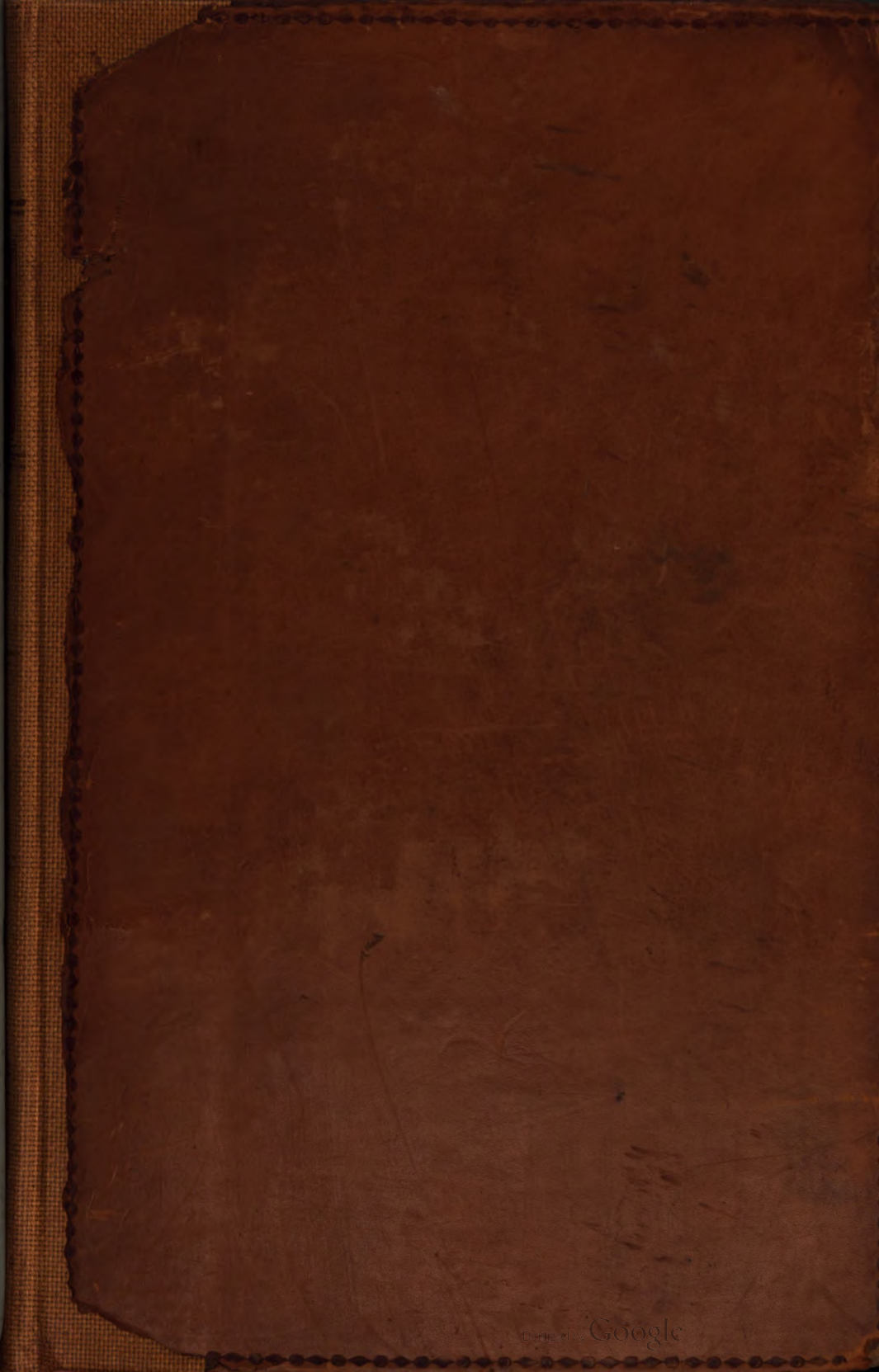

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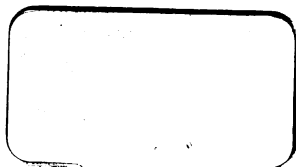
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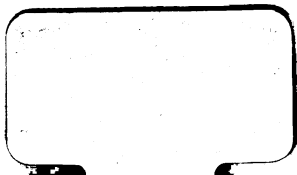
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A

TREATISE

ON

The Law of Corporations.

BY STEWART KYD,

BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

VOL. I.



LONDON:

PRINTED FOR J. BUTTERWORTH, FLEET-STREET.

1793.

DEDICATION.

TO

JOHN HORNE TOOKE.

SIR,

THE intrinsic merits of a book are unquestionably its best recommendation to the attention of the public:—If it can derive any additional advantage from the sanction of HIS name to whom it is inscribed, that advantage must arise from the supposition that he is capable of judging of the subject, and that he has in fact exercised his judgment.

THE man whose public conduct, for a series of years, has proved that he possesses the most profound and accurate knowledge of the *whole* of
the

DEDICATION.

the English constitution, must be allowed to be a pretty competent judge of the merits of a performance which professes to treat of the law relating to a *part* of its institutions.

So far, therefore, as an advantage can arise from a supposed capacity of judging, the public will readily admit that I have chosen well, when I have chosen to dedicate my book to you:—But from that situation in which those who direct the councils of the nation have, in their wisdom, thought proper that you and I should at present be placed (*a*), I am deprived of that advantage which would inevitably result from the public supposing, that you had actually exercised your judgment on the work, and given me your permission to send it into the world under the sanction of your name. I have not the opportunity of communicating to you my intention so to do; but if by chance this circumstance should be conveyed to your knowledge, I am not without hopes that you will learn it without displeasure.

(*a*) Both being, at this time, prisoners in the Tower of London, under warrants of commitment for high treason.

DEDICATION.

Two motives influence my conduct on this occasion; a desire to pay a public tribute of gratitude for the honour of your friendship; and an ambition to have my name hereafter mentioned in company with yours as a scholar, as it will most probably be as a citizen, engaged in the same public cause.

I HAVE the honour to be, with the highest affection and esteem,

DEAR SIR,

Your most obedient

and devoted humble servant,

STEWART KYD.

TOWER,
August 20, 1794.

ADVERTISEMENT.

THERE is no title in the laws of England more extensive, or more generally interesting, than that of Corporations. The present work is an attempt to reduce into a systematic form the law upon that subject, which lies scattered in so many volumes of reports. The introduction prepares the reader for the perusal of the body of the work, by giving a definition and description of a corporation, the distribution of corporations into their different kinds, and the manner in which a corporation is composed.

THE first chapter treats of the authority by which a corporation is created; the second, of corporations considered in their relation to the public; the third, of their internal constitution; the fourth, of the manner in which they are visited; and the fifth, of the dissolution of a corporation, and its effects.

THE present volume contains the first and second chapters, and a considerable part of the third; the rest of the latter, and the two succeeding chapters, will make two other volumes similar to the present. The whole of the work will be published before the end of next Trinity term.

SHOULD the present work be favourably received, it is the author's intention to publish another volume on the constitution and laws of the city of London.

NO. 4, HARE-COURT, TEMPLE,
NOVEMBER 4th, 1793.

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* N. B. In page 306 it is said, "that it appears to be a general rule, that in actions where a corporation and a stranger are concerned, the latter shall not be assisted by the court to obtain inspection of the books of the former;" when this was written, the author was not aware of the cases of the "mayor of Lynn v. Denton, 1 Term Rep. 689," and "the corporation of Barnstable v. Lathey, 3 Term Rep. 303," which over-rule the former doctrine on this point.

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INTRODUCTION.

FROM the establishment of civil society and political government, not only the individual acquires rights, and becomes subject to duties, which can exist only in consequence of that establishment; but collective bodies of men come to feel a common interest, acquire a common property, become subject to common burthens and common duties, assume a known character and description, and become objects of political regulation. Some of these communities arise from the division of the country into districts for the sake of local government, or a more convenient system of police, whether such division takes place in consequence of a preconcerted plan, or from the progressive operation of natural and political causes; such, in England, are the political divisions of the country into counties, hundreds, liberties, manors, and parishes, and some other less common divisions. Other communities are naturally formed from the concurrence of considerable numbers of men into

B one

one place, from whence arise cities and towns; and others are established from a similarity of pursuit in many individuals, whether collected into one place, or dispersed over different parts of the country.

AMONG the institutions of almost all the states of modern Europe, but among none more than those of England, many of these collective bodies of men, under the names of bodies politic, bodies corporate, or corporations, make a conspicuous figure.

AT their first introduction, they were little more than an improvement on the communities which had grown up imperceptibly, without any positive institution; and, for a considerable period, the shade which separated the one from the other, was of a touch so delicate as to require the most minute attention, and the most discerning eye, to distinguish.

ONE essential characteristic of a corporation is an indefinite duration, by a continued accession of new members to supply the place of those who are removed by death, or other means, which, in the language of the law, is called perpetual succession: but this is not peculiar to corporations; other aggregate bodies of men are capable of the same perpetual continuance, and for the same natural and intrinsic reason. Thus, the

the inhabitants of a county, of a hundred, of a manor, of a parish, or of a town not corporate, like Birmingham or Manchester, have perpetual succession, as much as the corporation of the city of London. Even a voluntary association of private individuals, for any the most trifling purpose, is capable of perpetual succession, may be indefinitely continued as long as there is an accession of new members, and may, with equal propriety, be called the same society at the distance of any number of years, though not one of the original members remain, as the corporation of the city of London is called the same corporation which was known by that name a hundred or five hundred years ago.

BUT the distinction between the succession of a community, not corporate, and that of a corporation, is this; that the first has succession in a natural manner, as one generation succeeds another; the second has succession as a community modified, or put into a particular form, and under a special denomination, as of mayor and commonalty, bailiffs and commonalty, or the like, which is a complex kind of succession, being both natural and artificial (*a*).

IT is another characteristic of a corporation, that it is capable in its collective capacity of possessing

(*a*) Madox, *Firma Burgi*, c. 2, f. 17, page 50.

property, and transmitting it in perpetual succession; but this, in ancient times, was not peculiar to a corporation: Madox, in his *Firma Burgi* (a), gives a variety of instances, of towns not corporate, holding their town at ferm in the same manner as towns corporate: The ferm was a certain annual rent in lieu of the duties which the King was intitled to levy on a variety of accounts within the towns within his demesnes; when, therefore, he demised these duties to the townsmen at a certain rent, it was necessarily implied that they were capable of enjoying property in their collective capacity (b).

IN Dyer (c), there is a note, that it was held in the Star Chamber, by Bromley Chief Justice, Sir John Baker and others, "that if the Queen (d), at that time, by her charter, will grant land to the good men of the town of Islington *rendering rent*, without saying to hold to them, their heirs and successors, this is a good corporation perpetual, to this intent only and to *no other*, because a rent is reserved, and the King may have a remedy for his rent" (e). But without the rent reserved, it is said, the grant is void, unless they were incorporated before; because, say the books,

(a) C. 3.

(b) Id. c. 11, f. 3.

(c) 100. pl. 70.

(d) Queen Elizabeth.

(e) Per Geo. Croke, 2 Rol. Rep. 155.

the

the King is deceived in his grant (a); and, in the case where a rent is reserved, it is said, "they are only tenants at will, and if the King will release, or grant to them the rent and fee farm, it seems that the corporation is dissolved, *ipso facto*, for the rent and farm was the cause of their ability to be a corporation" (b).

WHATEVER observation may be made on the use of the word corporation in these two cases, or, however unsatisfactory the reason for the distinction between them, on account of the reservation of rent in the one, and the non-reservation of it in the other, it is perfectly clear that it was not conceived to be necessary that a collective body of men should be previously incorporated in order to enable them to take a grant of land, and that it was sufficient that they were known by some general description. This opinion is confirmed by Lord Coke, in a passage in which he says, "The parishioners, or inhabitants, or *probi homines* of Dale, or church-wardens, are not capable to purchase lands, but goods they are, *unless it were in antient time when such grants were allowed*" (c).

THERE seems, indeed, no reason in the nature of things, why such grants should not have been

(a) 7 Ed. 4, 30. 21 Ed. 4, 56, 59. 2 H. 7, 13. 1 Rol. 513.

(b) *Ideo Quære*, says Dyer, 100. pl. 70.

(c) 1 Inst. 3 a cites. 12 H. 7, 8. 37 H. 6, 30. 10 H. 4, 3 b.
4 Inst. 297.

allowed; there is certainly no *metaphysical* difficulty attending the transmission of landed property, through a series of individuals in their collective capacity, without the support of a positive institution: It has, however, been long an established maxim of the English law, that land, granted to a community or aggregate body of men, not incorporated, cannot, by virtue of the original grant alone, be transmitted to their successors^(a). It is difficult to account for the establishment of this rule; it can hardly be supposed to have been introduced on reasons of political expediency; for, by means of renewed conveyances, the same property may be continued in succession to any community through any indefinite period. The societies of the Inns of Court are not corporations; yet, in their collective capacities, they have held the property of the ground on which the chambers are built, ever since they were established. The rule may, perhaps, have arisen from the law of jointenancy, and its incident of survivorship, by which, if land be purchased by several, to them and their heirs, it does not go to the heirs of all, but to the heirs of the survivor; this, however, is not, altogether, a satisfactory derivation of the rule, for a purchase, by a community, would be in its collective capacity, with an

(a) Vid. 10 Co. 26 b.

intention

intention to transmit the property, not to their heirs, but to their successors: perhaps we must be satisfied with stating the rule as it is, without attempting to account for its origin.

THE mode, by which the societies of the Inns of Court supply the defect arising from their not being incorporated, is said to be this. The first grant of the possessions was made to a select number, and their heirs, in trust for the society at large—this select number forms the bench; as the members of it die, they choose others from the society; the legal property is in the surviving members only, of the original trustees; when that number is considerably reduced, they convey to one or two of their officers, as their Steward and Butler, in trust, to convey to all the existing members of the bench; that conveyance is made, and thus the incident of survivorship avoided, and the succession continued.

A THIRD characteristic of a corporation is, that the members of which it is composed, are subject to common burthens; but neither is this peculiar to them: Mr. Madox (*a*) has given a great number of examples of towns, not corporate, having paid their aids, tallages, fines, and amercements to the King, in the same manner as towns corporate, and of other aggregate bodies, or communi-

(*a*) Firma Burgi, c. 4.

ties of men (*a*) having been commonly fined or amerced, charged and prosecuted in their collective capacity, in the same manner as if they had been embodied by charter; among others, the men of the Abbey of St. Mary at York; the Englishmen and Welchmen of Gowerland in Wales; the Knights of the Bishopric of Durham; the Knights of the Honour of the Earl of Leicester; and the community of the Jews in England.

EVEN the several districts (*b*), or divisions of the kingdom, were treated as communities. A county, a hundred, a frankpledge, was then wont to be fined or amerced in common, and to be taillaged in common, and to be put in charge to the King in his revenue rolls, by the general name of county, hundred, frankpledge.

THE merchants of Venice, trading in England, were never incorporated (for ought that I know, says Madox (*c*) by the charter or patent letter of any King of England before the reign of King Henry VIII. or in it, or afterwards; yet, in Hilary term, in the 28th year of that King, they are charged to the King, in *Rotulo Compotorum*, with certain customs and subsidies, by the name of the merchants of Venice, and are discharged thereof by judgment of the Court of Exchequer, by the same general name of merchants of Venice.

(*a*) C. 4, f. 15. (*b*) Firma Burgi, c. 5, f. 16. (*c*) Ibid, f. 17.

ONE great purpose of forming aggregate bodies of men into a corporation, is to confer upon the members some peculiar privileges under one general description, and to preclude the necessity of a particular grant to every individual; but there are many instances, in ancient times, of privileges and exemptions conferred by charter on collective bodies of men coming under one general description, who were not incorporated before, and without any words which conferred on them a corporate capacity in any other respect than in the particulars expressed: Thus, it is said (*a*), "if the King grant to the men of Islington, that they shall be discharged of toll, this incorporates them to the purpose of being quit of toll, though it does not enable them to purchase land, &c."

So, the tinners of Devonshire and Cornwall were exempted by a charter, in the reign of Edward the first, from the jurisdiction of any court but that of the court of Stannaries (*b*).

IN like manner Edward the first, in the 31st year of his reign, granted a charter to foreign merchants, by which, in consideration of the customs paid by them for their goods brought into the kingdom, they were exempted from the duties

(*a*) 21 Ed. 4, 59. 1 Roll. Abr. 513.

(*b*) 1 Rol. Rep. 295.

of

of murage, pannage, and pontage, throughout the kingdom (*a*).

MADOX gives a great number of instances of such grants, and in the register there are many writs, particularly under the title *de essendo quietum de Theolonio*, commanding the observance of similar exemptions in favour of several collective bodies of men who were not incorporated (*b*).

THE privilege of conferring the degree of barrister, possessed exclusively by the societies of the Inns of Court, is an example of the same kind existing in modern times.

“BUT such a charter, at this day” (*c*), says Coke, “cannot be granted to any but a corporation.”

ANOTHER characteristic of a corporation is, that it may sue and be sued in its collective capacity; but in ancient times there are many instances of other collective bodies suing and being sued in the same manner.

THUS, in the second year of King Edward the second, an action was brought in the Exchequer, by John de Vanne and his fellows, merchants of the company of the Ballardi of Lucca, against brother Thomas, of Doncaster, master of the house of St. Germain, in Scotland, for nine pounds due upon bond. The defendant pleaded payment of

(*a*) 1 Rol. Rep. 148. Firma Burgi, c. 11, f. 4. Register, 259, a.

(*b*) Register, 258, b.—261, b. (c) 13 Jac. Vid. 1 Rol. Rep.

part of the money ; and judgment passed against him for the residue (*a*).

IN the same year of the same King, Richard de Abyndon and Margery Criel sued the tenants of the hundred of Wichford, in Cambridgeshire, for 89s. 6d. being their contingent part of a taillage assessed during the voidance of the See of Ely. Ralph of Norwich, Bailiff of the liberty of the Bishop of Ely, appeared in behalf of the tenants, and pleaded, that the plaintiff Richard had been paid and satisfied this very money ; and he produced a patent letter of acquittance made by him : on which the tenants had judgment to be dismissed the court (*b*).

EVEN two distinct bodies of men, of different descriptions, and having different interests within the same town, have been the opposite parties to a suit. Thus, in the forty-fourth year of Henry the third, Peter de Wakerlegh, and five others, who were " Prince Edward's men," in the town of Staunford, were attached to answer William Davison and William Reynerson, who sued for " the Abbot of Burgh's men," of the same town, for that the defendants unjustly caused the plaintiffs to contribute with them, and others, who were the men of Prince Edward in that town, in taillages and other burthens, payable by the said

(*a*) Firma Burgi, c.—f. 28.

(*b*) Ib. f. 31.

town,

town, beyond the sixth part of the said tallages and burthens, contrary to a *concord* made before the Barons of the Exchequer, about that affair, in the twenty-seventh year of Henry the third. The defendants came and pleaded, that they did not cause the plaintiffs to be distrained, contrary to the said concord; but desired that it might remain in force.

THE power of suing collective bodies of men, not incorporated, in some particular cases, has been likewise granted by act of parliament, where the remedy, by common law, was supposed not to be adequate to the injury sustained; of this kind is the action against the hundred, on the statute of Winchester, for not raising hue and cry(*a*); and such is the action given by the statute 8 H. 6, c. 27, to the inhabitants of Tewkesbury, in the county of Gloucester, against the commonalty of the forest of Dean.

THE case of " Prince Edward's men," and " the Abbot of Burgh's men," before mentioned, is a proof, that the capacity of contracting in a collective capacity, was not, in ancient times, confined to a corporation.

