of Auguſt*, 1688, *to theſe new corporators*. I n't think it will be extremely material, which way you find s iſſue, or that it goes a great way towards deciding, or a influencing (materially) the real queſtion upon the validity that charter, if it ſhall be found to have been regularly ac-ted, in the proper ſenſe of thoſe words. It is not this fact, t the order was notified (if you ſhould find it in favor of the ntiff) which will in my apprehenſion deſtroy the effect of that rter, if you ſhall ſee reaſon to affirm this charter of Charles (for that is the grand queſtion to try) it may then, for the e of preventing future difficulties, be worth your while ſider whether you will not take advantage of the want of proof of the ſignification of that order, to prevent the ibility of that order operating to deſtroy this corporation, ſuming that the charter, in other reſpects, is good and can maintained.

The eleventh iſſue is upon the notification of the charter of s II. which iſſued upon the 26th of October 1688; with

reſpect to that, I think it is impoſſible to heſitate upon the queſtion, "*whether that was notified, and whether it was accepted*;" nothing can be ſo clear upon the hiſtory of this place, but that that was accepted and was meant to be accepted, in as full a ſenſe as it could operate, for it appears by the hiſtory of it, that the perſons, who got into poſſeſſion of the corporation, under that charter, with the turn of the times, entered intirely into the views of the government, which took place upon the revolution, and there can be no great reaſon to ſuppoſe, but that they very gladly embraced a charter, which reſtored to them, that which they underſtood they had been wrongfully deprived of, and which to be ſure they would be glad to take, in the largeſt and moſt beneficial ſenſe, that it was poſſible to operate in their favor: upon the whole, therefore, I think there can be no great reaſon to doubt, *but that that charter was accepted in the fullest extent of it, and as far as it was poſſible for it to operate.*

The twelfth and laſt iſſue is not properly a fact, but a mere conſequential iſſue; it is, "*Whether the charters of Henry VII. and of Queen Elizabeth*, (which undoubtedly were the principal charters under which this corporation ſubſiſted, before the quo warranto was brought againſt them) *are to be conſidered at this time, in full force and effect.*"

Now, that will neceſſarily depend upon the queſtion, whether another charter interpoſed, which is to take effect, and which is to govern the corporation, either *intirely* or *in part*; if *entirely*, then theſe charters muſt be out of the caſe, and will no longer be in force; if in part, then, ſo far as that part goes, they can not be in force, and therefore they will not be in *full force*, which is the terms of the iſſue.

Suppoſing you ſhould be of opinion, that the charter of Charles II. was accepted, and that being accepted, it operates to protect the title of this defendant; in that caſe, it will follow, as of courſe, that the verdict upon that twelfth iſſue will be in favour of the defendant, ſo that I think it will ultimately, and ſubſtantially, be brought to the queſtion upon the third, fifth, and ninth iſſues, (namely) "*Whether this charter was accepted in part, as to the mere election of an alderman.*"—"*Whether it was accepted as to all the material points of it*"—and "*whether or no this corporation have been in the exerciſe of this franchiſe of electing, by the major, aldermen, and common council, the office of alderman under this charter.*"

On the part of the defendant, who began to ſuſtain this point, it is inſiſted that the ſituation of this corporation, at the time the judgment of ouſter was pronounced againſt them in the 36th year of Charles II. was ſuch, that this charter granted in 37th of Charles II. was in the nature of an original charter

charter, creating an original incorporation, and that conſequently the corporation (who certainly to a degree accepted and acted under it) were bound to accept it throughout, and did in fact, by having acted under it *in part*, accept it *throughout*, and were bound by it, and that therefore this charter, which followed, upon an actual diſſolution of the corporation by the judgment, neceſſarily concludes to both parts of this propoſition, to ſhew that this charter was accepted in the whole, at the time that it was originally granted.

I don't differ much from the learned counſel, who ſtated the law upon the ſubject—that the acceptance is to be determined at the time that they begin to act under the charter, for that is the time for parties to whom it is granted, to judge whether they will accept it or no; and they cannot well heſitate upon it. If they take poſſeſſion of the powers, and of the franchiſes, which are granted to them, they ſignify thereby, that they do mean to accept that charter; and yet I doubt much whether that concludes very materially to the point, which exiſts in this particular caſe—It is very true, that there was a judgment of ouſter againſt this corporation, at the time that this charter was granted. It is ſuppoſed, that the effect of that judgment was abſolutely to diſſolve the corporation, and conſequently that there was an end of all charters, and of all kinds of corporate capacity, that every thing was gone, and that thoſe, who were before the corporation, were reduced to the mere ſtate and condition of ſo many individual perſons, having no politic capacity whatever. I am not quite ſatisfied, that that is the effect of this judgment of ouſter. I remember it was extremely queſtioned, in the great cauſe of the corporation of London, when the quo warranto was brought againſt that body, whether the corporation could forfeit its politic capacity; and whether the effect of a judgment would be actually to diſſolve it. It would certainly operate, to take every thing into the hands of the crown, which they poſſeſſed, and to take every thing out of their hands; and that is the proper import of the judgment—that is, it is to turn them out of the thing, which they had before; but whether it actually goes to the length of entirely diſſolving the corporate capacity, is a queſtion extremely doubtful, upon which I am not prepared to ſay, that the capacity of this corporation was intirely gone, and that all the incorporation under the preſcriptive right (if there was one) or under the different charters, was abſolutely annihilated. If it was not, why then a great part of the argument, which is built upon it, will fall to the ground; but ſuppoſing it was, I ſhall have a great doubt, whether this argument will avail the

defendant,

defendant, in this particular cauſe—for taking it, that there was, at the moment, by the effect of this judgment in quo warranto, no corporation exiſting—taking it that the charter was granted to the citizens, the inhabitants of the city of Cheſter, and that they immediately accepted, and acted upon it, there is another very ſtriking circumſtance, which mixes with the conſideration of the queſtion, namely, that after a certain time, there came a new charter of James IId. pardoning and releaſing the whole effect of that judgment of ouſter. Now if the effect of that charter was to do away that judgment intirely, the conſequence would be, that the politic capacity, which was ſuppoſed to be annihilated by the judgment, would revive again; and then it would ſtand thus, here has been a charter granted to certain individuals in Cheſter, authorizing them to aſſume the part and character of the corporation of Cheſter, when in truth, upon the retroſpective operation of this charter of pardon, there was another corporation exiſting in Cheſter who had nothing to do with the charter of Charles IIc. who did not accept, nor wiſh to accept it, and which body were the old corporation; and who could not therefore be turned out by a new corporation brought in under that new charter. The inclination of my opinion upon this ſubject, at preſent is, that this is the true effect of that charter of pardon, and that as ſoon as that pardon and releaſe from the judgment paſſed—from that moment there was a corporation ſubſiſting in Cheſter, under the old charter, and THAT THOSE UNDER THIS CHARTER OF CHARLES THE SECOND, WERE MERE INTERLOPERS, THAT THEY AND THEIR CHARTER VANISH'D TOGETHER, WERE SENT OUT OF THE PLACE, AND HAD NO POWER THERE.