DEFINITION and DESCRIPTION of a CORPORATION.

THE union of the several circumstances, mentioned in this comparison, between a corporation

(*a*) Vid. 1 Term Rep. 72.

and

and other communities, seems to constitute the very *essence* of a corporation; from which, it is presumed, the following definition will convey a pretty accurate idea of what a corporation is.

A CORPORATION then, or a body politic, or body incorporate, is a collection of many individuals, united into one body, under a *special denomination*, having perpetual succession under an *artificial form*, and vested, by the policy of the law, with the capacity of acting, in several respects, as an *individual*, particularly of taking and granting property, of contracting obligations, and of suing and being sued, of enjoying privileges and immunities in *common*, and of exercising a variety of political rights, more or less extensive, according to the design of its institution, or the powers conferred upon it, either at the time of its creation, or at any subsequent period of its existence.

THE words corporation, and incorporation, are frequently confounded, particularly in the old books; the distinction between them is this; a corporation is a political institution; incorporation is the act by which that institution is created.

A CORPORATION has been called "a mere capacity to sue and be sued, and to take and to grant" (a); which is as ridiculous as it would be

(a) Treby's Arg. in Qu. War. 3, 4.

to say "that a man is a mere capacity to walk with two feet" (*a*). It is not a capacity, but a political person, in which many capacities reside.

A CORPORATION has also been called a franchise (*b*): the propriety of this appellation depends on the more or less extensive meaning in which the word "franchise" is used; in its most extensive sense it expresses every political right which can be enjoyed or exercised by a freeman; in this sense, the right of being tried by a jury, the right a man may have to an office, the right of voting at elections, may, with propriety, be called franchises; and in this sense, the *right* of acting, as a corporation, may be called a franchise, existing collectively in all the individuals of whom the corporation is composed; in this sense, and in this sense alone, "the franchise of *being* a corporation," can have any precise meaning.

In a less general and more appropriate sense, the word "franchise" means a royal privilege in the hands of a subject (*c*), by which he either receives some profit, or has the exclusive exercise of some right; of the first kind are the goods of felons, waifs, estrays, wrecks, or the like; of the second

(*a*) Sawyer's Arg. in Qu. War. 11.

(*b*) Finch's Arg. per tot. Sawyer's Arg. 7, 8, 11, 12.

(*c*) Finch's Law, 164.

are

are courts, gaols, return of writs, fairs, markets, and many others. They are estates and inheritances, which may be granted and conveyed from one to another, as other estates, which is not the case with a corporation (*a*); in this sense a corporation cannot be called a franchise; the latter is a privilege, or liberty, which can have no existence without reference to some person to whom it may belong; the former is a political person, capable, like a natural person, of enjoying a variety of franchises; it is to a franchise, as the substance to its attribute; it is something to which many attributes belong; but is itself something distinct from those attributes.

SEVERAL other epithets have been given to a corporation, which, unless particularly explained, are apt to bewilder and mislead the understanding: thus it has been said, that "a corporation aggregate of many, is invifible, immortal, and refts only in intendment and confideration of the law" (*b*); that it is "a mere metaphyfical being, a mere *Ens rationis*" (*c*).

THAT a body framed by the policy of man, a body whose parts and members are mortal, fhould in its own nature be immortal, or that a body

(*a*) Pollexfen's Arg. 98.

(*b*) 10 Co. 32 b. and the authorities there cited.

(*c*) Vid. Treby's Arg. 4 et paffim.

composed

composed of many bulky, visible bodies, should be invisible, in the common acceptation of the words, seems beyond the reach of common understandings. A corporation is as visible a body as an army; for though the commission or authority be not seen by every one, yet the body, united by that authority, is seen by all but the blind: When, therefore, a corporation is said to be invisible, that expression must be understood, of the *right* in many persons, collectively, to act as a corporation, and then it is as visible in the eye of the law, as any other right whatever, of which natural persons are capable; it is a right of such a nature, that every member, *separately* considered, has a freehold in it, and all, *jointly* considered, have an inheritance, which may go in succession (*a*). Natural persons, as such, are capable of taking and holding this right, which is not taken or held in their *politic*, but in their *natural* capacity (*b*); for many men, as men, are capable of union, which, if it requires proof or illustration, is evident from the charters of creation, and the pleadings in all such cases, in which it is said, that the "men and burgessees," or "the men and citizens," are constituted one body corporate or politic (*c*). And as the natural

(*a*) James Bagg's case. 11 Co. 98 b. as cited in Sawyer's Arg. 8.

(*b*) 10 Co. 26 b.

(*c*) Sawyer, *ibid*.

persons

persons essentially constitute the body politic, so all the operations and exercise of this right, are performed only by the natural persons (*a*).

WHEN it is said that a corporation is immortal, we are to understand nothing more than that it is *capable* of an indefinite duration, and the authorities cited (*b*) to prove its immortality, do not warrant the conclusion drawn from them. If a man give lands, says Sir Edward Coke (*c*), to a mayor and commonalty, or other body aggregate, consisting of many persons capable, without naming successors, the law construes it to be a fee simple, because, in judgment of law, they never die: where the sense is plain that these natural persons, though capable to take in their natural capacities jointly, which the law would adjudge an estate for lives; yet the grant being made to them in their corporate name, they take in that capacity, and the grant is not determinable on the death of any of the individuals, but continues as long as the corporation continues (*d*).

IN support of this idea of the immortality of corporations, a passage is also cited from Gro-

(*a*) 21 Ed. 4, 14, cited *ibid*.

(*b*) Treby's Arg. 4, where he cites 1 Inst. 9 b. 3 Co. 60, a. 2 Bulstr. 233. 21 Ed. 4, 13. Grotius de Jure Belli et Pacis, c. 9, f. 3.

(*c*) 1 Inst. 9.

(*d*) Lawyer's Arg. Q. W. 12.

tius (*a*); which, however, when fairly considered, is so far from justifying the conclusion drawn from it, that it proceeds on the supposition that they may cease to exist (*b*).

It has been said, that a corporation aggregate has neither predecessor nor successor (*c*), an expression which probably arose from the comparison of a corporation with a natural body, with respect to its personal identity (*d*), and which means nothing more than that all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, in the same manner as the river Thames is still the same river, though the parts which compose it are continually changing (*e*).

(*a*) De Jure Belli et Pacis, lib. 3, c. 9, f. 3.

(*b*) Si qua persona, nullâ editâ voluntatis significatione, nullo consanguineo relicto, moriatur, omne jus quod habet, interit—f. 1.—Idem si populus. Dixit Isocrates, et, post eum, Julianus Imperator, civitates esse immortales, id est esse posse, quia scilicet populus est ex eo corporum genere, quod ex distantibus constat, unique nomini subiectum est; quod habet—spiritum unum—Is autem spiritus, in populo est vitæ civilis consociatio plena atque perfecta, cujus prima productio est summum imperium, vinculum per quod respublica cohæret, spiritus vitalis quem tot millia trahunt—f. 3.

(*c*) 39 H. 6, 13. b. 14, cited 10 Co. 32 b.

(*d*) Plane autem corpora hæc artificialia instar habent corporis naturalis. Corpus naturale, idem esse non definit, particulis paulatim commutatis, una manente specie. Grot. ubi sup.

(*e*) 1 Bl. Com. 468. Manet idem fluminis nomen, aqua transmissa est. Sicut et Aristoteles, flumen populo comparans dixit, flumina eadem vocari quanquam alia subeat semper aqua, alia decedat. Grot. ubi supra.

AMONG

AMONG the political institutions of England, there are many instances of the appropriation of particular revenues to the maintenance of a single person, filling some particular station; and as these revenues belong to the person, not in his natural capacity, but in his public character, the right to them, after his death, vests of course, not in his natural representative, but in the person who succeeds him in that character; such persons, therefore, have necessarily, in their political capacity, perpetual succession resembling that of corporations; and to give effect to this succession, they must also necessarily have the capacity of suing and being sued in right of the office they hold, distinct from their capacity of suing and being sued as private individuals.

THERE are also instances of persons who hold particular offices, being vested with the power of acting, in their public character, as trustees for others, which likewise involves the necessity of their having perpetual succession, and the power of suing and being sued in their public character, as far as their trust is concerned.

DISTRIBUTION *of* CORPORATIONS *into their* DIFFERENT KINDS.

FROM their having perpetual succession, and the capacity of suing and being sued in their political character, single persons of both these descriptions,

scriptions, have, without much propriety, been, uniformly, in the books of English law, called corporations; and from hence, corporations have been distributed into two general classes; corporations sole, and corporations aggregate of many (*a*); the description of each of these two classes, and the distinction between them, will be sufficiently understood from what has been already said, as will also, one general division of sole corporations into two kinds; those, where the person so denominated, has a corporate capacity for his own benefit; and those, where he acts only as a trustee for the benefit of others: of the first kind, those best known, and most commonly enumerated, are the King, archbishops, bishops, certain deans, and prebendaries, all archdeacons, parsons, and vicars; and of the same kind were chauntry priests, in the times of Popish superstition (*b*); of the second kind, the most familiar instance is the chamberlain of the city of London, who may take a recognizance to himself and successors, in his politic capacity, in trust for the orphans (*c*).

BEFORE the dissolution of monasteries, corporations aggregate were divided into the two classes of corporations aggregate of many persons capable, and corporations aggregate of one person

(*a*) Co. Lit. 250, a.

(*b*) Vid. 10 Co. 27, a, b. 28, a.

(*c*) Vid. 1 Rol. Abr. 515. 4 Co. 65. Cro. El. 464.

capable,

capable, and the rest incapable or dead in law (*a*). A master and fellows, or a master and scholars of a college (*b*), and a dean and chapter, are examples of the former kind; an abbot and monks, and a prior and monks, were examples of the latter: those of the former must sue and be sued by their aggregate name; but the abbot alone, or the prior alone, might sue and be sued alone in right of his house: Thus, when an abbot and convent were seised of land, and were afterwards disseised of it, the abbot might have an assize in his own name without naming the convent, and a *præcipe quod reddat* was, in like manner, to be sued *against* the abbot alone; for as to *civil* purposes, a monk was totally incapacitated to act in his own right, and if he received a personal injury, or did an injury to another, he could not sue or be sued alone, but the sovereign of the house must, in both cases, have been joined with him (*c*); but he had a capacity to fill a spiritual office, as to be a vicar, or to be the abbot of *another* place than that of which he had been a subordinate monk, or he might act in the right of another, as executor (*d*). And the abbot, as well as the subordinate monks, was, as a natural person,

(*a*) Co. Lit. 2, a.

(*b*) Long quinto Ed. 4, 73 b.

(*c*) 11 Aff. pl. 9. Bro. Corpor. 81.

(*d*) 3 H. 6, 23. Bro. Corpor. 78. Moigne. 1.

considered as dead in law; but he had a politic capacity as fovereign of the house, by which he might sue and be sued, infeoff, give, demise, and lease to others, and purchase and take from others, and which was admitted by the policy of the law, that those, who had a right against the house, might know how they were to sue, and that the rights of the house itself might be recovered in the name of the abbot (a).

THERE is one *general* division of corporations, whether sole or aggregate, into *ecclesiastical*, and *lay*. Ecclesiastical corporations are those of which not only the members are spiritual persons, but of which the object of the institution is also spiritual; such are bishops; some deans and prebendaries; all archdeacons, parsons and vicars; and formerly chauntry priests, which are sole corporations; deans and chapters at present, and formerly prior and convent, abbot and monks, which are corporations aggregate.

AND ecclesiastical corporations were formerly subdivided into regular and secular; the regular were composed of those ecclesiastical persons who lived under some rule, had a common dormitory and refectory, and were obliged to observe the statutes of their order; of this class were the mo-

(a) Vid. 22 H. 6, 4. Co. Lit. 346, b. 347, a.

nasteries,

nafteries, priories, and ſome canonries. The ſecular were ſo called becauſe they converſed *in ſeculo*, performed ſpiritual offices to the laity, and took upon them the cure of ſouls: ſuch are, at this day, all the eccleſiaſtical corporations known to the law, and ſuch were formerly ſome canons (*a*).

It is not the deſcription of the perſons who are the members of a corporation, but the purpoſe of its inſtitution which characteriſes it to be a lay or a ſpiritual foundation; and for this reaſon, though the greater part of the members of the colleges in the univerſities be clerical, yet they are, in general, to be conſidered as lay corporations (*b*): they are not within the juriſdiction of the eccleſiaſtical courts; their members have no admiſſion or inſtitution from the ordinary; they are merely private ſocieties to be governed by their own ſtatutes and orders (*c*): moſt of them were founded *ad ſtudendum et orandum*: the object of their ſtudies is human learning, in its various branches, as logic, philoſophy, mathematics. Camden (*d*), deſcribing the univerſity of Oxford, ſays, that the places of learning were, in ancient times, called *Studia*, for that they were deſigned

(*a*) Vid. Burn's Eccleſiaſtical Law, Monafteries, f. 3.

(*b*) Per Holt, Carth. 93. Vid. 1 Lord Raym. 6.

(*c*) Skinner, 494.

(*d*) Britannia 381, cited Raym. 107.

pro bonarum literarum studio: and in his description of Cambridge, after having enumerated all the colleges in the university, he adds, "I will let pass little monasteries and religious houses;" so that he makes a plain distinction between the colleges and religious houses: and Stow (a), enumerating all the colleges of both universities, and their foundations, and shewing some originally founded for grammar, some for logic, and others, for other sciences, reckons none of them barely for ecclesiastical matters. Lindwood (b) defines a college to be only *habituaculum scholarium*: and if we observe the foundation of all religious and ecclesiastical corporations and societies, not one will be found whose object was *ad studendum*. Their design was either to pray *pro animabus*, or to observe such and such canonical hours, according to such and such an order, their matins, vespers, and other ceremonies belonging to divine worship, which were prepared by the church to their hands, and were such as men of little learning might perform; they might contemplate on what was already prescribed to them, but not excogitate new matters in religion: They went on in a circle, and where they left off at night they began in the morning: They were not enjoined

(a) Fol. 450, &c. cited Raym. 108.

(b) 155 K. cap. de Magistris, cited Raym. *ibid*.

ad

ad studendum, but *ad celebrandum divina*. It is true there have been some members of such foundations, who have made proficiency in arts, have written learned tracts, and improved human knowledge; but this was not the purpose of their institution, for it is not study, but *celebratio divinarum*, which makes an ecclesiastical corporation; nor does the injunction to pray constitute an ecclesiastical foundation; for that was implied as concomitant to all studies: if the injunction of saying their prayers were to make a corporation spiritual, there was hardly any one of those which, beyond all doubt, were lay hospitals, but would have been spiritual (*a*).

THE knights of St. John of Jerusalem, though religious, were not ecclesiastical, but lay corporations (*b*).

LAY corporations are again subdivided into two classes, *eleemosynary* and *civil*. Eleemosynary corporations are such as are constituted for the perpetual distribution of the free alms, or bounty of the founder of them, to such persons as he has directed (*c*). These are of two general descriptions: hospitals for the maintenance and relief of poor and impotent persons; and colleges for the promotion of learning, and the support of persons

(*a*) Vid. Raym. 108, 109.

(*b*) Goldb. 393. et seq.

(*c*) 1 Bl. Comment. 471.

engaged

engaged in literary pursuits, of which the greater number are within the universities, and form component parts of these larger corporations; and others are out of the universities, and not necessarily connected with them.

“Of hospitals,” says Sir Edward Coke, “some are corporations aggregate of many, as of master, or warden, and his *confreres*; some, where the master or warden hath alone the estate of inheritance in him, and the brethren or sisters power to consent, having a college or common seal” (a).

BETWEEN such hospitals as these, and colleges either in the universities or out of them, there is no difference in legal consideration; the difference is only in degree; for, where, in an hospital, the master and poor are incorporated, it is a college, having a common seal by which it acts, although it have not the *name* of a college (b). But there are other hospitals “where the master or warden hath the estate in him, but where there is no college or common seal,” and which, therefore, cannot properly be considered as corporations, the master or warden being merely a trustee for the house.

THERE are other hospitals, where the poor, who are the objects of the founder’s bounty, are not

(a) Co. Lit. 342, a.

(b) Per Holt. Skinner, 484.

themselves

themselves incorporated, but the corporate succession is vested in trustees under various denominations, who, of course, have no beneficial interest, but are only employed as instruments to effectuate the purposes of the institution; of this description is Sutton's Hospital, commonly called the Charter House (*a*); and most other hospitals of modern creation; but these, says Lord Coke, are not legal hospitals (*b*).

THERE are also many other corporations, resembling hospitals, of this last description, which are neither colleges nor hospitals, but which may be classed under the head of eleemosynary corporations, as their object is, by means of trustees incorporated, to carry into execution some public charity; such is the corporation created in the reign of Queen Anne (*c*), under the name of "the governor of the bounty of Queen Anne, for the augmentation of the maintenance of the poor clergy;" and such are many corporations of trustees for the education of children at free schools, and many others, for various purposes.

CIVIL corporations are established for a variety of temporal purposes. Thus a corporate capacity

(*a*) 10 Co. 1, 35.

(*b*) 10 Co. 31, a.

(*c*) 2 Ann. c. 11. 5 Ann. c. 24. 6 Ann. c. 27. 1 Geo. 1, ft. 2, c. 10. 3 Geo. 1, c. 10.

is given to the King, to prevent, in general, the possibility of an interregnum or vacancy of the throne, and to preserve entire the possessions of the crown; for immediately on the demise of one King, his successor is in full possession of the regal rights and dignity(*a*). Other civil corporations are established for the purpose of local government, such as the corporations of cities and towns, under the names of Mayor and Commonalty, Bailiffs and Burgeffes, and other similar denominations; and to this class seem properly to belong the general corporate bodies of the two universities, which, whatever may have been the notion of former times with respect to them, are now universally considered as *lay* corporations with temporal rights, not as eleemosynary foundations, as particular colleges are, though stipends are annexed to particular magistrates and professors; for these are rewards *pro opera et labore*, in the same manner as the standing salaries of particular officers in other corporations which are confessedly not eleemosynary, but civil (*b*). Other corporations are established for the maintenance and regulation of some particular object of public policy; such as the Corporation of the Trinity House for regulating navigation(*c*), the Bank,

(*a*) 1 Bl. Com. 470. (*b*) 3 Bur. 1652, 1656. 1 Bl. Com. 471.

(*c*) Sawyer's Arg. Quo. War. 9.

and

and the different Insurance Companies in London; others for the regulation of trade, manufactures, and commerce, such as the East India Company, and the companies of trades in London and other towns; others for the advancement of science in general, or some particular branches of it; such are the College of Physicians and the Company of Surgeons in London for the improvement of the medical science; the Royal Society for the advancement of natural knowledge; the Society of Antiquarians for promoting the study of antiquities; and the Royal Academy of Arts for cultivating painting and sculpture.

THERE are also some corporations which have a corporate capacity only to some particular purpose. Thus the churchwardens may take goods in succession to the use of the parishioners (*a*); so, if a gift of chattels be made to the parishioners, it is good, and the churchwardens shall have an action for them, the gift being considered to be for the use of the church (*b*). They have the custody of the ornaments of the church, as the plate and bells, and an action of trespass has been maintained by them against the parson for breaking the bells; though the parson pleaded that he and others purchased the bells with their own

(*a*) 20 Ed. 4. 2 Bro. Corp. 60.

(*b*) 37 H. 6, 30. Bro. Corpor. 73.

money,

money, and put it up; because, when put up, it was consecrated to the church (*a*). So, if a man take the organs out of the church, they may have an action of trespass for it; for the organs belong to the parishioners and not to the parson (*b*). So, the churchwardens, by the assent of the parishioners, may take a ruinous bell, and deliver it to a bell-founder, and agree that he shall have a certain sum for casting it, on which the bell-founder may retain the bell till he be paid; and this agreement shall excuse the churchwardens in a writ of account brought against them by their successors; because the parishioners are a corporation for the disposal of such personal things as belong to the church (*c*). So, with the like consent of the parishioners, they may take stones belonging to the church, and empower a builder, with part of them, to repair a ruinous window, retaining the residue to himself, in satisfaction of his labour and expences (*d*): so, they may have an appeal of robbery, or an action of trespass, for those things of which they have the custody, and count to the damage of the parishioners (*e*): but they cannot give or release them, for that is to the disadvan-

(*a*) Vid. 11 H. 4, 12.

(*b*) 1 Roll. 393.

(*c*) Inter Methold et Winn, 1 Rol. 393. M. 37, 38. El. B. R.

(*d*) Id. ibid. (*e*) Vid. Finch's Law, 178, and the authorities there cited. 1 Leon. 177. Comb. 417. 1 Vent. 89.

tage

tage of the church; and if they do, the parish may choose new churchwardens, who shall have an account against them (*a*): but if a feoffment be made to the use of the churchwardens, it is void, for they have no capacity for such a purpose. So a devise or a gift of land to the parishioners is not good; nor can the churchwardens prescribe to have lands to them and their successors, for they are not a corporation to have lands (*b*), neither does their capacity extend to take an obligation to them and their successors (*c*): neither is a gift by them of goods in their custody good, without the assent of the fidemen or vestry (*d*): and the corporate capacity is in the churchwardens jointly, and therefore the one, without the other, cannot give away the goods of the church, nor release costs to which they are entitled (*e*). But though the corporate capacity of churchwardens be, in general, thus limited, yet by letters patent they may, in particular cases, have a more enlarged capacity. Thus, in the case of St. Saviour's, Southwark, it was granted, by letters patent, before the 33 of Elizabeth, that the parishioners, or the greater number of them, should annually

(*a*) Finch, 179, &c.

(*b*) Vid. 37 H. 6, 30. Bro. Corpor. 77. 12 H. 7, 27. Bro. Corpor. 84. 17 H. 7, 27. b. 1 Rol. 393.

(*c*) 20 Ed. 4, 2 Bro. Corpor. 60.

(*d*) 1 Rol. 393.

(*e*) Cro. Jac. 234.

elect

elect two churchwardens, and that they and their successors should be a corporation, with capacity to take, purchase, and sell: so the King granted that the parishioners of Wallingford should be a corporation to bargain and sell; and in consequence, they or the greater number were accustomed to make leases and estates (*a*); and by custom in some places, as in London, the parson and churchwardens are a corporation to purchase lands, and to demise them (*b*): so by statute the 9 G. 1, c. 7, the churchwardens and overseers of the poor are enabled to purchase a workhouse for the use of the poor.

How a CORPORATION is composed.

A CORPORATION is usually composed of natural persons, merely in their natural capacity; but it may also be composed of persons in their political capacity of members of other corporations (*c*): Thus, by a charter of Edward the sixth, the mayor, citizens, and commonalty of London are appointed governors of Christ's Hospital of Bridewell, and incorporated by the name of the Governors of the possessions, revenues, and goods of the Hospital of Edward the sixth King of England, of Christ Bridewell (*d*).

(*a*) Lane, 21. 10 Co. 66.

(*b*) Cro. Jac. 532.

(*c*) 10 Co. 29 b.

(*d*) 10 Co. 31 b.

So,

So, a man, who forms a component part of a corporation aggregate, may have, to some purposes, a distinct corporate capacity; thus a dean and chapter form one corporation aggregate; but in many cases both dean and prebendaries have distinct rights as corporations sole; each may have peculiar revenues, appropriated to him and his successors in his political capacity; and the prebendaries alone, without the dean, may also form one aggregate corporation distinct from that of dean and chapter (a).

SOMETHING similar to this obtained with respect to abbies and priories, before the dissolution of monasteries: of the former there was but one kind, every house being independent; but of the latter there were two kinds: first, those where the prior was chief governor, as fully as any abbot in his abby, and was chosen by the convent: secondly, those where the priory was a cell, subordinate to some great abby, and the prior was placed and displaced at the will of the abbot. But there was a considerable difference between some of these cells; for some were altogether subject to their respective abbies, who sent them what officers and monks they pleased, and took their revenues into the common stock of the abbies: but others consisted of a stated number of monks, who had a

(a) 9 Ed. 3, 18 b. 14 H. 4, 10 b. 20 Ed. 4, 2. 10 Co. 31 b.

prior sent them from the abby, and paid a pension yearly, as an acknowledgement of their subjection, but acted in other matters as an independent body, and had the rest of the revenues for their own use (a).

Thus, the possessions of the abbot and prior of Westminster were several, and there have been instances of the prior having brought a *Quare impedit* against the abbot, though it is said, "that this must have been by virtue of the King's charter, because a corporation cannot be divided into two corporations, but by the King's grant" (b).

So, a writ having been brought by a prior, the defendant pleaded that the plaintiff was a monk professed, under the obedience of one B. abbot of S. to which the plaintiff replied, that he and his predecessors, priors, had impleaded and been impleaded, and had answered and been answered, without their sovereign, for time immemorial, and this was held good, and instances mentioned of several priors having been impleaded without their sovereign, notwithstanding that they were removeable at his will (c).

So, also, several distinct and independent corporations may form the component parts of one

(a) Burn's Eccles. Law. tit. Monasteries. s. 7.

(b) 49 Aff. pl. 8. Bro. Corpor. 45.

(c) 12 Ed. 4, 17 b. Bro. Corpor. 57. vid. 14 H. 4, 10. Bro. Corpor. 70.

general

general corporate body: thus there are in Shrewsbury several distinct independent companies of carpenters, brickmakers, bricklayers, tylers, and plaisterers, and these all united form one great corporation, under the name of the company of carpenters, brickmakers, bricklayers, tylers, and plaisterers of Shrewsbury (*a*).

THERE are some towns in which there are several incorporated companies of trades, which have so far a connection with the general corporation of the town, that no man can be a freeman of the town at large, and consequently a member of the general corporation, without being previously a freeman of some one of these companies; of this description is the corporation of the city of London (*b*) and of many other cities and towns: and the general corporate bodies of the universities are constituted nearly in the same manner; for every member of the general corporation must be a member of some one or other of the colleges or halls within the university. There are other incorporated towns in which there are no incorporated companies which have any reference to the general corporation of the town, and the freedom of the town of course refers only to that general corporation; such, I am informed, are the towns of Kingston upon Hull and Kingston upon Thames.

(*a*) Vid. Doug. 374 (359).

(*b*) 1 Str. 675.

THERE are also several corporate companies of trades, without reference to any general corporation of the town in which they are, and indeed where there is no incorporation of the town at all; such are the cutlers' company of Sheffield, and the company of shipwrights of Rotherhithe (*a*): The Bank, the East India company, the College of Physicians, and the other scientific companies before mentioned, have no reference to the general corporation of the city of London.

MANY aggregate corporations are composed of several distinct parts, which are called integral parts, without any one of which the corporation would not be complete, although none of them be a distinct corporation; thus, where a corporation consists of a mayor, aldermen, and commonalty, the mayor, the aldermen, and commonalty are three integral parts; but neither of these has any corporate capacity distinct from the other two, and therefore the mayor cannot, in his political character of mayor, take in succession any thing as a sole corporation; nor the aldermen, as a select body, take any thing to them and their successors as an aggregate corporation.

IN most aggregate corporations, there is one particular person who is called the head, and who

(*a*) Vid. s. Bulstr. 233.

forms one of the integral parts of the corporation ; such is the mayor in a corporation of mayor, aldermen, and commonalty ; the chancellor in the general corporations of the universities ; the dean in the corporation of dean and chapter ; the master in a corporation of master and fellows, or master, fellows, and scholars, in the colleges of the universities, or in a corporation of master, wardens, and assistants of any of the companies in London, or other cities.

BUT there may be a corporation aggregate of many persons capable, without a head, as a chapter without a dean, or a commonalty without a mayor ; thus the collegiate church of Southwell, in Nottinghamshire, consists of prebendaries only, without a dean ; and the governors of Sutton's Hospital, commonly called the Charter-house, have no president or superior, but are all of equal authority ; and at first the greater number of corporations were without a head (*a*).

(*a*) Vid. 1 Bl. Com. 478, 10 Co. 30 b. the case of Sutton's Hospital.

A
T R E A T I S E
ON THE
LAW OF CORPORATIONS.

CHAP. I.

HOW A CORPORATION IS CREATED.

WITH respect to the authority, by which corporations are established, they are generally divided into four kinds.

1. Corporations by common law. 2. By authority of parliament. 3. By the King's charter; and 4. By prescription (a).

CORPORATIONS by common law, are those to which several corporate capacities have been annexed, in virtue of their political character, by the universal assent of the community, from the most remote period to which their existence can be traced: Of this description are the King, all bishops, parsons, vicars, deans, archdeacons, prebendaries, or canons of some cathedrals, churchwardens, and deans

(a) 10 Co. 29 b. 1 Rol. 512.

and chapters, and such were all chauntry priests, abbot and convent, or prior and convent. It is, indeed, sometimes said, that a corporation of dean and chapter, is a corporation by the King's charter (*a*); at other times that it may be by prescription, King's grant, or act of parliament (*b*); and the same observations might have been made with respect to abbot and convent, or prior and convent. When it is said, they may be by prescription, nothing more can be meant, than, that they may be by common law; for it is impossible that, in this place, the word "prescription" can be taken in an appropriate sense: and, it is true, that in one point of view, they may be considered as corporations by the King's grant, or by act of parliament, and, in another, as corporations by the common law. Their capacity, and the nature of their establishment, they derive from immemorial usage, which gives them the description of corporations by the common law; yet they are all, individually, of the King's foundation; some of ancient foundation, says Sir Edward Coke, and others newly erected, and may have been erected either by act of parliament, or by the act of the King alone: or, in other words, the act of the King gives *being* to every individual bishopric, deanery and chapter, &c. but the moment it is erected as a bishopric, or deanery and chapter, the nature of their institution, their capacities and incapacities, are immediately known to the common law (*c*).

A CORPORATION by authority of parliament, as the terms imply, is a corporation established in consequence of the express act of the whole legislature; as a corporation by the King's charter is such a one as exists by virtue of such charter alone.

(*a*) Plowd. 242.

(*b*) Sir W. Jones, 168.

(*c*) Vid. 1 Inst. 94 a. 97 a. 134 a. 344 a.

A CORPORATION by prescription is a corporation which has existed from time immemorial, and of which, it is impossible to shew the commencement by any particular charter or act of parliament, the law presuming, that such charter, or act of parliament, once existed, but that it has been lost by such accidents as length of time may produce (*a*).

To the existence of all corporations, it has long been an established maxim, that the King's consent is absolutely necessary; in those by common law, and by prescription, it is implied; and in those by authority of parliament, and by charter, it is expressly given: But, when it is said, "that the King's consent is necessarily implied in corporations by the common law," this is to be understood in no other sense than another maxim, "that the consent of every *individual* of a community is necessarily implied to every law of that community;" all those corporations which are said to exist, by force of the common law, existed at a time when the King did not form a distinct branch of the legislature (*b*); they existed before the union of the heptarchy; and *before* that event, and during the whole of the Saxon period, the King seems to have had no other authority, as a legislator, than what he derived from the influence which he necessarily possessed as the president of the grand council of the nation (*c*). Neither does he seem to have originally been the only person who might, without the authority of the legislature, have given being to any of those corporations which do not come under the de-

(*a*) Vid. 21 Ed. 4, 56 et seq. Bro. Corpor. 65.

(*b*) This is to be understood according to the distinction taken in page 40.

(*c*) Vid. Millar on the English Government, l. 1. c. 8. particularly page 154.

scription

scription of those which are said to exist by force of the common law. It is certain, that during the latter part of the Saxon period, and for some time after the conquest, the great nobles claimed and exercised prerogatives within their own demesnes, similar to those which the King exercised within those of the crown (*a*); and of these it is certain, that the power of conferring corporate privileges on their towns, was one. There are many instances of towns within the demesnes of the feudal barons, which had enjoyed such privileges by charters from their immediate lords, and, having come to the crown by escheat, have had these privileges confirmed, and others added to them by subsequent charters from the King (*b*). The whole history of the incorporation of towns, in every country in Europe, proves, that the King did not exclusively possess this prerogative. "The inhabitants were originally the tenants, or dependants, either of the King or some particular nobleman, on whose demesne they resided, and the *superior*," whether King or Lord, "exactd from them, not only a rent for the lands which they possessed, but various tolls and duties for the goods which they exchanged with their neighbours. These exactions, which had been at first precarious, were gradually ascertained and fixed, either by long custom, or by express regulations. But as, on the one hand, many artifices had been frequently practised, in order to elude the payment of those duties, and as, on the other hand, the persons employed in levying them were often guilty of oppression; the inhabitants of particular towns, on their increasing in wealth, were induced to make a bargain with the *superior*, by which

(*a*) Vid. Millar 149, and Stewart's Dissertation concerning the Antiquity of the English Constitution, part 3. f. 3.

(*b*) Vid. Lutw. 1336, the case of Tewksbury in Gloucestershire.

they

they undertook to pay a certain yearly rent, in the room of all his occasional demands; and these pecuniary compositions, being found expedient for both parties, were gradually extended to a longer period, and at last rendered perpetual.

“AN agreement of this kind seems to have suggested the first idea of a *borough* considered as a *corporation*. Some of the principal inhabitants of a town undertook to pay the superior's yearly rent; in consideration of which, they were permitted to levy the old duties, and became responsible for the funds committed to their care. As managers of the community, therefore, they were bound to fulfil its obligations to the superior; and by a natural extension of the same principle, it came to be understood, that they might be prosecuted for all its debts; as, on the other hand, they obtained, of course, a right of prosecuting all its debtors. The society was thus viewed in the light of a body politic, or fictitious person, capable of legal deeds, and executing every sort of transaction by means of trustees or guardians.

“THIS alteration in the state of towns, was accompanied with many other improvements. They were now generally in a condition to dispense with the protection of their superior; and took upon themselves the burden of keeping a guard, to defend them against a foreign enemy, and to secure their internal tranquility. On this account, beside the appointment of their own administrators, they obtained the privilege of electing magistrates for distributing justice among them,” and were thus vested with the local government of the place (a).

(a) Millar 379, 380. Vid. *Firma Burgi*, b. et seq. 15, 16, 17, and c. 2, f. 3, a grant of privileges by a baron, and c. 7, f. 16.

THE distinction which still subsists in Scotland, between royal boroughs, and boroughs of barony, is also a proof of this prerogative having once belonged to the barons.

THAT the King, however, was, very soon after the conquest, understood to possess the *exclusive* prerogative of erecting guilds, or incorporate companies, appears from this circumstance, that many such companies were suppressed, about that period, as *adulterine* guilds; that is, guilds set up without the King's warrant or authority (*a*).

IN the time of Bracton, who lived in the reigns of Henry the third and Edward the first, the King's prerogative, as to the exclusive right of granting liberties and franchises in general, seems to have been fully established (*b*); and the absolute necessity of his assent to the erection of *any* corporation was held, in the reign of Edward the third, to have been long settled as clear law (*c*).

AT the time of the reformation, in consequence of the statute of Edward the sixth (*d*), which gave the colleges therein described to the King, it generally became a question, whether the house claimed was a *lawful* college, the determination of which depended on the authority by which it was established.

IN the case of Greystock College (*e*), it appeared, that Pope Urban, at the request of Ralph, baron of Greystock, founded a college of a master and six priests, resident at

(*a*) Vid. Firma Burgi 26, in the time of H. 2.

(*b*) Bract. l. 2, c. 24, f. 55, 56.

(*c*) 49 Ed. 3. 3, 4, 49 Ass. 8 Bro. Corpor. 15, Prescription 15, 10 Co. 33 b. 1 Rol. 512.

(*d*) 1 Ed. 6. c. 14.

(*e*) Dyer 81. pl. 64. 4 Co. 107 b. cited in Adams and Lambert's case.

Greystock,

Greystock, and assigned to each of the priests five marks per annum, beside their bed and chamber, and to the master 40*l.* per annum; and it was certified into the book of first fruits and tenths, that this college was in being within five years before the making of the statute; and it was resolved, "by the justices," that this *reputative* college was not given to the King, by that statute, because it wanted a *lawful* beginning, and the *countenance* also of a lawful commencement, for that the Pope could not found or incorporate a college within this realm, nor assign, nor licence others to assign, temporal livings to it; but that it ought to be done by the King himself, and by no other.

BUT if the college had the *countenance* of a lawful commencement, as Sir Edward Coke expresses it, then it was held that, by that statute, it was given to the King.

THUS, in the case of the college of Landwybrevy (a); where it appeared that King Edward the first, in the 12th year of his reign, by his letters patent under the great seal, granted to Thomas Beale, then bishop of St. David's, and his successors, the advowson of thirty-four churches, in Wales, within his diocese, to hold of the King and his successors, so that the bishop and his successors might appropriate them, or any of them, to their churches of St. David's and Aberguelley, or make and annex prebends of them in the said churches of St. David's and Aberguelley, as to them should seem most convenient; and three years after, the bishop, by the King's assent, as he affirmed in his instrument, out of the chapter of St. David's, erected and established a college, or church collegiate, in Landwybrevy, being one of the thirty-four churches, and ordained thirteen canons secular there, namely, five priests, four deacons, and

(a) Dyer 267, pl. 12, 13, cited 4 Co. 107, 108, vid. Hob. 123.

four subdeacons, and annexed and appropriated thirteen of the said churches to them, as prebends, reserving to the bishop himself and his successors, as deans, a place in the choir, and voice in the chapter, and also the power of visitation and correction; in which, says Lord Coke, the bishop did not pursue the authority and power given him by the letters patent, for, by them, no power was given him to found such college: and afterwards King Edward the third, by his letters patent, reciting the said foundation and erection of the said college, and all other the premises, with some doubt of the validity of it, by the same letters patent, granted and confirmed to the then bishop of St. David's and his successors, all that which his said predecessor had done in the premises, notwithstanding the statute of mortmain, or any other statute: and though this college was erected or founded, and the appropriations made without the King's licence, and the grant and confirmation made to the bishop and his successors, could not make the college good in law, as it wanted lawful erection and foundation: yet, as it had continued a college in reputation till the 1 E. 6, and had the *countenance* of the King's letters patent, though they had not effect, the justices held, that it was given to the King by the provisions of this act.

BUT, during the times of Popery, even long after the King's consent was thought necessary to the erection of a corporation, it was held, that that consent was not sufficient, without the concurrence of the Pope, to found an abbey or a convent (*a*).

IN the more ancient books, we find several instances of private companies of trades within a corporate town, claiming to act as corporations erected by the authority of

(*a*) Vid. 14 H. 8. 2. 29. Bro. Corpor. 34, and Jenkin's Centuries, 205.

the general corporation of the town in which they claim to act; but it is on all such occasions uniformly decided, that no commonalty or corporation can make another corporation or commonalty, either by usage or prescription, or by any other means than by the authority of the King's charter empowering them to do so, by express words (a).

BUT it is admitted (b), that the mayor and commonalty of London may make a fraternity or company within the city, which, however, will be no more than a voluntary association, from which each of the members may retire whenever he pleases.