I think there can be no doubt, that if before that judgment of ouſter, the King had thought fit to ſend his charter down to certain perſons, who were not members of the old corporation, and they were under ſuch a charter to aſſume the powers of, and to act as, a corporation there, that charter could not have any effect; and I don't ſee, that there is much difference between that caſe, and the caſe of the old corporation being reſtored again, and then finding themſelves in poſſeſſion of their old corporate rights, and empowered to act, they ſay to the new comers * * * * * * * * * * *(a).

— That makes the difficulty of the caſe, otherwiſe there is no difficulty in it all. Here is a new charter granted by Charles II, to *certain perſons*, they accept that charter and act under it. It muſt continue and would bind *them* in certain caſes. When the old corporation revived, it ſeems to me, that the per-

(a) Mr. Carne's notes are imperfect here.

under that new charter were no longer at liberty to conteſt the point of incorporation, with the old corporation—and without ſaying, that the charter (with regard to thoſe perſons to whom it was granted) is void; yet it does ſeem to me as *null* and *void* with reſpect to the *old corporation*; and in that view of it, all this evidence of the acceptance of the charter falls to the ground, as applied to the old corporation, of which there is no evidence in point of fact, and as applied to the *new* corporation, it is immaterial.

It was having this view of the caſe, that I could not bring my mind to the idea of the counſel (namely) that this corporation was not a corporation exiſting from time immemorial—Suppoſing that that corporation was diſſolved by the judgment of ouſter, it was forcibly urged by the counſel for the defendant (who argued againſt his own iſſue) that it was impoſſible that this corporation could exiſt as a corporation by preſcription: But if the charter of James 2d, was *entirely* to do away the effect of that judgment, then (however it might have ſtood if the queſtion had been agitated before the charter of pardon was paſſed) it could not be ſaid, that this corporation was gone, but was revived, and if ſo, it was a corporation, which did ſubſiſt at the time of the charter of Charles IId. I did not obſerve, that the counſel for the defendant *ſtrenuouſly contended* that point—that independent of the judgment of ouſter, this was not a corporation by preſcription.

The charter of Henry VII. is a grant to the citizens and commonalty and their ſucceſſors. It ſpeaks of ſome of their liberties (as being thoſe which they were *of old* accuſtom'd to enjoy) in terms, which in my apprehenſion do ſtrongly import, that this was a much older corporation, than the date of that charter; it ſeems to be agreed on all hands, that it was, and as the point of time, when it *began* to exiſt, is not in evidence, that is a ground for you to underſtand, that it is a corporation *by preſcription*; and therefore I was rather inclined to think, and am now of opinion, upon the whole caſe, that that iſſue ought not to be with the plaintiff, but with the defendant, *that it was a corporation time out of mind, and at the time of granting that charter.*

However, though I am ſtating my apprehenſions of the caſe, in a way which would render all this maſs of evidence, you have been obliged to liſten to, intirely irrelevant, if it be true that this charter of Charles II. and thoſe to whom it was granted, had nothing to do with the old corporation, and that as to them, it was intirely out of doors (whether it was accepted or not by the *people to whom it was granted*, would not ſignify a

ſtraw,

ſtraw, or go a jot towards giving a right to this defendent) yet probably what I have ſaid upon that ſubject may not be ſatisfactory to you, it is fit therefore that the evidence upon the acceptance of that charter ſhould be ſtated to you, and I ſhall now (having ſaid ſo much by way of introduction) ſtate the evidence which has been offered on both ſides to this point.

The firſt thing produced on the part of the defendant, was an order by the mayor and his brethren, in the 19th Henry VII. (prior to the date of the charter of that King) and it was read for the purpoſe of ſatisfying you, that the corporation did exiſt before that charter, and that therefore it is reaſonable to preſume it was a corporation time out of mind.—They alſo produced a charter of Edw. I. with an inſpeximus in it of an older charter, granting it to the corporation, by the name of CIVES, which is a general term, applicable to every ſpecies of corporation, of which citizens may happen to be a branch.

Upon the third iſſue, they read firſt a roll, of 17th April, 1ſt James IId. containing the *nomina miniſtrorum* of that day—There is a writ directed to the ſheriffs, for holding the ſeſſions, —that writ is teſted by Sir Thomas Groſvenor (the mayor) and Sir Edw. Lutwych (the recorder) the two perſons named in the charter of Cha. II. for mayor and recorder. The *nomina miniſtrorum* contains not only the names of the mayor and recorder, but of 16 of the aldermen named in that charter; and this is certainly evidence that *ſo many* of theſe people did begin to act under that charter, and did accept of it. The name of Thomas Simpſon is alſo inſerted as common clerk (town clerk) who is alſo named in that charter.

It appeared there was a common ſeal, which alſo agrees with the grant in the charter of a common ſeal; however by way of obviating the effect of that, Mr. Hall likewiſe ſaid, there was no doubt, but there was a common ſeal *long before* that charter.

They next read an act of aſſembly of 7th March, 1ſt James 2d, where the mayor (Sir Thomas Groſvenor) the aldermen and common council, elected one Bradford Thropp a common council man in the room of William Plumley, deceaſed; and that act of aſſembly alſo ſpeaks of the office of treaſurer, which is likewiſe mentioned in the charter. The admiſſion of Bradford Thropp, was alſo read.

They next read an act of aſſembly, 12 March 1684, by which it was ordered, that 20 guineas ſhould be paid to Dr. Owen Wynne, for his extraordinary care and pains, in procuring the late charter, granted by his majeſty Charles 2d. Alſo 20 guineas to Mr. John Kegge, for his extraordinary care and pains about the buſineſs of the late charter.

It then purported to contain an order upon the proper perſons, to audit the accounts of the late murengers, &c.

In theſe different acts of aſſembly, there occur the names of four more of the aldermen, from whence it appears, that 20 of the perſons, out of 24 named in the charter of Cha. II, to be aldermen, did take upon them the office, and did act as aldermen, and that they acted in the general buſineſs of the corporation.

There is an order of the 3d of April, of the ſame year, directing that the money due for the charge of obtaining the charter, ſhould be paid by the treaſurer, into the hands of the mayor, to be by him paid over *where it ought*—an expreſſion a little myſterious!—Leave-lookers too were then elected.

The next was an act of aſſembly holden 8th Oct. 1 James II, by Sir Thos. Groſvenor (mayor) the aldermen, and common-council—whereby it was ordered, that Richard Leving, Eſq. deputy recorder, ſhould be elected a common-council-man, in the room of Robert Jones, deceaſed; and another common-council-man, was alſo elected, in the room of Owen Shone, deceaſed; both theſe perſons were ſtated as being of the common-council.

This act of aſſembly ſpeaks of the yeoman of the pentice, who is an officer mentioned in the charter; it ſpeaks alſo of the ſheriffs, and ſheriff's peers; it regulates the fees to be paid to the yeoman of the pentice—ſome of which are paid, it ſeems, to this day—others are not now paid; it then goes on to ſay, that all thoſe, who had been made aldermen by the letters patent of King Charles, and had not been aldermen before that time; and the common-council-men, who were in the ſame ſituation, were to pay certain ſums, to purchaſe plate for the uſe of the corporation.