AND in later times, it is said by the court, that, "though the city of London cannot make a corporation, as that can only be created by the crown; yet they may make a fraternity or fellowship:" and the court thus distinguishes between a corporation and a fraternity, "that a corporation is properly an investing of the people of the place with the local government thereof, and therefore their laws shall bind strangers; but that a fraternity is some people of a place united together in respect of a mystery and business, into a company, and their laws and ordinances cannot bind strangers, because they have not a local power or government" (c).

THIS distinction, however, is certainly made in very inaccurate terms; it seems to imply, that the name of corporation, and the powers belonging to such a body, can be enjoyed only by a corporation invested with the "local government" of a place, and that all the companies of trades within towns and cities, are only voluntary associations, and can exercise no corporate powers, which is

(a) Vid. 49 Aff. p. 8. 49 Ed. 3. 3, 4. Bro. Corpor. 15, 45. Prescription 15. 10 Co. 33 b. 1 Rol. 512. 1 Sid. 291. 2 Keb. 53.

(b) Vid. the last cited authorities.

(c) Salk. 193.

certainly

certainly not true; for when such companies are incorporated by the King's charter, they are as much corporations, as the general corporate body of the town or city in which they are. But the true distinction seems to be this, that a company incorporated by the King's charter, can act as a corporation by its own intrinsic powers without the assistance or protection of the corporation of the town; but that a company established by the authority of the mayor and commonalty of London, though allowed to be a legal institution, cannot act of itself as a corporation, but its members must assert their claim of privileges under the prescriptive right of the mayor and commonalty to establish such a company: a distinction which seems to be supported by the following cases.

A BYE law was made in the city of London, reciting, that the company of minstrels were an ancient company, and that great mischief and debauchery had happened, on account of several foreigners having set up dancing schools; for which reason, it was ordered, that all persons using those arts, not being free of that company, should, on notice, by summons of the beadle, accept their freedom, under a penalty of 10*l.* one half to the mayor and commonalty, and the other half to the company of music-masters. The court held, that a bye law which obliged dancing masters to be of the company of musicians, could not be good: and Holt C. J. said, the musicians were no corporation; they were a brotherhood or club, to meet and drink and talk together, and no more; the city might make a guild or fraternity of dancing masters, *though they could not make a corporation*, and then it were reasonable to oblige the dancing masters to be of that company, though they could not oblige them to be of a company foreign to their profession (*a*).

(*a*) Comb. 372, 373.

To

To a habeas corpus directed to the court of the mayor of London, the custom of London was returned, "that the portorage from any vessel on the river, and the meterage of corn, roots, &c. imported or exported, belonged to the city, upwards from *Staines-bridge* to *London-bridge*, and downwards as far as *Yendal* in *Kent*; and also another custom to make bye laws, confirmed by Richard the second, where any of their customs wanted a suitable remedy." And further, "that in the eighteenth year of King James the first, a bye law was made by the corporation, that the corn porters should be a company, with twenty-four assistants, who should be called free porters, and should work at a particular settled rate; and that none but the free porters should intermeddle in importing or exporting any corn, roots, &c. within the limits mentioned in the custom, on pain of 20s. for every offence, except in time of danger or urgent necessity, or in the case of perishable goods, the forfeiture to be recovered by action, in the name of the chamberlain, and four hundred porters were appointed for the future; and, that the free porters had ever since used and exercised this bye law, till the defendant intruded by carrying barley, though a free porter was present, by which he forfeited 20s. which the plaintiff, as chamberlain, was intitled to have, and for which he sued in the mayor's court" (a).

AFTER a long argument on the validity of the custom, and the bye law, as founded on it, the court held both to be good, and, of course, recognized the power of the city of London to establish such a company, and the manner of enforcing the privileges of its members (b).

(a) *Fazakerley v. Wiltshire*. 1 Str. 462.

(b) *Vid. tit. Bye Law*.

IT was formerly asserted, that the act of incorporation must be the immediate act of the King himself, and that he could not grant a licence to another to erect a corporation (a): but the law has long been settled otherwise; and he may not only grant a licence to a subject to erect a *particular* corporation, but give a *general* power by charter to erect corporations indefinitely. The chancellor of the university of Oxford has by charter such a power, and has actually often exerted it, in the erection of several articulated companies, now subsisting, of tradesmen subservient to the students (b).

THIS power is most frequently exercised in the case of eleemosynary or charitable corporations, when a licence is granted to a subject to erect such a corporation, and to endow it with possessions or revenues; in which case the donor is called the founder.

THE word "foundation," as applied to such corporations, is taken in two different senses, which Sir Edward Coke distinguishes by the terms "fundatio incipiens," and "fundatio perficiens," for as to the politic capacity, the act of incorporation is metaphorically called the foundation, that being the beginning, as a foundation "quasi fundamentum capacitatis" preceding the whole: but as to the dotation, the first gift of the revenues is called the foundation, and he who gives it is the founder in law (c).

A PRIVATE person might have been, in the latter sense, the founder of an abbey or priory, as well as the King; and if the possessions, with which he endowed it, had been of ever so small a value, and the King had afterwards endowed it with large possessions, yet the private person still continued founder. If a common person had founded a chantry,

(a) Vid. 2 H. 7. 13 a. b. 10 Co. 27 b.

(b) Bl. Com. 474.

(c) 10 Co. 33. a passim. 1 Rol. 514.

and

and afterwards the King had translated it into a monastery, and endowed it with possessions, yet the common person continued to be considered in law as the founder; so, if a subject had been the founder of an abbey or priory, and the King, after the statute of 25 H. 8, c. 21, by which the King was declared to be the head of the church, had translated the abbot, or prior and monks, into dean and chapter, the foundership would still have remained in the subject (*a*): so, if the King had erected a chapel and given it possessions, by which he was the founder; though the seculars had afterwards been translated into regulars, yet the King would still have been the founder, because he gave the first possessions (*b*). And it is said, by Sir Edward Coke, that the foundership is so inseparably incident to the blood of the founder, that it cannot be granted over, and that if a subject founder should grant his foundership to the King by deed inrolled, it would be a void grant (*c*).

BUT if the King and a common person give possessions to a corporation at the same time, on its original creation, the King, by his prerogative, shall be the founder (*d*).

WITH respect to the mode of erecting such corporations, where there is a subject founder, this difference is to be observed; either the King expresses the words of incorporation, designs the place, appoints the number, and gives them a constitution and a name by his charter, so that the corporation is complete; and then the founder or donor has nothing more to do, than to make the dotation, without any instrument comprehending any words of incorpora-

(*a*) 3 H. 7, 6 b. cited 3 Co. 74. a. 2 Inst. 68.

(*b*) 38 Aff. 22. 1 Rol. 514.

(*c*) 11 Co. 77. a. 78. a. cites temp. Hen. 8, Brooke tit.

(*d*) 50 Aff. 6. 1 Rol. 514. 9 Co. 129 b. 2 Inst. 68. cites 44 Ed. 3. 24, 25.

tion, for with that, in such a case, the common person, who is the founder, has nothing to do; or the King, by his charter, may reserve as well the nomination of the persons, as the name and constitution of the corporation, to the person who is to be the founder; then the latter must name the persons, and declare by what name they shall be incorporated, and what powers they shall exercise; and when he has done this, then they are incorporated by virtue of the King's letters patent, and not by the common person, for he is but an instrument, and it is the King who makes the corporation, in such case, in the same manner as if all had been comprehended in the letters patent themselves, according to the maxim, that "*qui, per alium facit, per se ipsum facere videtur*" (a).

THE incorporation ought, in fact, to precede the dotation, because before the incorporation, there is no capacity to take as a corporation (b); but, it is not necessary that in the letters patent the licence to incorporate and the licence to endow should be in distinct independent clauses, or that the licence to incorporate should, in the order of expression, precede that to endow.

KING Henry the fourth, by his letters patent, dated the sixth year of his reign, reciting that Robert Ramsay was seised in fee of a house in the parish of St. Margaret, in London, called the Sun, notwithstanding the statute of mortmain, of his special grace, and for 20*l.* gave licence to Ramsay to grant a rent of 20 merks issuing out of the said house "to a certain chaplain, who should celebrate divine service at the altar of the blessed Mary, in the church of St. Magnus, London, every day, for the salvation of the said Robert and his wife Joan, to have and

(a) 38 Ed. 3, 14 b. 22 E. 4, Grant 30. 2 H. 7, 13. a. b. 20 H. 7, 7. cited 10 Co. 33 b. (b) Vid. 10 Co. 26 b.

to hold to the same chaplain and his successors, chaplains of the said chauntry, celebrating divine service in the church aforesaid, at the altar aforesaid, for ever, according to the appointment of the said Robert in that behalf to be made:" and afterwards, on the 10th of June, 1407, Ramsay, by his deed indented tripartite, founded, ordained, and erected the said chauntry, and appointed one John Meadow to be the first chaplain to do the said divine services; and, by the same deed, further granted to the said John Meadow, the first chaplain, 10 merks of yearly rent issuing out of the said house, to have to him and his successors, chaplains of the said chauntry, at four usual feasts in London to be paid, with a clause of distress, to him and his successors; and further appointed, by the same deed, that he himself should present to the said chauntry during his life; and that after his decease Joan his wife should present to it during her life; and after her decease the parson and churchwardens of the said church of St. Magnus and their successors. After the death of John Meadow, and several intermediate vacancies, Richard Fowcher was presented to the said chauntry, and for rent arrear entered the said house, the door being open, and took a cup for a distress, on which an action of trespass was brought by the master of the house, and the whole matter being brought before the Court of King's Bench on demurrer, the case was adjourned into the Exchequer chamber, and there, before all the judges of England, several objections were made against this licence and grant; among which this was one, that admitting there was here an incorporation by implication, yet the incorporation ought to be before the licence to endow, but that here the licence was before the incorporation, and therefore void: but it was resolved, in answer to this objection, that it was not necessary that the

licence to found the chauntry should be first, and that to grant the rent subsequent, for that the law would construe that to precede which ought to be first; though in the present case the aid of such construction was not wanted, for that the licence to found and the licence to grant were contemporaneous (*a*).

NEITHER is it necessary that the corporation should be actually in existence at the time of the licence to grant to it; it is sufficient that it exist at the time of the grant made: thus in the case of Ramfay before mentioned, it was objected, that the licence was to grant to "a certain chaplain," which was void for uncertainty, and because there was not any such chaplain till Ramfay had named and appointed one, and that therefore the grant would be to one who was not *in rerum natura*; in the same manner as if the King gave licence to grant to the mayor and commonalty of Islington, when, in fact, there was no such corporation, it would be void, though the inhabitants of Islington were afterwards incorporated by the name of Mayor and Commonalty, because there was no such corporation in existence at the time of the grant;—but this objection was over-ruled, and it was resolved that the grant was good, for that all the grants of chauntries were in the same form, and although there were no such chaplain at the time, yet that was not to the purpose (*b*); to which, it might have been added, that this was not in truth a grant to a person not in existence, but a licence to grant, at a future time, to a person then existing.

IT is not necessary that all the persons who are to be the constituent members of the corporation should be named in the letters patent; it is sufficient that a power of future

(*a*) 2 H. 7, 13. a. b. cited at large in Sutton's Hospital Case, 10 Co. 27. 28.

(*b*) Id. *ibid*.

nomination

nomination or election be given ; this is expressly decided by one of the resolutions in the case of Sutton's Hospital. —King James the first, by his letters patent bearing date the 22d day of June, in the 9th year of his reign, granted to Thomas Sutton licence to found an hospital for the relief of poor, aged, maimed, needy, or impotent people (*a*), and a free-school for the maintenance and education of poor children or scholars (*b*) ; “and also that the said Thomas Sutton, during his life, and, after his death, the governors thereafter named and their successors, and the survivors and survivor of them, and his and their successors for ever, and the governors thereof, for the time being, and their successors, should have full power, licence, and lawful authority, at his and their wills and pleasures respectively, from time to time, and at all times thereafter, to place therein such MASTER or head of the said hospital ——— as to him the said Thomas Sutton during his life, and after his death to the said governors and their successors, and to the survivors and survivor of them, and to his and their successors, and to the governors thereof for the time being, and their successors, should seem convenient (*c*) ;” and, in a subsequent (*d*) part of the same letters patent, appointed fifteen persons by name, “and the MASTER of the hospital, and such person and persons as should, from time to time, be master or masters of the said hospital, during the time that they should be master or masters thereof, to be the first and present governors of the lands, possessions, revenues, and goods of the hospital of King James, founded in the Charter-house, within the county of Middlesex, at the humble petition and only costs and charges of Thomas Sutton, esquire, and that they and the

(*a*) 10 Co. 8 b.(*b*) 10 Co. 9. a.(*c*) 10 Co. 8 b.(*d*) Id. 10. a.

survivors of them, and such as the survivors and survivor of them should, from time to time, elect, to make up the number sixteen, when, and as often as any of them or any of their successors should happen to decease, or be removed from being governors or governor thereof, should be incorporated and have perpetual succession, and be one body corporate and politic——.”

Sutton, on the 30th of October, in the same 9th year of the King, by a writing sealed with his seal, and bearing date the same day and year, appointed one John Hutton to be the first master of the hospital (a).

It was objected (b) to the validity of this incorporation, that the King, by his letters patent, intended to make a present corporation, which his words expressly imported; but that no incorporation could be until Sutton had named a master, and that nomination being subsequent to the letters patent, the latter were repugnant in themselves, and void.

To this it was answered (c), that such an objection would extend to the subversion of a great number of corporations; for that when a corporation is created by letters patent, power is usually given by the same patent to the body to choose a mayor, aldermen, or bailiffs, or governors, or the like; and yet they are immediately incorporated by the same letters patent, though the election of the mayor or other officer be future. And, it is true, adds Lord Coke, this was immediately by the letters patent a corporation *in abstracto*, but not *in concreto* till the naming of the master.

IN consequence of the dissolution of the monasteries and other religious houses, the poor, who had derived a very

(a) Id. 16. a.

(b) Id. 23 b.

(c) Id. 31. a. vid. eund. 27 b. v. finem.

considerable

considerable part of their subsistence from them, became a burthen to the public, and the legislature found it necessary to encourage such as should be charitably disposed, to appropriate part of their wealth to charitable purposes, and in the 35th of Elizabeth it was enacted, "That it should be lawful for every person, for and during the space of twenty years then next ensuing, to make feoffments, grants, or any other assurances, or by last will in writing to give and bequeath in fee simple, as well to the use of the poor, as for the provision, sustentation, or maintenance of any house of correction, or abiding houses, or of any stocks or stores, all or any part of such of his lands, tenements, and hereditaments, and in such manner and form as he might have done" by a former statute (a) revived by the present (b).

BUT the charges of incorporation, and of the licence of mortmain, which was necessary to carry into effect the purposes of this act, having, by some means or other, become so great as to discourage many from undertaking these pious and charitable works (c); it was thought necessary, by an act of parliament, to dispense, in certain cases, with the licence of incorporation and mortmain, and to enable the founder to do the whole by his own act, without the immediate assent of the King to every particular foundation; it was therefore enacted, "That all and every person or persons, seized of an estate in fee simple, their heirs, executors, and assigns, at his or their will and pleasure, should have full power, strength, licence, and lawful authority, at any time during the space of twenty years then next ensuing, by deed inrolled in the High Court of Chancery, to erect, found, and establish, one or more hospitals, *maisons de Dieu*, abiding places, or houses of cor-

(a) 22 H. 8, c. 12. (b) 35 El. c. 7. f. 27. (c) 2 Inst. 722.

rection,

rection, at his or their will and pleasure, as well as for the finding, sustentation and relief, of the maimed, poor, needy, or impotent people, as to set the poor to work, to have continuance for ever, and from time to time to place therein such head and members, and such number of poor, as to him, his heirs and assigns should seem convenient; and that the same hospitals or houses so founded, should be incorporated, and have perpetual succession for ever, in fact, deed, and name; and of such head, members, and numbers of poor, needy, maimed, or impotent people as should be appointed, assigned, limited, or named by the founder or founders, his or their heirs, executors, or assigns, by any such deed inrolled; and that such hospital, &c. and the persons therein placed, should be incorporated, named, and called by such name as the said founder, &c. should so limit, &c. and that the same hospital, &c. so incorporated and named, should be a body politic and corporate, and should by that name of incorporation have full power, authority, and lawful capacity and ability to purchase, take, hold, receive, enjoy, and have, to them and to their successors for ever, as well goods and chattels, as manors, lands, tenements, and hereditaments, being freehold, of any person or persons whatsoever, so that the same should not exceed the yearly value of 200l. above all charges and reprises to any one such hospital, &c. without licence or writ of *ad quod damnum*, the statute of mortmain, or any other statute or law to the contrary notwithstanding; and that the same hospital, &c. and the persons so incorporated, &c. should have full power and lawful authority, by its true name of incorporation, to sue and be sued, implead and be impleaded, to answer and be answered, in all courts of the realm, as well temporal as spiritual, in all manner of suits whatever——— and
that

that the same hospital, &c. should have and enjoy for ever such a common seal or seals as by the said founder, &c. should be, in writing, under his or their hand and seal assigned, &c. whereby the same corporation should or might seal any manner of instrument touching the same incorporation, and the lands, tenements, hereditaments, goods, or other things thereto belonging, or in any wise touching or concerning the same (a).

“PROVIDED that no person within age, or of non-sane memory, or women covert without their husbands, should have power by this act to make any such corporation, or to endow the same (b).

“AND provided that no such hospital, &c. should be erected, &c. by force of this act, unless on the foundation or erection thereof the same were endowed for ever with lands, tenements, or hereditaments, of the clear yearly value of ten pounds.” (c)

THE act is made perpetual by a subsequent statute (d).

THE words, “all and every person and persons” in this act, extend to such bodies politic and corporate, as may alienate, such as mayor and commonalty, bailiffs and burgeses, and the like; but not to those whose power of alienation is restrained by act of parliament (e).

THE manors, lands, tenements, or hereditaments of which the endowment is made, must be of an estate in fee simple, either absolute, conditional, or qualified; they must be freehold; of the clear yearly value of 10l. or more, and not exceeding the yearly value of 200l. above all charges and reprises: but if the first endowment be of the yearly value of 10l. or more, and under the yearly value of 200l. they may purchase; or take by gift from

(a) 39 El. c. 5. f. 1.

(b) f. 3.

(c) f. 4.

(d) 21 Jac. 1, c. 1.

(e) 2 Infl. 722.

others,

others, without licence of mortmain, any manors, lands, tenements, or hereditaments, of such value as, together with their first endowment, will amount to the yearly value of 200*l.* above all charges and reprises (*a*). And if, at the time of the foundation or endowment, they be of the yearly value of 200*l.* or under, and afterwards they become of greater value, by good husbandry or other causes, they shall continue to be enjoyed by the hospital, though they be above the yearly value of 200*l.*; for that must be reckoned as it was at the time of the endowment made. Goods and chattels, whether real or personal, they may take to any value whatever (*b*).

THE hospital, &c. can be erected by no other instrument, conveyance, or assurance, than a deed inrolled in chancery according to the provisions of the act: but it is not necessary that it should be inrolled within six months after the date; nor is it necessary to be indented: and the deed may be in paper, but it must be inrolled in parchment (*c*).

ALTHOUGH, at common law, the incorporation may be of certain persons to be governors of the hospital, which at the time of the incorporation may be only in contemplation, and not of the persons placed in it; yet the safest and surest way on this statute is, for the founder first to prepare the hospital, and place the poor in it, and then to incorporate them, or rather to give them their name of incorporation; for it is the parliament which incorporates them, and the founder only gives them their name (*d*).

THE next thing to be done after the incorporation, is to convey the lands, tenements, and hereditaments to the persons incorporated, which may be done safely, with

(*a*) *Id. ibid.*

(*b*) *Id. ibid.*

(*c*) 2 *Inft.* 723.

(*d*) *Id.* 723. 4.

greater

greater facility and less charge, by bargain and sale, by deed indented and inrolled, according to the statute 27 H. 8, c. 16, between the founder or founders on the one part, and the master and brethren on the other, in consideration of five shillings in hand paid by the master of the hospital, for himself and for his brethren, and of other five shillings in hand paid by the master and brethren (a), "of which," says Sir Edward Coke, "you may have a precedent in the tenth book of my reports in the case of Sutton's Hospital" (b).

WHEN it is intended that a corporation should be established, vested with powers or privileges which by the principles of the common law cannot be granted by the King's charter, then recourse must be had to the aid of an act of parliament; as, if it be intended to grant the power of imprisonment, as in the case of the college of physicians; or, to confer an *exclusive* right of trading, as in the case of the East India company; or when a court is erected with a power to proceed in a manner different from the common law, which is the case of the Vice Chancellor's court in the two universities (c). But it has been well observed (d), that most of those statutes which are usually cited as having created corporations, either confirm such as have been previously created by the King; as in the case of the college of physicians before mentioned, which was erected by charter in the tenth year of Henry the 8th, and afterwards confirmed in parliament by an act of the 14th and 15th of the same King (e); or they permit the King to erect a corporation *in futuro*, with such and such powers, as is the case of the bank of England (f),

(a) Id. 725. (b) 10 Co. 17 b.

(c) Vid. Cro. Car. 73, 87, 88. Jenk. 97, 117.

(d) 1 Bl. Com. 473. (e) 14 and 15 H. 8, c. 5. Vid. 8 Co. 114, Dr. Bonham's case. (f) 5 and 6 W. and M. c. 20.

and

and the society of the British fishery (*a*); so that the immediate creative act is usually performed by the King alone, in virtue of his royal prerogative.

IN order to erect a corporation, words of sufficient import must be used; but there is no prescribed form, nor appropriate words, peculiarly requisite for that purpose: the words, "to incorporate, to found, to erect" are indeed most commonly used, but neither these nor any derivatives from them are indispensibly necessary; other words, or other forms, which shew an intention to erect a body politic, in the case of a corporation by charter, or the existence of a body politic in pleading one by prescription, are sufficient (*b*). Thus in the case of Ramsay's chauntry before mentioned (*c*), it was objected that in the licence to grant the rent, there were no such words as these, "to found, erect, or establish," which, it was contended, were the necessary words of incorporation; but it was determined, that the mere licence to grant the rent in succession was sufficient to confer a corporate capacity on the chaplain and his successors (*d*).

IN former times a gift of land from the King to the burgesses, citizens, or commonalty of such a place, was conceived to be sufficient to incorporate them under such collective name (*e*). So, if the King granted to the men of Dale that they might elect a mayor every year, and that they should plead and be impleaded by the name of Mayor and Commonalty; this seems to have been sufficient to incorporate them (*f*). And there are many instances of

(*a*) 23 G. 2, c. 4.

(*b*) 10 Co. 28 a. 29 b.

(*c*) Vid. ante, page 52.

(*d*) 10 Co. 27. a et seq. 1 Rol. 513.

(*e*) 7 Ed. 4. 14 Bro. Corpor. 54.

(*f*) 21 Ed. 4, 56. Bro. Corpor. 65; but 21 Ed. 4, 57 b. seems contra: it is said, "such a grant to the men of Dale is good, and yet they are not incorporated by that name," which seems odd.

grant^s

grants by charter to the inhabitants of a town, "that their town shall be a free borough," and that they shall enjoy various privileges and exemptions, without any direct clause of incorporation; and yet by virtue of such charter, such towns have been uniformly considered as incorporated (*a*). Nor is it necessary that the charter should expressly confer those powers, without which a collective body of men cannot be a corporation, such as the power of suing and being sued, and to take and grant property, though such powers are in general expressly given (*b*). A grant of incorporation to the citizens or burgesses of such a city or borough, especially an old grant, is good, without the words "their successors." (*c*)

THE most ancient secular corporations established directly by the King's charter, seem to have been gilds, or incorporated companies of merchants, traders, and artisans; and it is not improbable, that the practice of expressly incorporating whole towns by charter was introduced in imitation of these companies; for, amongst other franchises conferred on the inhabitants of towns, by ancient charters, this was frequently one, that they should have *gildam mercatoriam*, or a merchant gild (*d*), which was establishing them into a corporate body, gilda, according to Sir Edward Coke, signifying an incorporate brotherhood or company, for which reason the place of their meeting was called the gild-hall. "And I have seen," says that author, "a charter made by King H. 1, to the weavers of London, by which he grants to them that they shall have *gildam mercatoriam*, and a confirmation of it made by Henry 2, by which charters, adds he, they

(*a*) Vid. Firm. Burg. c. 11, and Madox Hist. of Exch. 402, the charter of Dunwich. (*b*) Vid. 10 Co. 29 b.

(*c*) Brownl. and Gould's 2d pt. 292. (*d*) Vid. Firm. Burg. 27.

were

were incorporated (a). But the grant of a *gilda mercatoria* does not seem to have invested the grantees with the local government of the place, for a *gilda mercatoria* established in a town may be distinct from the *general corporation* of the town, as is evident from the following case.

THE mayor of Winchester brought an action on the case against one Wilks, in which he declared that "whereas, from time immemorial, Winchester was an ancient city, and in the same city there was and had been, from time immemorial, a custom that it should not be lawful for any person, except the freemen of the *merchant gild* of that city, to use or exercise publicly within the same city any mystery, art, or manual occupation, in the same city, during all the time aforesaid, used——yet the defendant, not being free of the gild——had used and exercised a trade within the custom, to the damage of the plaintiff."—On not guilty pleaded, and a verdict for the plaintiff, the court was moved in arrest of judgment, and the judges observed, that, where in ancient times the King granted to the inhabitants of a ville or borough to have *gildam mercatoriam*, they were by that incorporated; but what it signified in this declaration nobody knew; the plaintiff did not shew what it was, but only shewed that it was not lawful for any person to exercise a trade, who was not free of the *gilda mercatoria*; the corporation, therefore, would wish to maintain an action for a breach of their franchise, without shewing that they had any; for the franchise was laid in the *gilda mercatoria*, and the court could not presume that the *gilda mercatoria*, and the corporation of the city were the same, though they might be so (b).

(a) 10 Co. 30. a. b. 1 Rol. 513.

(b) 1 Salk 203. 2 Ld. Raym. 1129, 1134, case of the mayor of Winton v. Wilks.

THAT

THAT the *gilda mercatoria* in England, was something distinct from the corporate body vested with the local government of the place, receives confirmation from the actual state of the royal boroughs in Scotland.—In most of these, there are several incorporated companies of trades, and a gildry, which is also an incorporated company, but distinct from the others; and the magistracy of the town is composed of members partly taken from the gildry and partly from the trades.

THE objects of charters, as they respect corporations, are various; some, properly called charters of incorporation, give them their original constitution: some, without interfering with their constitution, confer on them particular privileges, of which kind the city of London can shew many examples; others totally alter, or in a great measure new model the constitution, or make particular alterations in it; and, sometimes, the effect of a charter is little more than to confirm the constitution or the ancient privileges.

As the *intention* of a grant of incorporation is to confer some benefit on the grantees, which, however, *may* be counterbalanced by some conditions with which it is accompanied, it has become an established rule, that the grant must be accepted by the voluntary consent of a majority of those whom it is intended to incorporate; otherwise the grant will be void (*a*). And it must be accepted as it is offered; they are not at liberty to act under part of its provisions and reject the rest: but if a *new* charter be given to a corporation already in being, and acting either under a former charter or prescriptive usage, such corporation already existing is not obliged to accept the new charter in the whole, and to receive either all or no part

(*a*) 1 Rol. Rep. 226. Brownl. and Gouldf. 2 pt. 100.

of it: It may act partly under that and partly under its old charter or prescription (a).

On a contest for the office of high steward of the university of Cambridge, between the Earls of Sandwich and Hardwicke, the latter, who conceived himself to have been legally elected, applied to the court of King's Bench for a writ of mandamus, to have the effect of his election. On the rule to shew cause, it was urged (b) in opposition to the application for the writ, that Queen Elizabeth, in the 12th year of her reign, had granted to the university a new body of statutes, under which they were *then* governed, and in which no particular mode was prescribed for the election to the office of high steward; but which directed that all officers, not therein particularly mentioned, should be chosen in the same manner in which the vice-chancellor was to be chosen; but that the election in question was not had as the election of a vice-chancellor; that the university had *accepted* these statutes, and were therefore *bound* by them, and that consequently the election was void.—In support of the application for the writ, it was contended, that the election was according to a usage which had prevailed above 240 years; that this new charter did not affect the old prescriptive rights, and that the usage shewed only a *partial* acceptance of the statutes of Queen Elizabeth.

It was held by the court (c), that the Crown could not take away from the university any rights that had formerly subsisted in them under old charters or prescriptive usage; that the validity of these *new* charters must depend on the *acceptance* of the university; that when the Crown gave these statutes, the university of Cambridge was of ancient establishment, and had many prescriptive rights, as well

(a) 3 Bur. 1647, 1656, 1661.

(b) 3 Bur. 1650.

(c) Id. 1656, 1661.

as former charters of very old date, and there was no intention to alter or overturn their ancient constitution; that these statutes undoubtedly meant to leave the ancient constitution of the university in a great measure as it was, without repealing or abrogating their old established customs, rights, and privileges; and that the university could not mean to accept them on any other terms; that the statutes of Queen Elizabeth, therefore, could never be set up to invalidate establishments which had subsisted long before she was born; that the office of high steward came under this description, and that it was not intended, by these statutes, to alter the mode of election to it, unless the university chose to do so; that it was the *concurrence* and *acceptance* of the university that gave force to the charter of the Crown; that they might accept the body of statutes *separately* and *distinctly*, and were not bound to *accept* all or *leave* all; and that in the present case it appeared there was in fact a *partial* acceptance.

BUT though the King cannot take away liberties before granted by him or his predecessors, yet if a corporation *accept* a charter which abridges or alters any of their liberties, this is good; and when a corporation takes a new charter concerning their liberties, they may make use of it as a grant, or as a confirmation.

HENRY the fourth, by charter, granted, among other things, to the corporation of the city of Norwich, that they might choose two sheriffs; Charles the second confirmed this charter, and granted besides, that, in the election of sheriffs, this form should be observed; that the mayor, sheriffs, and aldermen, between the 24th of June and the first of September, should choose one fit person to execute the office of sheriff for the year ensuing, and that the commonalty should choose another: the corporation

F 2

having

having acted under this charter for a considerable time, that circumstance was held to be evidence of *acceptance*, and the alteration in the mode of election valid (*a*).

(*a*) 4 Mod. 269. 1 Salk. 167. 1 Ld. Raym. 29, 32; case of the King v. Larwood.

CHAP. II.

OF CORPORATIONS CONSIDERED IN THEIR RELATION
TO THE PUBLIC.

WHEN a corporation is duly created, many powers, capacities, and incapacities, are tacitly annexed to it without any express provision (*a*); and of these, five are said to be necessarily and inseparably incident to *every* corporation. 1. To have perpetual succession, and therefore all *aggregate* corporations have a power necessarily implied of electing members in the room of such as are removed by death or otherwise (*b*). 2. To sue and be sued, implead and be impleaded, grant and receive by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them for the benefit of themselves and their successors. 4. To have a common seal, and 5. To make bye-laws, or private statutes for the better government of the corporation.—The two last, however, it is admitted, are very unnecessary to a corporation *sole*, though they may be practised (*c*); and the last is not so inseparably incident to a corporation *aggregate*, that it cannot subsist without it; for there are some aggregate corporations to which rules and ordinances may be prescribed, and which they are bound to obey (*d*), as will be more fully shewn in another place: neither are these *all* the incidents, which without any express provision are necessarily annexed by legal implication to an *aggregate* cor-

(*a*) 10 Co. 30 b.(*b*) 1 Rol. Abr. 514.(*c*) Vid. 1 Bl. Com. 475, 6.(*d*) Vid. eund. 477.

poration; and, it is material to observe, that though *many* things be *incident* to a corporation, yet to form the complete idea of a corporation aggregate, it is sufficient to suppose it vested with the three following capacities. 1. To have perpetual succession under a *special* denomination, and under an *artificial* form. 2. To take and grant property, to contract obligations, and to sue and be sued by its corporate name, in the same manner as an individual. 3. To receive grants of privileges and immunities, and to enjoy them in *common* (a). These alone are sufficient to the *essence* of a corporation; neither the *actual* possession of property, nor the actual enjoyment of franchises, is necessary (b).

THERE are two general points of view in which corporations may be considered. 1. In their relation to the public; and 2. In respect to their internal constitution.

CONSIDERING them in their relation to the public, these will be the objects of our enquiry; 1. Their several capacities and incapacities. 2. The mode prescribed by the law, in which they must act, and which must be observed by others in acting against them. 3. By what acts they are bound; and 4. To what burthens they are subject.

SECTION I.

Of their several Powers, Capacities, and Incapacities.

A CORPORATION being merely a political institution, it can have no other capacities than such as are necessary

(a) Vid. the definition and description of a corporation, page 12.

(b) Per Holt. Skin. 311. 10 Co. 31. a. 3 Co. 75. b. case of the Dean and Chapter of Norwich.

to carry into effect the purposes for which it was established; it cannot therefore be considered as a moral agent subject to moral obligation, nor as a single person subject to personal suffering, or capable of personal action; and on this principle we may account, in a satisfactory manner, for many of the incapacities attributed to a corporation aggregate, without having recourse to the quaint observations frequent in the old books, "that it exists merely in idea, and that it has neither soul nor body" (*a*).

ON this principle a corporation aggregate cannot be guilty of a crime, as of treason or felony (*b*); and consequently cannot be subject to the punishment of a criminal: nor can it take an oath, which is one reason why it could not do fealty (*c*), and why it cannot be executor or administrator (*d*); and for the same reason it cannot wage its law (*e*); neither can it be subject to ecclesiastical censures, and consequently cannot be excommunicated, nor summoned into the ecclesiastical courts (*f*); neither can it do or receive a personal injury, and therefore can neither sue nor be sued in an action of trespass for battery or false imprisonment (*g*). It is incapable of a personal appearance, and therefore could not have done homage, because that could not be done by attorney (*h*); which is another reason why it could not do fealty; but it might have purchased land held by homage and fealty, and then it would

(*a*) Vid. 10 Co. 32. b. Manwood, C. Baron, is said by Lord Coke to have said of corporations, that they had no soul, which he proved by this curious syllogism, "None can create souls but God; but a corporation is created by the King: therefore a corporation can have no soul." 2 Bulfr. 233. (*b*) 10 Co. 32. b.

(*c*) Pl. Com. 213, 245. 10 Co. 32. b.

(*d*) Com. Dig. Administration, B. 2.

(*e*) 9 Co. 32. a. (*f*) 10 Co. 32. a.

(*g*) Br. Corpor. 63. (*h*) Co. Lit. 66. b.

have been considered as holding them by that tenure (*a*). For the same reason it cannot levy a fine (*b*); neither can it be apprehended or arrested, and therefore cannot be outlawed (*c*), for outlawry always supposes a precedent right of arrest.

A CORPORATION aggregate cannot hold lands in jointenancy with a natural person, because, as the corporation never dies, the natural person cannot have the advantage of the incident of survivorship; but such corporation may hold lands in *common* with a natural person, because survivorship is not incident to lands so holden (*d*).

NEITHER can a corporation aggregate, by the strict rules of the common law, be seised of lands to the use of another; for this is foreign to the purpose of its institution; the persons, who compose the corporation, might, in their *natural* capacities, have been seised to the use of another; it would therefore be nugatory to allow them to do that in their *corporate* capacity, which they had power to do in their *natural*, as the sole purpose of incorporating them, was to confer powers upon them which they could not otherwise have (*e*); another reason given for this incapacity is, that the corporation aggregate could not be compelled by subpoena to execute the possession to the use, because if it disobeyed, it could not be compelled by imprisonment (*f*).

Corporations as trustees of a charity. NOTWITHSTANDING this rule, however, it is certain that many corporations are made trustees for charitable purposes, and are compelled to perform their trusts; which may, perhaps, however, be reconciled to the rule in this

(*a*) 33 H. 8, Br. Fealty. 15.

(*b*) Com. Dig. tit. Fine. B.

(*c*) 10 Co. 32. a. cites 39 Ed. 3. 13. a. Br. Utlagary 72. Corpor. 11.

(*d*) Pl. Com. 239.

(*e*) Gilb. Uses and Trusts 5, 170.

(*f*) Id. *ibid* and Jenk. 195. Pl. Com. 102, 538.

way;

way; the trust is not vested in the corporation, as a corporation; but the natural persons of whom it is composed are created trustees, and their description as constituent parts of a corporation, operates only as a more certain designation of their persons: this explanation appears the more reasonable from what is said of a sole corporation, on the same subject; "that a man who is a corporation sole cannot be seised to an use in his corporate capacity, nor by his corporate name alone without his *natural* name, and then the addition of his corporate name must be considered only as a fuller description of his person" (a).

NEITHER can the King be seised to an use: he cannot in his corporate capacity for the reason before mentioned; he cannot in his natural capacity for two reasons. 1. Because, of all the lands of which he is seised, he is seised *jure corona*, as will appear more fully hereafter (b); and, 2. Because there is no way of compelling him to execute the use; for the chancery has only a delegated power from the King over the consciences of his subjects; and the King, who is the universal judge of property, ought to be perfectly indifferent, and not take upon himself the defence of any person's estate as a trustee (c).

MANY of the incapacities before enumerated as belonging to *aggregate*, apply equally to *sole* corporations; thus, when a single person who is a *sole* corporation commits treason or felony, he does it not in his *corporate*, but in his *natural* capacity; and in his *natural* capacity alone is he subject to punishment: and if all the members of an *aggregate* corporation, under pretence of holding a corporate assembly, were to be guilty of any crime of which a collective body of men may be physically capable, the

(a) Gilb. Uses and Trusts. ubi supra. et vid. 2 Leon. 122.

(b) Vid. page 75.

(c) Gilb. Uses and Trusts. ubi supra.

members

members would, as individuals, be equally subject to punishment, as the person who is a sole corporation.—The same observation will apply to other incapacities.

By the general rule of the common law, a body corporate is capable of taking any grant of property, privileges, and franchises, in the same manner as private persons (*a*) ; but with respect to the capacity of taking land, there is this difference between a corporation aggregate, and a corporation sole, that the former has only a *corporate* capacity, and therefore as a collective number of persons, the members of it cannot take lands by their corporate name, to them and their heirs, but only to them and their successors; sole corporations have two capacities, their natural and corporate, and may therefore take either to them and their heirs, or to them and their successors. But the law on this subject, respecting the King, differs from that respecting any other sole corporation; for though, like the others, he has both a natural and politic capacity, yet in general the politic capacity prevails, and land given to the King and his heirs, passes in the same manner as land given to him and his successors; for, as applied to the King, the word “heirs” includes successors, and, in early times, the word “successors” was not added in the King’s grants; and therefore land given to the King and his heirs, descends to the same person who shall afterwards be in possession of the regal dignity, though by the course of law, in the case of common persons, it would have vested in others: thus, if a man be King by descent on the part of his mother, and purchase lands to him and his heirs, and die without issue, the heir on the part of his mother, who has the dignity royal, and is consequently the successor, shall have the land, although in the case of a common person, it would

(*a*) Litt. Rep. 49, 112, 114.

have

have descended to the heir on the part of his father. So, if land be given to the King and his heirs, and he die without issue, leaving a sister of the whole blood, and a brother of the half blood, the latter shall have the land as successor, though in the case of a common person, it would have been inherited by the sister.—If the King die leaving no son, but two daughters, the lands he had to him and his heirs, shall go to the eldest, though in the case of a common person, they would have gone to both. If the King purchase gavelkind lands, they descend to the eldest son alone, though in the case of a common person they would have been equally divisible among all the sons: But if land in gavelkind descend from a subject to the King and his brother, the King shall only have the moiety; yet, if the King die, leaving two sons, his moiety shall not descend to both equally, but to the eldest son alone. The possession of the Crown, however, of lands originally gavelkind, and a contrary course of descent while they continue in the crown, only suspends the custom and does not destroy it; but on a separation by grant of the lands to a subject, it immediately revives, and the lands are again partible among the males (*a*).