Upon 16th Oct. 1 James II, William Wilſon was elected mayor, Randal Turner, and Richard Oulton, were elected ſheriffs; there were then alſo, murengers, treaſurers, coroners, and leave-lookers elected.

Upon 25th Nov. 1 James II. a common-council-man was elected, in the room of Richard Bird, deceaſed—and Richard Leving, Eſq. who had been elected a common-council-man, at a former meeting, was elected an alderman, in the room of Sir Edward Lutwych; a common-council-man was elected in the room of Leving—and Leving was at that time elected recorder, as well as alderman.

Upon 18th December, 1ſt James II. William Starkey another alderman named in the charter is mentioned; and there

was a common-council-man elected in the room of Richard Francis, deceased.

At an assembly 20th February, 2 James II. there arose a question, whether they should give the usual notice of a fair, which had been granted in this charter, by hanging out a glove, and they directed, that a glove should be hung out, to give notice of the fair

Upon 18th June, 2 James II. one Anderton, was elected a common-council-man, in the room of Richard Harrison, and Peter Bennett was elected an alderman in the room of Ralph Burroughs, another officer named in the charter, and a common-council-man was elected in the room of said Bennett.

Upon 15th October, 2 James II. William Bennett is mentioned as being elected an alderman, which makes the twenty-four aldermen.

You recollect, I mentioned, that that question was in favor of the defendant.

Upon the 3d of April, 4 James II. in the mayoralty of Hugh Starkey, there was a common-council-man elected, in the room of Ralph Poole, deceased.

They then produced the book of the portmote court, and in that book there appears a list of officers chosen upon the 14th of October, in the time of Hugh Starkey;—the style of the court is held on Monday before Hugh Starkey, mayor, "*according to the antient custom of the city used and approved time out of mind.*"—Some stress seemed to be laid upon that expression, by the plaintiff, as if the circumstance of saying, that the court was held according to the usage time out of mind, implied a negative upon its being held according to this charter, which is long since the time of memory, but it seems to me to be very reconcileable, for time out of mind goes to the existence of this portmote court, which has existed in Chester time out of memory—but as to who were to preside in it, and to be the judges of it, that might be regulated by the charter, notwithstanding the court itself has been held time out of mind. Indeed I don't know how it could in any other way have been the subject of the charter, or that the court could be created by charter within the time of memory, which I think is a pretty fair explanation of that objection.

They then produced the book of the year preceding, in there it was said to be holden before Edward Oulton, mayor, and Richard Leving, recorder, according to the custom, &c. as before, here there is a plain allusion to the charter of Chas. II. for it directed, that this court of portmote should be held in future before the mayor and recorder, instead of the

only. Undoubtedly, therefore, they underſtood, at that moment, that they were purſuing that charter; and it cannot be queſtioned, but that during this period of James II. before they were removed, theſe people conſidered themſelves to be acting under this charter of Charles II. as their authority. Indeed it was the only ground they could then poſſibly have; for, independent of that charter, they were mere uſurpers, the bulk of the town having no correſpondence with them,—nor did they accept their freedom, which they might have had (if they had pleaſed) agreeably to the proviſions of that charter. Therefore it is plain (whether right or wrong) that the ſelect body underſtood themſelves to be then acting under that charter.

The defendant then produced another *nonima miniſtrorum*, in which were the names of coroners, ſword bearer, ſerjeant at mace, and his deputy; alſo correſponding with the account in the charter.

They produced an account of Thomas Simpſon, and William Ince, the murengers, in order to ſhew, that there were under this charter, murengers elected.

They then ſhew, under another entry, that two perſons of the names of Harriſon and Johnſon, acted as ſheriffs; they were two perſons who were nominated under this charter: They alſo produced a ſheriff's account, in which one of the acting ſheriffs was ſo named in the charter.

In a portmote court book, in Starkey's mayoralty, it appeared, that there was a yeoman of the pentice, and cryer of the court, who were officers named in the charter.

Next is produced a file of the ſeſſions, holden before Sir Thomas Groſvenor, Sir Edward Lutwych, recorder, Lord Darby, and others.

Then a record of a proceeding of a portmote court, in the time of Sir Thomas Groſvenor, holden upon 4 May, 1 James 2. before Sir Peter Pinder, deputy to Sir Thomas Groſvenor, the charter authoriſed (what had not exiſted before) the appointment of a deputy to the mayor or to the recorder.

Upon the 9 April, in the ſame year, another court was holden before the ſaid Sir Peter Pinder, as deputy to Sir Thomas Groſvenor.

They then produced a roll, which was ſaid to be a roll of the proceedings of the crownmote court, upon 2 April, 2d. James 2. It contained a writ to the ſheriffs to ſummon juries to attend a court before the mayor and recorder, for delivering the roll at the next crownmote court; the ſtyle of that court was, "The crownmote court, holden before the mayor and recorder" with the ſame expreſſions of "*According to the* [illegible] as before.

At another court, holden 12 October, 1 James 2d, in the course of their proceedings they tried a perſon for a very ſerious offence and paſſed a capital judgment upon him.

They then produced from the petty bag, the record of the return of members, to ſerve in parliament, in the firſt year of the reign of James 2d, for this city: The return is between the two ſheriffs, named in the charter, and ſeveral of the aldermen alſo named in the charter, and ſome others who are ſtyled *cives*: They returned Sir Thomas Groſvenor, and another perſon; and there are four perſons, whoſe names are to this return, who are none of them aldermen or common coucil men. This was in order to ſhew, that ſome of the freemen alſo had come in, and had accepted this charter.

They then examined Mr. Hall, the (town-clerk) who ſays, that the mayor and recorder have cognizance of pleas, that the mayor at preſent, is the judge *alone*, he being ſolely named, as judge upon the record, the recorder only aſſiſting him upon great occaſions; that the Northgate-tower is their gaol; that the ſheriffs hold a pentice court.

A pannel was then produced of a jury in the 1ſt James II. and the obſervation upon it is, that there are eleven freemen; but they *muſt* have been *old freemen*, for this was ſo ſoon after the charter of Charles II. that it is probable there had not been time to make a pannel of new freemen.

There is another pannel produced, in which there are the names of Thomas Edwards, and of Randle Daniel, who were made free in 1683, and were re-ſworn in 1686, it ſeems there is a proviſion in the charter of Charles II. that all perſons who are admitted to the freedom, ſhall take certain oaths therein mentioned, and that all perſons who were free of the old corporation, ſhall be admitted to the capacity of freemen, under the new charter; ſo that it is probable, that theſe were two perſons who were old freemen, and who came in in 1683, and who were upon that occaſion re-ſworn.

Another pannel was produced, dated 28th Feb. 2d James II. and there the crownmote court was held, agreeably to the language of the charter, (though contrary as it ſhould ſeem to the preſent uſage) before the mayor and recorder; it appears that Humphrey Page, ſtationer, was a juryman upon this pannel, who had been admitted to his freedom in the year 1685.

Mr. Hall was then examined again, he ſays the freemen ſerved conſtantly upon juries within the city, never without that they pay no tolls, except for prize wines, and it ſeems there is a grant of all tolls in this charter, to this corporation, except prize wines and iron.

I remain

I remember it was obſerved at the time that the ſame proviſion was in the charter of Henry VII.

Mr. Hall ſays, they arreſted by proceſs from this court, for 40s. until the late act of parliament. He alſo ſays, there is a fair at midſummer, another at michaelmas, and another on the laſt Thurſday in February, which is called horn-and-hoof fair.

He ſays, the recorder and town-clerk are at this day elected by the ſelect body, and approved by the crown.

I don't recollect that there is any proviſion of that ſort in the charter of Henry VII. but only in the charter of Charles the Second. He ſays, that there is a ſword and a mace granted to this corporation; that they have felons' goods, fines, and forfeitures, (that is) the ſheriffs take them, in conſideration probably of their paying a rent to the corporation; the corporation have the inſpection of the river dee; it ſeems that the hoſpital of St. John Baptiſt, with the lands thereto belonging, were granted to the corporation immediately after the death or forfeiture of one Roger Whitley (the maſter, to whom it had been granted by charter, of the 14th June, 12 Charles II.) by this charter of Charles II.

Then they ſhew that the new corporation claimed a right to this hoſpital, which they could only do under this charter of Charles II. from whence they infer, that of neceſſity that muſt have been the charter which had been accepted by the corporation.

They read an entry of an order of aſſembly, holden 15th Oct. 1698, at which the deputy recorder was preſent, whereby an enquiry after the lands granted to the hoſpital of Saint John Baptiſt, was directed to be made by him, and he was ordered to receive the ſeal from lady Mainwaring. That entry certainly is a recognition of the charter. It was by this charter that this hoſpital was granted, after the death of Roger Whitley, and, therefore, the date of this order is material, which was after the old corporation was revived, at which time (to be ſure) it would be conſiſtent, that they ſhould have renounced all connexion with the the new corporation and their charter, ſuppoſing they (the old corporation) meant to infiſt that they were not bound by it.

There is another order of aſſembly, upon the 19th Auguſt, 1703, whereby the recorder was directed to apply to lady Mainwaring for the ſeal of the hoſpital, and he was to be entruſted with the charter granting the hoſpital to the city. I think the expreſſion there, is extremely ambiguous, what charter it was which he was to be entruſted with, and, whether he

he was to keep it in his cuſtody conſtantly, or only to ſhew it to lady Mainwaring, as his authority for demanding the ſeal and every thing belonging to the hoſpital; it is not at all unlikely, that it may be this charter of Charles II. becauſe if he was to go to lady Mainwaring to ſettle this buſineſs, he muſt carry ſome voucher with him, I don't know but that this charter, which granted it to the corporation upon Mr. Whitley's death, was a proper voucher, however, that is for your conſideration.

Some ſtreſs was laid upon the circumſtance of the hoſpital having a ſeal. I can't ſay it ſtruck me, as being in the leaſt material, for moſt probably this hoſpital came to the crown upon the diſſolution of the religious houſes, at which time, it is not at all unlikely, but that the maſter uſed this ſeal to his leaſes; the hoſpital was afterwards granted to Whitley, on the 14th June, 12th Charles II. and by the charter of Charles II. it found its way to the corporation eſtabliſhed by that charter:—It would therefore follow of courſe, if the revenues of the hoſpital were granted to the corporation, that they would have a right to call for that ſeal, from the repreſentative of Mr. Whitley.

Mr. Hall being examined upon this ſubject, ſays, that the corporation are at this moment in poſſeſſion of theſe hoſpital lands—that the fines go into the general treaſury, ſubject only to certain charitable purpoſes, which theſe revenues are devoted to. He ſays too, the corporation are indebted upon ſecurity, to the amount of 1600l. and pay 200l. a year, annuities.

The object of this was to ſhew the importance of preſerving this corporation, which is in danger by the queſtion now in agitation

Mr. Hall is croſs examined by the council for the plaintiff. He ſays, he has been 23 years in the town clerk's office, but not as principal, till laſt year; he recollects but one inſtance of the election of alderman, being otherwiſe than as now, filled upon by the defendant, which was in the time of Queen Elizabeth, except ſuch inſtances as are afterwards laid, put to you by the plaintiff during Mr. Whitley's mayoralty, and the two ſucceeding mayoralties; he ſays that before this charter of Charles II. there was a ſelect body, but he apprehends it was differently compoſed, for that the ſheriffs peers were in the liſts of the aſſembly, and that the ſheriffs were not part of the forty common-council-men at that time, whereas now they are part; he ſays the ſheriffs were then choſen out of the common-council-men, and that this reduced them to the eight, and at the next meeting they uſed to elect two more

that there were forty excluſive of the ſheriffs. He ſays he has no doubt of their having a common ſeal before this charter.

As to a queſtion put to him, whether the yeoman of the pentice has the ſame fees now as he uſed to have, he ſays he does not know of any order to diſcontinue thoſe fees, tho' in fact ſome have been diſcontinued; and he hath received other payments; he ſuppoſes that the order directing the aldermen named in the charter, who were not aldermen before, to give plate; and alſo the common-council-men under the ſame circumſtances to the like, was becauſe the old ones had paid before, and they were not willing to charge them twice.

He was aſked how it happens there were no proceedings to be found on the 3d year of James II, he ſays there is a blank leaf for the proceedings, why they were not entered, or what they were, he cannot ſay.

He ſays the portmote court, which by the charter of Charles II, is directed to be before the mayor and recorder, is now holden conſtantly before the mayor alone; the mayor is aſſiſted by the recorder, but the records of the court, which determine who is the judge, ſtate it as a court held before the mayor only. He ſays he never knew of any deputy recorder in his time till lately, when there was occaſion to appoint a deputy, and at that time he did all the buſineſs; he ſays there is no inſtance of a deputy mayor. The crown mote court is holden before the mayor; the ſeſſions before the mayor, recorder, and juſtices—that the mayor and recorder are the quorum.

On the election of a mayor the courſe is, that the freemen chuſe two aldermen; that there is no regard to their having ſerved the office of ſheriff within three years—that the mayor, recorder, and aldermen chooſe one of thoſe two; and that the election was made in that manner. As to the election of ſheriff, the courſe he ſays, is for the mayor to name the firſt ſheriff, and the freemen to chooſe the other; and that all theſe elections were made in the common-hall.

He obſerve, with reſpect to both theſe elections, as he takes the uſage to be, they differ totally from the directions of the charter of Charles II. and they correſpond pretty exactly with the charter of Henry VII.

He ſays that he remembers one conteſt for the election of ſheriff, a poll, at which Mr. Amery (then a common-council-man) was elected. He ſays the uſage is for the mayor to name the coroners—whereas the coroners are directed by the charter of Charles II, to be choſen by the ſelect body. He ſays the clerks are appointed by the mayor—whereas the charter of Charles II, directs that they ſhall be elected by the mayor,

an

and ſelect body. The mayor names the treaſurer, and the leave-lookers—who are alſo directed by the ſame charter, to be elected by the ſelect body; they are all ſworn in before the mayor, and another juſtice at leaſt. The ſheriffs are always elected out of the common-council, but that the rotation was broke through, by one Mr. Corles; but he thinks he was a common-council-man, though it was out of his turn to be elected. He ſays the ſheriffs hold the pentice court on Tueſdays, Thurſdays, and Fridays only; that freemen are always returned for juries, except in the ſingle inſtance of coroners juries.