It seems, if the King be removed, and another family succeed to the crown, that lands given to the former King and his heirs, would, in like manner, go to the successor: and if a person purchase lands to him and his heirs, and afterwards become King, the law is still the same with respect to these lands, or indeed any lands he possessed by descent or purchase, unless special provision be made by act of parliament, as was done in the case of the Duchy of Lancaster in the time of Henry the fourth (*b*).

(*a*) Vid. Robinson on Gavelkind, 68.

(*b*) Vid. Pl. Com. 212.

YET

YET land may be intailed on the King, as well as on a subject, and then it shall go in descent to the particular heirs, and not to the successor who happens not to be the particular heir; and if the King be removed from the crown, the intailed land shall not go to the successor, but continue in the heir pointed out by the entail; and the reason is, that the King's natural capacity, though overshadowed by the pre-eminence of his political, yet still subsists distinct from it; and he who gives to the King, may give to him in the one capacity or in the other, and a gift in tail points out in what capacity the King shall take it, the limitation being to him and the heirs of his body (a).

WHAT makes this difference between the mode of descent of lands to the King and any other *sole* corporation the more remarkable, is, that lands given to the latter, and his successors, are intended for the support of his corporate dignity; but lands given to the King, though descending according to his corporate capacity, are not considered as intended for the support of his kingly dignity, but are as much at his private disposal as the *private* property of any individual is at the disposal of its owner.

THE capacity of aggregate corporations to take property for the benefit of themselves and successors, extends equally to personal and to real property: but it is a general rule that no chattel shall go in succession in the case of a corporation sole (b): and therefore if a lease for years be granted to a bishop, dean, parson, vicar, &c. and to his successors, it shall go to the executor and not to the successor; so, if a man be bound in a recognizance or obliga-

(a) Vid. Co. Lit. 15, 16. Plow. 212—252, where the whole subject is fully discussed; and Dyer 209, pl. 22. 7 Mod. 78.

(b) Co. Lit. 46 b. 4 Co. 65. 1 Rol. 515. Dyer 48, pl. 15. Cro. El. 464.

tion,

tion, to any such sole corporation, the executor and not the successor shall have it; for though they have a *natural* and a *corporate* capacity, yet the latter is confined to real property: But Lord Coke makes a distinction between the case of a sole corporation, who is a body politic by *prescription*, and one who is a body politic by *custom*, and cites the case of the chamberlain of London as an example of the latter, who may take a recognizance to himself and his successors in trust for the orphans: But the reason does not seem to depend so much on the corporation being by prescription or by custom, as on his being a trustee or not, and taking for his own benefit, or for the benefit of another. The reason given by Blackstone (a) for this incapacity of a sole corporation, is, that such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid. Perhaps the reason might be more correctly stated thus, that the law has appointed a revenue in fee to be the only source from which sole corporations are to support their official or corporate character, and that therefore their successors have no interest in any chattel given to the predecessor; for certainly a lease for years given to a corporation sole, and his successors, is as little likely to create a misunderstanding between the executor and the successor as a gift in fee.

IF a master of an hospital, or any similar corporation, recover in a writ of annuity, and die, the successor shall have the arrears and not his executors; but it is otherwise in the case of a parson, for there the executors are intitled and not the successor; and the reason of the difference seems to be, that the parson is intitled to the annuity for his own benefit as parson, and therefore the arrears incurred in his life-time

(a) 1 Com. 477.

belong

belong to his perſonal representatives; but the maſter of the hoſpital is intitled to the annuity only as trustee for the benefit of his houſe (*a*).

ON the ſame principle, if a rent due to dean and chapter be in arrear, and the dean die, the rent belongs to the ſucceeding dean and chapter; if rent be due to the dean in his ſole corporate capacity, and he die, it ſhall go to his executors; but rent on a leaſe granted by a ſole corporation, accruing after the death of the predeceſſor, ſhall go to the ſucceſſor, and he ſhall have an action of covenant on the leaſe (*b*).

THE charter granted to the college of phyſicians, and confirmed by act of parliament, impoſes on all offenders in practiſing phyſic in London, without admiſſion by the college, a penalty of 5*l.* per month, one half to the King and the other to the preſident and college: if the preſident recover in debt againſt an offender and die, the ſucceſſor and not the executor ſhall have a ſcire facias on this judgment, becauſe the ſucceſſor recovers as due to himſelf and the college, and not as repreſenting his predeceſſor (*c*).

IT has been before obſerved, that, by the rule of the common law, a corporation has an equal capacity of taking property with a private perſon (*d*), but their capacity to take *landed* property, is ſubject to ſome reſtraints impoſed by ſtatute, of which it is neceſſary now to give an account.—Theſe reſtraints were at firſt introduced to prevent the effects of too great an accumulation of land by religious houſes, and other eccleſiaſtics; and the ſtatutes by which they were impoſed, have been called ſtatutes of *mortmain*; a name which, Sir Edward Coke, after enu-

(*a*) 19 H. 6, 44. Br. Corpor. 26. 1 Rol. 515.

(*b*) Dyer, 48, in marg. Carter, 16. (c) 1 Rol. 515.

(*d*) Vid. ante page.

merating

merating what he calls the conceits of other writers, ascribes to the effects produced by alienation to such bodies, observing that the lands were said "to come to dead hands as to the Lord's, for that by alienation in mortmain, they lost wholly their escheats and other incidents, and because a dead hand yieldeth no service" (a). But Mr. Justice Blackstone observes, that this appellation arose most probably from this circumstance, that these purchases being made by ecclesiastical bodies, of which the members, being professed, were reckoned dead persons in law, land holden by them might with great propriety be said to be held in *mortua manu* (b).

ACCORDING to the strictness of the feudal system, a vassal could not alienate his fief without the consent of his lord; but this consent was not more necessary in the case of an alienation to a religious house, than in that of an alienation to a common person, and when this strictness began to be relaxed in the latter case, it seems to have been equally relaxed in the former: for Bracton tells us, "that a gift might be made to *religious men* as well as to others who were capable of a gift, unless the owner of the land was restrained from alienating to them, by an express exception to his power of alienation, in the charter by which he held the land;" and he adds, "that no reason or necessity induced a prohibition with respect to them, except the form of the original gift" (c). And Lord Coke tells us that he has seen many charters with such clauses of

(a) Co. Lit. 2 b.

(b) 1 Bl. Com. 479.

(c) Item fieri poterit donatio, tam viris religiosiis quam aliis quibus dari poterit—nisi modus donationis inducat contrarium; scilicet quod licitum sit donatorio rem datam dare cui voluerit, exceptis viris religiosiis—et quod talibus personis dari non poterit sicut aliis, nulla ratio vel necessitas illud inducit nisi tantum modus donationis. Bract. f. 13. a. v. finem.

exception.

exception (*a*). But the frequent introduction of such clauses into the charters of infeoffment, while it proves the freedom of alienation to religious houses, where no such restraint was expressly imposed, proves at the same time, that many inconveniences were felt from the indulgence of that freedom. By the lands being thus vested in tenants who could never be attainted or die, the lords lost the feudal casualties of wardship, escheat, relief, non-entry, and the like, and the military service of the country decayed.—The precaution of individuals was found unable to meet the ingenuity of the clergy; for whenever such clauses of exception stood in their way, it appears that, as the forfeiture for such alienations accrued, in the first place, to the immediate lord of the fee, the tenant who meant to alienate, first conveyed his lands to the religious house, and instantly took them back again to hold them as tenant to it; and then, under pretext of some forfeiture, surrender, or escheat, the society entered into those lands in right of their newly acquired seignior, as immediate lords of the fee: and the instantaneous seisin in the house by means of the conveyance to it, was probably not considered as a forfeiture to the original lord (*b*). This is rendered probable from the terms in which the first statute of mortmain is expressed (*c*), by which it is provided “that no one in future should give his lands to a *religious house*, and take them *back again* to be held of the same house; and, on the other hand, it should not be lawful for any religious house to take the lands of any one, in order to give them back to him to be held of that house; and if any one should be convicted of *so* giving his land to a religious house, the gift should be void, and the land should be forfeited to the lord of the fee.”

(*a*) 2 Inst. 75.

(*b*) 2 Bl. Com. 269.

(*c*) 9 H. 3, c. 36. Magna Charta.

NOTWITH-

NOTWITHSTANDING this general prohibition, it seems to have been understood, that if the chief lord, of whom the land was immediately holden, gave a *licence* for alienation to a religious house, the forfeiture should not be incurred ; for, in the recital of the next statute on the subject (*a*), it is complained, that “notwithstanding it had been provided, that religious men should not enter into the fees of any, without the licence and will of the chief lord of whom such fees were immediately holden, yet such religious men had entered as well into their *own* fees, as into the fees of other men, appropriating and buying them, and sometimes receiving them of the gift of others, by which the services which were due for such fees, and which at the beginning were provided for the defence of the realm, were wrongfully withdrawn, and the chief lords lost their escheats.”

It appears from this, that these religious societies, in order to elude the first statute, had made it a practice to purchase land held of themselves; and the enacting clause of the present, shews, that one of their contrivances, when they could not obtain the licence of the chief lord for an alienation in fee, was to take leases from the tenant for long terms of years ; a practice which was soon felt to be productive of inconveniencies of the same kind ; and, as the express words of the first statute only prohibited alienation to religious houses,—bishops, parsons, and other sole corporations ecclesiastical, conceived that the prohibition did not extend to them (*b*).

To remedy these mischiefs, it was ordained, that no *person*, religious or *other*, whatever, should presume to buy or sell, or receive from any one, under colour of *gift* or *lease*, or of any other title whatever, or by any mean, art,

(*a*) 7 Ed. 1. st. 2.

(*b*) 2 Inst. 75.

or device, to appropriate to himself any lands or tenements, by which they should come into mortmain, under pain of forfeiture; and to enforce the observance of this ordinance, it was provided, that in case of such alienation, the *King*, and other immediate chief lords of a fee so alienated, should be at liberty, within a year from the time of such alienation, to enter and hold it in fee as an inheritance; and if the immediate chief lord did not enter within the year, then the next mediate chief lord might enter within half a year next following; and so every next mediate lord might do, in case of default by the lord preceding; and if all the chief lords who were of full age, within the four seas, and out of prison, should for *one* year be negligent or remiss in that behalf, the *King* might, immediately after the year compleat from the time of the purchase, gift, or other appropriation, take the lands into his own hands, and infeoff others in them, under certain services for the defence of the realm, saving to the intermediate lords their wardships, escheats, and other incidents (*a*).

THERE seems to be some inaccuracy in the latter part of this statute, with respect to the time of the *King's* entry into lands held of intermediate lords: where it is said in the first part, "that the *King* is to enter within a year," this evidently applies to the case where the lands alienated were held immediately of himself: but it is said, "that where all the intermediate chief lords neglected to enter within their respective times, the *King* might enter immediately after the year compleat." this can only apply where there was but *one* lord between the *King* and the tenant who alienated.

UNDER this statute it has been held, that if there were lord, and an abbot tenant, and the lord released to the ab-

(*a*) 7 Ed. 1, ff. 2. 21 Ed. 3, 18. b.

bot his feigniori, this was mortmain, and the lord paramount should have the feigniori by force of the statute (*a*).

So, a grant of a *rent* to an abbot and his successors was mortmain under this statute; for the words are not confined to lands, but prohibit the alienation of lands and tenements (*b*).

So, if an abbot had been seised in fee, in his own right, of an advowson, it would have been mortmain, if he had appropriated it to him and his successors.—The same observation applies to a similar appropriation by a bishop (*c*).

If an abbot, or a dean and chapter, had a rent in fee issuing out of lands, and the tenant of the lands had granted by his deed, that they and their successors should distrain for that rent in *other* lands; this would also have been construed to be within the statute (*d*).

If the villain of an abbot or prior had purchased lands or tenements in fee, the abbot or prior could not enter into them without licence; or if he did, he would have incurred a forfeiture in mortmain (*e*).

NOTWITHSTANDING this statute, however, it has been said, that by the custom of London a man might have devised in mortmain, because by subsequent statutes their customs are confirmed (*f*).

It might have been supposed that the provisions of this statute would have been sufficient to accomplish the purpose for which it was intended; but the resources of ecclesiastical ingenuity were not yet exhausted.—They began now, by collusion with the tenant of the land which was intended to be appropriated to them in mortmain, to set up a title to it in a fictitious suit, to which the tenant did not

(*a*) F. N. B. 223 I. cited 7 Co. (39) 38. a.

(*b*) F. N. B. 223. B.

(*c*) Id. 223. H.

(*d*) Id. 224. G.

(*e*) Id. 224. D.

(*f*) 2 Bullfr. 187.

appear, on which judgment passed against him by default; and the judges held that these religious and ecclesiastical persons did not thus acquire the land by "title of gift or alienation," and that recovery by such a suit was not within the general words of the statute, "by any other mean, art, or device;" because recoveries being prosecuted in course of law, were, by law, presumed to be just and lawful (a).

THIS gave rise to the statute of the 13 Ed. 1. c. 32, by which, after a recital, that 'religious (b) men and other ecclesiastical persons had impleaded men, and that the impleaded made default, by which they lost the tenements, because the justices had hitherto been of opinion, that in cases where, by means of the statute, the demandant could not obtain seisin of the land by title or gift, or other alienation, yet he should by reason of the default, and so the statute was eluded,' it was enacted, "that in such cases, after default made, it should be inquired by the country, whether the demandant had right in the thing demanded or not; if it was found that he *had* right, judgment should pass for him, and he should recover seisin; and if he had no right, the land should accrue to the next lord of the fee, if he demanded it within a year from the time of the inquest taken; and if *he* did not demand it within the year, it should accrue to the next lord above, if he demanded it within half a year; and that, in the same manner, every lord should have the space of half a year to demand it successively, till it came to the King, to whom at length, through default of other lords, the lands should

(a) 2 Inst. 75. 429.

(b) It appears by the tenor of all these statutes, that the term "religious" was used to denote the regular clergy, in opposition to the secular.

accrue.

accrue. That the jurors of the inquest might be challenged, by each of the chief lords of the fees, and, on behalf of the King, by any one that chose; and that after the judgment given, the land should remain clear in the King's hands, until it were deraigned by the demandant, or some other chief lord, and the sheriff should be charged to answer for it at the exchequer."

It was held, that *all* actions brought for any lands or tenements, in which a freehold, inheritance, or long term of years was to be recovered, a *præcipe quod reddat*, a *quare impedit*, a writ of right of ward, *ejectione firmæ*, *quare ejecit infra terminum*, *warrantia chartæ*, a covenant to levy a fine and execution by *elegit*, *statute merchant*, or *statute staple*, were within this statute (*a*).

It was construed to extend to some who were not parties to the writ; as to the vouchee and tenant by receipt, and the like; and to the case where the religious or ecclesiastical person was tenant or defendant, as well as to the case where he was demandant or plaintiff; and not only to the case of judgment by default, but to judgment after verdict on issue joined, judgment by confession, *nil dicit*, and on demurrer.

THIS statute gave rise to a judicial writ, where judgment was obtained in any other case than after verdict, and which, from one of the duties prescribed to the jury who were to be returned in consequence of it, was called *quale jus* (*b*). After reciting the recovery, and the suspicion of fraud, it commanded the sheriff to return a jury to inquire what right the religious person had in the tenements recovered, which of his predecessors had been seised of them as in right of his church, and what was the annual value. The

(*a*) 2 Inst. 429.

(*b*) *Quale jus idem abbas habuit in prædicto messuagio.*

sheriff was, in the mean time, commanded to seize the tenements in question into the King's hands, and to answer for the issues at the exchequer; and to give notice to the chief lords, mediate and immediate, of the fee, that they might attend, if they thought proper, at the inquest to be taken (a).

WHERE issue was joined, the jury were to inquire not only of the fact put in issue, but likewise of the collusion, and if they neglected to do the latter, a *special writ* was to issue expressly for that purpose (b).

ABOUT the beginning of the 12th century two religious orders were established under the name of Knights Templars and Knights Hospitallers, and soon acquired large possessions and revenues all over christendom, but more especially in England. They had the address too, to obtain, not only for themselves, but also for their tenants and farmers, many important privileges and immunities; among others, to be free from tenths and fifteenths to be paid to the King, to be discharged of purveyance, not to be sued for any ecclesiastical cause before the ordinary, *but before the conservators of their own privileges*.—The knights being distinguished by the sign of the cross, it became a practice with their tenants to erect crosses on their houses and lands, that their privileges might not be invaded. The tenants of other lords, in order to participate with them in these advantages, began to set up crosses on their lands and houses, as if they had also been tenants of these orders (c).

To remedy the evils arising from this practice, it was enacted (d), that the lands on which crosses should be set up with a view to defraud the King or other lords of their

(a) Vid. Regist. Judic. 16, 17. 2 Inst. 429.

(b) 2 Inst. 430.

(c) Id. 431, 2.

(d) 13 Ed. 1, c. 33.
services,

services, should be forfeited in the same manner as had been provided for lands alienated in mortmain.

AT common law, when a tenant made a feoffment generally, without specifying the tenure by which the feoffee was to hold the land, it was understood, that he was to hold it of the feoffor by the same services by which the latter held it of his lord (*a*).—When such alienations were first introduced, no considerable degree of inconvenience was felt by the lord, because the original vassal remained still liable for the services, and distress might be taken for them on the whole of the land: but when the rear vassal had long possessed his feud, and held it of another, he began to think he had a connection only with that other, and none with the original lord. This persuasion of the rear vassals gained ground, and the superior lords came in the end to be deprived of their services and emoluments.

To remedy this inconvenience, and to reconcile the jarring interests of lords and vassals, while the latter were eager to assert their power of alienation, and the former complained that they were stripped of their ancient rights, the statute of *quia emptores* (*b*) was made, which enacted in favour of the vassals, that they might alienate the whole or any part of their land as they pleased; and in favour of the superior lords, that the lands so alienated should be held of them and not of the alienors (*c*).

BUT it was expressly provided, that this liberty should not extend to alienation in mortmain (*d*).

WHETHER the King's licence to alienate in mortmain, was originally necessary in any case, but where the tenements to be alienated were held immediately of himself,

(*a*) 2 Inst. 501.

(*b*) 18 Ed. 1, c. 1.

(*c*) Vid. this subject ably handled in Dalrymple's feudal tenures, 84, 85, &c.

(*d*) 18 Ed. 1, c. 3.

does not very clearly appear.—It is indeed presumed, from the interest the King must have had as ultimate lord of every fee, that his licence was necessary in all cases, even so early as sixty years before the Norman conquest (*a*). And it is said that the necessity of it was acknowledged by the constitutions of Clarendon in respect of advowsons (*b*): but the passage, from which this conclusion is drawn, applies manifestly only to the case of advowsons belonging to the King's immediate tenant (*c*).