He ſays there is a ſeparate ſeal for the hoſpital: He has heard of a charter of Oliver Cromwell's, and another of James 2d, reſpecting the hoſpital lands, neither of which he has ſeen: I don't know what thoſe charters are.

He ſays the title to freedom, is by birth or ſervitude. The obſervation upon which is, that the charter of Charles 2d, is granted to the citizens, by the title of *inhabitants*; yet no inhabitant ever claimed a right to the freedom, under that charter.

This is the whole of the evidence, with reſpect to this grand point, the acceptance of this charter either in whole or in part. —You ſee the ſubſtance of it is, that the charter was accepted, and meant to be acted under, and to be the rule of their conduct. Undoubtedly during the reign of Charles 2d, they did not ſeem to entertain any other idea, than to procure ſuch a charter as they (the perſons who were parties to it) could get from the governing power; they did procure it—they paid for it—they ſeemed extremely pleaſed with it. By a circumſtance which came out on the part of the plaintiff it appeared, there was a table erected over one of their buildings, ſtating that this was an excellent charter, and acceptable to the town; which afterwards, when the times turned, was pulled down; but however it demonſtrated what the ſenſe of thoſe perſons who took their offices under this charter at that time was; and there cannot be a doubt but that this charter was accepted as far as it could be *by the perſons that acted under it*. The evidence certainly ſhews, that the old corporation, after it had got rid of all thoſe people who were impoſed upon the city by the new charter, did take ſome of the benefits which were granted by the new charter to that corporation, particularly the hoſpital lands; and it does appear that the election of aldermen did continue to be (with a ſmall variation as to part of the time) conducted in the manner directed by that charter. On the other hand to be ſure it appears by the croſs examination of Mr. Hall, and alſo by ſome of the written evidence in the cauſe, even on the part of the defendants

fendant; that as to a vaſt many points indeed—as to the bulk of this charter, that they did not pretend to act upon it, from the moment that the charter 26th October, 4 James II. was granted; from that time there was an end of great part of Charles's charter; for it appears, that the mayor, ſheriffs, murengers, coroners, in truth, all the officers at that time, with the ſingle exception of aldermen and common-council, were elected in a mode intirely different. It alſo appears, that the courts of the corporation were not held agreeably to the mode preſcribed by that charter, except in a very few inſtances, during the ſhort period which I have mentioned.

This is the caſe on the part of the defendant with reſpect to theſe iſſues. I may go on to ſtate the little evidence on the part of the plaintiff, applicable to theſe iſſues, without diſtracting your attention; for although it applies to others, there will be no queſtion upon them.

As to the queſtion of Mr. Amery's qualification to be elected an alderman (having firſt been a common-council-man) and as to his admiſſion, a difficulty aroſe on account of that election being made in the pentice room; but upon farther diſcuſſing the ſubject, though there was an order produced directing that all the public meetings ſhould be at the common hall, yet it was abandoned as a thing not tenable, unleſs it could be followed up by ſhewing, that in conſequence of holding the election at an improper place, ſome of the corporators had not due notice where to attend, and had therefore been defrauded of their right of election, in not attending at the due place;—but there is no queſtion about that; therefore there is no reaſon to doubt, if the mayor, aldermen, and common council, had *a right to elect*, but that the defendant was duly elected. Here, therefore, the caſe was cloſed on the part of the defendant.

On the part of the plaintiff, they have laid a pretty ſtrong foundation to object to this charter, for having been accepted in the whole, from what they have brought out by the croſs examination of the officer of the corporation, by which they have ſhewn, that in a multitude of inſtances, it was ſo far from being accepted, that they had always acted in diametrical oppoſition to it; and it is certainly ſo, and in truth it ſeems confeſſed on the part of the defendant that now by ſome means or other, the operation of this charter is reduced to the ſimple point of the election to the offices of aldermen and common-councilmen. As to all the reſt, either by not having been accepted, or as they ſay (though it was accepted) by the effect of a ſubſequent charter, it is confined to the election of aldermen and common council only.

On the part of the plaintiff, they go farther and ſtate to you in general, that from the time this old corporation was reſtored, (tho' there was a continual warfare in the place, down almoſt to the preſent time, and though there has been great anxiety on one ſide, to introduce a popular election, and on the other, to confine the election to the ſelect body of aldermen and common-council) yet there ſeemed to be no idea on either ſide, that it was poſſible to maintain the right of the ſelect body under this charter, but that they reſorted to other expedients, in order to do it.

They ſtate, that ſoon after the revolution, when Col. Whitley became mayor, he had influence enough to prevail on the magiſtrates to let in a popular election of aldermen and common-council-men in future, and there was a great ſtruggle upon the occaſion; proteſts, applications, (by way of petition) to the privy council, mandamuſes, in ſhort a perpetual ſcene of conteſt and confuſion, for a great number of years, but more particularly during the firſt ten or twelve years after the revolution, and they ſay, notwithſtanding many points were then inſiſted upon, yet that this charter ſeemed to have been by common conſent, thrown out of doors, as a ſort of thing, which nobody thought was to be heard of after the old corporation had been reſtored.—I cannot but ſay, that, as far as the fact goes, they have gone a great way towards making out that caſe.

I will now ſtate the evidence to you in the order in which they produced it.

They firſt of all called a witneſs to a ſmall point in the cauſe, to endeavour to ſhew that the charter could have no operation for want of enrolment:—I have ſtated to you what I think upon that point, therefore I need not repeat the evidence with reſpect to it.

They then produced a charter of Henry VII. which gives very large power to this corporation, particularly providing for the election of aldermen, and common-council-men, of mayor, and of ſheriffs; and it is followed by a charter of Queen Elizabeth, ſupplying a defect in that charter of Henry VII. which had not provided for the caſe of a mayor or ſheriffs dying in their year of office, which occaſioned a difficulty, as you will ſee by the evidence, preſently.

After this charter of Henry VII. they produced a paper from the books of the corporation, importing to be a liſt (in the 7th of Henry VIII.) of twenty-four aldermen, and a great many other officers. The material point of it is, that they were ſtated therein, to be aldermen, who had been ch[illegible]

to continue in office from a particular day, to a particular day, for one whole year. That charter directed that the aldermen and other officers, ſhould be choſen yearly, and therefore agreeably to that charter, this entry imports, that at that time the election was in truth an annual election.

They then ſtated a proceeding in quo warranto in the year 1733.—The ſuit was inſtituted againſt the then mayor, ten aldermen, and eighteen common-council-men, and it was to call upon them to ſhew by what authority they exerciſed the the franchiſe of nominating and electing aldermen excluſive of the freemen of the city. To this information they put in a plea, ſtating the charter of Henry 7th—a power of making bye laws contained therein; and a bye law of the 20 April, 10th Henry VIII, (then not extant in writing) confining the election to the mayor, aldermen and common council, and they juſtify the exerciſe of that franchiſe, by virtue of that bye law, —There was an iſſue upon it, and it was found in favour of the bye law and there the queſtion ended.

The obſervation upon it, as applied to this caſe, is this; that whatever right or title the corporation may now claim, to an election by the ſelect body, yet that it cannot be under the charter of Charles II, as contended by the defendant; for had that charter been underſtood to be the right under which they could claim, it is not to be believed that in the year 1733, when this corporation were expreſsly called upon, to account for their claiming ſuch a franchiſe, they ſhould leave the charter of Charles IId (comparatively of a modern date) then before their eyes, *and is expreſsly to the point*, and that they ſhould reſort to the charter of Henry 7th, and then be obliged to ſeek for an *unwritten bye law*, in order to give a ſanction to this kind of election, by no means warranted by the letter of that charter, and which without a bye law, they could not have eſtabliſhed, conſidering that charter of Charles IId to be entirely out of the caſe. To be ſure it is a pretty fair obſervation upon this proceeding, that it could hardly be ſuppoſed to be the ſenſe of anybody acquainted with this corporation in the year 1733, that they could ſupport themſelves under this charter of Charles 2d. It does to be ſure ſeem, as if that was conſidered as a thing totally out of doors, after this reſtoring charter of James IId.

Then is produced what they called law, dated 6 October, 25 Henry 8th, wherein it is complained, that the mayor alone had taken upon himſelf to appoint the common council men; there ought to be 40 it was ſaid, and that when any of thoſe 40 died, there ought to be another elected by the mayor and his brethren; and that the mayor took upon himſelf to appoint, by

which means very improper people got in, and therefore they enact, that in future, they ſhall be choſen by the mayor, aldermen and the reſt of the common council, out of ſuch wiſe, diſcreet and able commoners, as by them ſhall ſeem meet and convenient.

This ſeemed to have been a diſpute among the members of this ſelect body, to which the freemen certainly were no parties, and to be ſure this bye law, made by the ſelect body in this way, could hardly be inſiſted upon, as that which could give a ſanction to this mode of election for the future, nor does it go to the material point, with reſpect to their being common council men for life. It only went to the mode of election, and therefore that bye law does not ſeem to have ever been inſiſted upon—in terms— as that which could ſupport this claim. Indeed if it had, no uſe could be made of it, for the defendant in this cauſe, becauſe he has put his title upon quite another ground.

Then they produced another bye-law, made at an aſſembly upon the 30th of May, 1567; when it was ordered, that in future the aldermen ſhould be holden to be choſen for life; that on reſignation, or a vacancy, the mayor, aldermen, and common-council-men, ſhould chooſe another: And it was alſo ordered, that the mayor and recorder were, on the election day, to rehearſe the names of the aldermen to the commonalty, that they might elect two out of them to be put in nomination for mayor. Mr. Hall ſtated, that there is ſomething of that ſort now practiſed; that the recorder reports to the body at large, what has been done at three previous meetings, and that after he has made that report, then the commonalty at large chooſe two, and out of thoſe two the ſelect body chooſe one.

The next piece of evidence was an exemplification of a decree of the Star Chamber, of the 4th June, 38th Henry 8th, 1547; and it ſeems this decree proceeded upon a difficulty which the corporation were got into, for want of a proviſion for the election of mayors and other principal officers, in the event of their dying before the charter day; and therefore the decree recites the letters patent of Henry VII. as the ground of the conſtitution of Cheſter, the day of the election of a mayor being on Friday next after the feaſt of St. Dennis, and the particular manner is ſtated, and, in truth, it is clearly borrowed from the charter of Henry VII; then it ſtates, that by the death of one Holcroſte, the office of mayor became void, before the charter day, and that great inconveniencies might follow for want of a ſucceſſor: It therefore ordains, that the citizens and commonalty ſhould, on the 11th of June [illegible]

next, repair to the common-hall, and there name two citizens of the twenty-four aldermen, of whom the aldermen and ſheriffs were to chooſe one to be mayor; and in the caſe of an equality of votes, the elder alderman's vote to be taken for two; the elder alderman is to admit and ſwear ſuch new mayor, and he was to continue in office till the enſuing charter day.—This recogniſes the charter of Henry VII. and the charter of Queen Elizabeth alſo recogniſes it, and provides a regular and an eſtabliſhed conſtitution, which would reach the particular caſe of a vacancy during the year.

It appears, in point of fact, that there was an election in conſequence of that decree, and one Mr. Walley was choſen; and there is a memorandum in the book, which ſeems to me to have a tacit alluſion to this decree, and that the election was held under the authority of it. Whether the decree was a lawful one and obligatory, or no, is nothing to the purpoſe: It ſerves to ſhew us what the ſenſe of the corporation was (namely) that they looked to the charter of Henry VII. as to that which was to direct them in the manner of their electing; and it was that which created the difficulty they were then under, and it ſeems that there was a quiet election had under it, till there could be a more effectual proviſion by charter.

Upon 2d July, 16th Eliz. there was an aſſembly (which we at firſt took to have been a general aſſembly of the body at large) directing a proviſion to be made for reimburſing the mayor the expence of obtaining the charter of Queen Elizabeth. You recollect there is an iſſue upon the queſtion, whether theſe charters are in force or not? and to be ſure it was neceſſary they ſhould be accepted, in order to be in force; and theſe are circumſtances which go materially to both,—that they were accepted, and were underſtood, for a time at leaſt, to be in force.

Upon 9th July, 1630, there was an election of a ſheriff, occaſioned by death, under that charter of Elizabeth, out of the forty common-council-men; and there is reaſon to believe, that that was a popular election by the body at large.

Upon the 9th May, 1701, there was an election of a mayor, in the ſame ſituation, by a popular election.

Upon the 6th November, 1702, there was an election of a mayor, in the ſame ſituation.

Upon the 23d Sept. 1720, there was an election of a ſheriff, that was by the ſelect body—at leaſt they ſuppoſe ſo from the names of the number, for not above four or five burgeſſes were preſent; and yet Mr. Hall ſeems to admit the elections, to be made by the body at large.

Upon

Upon 22d April, 1743, there was an election alſo of a ſheriff, upon death, by a very ſmall number.

Mr. Thos. Fluitt was called for the purpoſe of ſtating to you, that he had examined the freemen's books, of this corporation, from the year 1663 to 1683, a period of twenty years, in order to ſhew how many freemen had been admitted in that time; and he, and another witneſs examined with him, counted the number to be 913.

They then call Mr. Wm. Wylde, in order to ſhew you how many of theſe freemen accepted the offer made by the charter of Charles II. to come in under the new charter. The method of doing it, is by ſhewing how many in the year 1684, 5, 6, 7, and 8, were ſworn, as they ſuppoſe re-ſworn.

In the year 1684, there was one; in 1685, there were none ſworn; in 1686, two; in 1687, eleven; in 1688, ſeven.

There is ſome puzzle about it—whether that mark of their being ſworn, applies to the circumſtance of old freemen coming in as freemen under this charter; or whether it applies to the circumſtance of freemen being ſworn into other offices. The proſecutor's council obſerve, that with regard to one in particular (Sir Thos. Groſvenor) who is marked as being ſo ſworn, that he could not be re-ſworn in any other way than as coming in as a freemen, he having been mayor before that time.

There was a difficulty in this part of the caſe, upon the effect of the charter of Charles II. as to the re-admiſſion of theſe freemen—whether they were to come in without being re-ſworn.