If we may judge from the tenor of the former statutes, it is probable, that till the 9th of Henry the third, neither the licence of the King nor of other superior lords was necessary for an alienation in mortmain, in any case where it would not have been necessary to alienate to a common person, except where there was an express clause of restriction in the original charter of infeoffment. The words of that statute seem to imply a general prohibition in favour of the immediate lord of the fee; but as every man may dispense with a forfeiture intended for his own benefit (*d*), it seems, that notwithstanding this statute, an alienation in mortmain was lawful, if made with the licence of the *immediate* lord, whether that lord was the King or a subject; and the complaint of the preamble of the next statute, does not extend to an alienation without the licence of any other: it complains indeed of a practice, against which the first statute had made no provision, the entry of religious men into fees holden of themselves; from which it is manifest, that the general interest of the

(*a*) Selden. Jan. Angl. l. 2. f. 452 cited, Bl. Com. 269.

(*b*) Id Ibid. (*c*) *Ecclesiæ de feudo Domini Regis non possint in perpetuum dari absque assensu et concessione ipsius.* Wilkins. 331, 323.

(*d*) *Alienatio licet prohibeatur, consensu tamen omnium, in quorum favorem prohibita est, potest fieri, et quilibet potest renunciare juri pro se introducto.* Co. Lit. 99. a.

community

community began to be considered as equally endangered by these appropriations, as the particular interests of the lords. The enacting part of this second statute therefore, not only prohibits *absolutely* all the practices complained of, but makes a provision for the entry of the King in default of all the other lords.—From this time, therefore, we may suppose, that if an alienation in mortmain was permitted at all, it must have been in consequence of a licence not only from the *immediate* lord, but from all the *mediate* lords, and from the King.—A regular form of proceeding began now to be used in applying for this licence; and at length the statute of 27 Ed. 1. ft. 2, enacted, “that men of religion who would purchase lands or tenements in mortmain, should have writs out of chancery to enquire upon the points *accustomed* in all things; and that inquests of lands or tenements that were worth yearly more than twenty shillings by extent, should be returned into the exchequer, and a fine made there if the inquest passed for the purchaser; and that it should afterwards be certified to the chancellor, or his deputy, that he should take reasonable fine, and afterwards make delivery.”

It is probable that, in consequence of this statute, the licence of the King came to be considered as of the principal importance, and that the interests of the *mesne* lords began to be overlooked, which gave rise to the statute 34 Ed. 1. ft. 3, by which it was enacted “that where there were any *mesne* lords, nothing should be done in pursuance of the former statute, unless the religious persons could shew to the King the assent of such lords, under their patents, sealed with their seals, and that nothing should pass where the donor reserved nothing to himself; or where inquisitions were made without warrant, that is, without the original writ being returned with the inquest, and unless the
the

the original writ made mention of every thing required by the new ordinance devised by the King." This new ordinance was the statute immediately preceding.

THE writ to which these statutes refer, from a clause in it expressing the object it had principally in view, was called the writ of *ad quod damnum*: from the words of the statutes, it is not improbable that it existed at common law, and that they were intended to enforce a more strict attention to all the objects of inquiry which it pointed out. It was directed to the King's escheator for the county in which the lands or tenements lay, which were intended to be alienated in mortmain; and commanded him, by the oath of good and lawful men, diligently to enquire, whether it would or would not be to the damage or prejudice of the King or of others, that the King should grant to the person who had sued out the writ, the liberty of alienating to the particular corporation, whether sole or aggregate, to which the alienation was to be made, the particular lands or tenements described in the writ; and, if it should appear to be to the damage or prejudice of the King or of others, then to what extent; and of whom, by what tenure, and by what services the lands or tenements were holden; what was their real annual value; and who were the mesne lords between the King and the tenant who intended to alienate; what lands and tenements would remain to the tenant after the intended alienation, where they were situated, of whom, by what tenure, and by what services they were held, and what was their real annual value; and if lands and tenements would remain to him, whether these would be sufficient to enable him to perform all the services which were due, as well for the lands and tenements intended to be alienated, as for what should remain to him after the alienation; and to support all the burthens which

which he then bore or was accustomed to bear, as in suit of court, view of frankpledge, aids, tallages, watchings, fines, redemptions, amercements, contributions, and all other burthens whatever; and whether he could be put upon affizes, juries, and other inquisitions, in the same manner as before the intended alienation.

IT then commanded that the writ should be returned, together with the inquisition certified, into the chancery, under the seals of the escheator, and of the jurors by whom the inquisition was found (a).

THE course of proceeding appears to have been, that the tenant who intended to alienate in mortmain, first applied for leave from the King, to sue out the writ, and then after the return of it by the escheator, if the inquisition was in favour of the alienation, he obtained letters patent of licence from the King and from the intermediate lords: but these could not vary from the substance of the particulars rehearsed in the writ (b).

IF one abbot wished to give lands or tenements in mortmain to another abbot or prior, or to any other body corporate, though they were in mortmain before, yet he could not do it without the King's licence, in consequence of the writ of *ad quod damnum*: but the writ was not to contain the clause which related to the ability of the alienor to be put upon affizes, nor that which was to guard against the country being injured by the alienation (c).

IF a man devised lands or rents to his executors and to their heirs, to dispose according to his will, and afterwards made his will commanding them to give the same in

(a) Vid. Reg. orig. 247, a. F. N. B. 222.

(b) F. N. B. 221. G. 224. C. D.

(c) F. N. B. 222. D. Reg. orig. 247, b,

mortmain;

mortmain; they could not execute the commandment of the will without the King's licence, in consequence of an inquisition returned on a writ of *ad quod damnum* (a).

AND if a man wished to *exchange* lands, tenements, or rents with an abbot, or other body corporate, he could not do it without suing forth this writ; in which both the lands which were to be given, and those which were to be taken in exchange, must have been particularly described (b).

THOUGH the statute of 34 Ed. 1. ft. 3, had provided for the interests of the mesne lords, yet, by the gradual operation of the statute of *quia emptores*, and other causes, these had become of so little importance, that the King's licence to alienate in mortmain, began to be considered in the light of a peculiar prerogative; which seems to be admitted by a statute of Edward the third (c), by which it is provided, that "if prelates, clerks beneficed, or religious people, who had purchased lands in mortmain, should be impeached on that account before the justices, and should shew the King's charter of licence, and process on it, by an inquest of *ad quod damnum*, or that it had been by the King's grace, or by fine, they should be freely left in peace without being further impeached for the same purchase; and if they could not sufficiently shew, that they had entered by due process after licence to them granted in general or in special, they should be admitted to make a convenient fine for the same, and that the inquiry should cease."

THE statute of *quia emptores* having expressly provided that the free power of alienation thereby given, should not enable any one to give his lands or tenements in mortmain, it became a practice to insert, in all licences to make such

(a) F. N. B. 224. F.

(b) Id. 223. E.

(c) 18 Ed. 3, ft. 3. c. 3

alienation,

alienation, a clause of *non obstante* applying to that statute, as well as to the statute of mortmain; though it is conceived, that such clauses were not necessary (*a*): but when they had once been introduced, their operation was such, that, that which was at first manifestly only a remission of a forfeiture by those who were intitled to take advantage of it, began to be considered as a power to dispense with the existing law of the country; and Fitzherbert (*b*) tells us, that in his time (*c*), the common experience was, that those who would purchase leave to alienate in mortmain, did not sue out the writ of *ad quod damnum*; but obtained the insertion of a clause at the end of the King's letters patent of licence, which dispensed with the necessity of the writ, and of all other ceremonies whatever: he adds, indeed, that it seemed doubtful whether such patents were good or not, if it were evidently proved that they were prejudicial to the interests of the King or of others.

HOWEVER, the pretended power of suspending statutes by the royal authority, having, at the time of the revolution, been declared illegal, and the interest of mesne lords having at length been reduced almost to a shadow, it was thought prudent to confirm, by act of parliament, the King's power of granting licences in mortmain, in order, on the one hand, to prevent such licences from being confounded with a dispensation, and on the other, to remove all doubts that might have been entertained of their validity.

ACCORDINGLY, it is enacted by the 7 and 8 W. 3, c. 37, for the purpose of encouraging learning, and enabling such as should be so disposed, the more easily to endow new colleges and schools, or to increase the revenues of

(*a*) Vid. Co. Lit. 99. 2.

(*b*) F. N. B. 222. D.

(*c*) The time of H. 8.

such

such as were already endowed, that the King, his heirs and successors, might grant in such cases as they thought proper, to any person or persons, bodies politic or corporate, their heirs and successors, licence to alienate in mortmain, and also to purchase, acquire, take, and hold in mortmain, in perpetuity or otherwise, any lands, tenements, rents, or hereditaments whatever, of *whomsoever* the same should be holden; and that *no* forfeiture should be incurred by reason of such alienation or acquisition.

SINCE this statute, writs of *ad quod damnum* have not been usual on granting licences to alienate in mortmain (*a*).

BETWEEN the time of Edward the first and Richard the second, it had become a common practice with *religious* persons, parsons, vicars, and other *spiritual* persons, to enter, by the assent of the tenants, into lands which adjoined to their churches, to convert them into church yards, and to consecrate them for burying places, by virtue of bulls from the pope, without licence from the King or the chief lords.—To put a check to this practice, which it seems had become a very serious evil, it was declared by the 15 Rich. 2, c. 5, that it was manifestly within the statute of mortmain.

THE ecclesiastics had also, in order further to elude the former statutes, invented, or adopted from the Roman law, a distinction between the possession of land, and the use or beneficial interest, and had procured many to be infeoffed, to the use of religious houses or other spiritual persons, of houses, lands, advowsons, and the like; and the clerical chancellors had assumed a power of compelling the feoffees to perform the trust which had been reposed in them; by which means, the same inconveniencies were soon felt by the King and the lords, which would have resulted from a

(*a*) Notes to Hargrave and Butler's Co. Lit. 100. b.

direct

direct alienation in mortmain. To remedy this abuse, it was enacted by the same statute, 15 R. 2, c. 5, that, within a limited time, all those who were then possessed by feoffment, or by any other means, of lands and tenements, fees, advowsons, or possessions of any other kind whatever, to the use of *religious* people, or other *spiritual* persons, should either regularly convey them in mortmain, by the licence of the King and of other lords, or that they should, within the same time limited, sell them to some other use, under the penalty of their being forfeited to the King and to the lords respectively, according to the provisions of the statute *de religiosis* (a). And, under the same penalty, it was further enacted, that from thenceforth no such purchase should be made, so that such *religious* houses or other *spiritual* persons should enjoy the profits.

ALL the statutes of mortmain hitherto made, relate only to *ecclesiastical* corporations; which affords one strong presumption, if direct proof were wanting, that *civil* corporations were of much later origin than the *ecclesiastical*. The former began now, however, to attract the public attention, and the same inconveniencies to be felt from the appropriation of land or tenements by them as by the latter.

IT was therefore enacted by the same statute, 15 R. 2, c. 5, that it should extend to lands, tenements, fees, advowsons, and other possessions, purchased or to be purchased to the use of guilds or fraternities; and, "because mayors, bailiffs, and commons of cities, boroughs, and other towns which had perpetual commonalty, and others who had perpetual offices, were as perpetual as people of religion," it was enacted that these should not purchase to them, and to their commons, or office, under the penalty

(a) 7 Ed. 1, ft. 2.

mentioned

mentioned in the same statute *de religiosis*; and that others should not take to their use, under the same penalty.

AND to remedy some inconveniencies which had been felt by parishioners from the appropriation of benefices by religious houses, it was provided by the next chapter (*b*) of the same statute, that in every licence for the future, to be made in chancery for the appropriation of any parish church, it should be expressly mentioned, that the diocesan of the place should appoint, according to the value of the church, a convenient sum of money to be paid and distributed yearly, of the fruits and profits of the same church, by those to whom the appropriation was made, and their successors, to the poor parishioners; and that the vicar should be well and sufficiently endowed.

THE next statute we meet with, which seems to have some relation to the statutes of mortmain, is the 21 H. 8, c. 6, f. 5, by which it is provided that parsons, vicars, curates, parish priests, and other spiritual persons, might take and receive any sum of money, or other thing, which by any person dying should happen to be disposed, given, or bequeathed to them, or any of them, or to the high altar of the church.

BUT this is not properly an exemption from the penalty of the statutes of mortmain, because the property permitted to be taken is personal, and cannot go in succession in the case of a sole corporation. It is rather a provision against the supposed consequence, from the restraint imposed in the preceding part of the statute, on the claim of mortuaries or corse presents.

BY the preamble of the statute 23 H. 8, c. 10, it appears that it had become a frequent practice to convey by feoffment, fine, recovery, and other assurances; manors, lands,

(b) 15 R. 2, c. 6.

tenements,

tenements, and hereditaments, in trust to the use of parish churches, chapels, churchwardens, guilds, fraternities, companies, or brotherhoods, erected from devotion, or by common assent of the people without incorporation, or for the maintenance of perpetual obits, or for the continual service of a priest for ever, or for the long periods of sixty or eighty years.

THE statute of Richard the second, it was supposed, extended only to bodies formally incorporated, or considered as legitimate corporations; but it being conceived that the same or similar inconveniencies resulted from conveyances to the use of such bodies, as from alienations in mortmain, it was by the present statute enacted, that "all conveyances to such and other similar uses, should, for the future, be utterly void; and that the provisions of this statute might not be eluded by any collateral assurance, it was further enacted, that if any one should bind his heirs or successors, or any other person or persons, to suffer such uses to endure and continue, under the penalty of losing other lands, tenements, or hereditaments, or any thing else; or should attempt or devise by any colour, craft, or means, to make such uses prevail, against the meaning of the act, such penalty, craft, or colour, should be utterly void; and that the statute should always be expounded as beneficially as possible for the avoidance of such uses.

It was, however, provided, that any one seised of any manors, lands, tenements, or hereditaments to his own proper use, or having feoffees, recoverors, or conusees to his use, might create any of the uses above specified, in the same manner as he might have done before the making of the act, on condition that they should not be made to continue beyond the term of twenty years from the time of their creation.

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IT was also provided that the statute should not affect any good and lawful authority by ancient custom in cities and towns corporate, to devise in mortmain lands, tenements, and hereditaments, within the same cities and towns corporate.

THE statutes of the 32d and 34th H. 8. (a) commonly called the statutes of wills, give free liberty to every person having a sole estate in fee simple, of any manors, &c. "to give, dispose, will, or devise, to any person or persons, *except to bodies politic and corporate*, by his last will and testament in writing, or otherwise by any acts lawfully executed in his life-time, all his manors, &c. at his own free will and pleasure, any law, statute, custom, or other thing, theretofore had, made, or used, to the contrary notwithstanding."

BECAUSE bodies politic and corporate are *alone* excepted in these statutes, it has been argued, that bodies of men not incorporated were tacitly included, and therefore the prohibition in the statute of 23 H. 8. was virtually repealed by them (b). Whether this opinion was well or ill founded, however, it is now become immaterial to inquire, because by a subsequent statute (c), all *superstitious* uses are taken away; and it has been expressly decided (d) that the statute was meant to extend to these alone, and not to *such* uses as had for their object the advancement of religion, the promotion of learning, or works of charity, or any other beneficial public purpose; so that a man might after that statute have given lands to any person and his heirs for the finding of a preacher, maintenance of a school, the relief and comfort of maimed soldiers, the sus-

(a) 32 H. 8, c. 1. and 34 H. 8, c. 5.

(b) 1 Co. 25. a. Porter's case.

(c) 1 Ed. 6, c. 14.

(d) 1 Co. 25. b.

tenance

tenance of the poor, reparation of churches, highways, bridges, caufeways, difcharging the poor inhabitants of a town of common charges; for making a flock for poor labourers in hufbandry, and poor apprentices, and for the marriage of poor virgins, or for any other *charitable* ufes: and this decifion is ftrengthened by the preamble of the ftatutes 1 Ed. 6, c. 14. and 43 El. c. 4. which clearly recognize the legality of donations to fuch ufes.

THIS general liberty, however, had produced many of the political inconveniencies againft which it was the object of the ftatutes of mortmain to guard; particularly from the improvident difpofition of property to a very confiderable extent, made by many perfons on their deathbeds to *charitable* ufes to take place after their deaths: in the courfe of time, therefore, it became an object of policy with the legiflature to throw fome difficulties in the way of fuch benefactions.

IT was therefore enacted (a), that after the 24th day of June, 1736, no manors, lands, tenements, rents, advowfons, or other hereditaments, corporeal or incorporeal, nor any fum or fums of money, goods, chattels, ftocks in the public funds, fecurities for money, or any other perfonal eftate, *to be laid out or difpofed of in the purchafe of any lands, tenements, or hereditaments*, fhould be given, granted, aliened, limited, releafed, transferred, affigned, or appointed, or any way conveyed or fettled to or upon any perfon or perfons, *bodies politic or corporate*, or otherwife, for any eftate or intereft whatever, or any way charged or incumbered by any perfon or perfons whatever, in *truff*, or for the benefit of any *charitable* ufes; unlefs under thefe reftrictions, That in all cafes, except that of ftocks in the public funds, fuch gift, conveyance, appoint-

(a) 9 G. 2, c. 36.

ment, or settlement, should be made, by deed indented, sealed and delivered in the presence of two or more credible witnesses, twelve calendar months at least before the death of the donor or grantor, including the days of the execution and death, and that the deed should be inrolled in the Court of Chancery within six months after the execution: and in the case of stocks, that they should be transferred in the public books, usually kept for the transfer of stocks, six calendar months at least before the death of the donor or grantor, including the days of the transfer and death; and that every such gift should be made to take effect in *possession* for the charitable use intended, immediately from the making of it, and without any power of revocation, reservation, trust, condition, limitation, clause, or agreement whatever, for the benefit of the donor or grantor, or of any person or persons claiming under him (*a*), and that every gift, &c. made in any other manner or form should be absolutely void (*b*).

FROM the manner in which this act is penned, it is apparent, that the restrictions imposed by it were intended to be confined to the case of a *voluntary* gift for *charitable* uses; but in order to prevent all doubts on that subject, it was expressly provided, that nothing relating to the sealing and delivering of any deed or deeds twelve calendar months, or to the transfer of any stock six calendar months before the death of the grantor, should extend to any purchase of any estate or interest in lands, tenements, or hereditaments, or to the transfer of any stock, to be made really and *bonâ fide* for a full and valuable consideration actually paid, at or before the making of such conveyance or transfer, without fraud or collusion (*c*).

(*a*) S. 1. (*b*) S. 3. (*c*) S. 2.

IT is also manifest that money, goods, chattels, stocks in the public funds, securities for money, or any other *personal estate*, if not directed to be laid out in the purchase of lands, tenements, or hereditaments, may, notwithstanding this statute, be given in *trust*, or for the benefit of any *charitable uses*, without the restrictions therein mentioned.

IT is equally clear, that *real* as well as *personal* property, may be given either by deed or by will to any *corporation*, as well as to private persons, if not given in *trust* or for the benefit of *charitable uses*, in the same manner as they might have been before this statute.

IT is also provided by an express clause (*a*), that this act should not extend to make void the disposition of any lands, tenements, or hereditaments, or of personal estate, to be laid out in the purchase of any lands, tenements, or hereditaments, though not made according to the directions of the act, to or in trust for either of the two universities, or any of the colleges within either of them, or the colleges of Eton, Winchester, or Westminster, for the better support and maintenance of the scholars *only* upon the foundation of the three latter; but, that no college should, by virtue of this exemption, be enabled to hold or enjoy more advowsons than should be equal in number to the moiety of the fellows or students on its foundation, exclusively of the advowsons annexed to its headship (*b*).