The charter directs, that all new freemen ſhall take certain oaths upon their admiſſion; and then ſays as to old freemen, upon reaſonable requiſition, they may be, and ſhall be admitted; but whether they are to be re-ſworn or no, is extremely doubtful on the words of the charter; and if it had appeared, that they had been re-ſworn, that would have been an evidence of it; but this may be collected from the examining of the rolls, that there were no great number of them, who did come in.

Mr. Dealtry is called, and produces an order of the privy council, of the 12 Aug. 1688, for the amotion of thoſe perſons who were put into office under the charter of Charles II.

Mr. Litchfield (a clerk in the privy council office) ſays, he concludes from the entry in the council book, that this order went out becauſe there is no vacat entered againſt it in the book, as is uſual where any thing has happened to prevent an order taking effect.

To

To be ſure, that is very looſe evidence indeed, as to the order having been put in force; the practice of entering a vacat, probably depending upon the vigilance of the officer.—The dependant inſiſts, that does not ſhew what became of this order of council; and indeed the officer ſeemed to intimate that the practice of entering vacat, was only where the order was at the ſuit of private perſons. Moſt probably this order of amotion was one of thoſe miſerable political ſtrokes, which drew upon that unfortunate prince, the conſequences which followed; this was in Auguſt, 1688, before, as I ſuppoſe, his fears were alarmed, for it was in October following, that he began to be in a hurry about theſe corporations; and to take meaſures for reſtoring them. This amotion therefore, does not ſeem to me to be with a view of reſtoring them afterwards, but rather as a puniſhment, for it profeſſes to amove all thoſe perſons who had been put in before. As to the circumſtance of the vacat I don't lay any ſtreſs at all upon it.

The next piece of evidence was, an act of aſſembly, of 9th January, 1688-9 (you ſee in Oct. 1688, the charter of pardon, and of reſtoration was given to this corporation) whereby it appears that Street who was the mayor reſtored, was at the head of the corporation, as mayor; and there are in this entry, a great number of the old corporators, who had been turned out, and who were reſtored undoubtedly in conſequence of this charter of James the II. and they were then certainly in poſſeſſion again of their old corporate rights.

Upon the 9th of February, 1688-9, another aſſembly appears to be holden before Street, the mayor.

Mr. Litchfield then produced, from the council office, a paper read before the privy council. It is a petition to the Queen, from ſeveral perſons (citizens and common-councilmen of Cheſter) ſtating the conſtitution of the corporation, and that the ſelect body have a right of electing the aldermen and common-council; that they (the petitioners) having been duly elected, had been diſplaced by King James, and reſtored upon the revolution: and then they complain of a ſubſequent diſplacing, and of the election of common-council-men not being made in the way in which it had been accuſtomed to be made; that the votes of the greater part of the aldermen and common-council, were refuſed to be taken;—and therefore they pray for redreſs. The truth of their complaint is certified by Sir Thomas Grosvenor, and ſeveral other aldermen. It does not appear that any thing was done upon that; but there does appear that which explains this proceeding—for in the ſame (viz. 1693) there was an act of aſſembly, in which the proceedings

ceedings had at the portmote court, before a gentleman who makes a diſtinguiſhed figure in this part of the hiſtory of this city (a Mr. Roger Whitley, the mayor) are recorded. From thence it ſeems, that Sir John Mainwaring and Mr. Booth preſented a petition, in the name of themſelves and a vaſt number of freemen, praying to be admitted to the benefit of their charter, in chooſing their common-council, according to the privileges thereby granted them. The freemen ſtate in this petition, that by their charter from Henry VII. they had power to chooſe their common-council-men yearly, and that there is nothing in that or any other charter, to deprive them of that privilege; that having been kept ignorant of their right, for a long time the uſage had been otherwiſe, but that it then was proper, for reaſons which they ſtate, to correct that uſage; they deſire to be admitted, therefore, to reſume thoſe rights to chooſe common-council-men. A proteſt was delivered by Alderman Wilcocke, ſigned by himſelf and ſeventy-ſeven other citizens, in which they juſtify the old practice, and ſuppoſe it to have been what had exiſted for ages paſt.

Upon 5th June, in that year, an aſſembly was holden in the inner pentice, before the mayor and aldermen only; when this petition and proteſt were taken into conſideration; and then the mayor, by the advice of his brethren, thought fit to conform to the election of the common-council according to the charter; and, without particularly explaining in this order how that was to be, they, upon 12th June, 1693, appoint the election to be upon Thurſday the 15th June following, with two diſſentient voices only; and order a notice to be given to the citizens at large, that there would be a general aſſembly held for the election of thoſe officers. This general aſſembly appears to have been held upon the 15th of June, before the then mayor and commonalty, when two aldermen were likewiſe choſen, in the room of two deceaſed; and there was a proteſt at this time by twenty-ſix of the old aſſembly.

Upon the 23d June, 1693, the perſons elected at this particular aſſembly, were all ſworn.

Then they produced the proceedings on a mandamus to reſtore ſeveral perſons to the office of common council men to which they had been elected, according as they ſaid, to *the ſyſtem of the city*. There was a return by the mayor and citizens of an election having been had under the charter of Henry VII. by the mayor and commonalty; and it ſeems as if that return had ſucceeded, for there were no farther proceedings upon it.

Upon 2d January, 1693-4, that return was produced by the mayor, at an aſſembly of the mayor, aldermen and com-

council in the inner pentice, ready engroſſed, and they directed the common ſeal to be put to it, which was done immediately.

There were on the 15 June, and 25 September, 1694; and on 15 June, and the 9 September, 1695, popular elections of aldermen and common council, during all which time, Whitley continued mayor.

Upon 12 June, 1696 (Whitley ſtill continuing mayor) there was an order in the nature of a bye law, appointing 15 June, for the annual election of common council, except when it happened on a Sunday, and then it was to be on the day following.

Upon 9 October, 1696, two aldermen were choſen by a popular election, on account of vacancies by the aldermen not ſigning the aſſociation.

Upon 15 October, 1696, there was a ſtring of propoſals for regulating the election of aldermen and common council, in the form of a popular election.

They then produced from the privy council office, the petition of Roger Whitley (who had ſerved the office of mayor for four years before) wherein he ſtates, that having reſtored as he apprehended, the conſtitution of the city by this popular election, in the room of the election by the ſelect body, he complains, that tho' the 15 June, had been appointed by a bye law for the purpoſe of proceeding to the election of theſe officers (no day being fixed in the charter) Bennett, his ſucceſſor held no election; he complains of Bennett, for that, amongſt other things. Bennett puts in his anſwer to this petition, in which he ſtates the charter of Henry VII. and that there was a received conſtruction of this charter, whether grounded upon an antient bye-law he did not know, by which the common-council-men were underſtood to be elected, upon vacancies, for life; he excuſes his not holding the election upon the 15th of June, which was the great grievance complained of, and ſays, that in fact he did appoint the 23d of July, and upon that day made the election in a quiet manner; and, therefore, he ſuppoſes there was no foundation for the complaint againſt him.

One cannot help obſerving, that the adviſers of Peter Bennett, who put in this anſwer, muſt have been a good deal at a loſs when they were ſtating it; and it could not be at that time their idea, that they could defend themſelves under the charter of Charles II. for they ſtate, that it was a received conſtruction upon their charters in general (whether grounded upon an antient bye-law, or no, he could not tell) that the common-council were to be elected for life—That, to be ſure, is not the language of a man who underſtood he had a clear charter right, under which ſuch election was to be ſupported—Certainly,

tainly, therefore, it inclines one to think, that as ſoon as the corporation was reſtored, they did conſider this charter of Charles II. as pretty much out of the caſe; for ſo ſoon after as the year 1697, if they had underſtood it to have been accepted and acted under, they would hardly have talked in this ambiguous manner: It certainly looks as if they were in the dark on what ground to put this election by the ſelect body, and that they did not think they could reſort to that charter.

Upon the 23d July, 1697, there was an aſſembly, at which the popular election, ſtated by this gentleman's anſwer, was had. In the mayoralty of William Allen, there is a new ſcene diſcloſed; during which, they make an order, at a general aſſembly holden 23d July, 1698, reciting, that there had been an election of aldermen and common-council, by the ſelect body, till the year 1693, when there were attempts made to change it, and to convert it into an annual election of common-council, and to elect the aldermen alſo in a new manner; and they then agreed, that thoſe common-council-men who had been choſen for life before 1693, and who were then removed, ſhould be reſtored; and they agreed to chooſe other common-council-men for life, to make up the proper number: They confirm the election of the aldermen and common-council; and they determine that they ſhall have the whole authority which they theretofore poſſeſſed.

Now whether this order of aſſembly may at ſome future time, be conſtrued into an act, which can ſupport this election in the ſelect body, is one thing—it may or may not—it is not neceſſary for me to ſay any thing upon it at preſent; but it cannot be applicable to ſupport the preſent defence in the manner, in which it is now inſiſted upon; and it is an additional circumſtance againſt that defence, as it ſhews—that even at that time, when they were conſidering the ſubject; and when they were agreeing that what was done in 1693, was an innovation upon the old right; yet they did not put it upon the charter of Charles II. nor take the leaſt notice of it.

The next evidence is an entry in the mayoralty of the ſame diſtinguiſhed gentleman (Mr. Whitley) containing an order to take down a table, which hung up in the pentice, ſtating, that the new charter was an excellent one, and acceptable to the town.

If this evidence ſtood ſingly, I ſhould not have laid a great deal of ſtreſs upon it; becauſe it plainly appears there were at that time great heats in this city; Mr. Whitley having got poſſeſſion of it in a wonderful way, for 4 or 5 years together; and it might have been a party meaſure, though at the time

this table was put up it might expreſs their ſenſe of that charter; but the truth is, that it is but one among a great number of other circumſtances, all tending to the ſame point—not acknowledging the exiſtence, or any effect of this charter, from the time, that the old corporation were firſt reſtored.

Then they read an entry of the 6th June, 1690, when there was a ſum of money ordered to be paid to Sir Wm. Williams, towards defraying the expences of the engroſſment of King James's charter.

That was to ſhew that King James's charter was accepted by this corporation—There is no doubt about that, for the reaſons I ſtated before.

They then produced the return of members for the city, in the year 1690, which appeared to be ſigned by the old freemen—That ſtanding alone would not be of much conſequence, for people often claim to vote at elections for members, who are not entitled. It ſtands upon a different ground often, and therefore thoſe freemen, if they had been regularly excluded by the judgment of ouſter, from all rights of the corporation, might ſtill be the only perſons who could vote. I don't know, that by deſtroying the corporation, the repreſentation of the city would be deſtroyed; therefore this piece of evidence does not ſeem to weigh much upon the ſubject.

They then call Mr. Hall, in order to ſhew that the charter of reſtoration, by King James, was found among the city muniments—ſtill further to ſhew, that that charter was accepted.

They then read an entry of the 9th of Feb. 1688, which contains a liſt of the common-council, who were reſtored, and who acted immediately after their reſtoration at this aſſembly. There were ſome vacancies, which they proceeded to fill up at that aſſembly.

They then called Mr. Benjamin Handley, to prove he had been preſent at the election of mayors, by the citizens at large. In truth there was no queſtion about that.

Mr. Wm. Hamilton was called to prove, that there was a conteſt for the election of ſheriff; and that Mr. Amery, the defendant, voted at that election

I don't think much turns upon that, if he had even voted on the popular ſide; for in all theſe borough diſputes people embark on different ſides, and engage with a great deal of warmth—but little depends on what they do.

You will be now to ſettle the true queſtion of right, between the parties; and I again repeat, that I ſhould have been glad to have found, there having been ſo long an uſage (the

origin of which the ſelect body themſelves don't ſeem to be well ſatisfied of) I ſhould have been extremely well pleaſed, if I could have found a good ground, upon which this defendant could have ſupported himſelf, becauſe where there have been long uſages, it is fit, if poſſible, that they ſhould be ſupported, for the ſake of peace and quiet—that men's titles ſhould be at reſt; but however, when they are canvaſſed, and ſpecific ground ſtated, upon which they are to be ſupported, that ground muſt be made out ſatisfactorily.

Now the ſubſtance of the caſe, upon which the defendant is to reſt here, is, that this charter of Charles II. was accepted by the old corporation, and acted upon by that old corporation, at leaſt up to the extent of this election, and that therefore that is now to be the rule of their conduct.

Mr. *Bearcroft.* I beg your Lordſhip's pardon—I apprehend the iſſue to be, the acceptance by the *citizens and inhabitants.*

Court. I have ſtated my ſenſe of that to the jury; if I am wrong, it is now too late to be corrected, for I have made up my mind upon it.—I certainly underſtand *citizens and inhabitants* there, to mean *the old corporation,—the perſons reſtored by the charter of James II.*—I take that to be the true queſtion; and if you ſhould find, on a full and fair conſideration of it, that this charter of Charles II. was never acted upon, and conſidered as the rule for the conduct of this corporation after they were reſtored, in this point, namely, the election of aldermen—(for beyond that there is no call to carry it)—if that ſhall be your opinion, I ſhall certainly recommend to you to find a verdict upon the firſt iſſue, in favor of the defendant. Upon the ſecond iſſue, in favor of the defendant. Upon the 4th, 6th, 7th, and 8th iſſues, in favor of the defendant.

In that caſe, you will find a verdict upon the 3d, 5th, and 9th iſſues, in favor of the plaintiff; becauſe I cannot conceive, that this charter can be underſtood to be accepted in all its parts.

With reſpect to the 10th iſſue, upon the notification of the order of council, I ſhould rather think, that the beſt thing you can do is, to let that follow the fate of the other; if you find your verdict in favor of the charter of Charles II. that then you ſhould find a verdict, that it was not ſufficiently ſignified; on the contrary, if you find your verdict againſt the charter of Charles II. then you will find, that it was properly ſignified; in order to exclude any farther queſtion upon it.

With reſpect to the eleventh, it is clear, that the charter of James II. was accepted; that iſſue you will find, *therefore*, with the plaintiff. And, with reſpect to the twelfth, if you

If this Opinion was the Ct of K.B. 3 Hil. 27 G3, upon that ground, as it was some others, granted a New trial.