THOUGH bodies politic and corporate are expressly excepted from the statute of wills, and are therefore incapable of taking *directly* by will; yet it has been held, that they were not, *by means of that exception*, rendered *totally* incapable of taking the benefit of a devise made in their favour; for that if a man devised that his executors should, by the advice of learned counsel, convey his lands

(a) S. 4.

(b) S. 5.

H 3

to

to any corporation spiritual or temporal, this was not against the statutes, because it might be lawfully done by licence to alienate in mortmain and writ of *ad quod damnum* (a).

AFTER the dissolution of monastries under Henry 8 (b), though the policy of the next popish successor affected to grant a security to those who had obtained grants of abbey lands, yet, in order to regain so much of them as the zeal or timidity of their possessors might induce them to part with, the statutes of mortmain, as far as they related to spiritual corporations, were suspended for twenty years, and free liberty was given (c) during that period, to those who were seised in fee simple in possession, remainder, or reversion in their own right, of any manors, lands, tenements, parsonages, tithes, portions, pensions, or other hereditaments, not being copyheld, to convey them by feoffment, grant, or any other assurance, or to bequeath them, by last will and testament in writing, to any spiritual body politic or corporate then erected or founded, or thereafter to be erected or founded, without any licence of mortmain or writ of *ad quod damnum*.

It has also been thought necessary at several subsequent periods, in particular cases, to a certain extent to dispense with these restraining statutes. Thus by the statute of 39 El. c. 5, all corporations established by virtue of that act (d), are enabled to take, without licence in mortmain or writ of *ad quod damnum*, manors, lands, tenements, and hereditaments, being freehold, so that the same should not exceed the yearly value of 200l. above all charges and reprises, to any one such corporation.

(a) Porter's case, 1 Co. 25. a.

(b) Vid. 28 H. 8, c. 28. 31 H. 8, c. 13. (c) 1 and 2 P. and M. c. 8. f. 51, 52. 2 Bl. Com. 273. (d) Vid. ante, page 57 et seq.

So,

So, the corporations established by the 13 and 14 of Charles the second, c. 12, for the relief of the poor, are enabled by the same act, without licence of mortmain, to purchase or receive any lands, tenements, or hereditaments, not exceeding the yearly value of 3000l.

AND by the statute 17 Car. 2, c. 3, made for uniting churches in cities and towns corporate, it is provided (*a*) that every owner or proprietor of any impropriation, tithes, or portion of tithes, in any parish or chapelry within England or Wales, may annex the same, or any part thereof, to the parsonage or vicarage of the parish church or chapel where they lie, or settle the same in trust for the benefit of the parsonage or vicarage, or of the curates there successively, where the parsonage is impropriate and no vicar endowed, without any licence in mortmain.

AND if the settled maintenance of parsonages, vicarages, churches, and chapels, united by virtue of the same act, or of any *other* parsonage or vicarage with cure, within England or Wales, should not amount to the full sum of 100l. *per annum*, above all charges and reprises; then the parson, vicar, and incumbent, and his successors, are enabled (*b*), without licence in mortmain, to take, receive, and purchase lands, tenements, rents, tithes, or other hereditaments, to him and his successors.

It may be observed, that none of the statutes of mortmain limit the *extent* to which a corporation may purchase lands; but that the object of all of them is to prevent a corporation from making any purchase without previous licence; with the King's licence therefore, as the law at present stands, corporations may, *in general*, purchase

(*a*) S. 7. (*b*) S. 8. Vid. st. 29 Car. 2, c. 8, an act made to give effect to the provisions of the former statute.

lands to any extent they please: but when corporations are erected by act of parliament, for some particular purpose, it is frequently thought prudent to prohibit them, by an express clause, from purchasing lands beyond a certain annual value: thus, each of the two companies (*a*) for insuring ships, erected by statute 6 G. 1, c. 18, have by a particular clause power to purchase lands, messuages, or tenements, not *exceeding* the value of 1000*l.* per annum. So, the East India company, by st. 2 G. 2, c. 14. s. 14, are restrained from enjoying or possessing, at any one time, any messuages, lands, rents, tenements, or hereditaments, in Great Britain, exceeding in the whole the yearly value of ten thousand pounds.—Many other examples might be given of the same kind,

It is likewise to be observed, that the statutes of mortmain make no mention of personal property, and therefore the power of corporations aggregate, in general, to take such property, remains unlimited: but many particular corporations, established by act of parliament for some particular purpose, are limited in this respect as well as in their power to purchase lands.

If a feoffment or grant be made by deed, to a mayor and commonalty, or to a dean and chapter, or to any other corporation aggregate of many persons *capable*, they have a fee simple without the word “successors,” because in judgment of law they never die (*b*).

BUT, according to Lord Coke, land given to a corporation aggregate of one person *capable*, and many *incapable*, as, to an abbot and convent, or prior and convent, without the word “successors,” would not have passed in fee

(*a*) The governor and company of the Royal Exchange assurance; and governor and company of the London assurance.

(*b*) Co. Lit. 9. b.

simple,

simple, but would have enured to them only during the life of the abbot or prior (*a*); but this opinion does not seem to be supported by the authorities, nor by the reason of the thing: not by the authorities; for there are cases in the year books which justify the contrary conclusion: thus, it is said (*b*), that an annuity granted to the abbot of Battle and his convent, extends to his successors, and their successors of the house, without the word "successors" in the grant.—So, if an abbot had made a lease with reservation of rent, expressed "rendering rent to us," it would have enured to his successor (*c*), and Lord Hale, citing the authority of the former case, says, "Gift to abbot and monks passeth fee simple" (*d*)—not by the reason of the thing; for an abbot, as an individual, was considered as dead in law, and could take only in his *corporate* capacity as head of his house, and in trust for them; and therefore a gift to him and his convent, must have been intended to go in succession (*e*).

BUT a gift to a corporation sole, as to a bishop or parson, without the word "successors," in general passes nothing but for life; though a gift to the King, without that word, is a gift in fee simple, because the King never dies (*f*). And in ancient times a gift to a *sole* corporation, or to a corporation aggregate of one person *capable* and many persons *incapable*, in frankalmoign, would have passed a fee without the word "successors," because the word "frankalmoign" implied a gift in fee, of itself (*g*).

WITH respect to the force of the word "successors," a distinction is made between the case where there is suc-

(*a*) Co. Lit. 94. b. (*b*) 11 H. 4, 84. b. (*c*) 20 H. 6, 8.

(*d*) Vid. Hargrave and Butler's notes to Co. Lit. 94. b.

(*e*) Vid. 9 H. 5, 9. a. Bro. Corpor. 20. (*f*) Co. Lit. 9. b.

(*g*) Co. Lit. 9. b. 94. b.

cession

cession in one *with* several others, and that where there is succession in one person, in *right* of several others: thus if a man be bound in an obligation to a dean and his successors, the word "successors" has no effect, because, as a *sole* corporation, he cannot take a chattel in succession; and it does not appear to be the intention of the parties that it should go to the dean in conjunction with the chapter; but it was otherwise of an obligation made to an abbot or prior, and his successors, without mentioning the convent; for this shall enure to the successors, because none of the other monks have capacity to take (a).

It is a general rule, that where a corporation aggregate has, by its constitution, a head, a grant to that corporation in the vacancy of the headship is void; thus if a corporation consists of mayor and commonalty, and a grant be made to it while there is no mayor, or a grant be made to a corporation of dean and chapter when there is no dean; in either case the grant is void: and the reason is, that without the head the corporation is incomplete, and the only act it can do, during the vacancy, is to elect another (b). But this rule is to be understood only of an *immediate* grant; for if during the vacation of the abbacy of Dale, a lease for life, or a gift in tail had been made, the remainder to the abbot of Dale, and his successors, this remainder would have been good, if an abbot had been chosen during the continuance of the particular estate. So, if there be mayor and commonalty of D. and the mayor die, a grant made to the mayor and commonalty of D. is void; but if a lease for life be made, with remainder to the mayor and commonalty of D. the remain-

(a) 20 Ed. 4, 2.

(b) 13 Ed. 4, 8. 18 Ed. 4, 8. Bro. Corpor. 58, 59.

der

der will be good, if, during the continuance of the particular estate, a new mayor be elected (*a*).

KING Edward the third newly founded a priory, and granted to the monks that they might choose a prior; and before the prior was chosen, W. made a lease to A. for life, with remainder to the prior and convent; and to a *scire facias* brought against A. he pleaded, that W. was seised in fee, and leased to A. the remainder to the prior and convent, and, because there was not yet a prior, he prayed aid of the King, in whom the right was till a prior was chosen; the aid was granted, and a *procedendo* came; then the defendant shewed that after the aid granted a prior was chosen, in whom the remainder then vested, and he prayed aid of the prior, but was refused, *because he had aid before*, "which proves," says Lord Coke, "that the remainder in such case is good" (*b*).

BUT a grant made in remainder to a corporation, when no such corporation exists, is void, though such a corporation be erected, before the expiration of the particular estate (*c*).

ON the principle just stated, a devise of land, by the master or president of a college to the house of which he is the head, is void; because the devise must take effect at the instant of the death of the deviser, and at that moment the corporation is incomplete (*d*).

A GRANT may be made to a corporation by the same charter by which it is erected (*e*).

HAVING considered the capacity of corporations to take property, we are naturally led, in the next place, to treat of the power they have to *dispose* of it.

(*a*) 1 Inst. 264. a.

(*b*) 10 Co. 31. b.

(*c*) Vid. Hob. 33.

(*d*) Dalison, 31.

(*e*) 2 Ed. 6. Bro. Corpor. 89. 10 Co. 74 b.

*Right of
All civil
corporations
to alienate
their property*

ALL civil corporations, such as the corporations of mayor and commonalty, bailiffs and burgesses of a town, or the corporate companies of trades in cities and towns, and all corporations established by act of parliament for some specific purpose, unless expressly restrained by the act which establishes them, or by some subsequent act, have, and always have had an unlimited controul over their respective properties, and may alienate in fee, or make what estates they please for years, for life, or in tail, as fully as any individual may do with respect to his own property (a).

AT COMMON LAW, the master, fellows, and scholars of a college; the master or warden of an hospital; an abbot or prior and his convent, had the same unlimited controul over the property of their respective houses; and a dean and chapter in their aggregate capacity; a bishop, a dean, an arch-deacon, a prebendary or canon, a parson or vicar, each in his capacity as a sole corporation, might, with the concurrence of such persons as had an interest in the disposition of the respective possessions, have made any grant whatever (b).

THE bishop, the dean and chapter, composed of prebendaries or canons, and all other persons belonging to a cathedral church, at first held their possessions together in gross; but in order to avoid confusion and promote better order, or for other reasons, it was afterwards thought proper to divide them; and part was assigned to the bishop and his successors, and other part to the dean and chapter to hold by themselves respectively: the possessions of the dean and chapter, too, are for the most part divided, the dean having one part alone in right of his deanery, and

(a) Vid. 1 Sid. 162.

(b) Co. Lit. 44. a. 300, 301. 1 Bur. 221.—Vid. Madox Firma Burgi, for examples c. 1. f. 4.

each

each particular prebendary or canon a certain part in right of his prebend or canonry. The residue belongs to the dean and chapter in their aggregate capacity (*a*).

WHEN all the possessions of the cathedral church were held in gross, the bishop assigned to each of the prebendaries or canons, a certain maintenance out of the common stock; and for that reason, after the division of their possessions, he was considered as patron of all the prebends as of common right. The King, however, is at this day patron of most of the great prebends (*b*).

To every grant by the dean and chapter, the assent of the bishop was necessary; and to every grant by the bishop, the consent of the dean and chapter; because the fee was not in the bishop alone, of the possessions of the bishopric, but in the bishop together with the dean and chapter; and the fee was not in the dean and chapter alone, of the possessions of the dean and chapter, but in the dean and chapter together with the bishop.

SOME other sole corporations ecclesiastic, such as prebendary, parson, and vicar, have only a freehold in their possessions, the fee being in abeyance; and therefore not only the consent of the bishop as ordinary, but also the consent of the patron was necessary to render their grants good against the successor; and the patron who gave his consent must have been patron in fee; for if he was only tenant for life or in tail, his consent would not have bound any successor, who did not come to the benefice during his life; and, in the case of a parson or vicar, where the bishop was patron, the consent of the bishop was not sufficient without that of the dean and chapter; when he consented as ordinary only, they had no controul over his act;

(*a*) Vid. the case of the dean and chapter of Norwich, 3 Co. 75. and Burn's Ecc. Law, tit. Deans and Chapters. (*b*) Ibid.

but,

but, when he was patron, they had an interest in what he did in that character: the advowson or patronage was parcel of the possessions of the bishopric; and therefore, without the dean and chapter, he could not make the grant good after the death of the incumbent, but during his own life (*a*), or till he was translated to another bishopric (*b*).

It is said, "that at common law, the dean might have passed the possessions of his deanery, with the consent of the chapter *only*, without that of the bishop; but that a prebendary could not alienate the possessions of his prebend, without the consent of the bishop as well as of the dean and chapter (*c*); because in the latter case, the bishop was patron:" but it is apprehended, that in the case of the dean as well as of the prebendary his consent was necessary in the character of ordinary.

In the case where the bishop was patron of the prebend, it is certain that the consent of the chapter was necessary as well as that of the bishop, on the same principle that it was necessary where the bishop was patron of an advowson to a common benefice; it is also certain (*d*) that their consent was necessary, where he was *not* patron, because the whole chapter have an interest in the possessions of each particular prebendary; and in most of the cases reported, if not in all, of grants by prebendaries, the con-

(*a*) Co. Lit. 300. b.

(*b*) Vid. Dyer, 356, pl. 42. where it is said, "that where the bishop was patron of a church, the confirmation of the bishop alone, without that of the dean and chapter, was sufficient at *least* during the life of the bishop, though he was translated to another bishopric," which seems contrary to the reason of the thing.

(*c*) Jenk. 235.

(*d*) Vid. the writ *de assensu capituli*, F. N. B. 194 K.

sent

sent of the chapter appears to have been actually given where such grants were held good (a).

WHERE

(a) As the law on this subject is now altered, I am satisfied with giving, in the text, a summary of what it was; but for the satisfaction of some readers I shall insert, by way of note, the principal cases I have been able to collect from the old reports.—By the opinion of the greater number (Popham, C. J. and Fenner, J.) against Gawdy, J. “a lease of the prebendal lands by a prebendary is good *only* for the life of the lessor, although confirmed by the dean and chapter,” Pop. 120, 121. So that by their opinion the confirmation of the bishop was necessary.—“Where a bishop was *patron* of a provostship in a cathedral church, and the provost made a lease confirmed by the dean and chapter, but not confirmed by the bishop, the lease was held void against the successor of the provost.” Benl. 81. pl. 126.

A prebendary in the cathedral church of Chichester made a lease for years by indenture, in the beginning of which it was said, “that he, with the assent and consent of the reverend father Robert bishop of Chichester, and the dean and chapter of the same church,” and in the conclusion it was said, “in witness whereof the parties aforesaid to these presents have interchangeably set their seals,” and the seal and name of the prebendary, and also the seal and name of the bishop, and the chapter seal were annexed to the lease, without any words of confirmation, or assent expressed by the chapter: the question was, whether this lease should bind the successor of the prebendary: but in answer we have only a quære. Dyer, 106. pl. 21.

A prebendary of the cathedral church of Sarum, by deed indented demised a rectory parcel of his prebend for seventy years; the bishop confirmed the demise for fifty-one years, and the dean and chapter confirmed it as to the said fifty-one years and not more; it was adjudged that these confirmations were good, though severally made and only for part of the term; and it being questioned whether the confirmation rendered the lease good for the *whole* term, it was held by all the justices that it did. P. 38 El. P. 16 El. 1 Anderf. 47. said to be doubted, Dyer 338. pl. 43. In Foord's case, 5 Co. 81, it is said, that the bishop, patron of the said prebendary, and the dean and chapter by their several instruments, under their common seal, reciting the said lease, confirmed *dimissionem predictam in forma predicta factam pro termino*

WHERE there were two deans and chapters to a bishop, and the bishop made a lease of lands belonging to the bishopric, both must have given their consent, otherwise the lease would not have bound the successor of the bishop (*a*): but the consent of the King, who is founder and patron of all bishoprics, was not necessary (*b*). And, though there were two chapters, yet if the bishop had the nomination to any of the prebends, he might have granted

termino 51 annorum tantum, et non ultra. And afterwards the same prebendary made another lease, to begin after determination of the first lease—and whether the first lease should continue *after* the fifty-one years, was the question. And it was adjudged that the said confirmation, as this case stood, should extend to the whole term, for when the bishop and the dean and chapter, reciting the said demise for seventy years, had confirmed *dimissionem prædictæ in forma prædictæ*, these words “*pro termino 51 annorum et non ultra*” came too late, and the lease being for seventy years, it was repugnant to confirm *dimissionem prædictæ* for fifty-one years, for it was the same as if they had confirmed the lease and term of seventy years for fifty-one years. But if the dean and chapter had recited the lease, and had confirmed the *land* to the lessee for fifty-one years, that would have been good, for then there would not be any such repugnancy in the confirmation.—Parson makes a lease of his glebe for term of years, to commence after his death, or makes a grant of a rent charge in such form: patron and ordinary confirm. Semble the successor bound. Dyer, 69. pl. 30.

Parson made a lease of his rectory for forty years, confirmed by the treasurer of the church of York, who was patron in right of his treasurer'ship; the bishop of Winchester, who was ordinary, confirmed the lease in the life-time of the lessor: before confirmation the treasurer had granted the next advowson *pro hac vice*; the lessor died; the grantee presented his clerk; and then the treasurer, with the assent of the archbishop of York and the dean and chapter, aliened the advowson in fee: *quære*, says Dyer, 72, pl. 5, whether the new incumbent shall avoid the residue of the lease?

(*a*) 1 Leon. 234. Co. Lit. 301. a. Dyer, 282. pl. 26.

(*b*) Co. Lit. 301. a.

over

over the advowson or presentation by the confirmation of the dean and chapter alone to which the prebend belonged (*a*). So if one of the chapters had been dissolved, the confirmation of the other would have been sufficient (*b*).

It was immaterial at what time the consent required was given, provided it was before the death of the grantor; and it might be by licence before, as well as by confirmation after the grant; therefore, if the patron and ordinary had granted leave to a parson to grant an annuity or rent-charge, and the parson had granted it and died, the successor could not have avoided it (*c*). And the consent might have been given by the same deed by which the grant was made. Thus, if a parson had made a lease for years, and the patron and ordinary had put their hands and seals to it, this would have bound the successor (*d*).

A MASTER of an hospital or of a college might have sole possessions distinct from those of the house, in the same manner as the dean; and the assent of the brethren and

(*a*) Dyer, 194. pl. 33.

(*b*) The deans and chapters of Christchurch and St. Patrick's both belonged to the see of the archbishop of Dublin, and by their several deeds and seals they were accustomed to confirm the leases of the archbishop, though Christchurch was known to be the oldest chapter of the see: the dean and chapter of St. Patrick's, by their chapter seal, surrendered to the King, after 26 H. 8. 1. his heirs and successors, their church, all their houses, lands, and possessions, without the licence or consent of the archbishop, who was their ordinary, and patron of the greater part of their prebends. Queen Mary revived this chapter, but between the surrender and revival, a lease made by the archbishop was confirmed by the dean and chapter of Christchurch. The judges in Ireland were divided, though the greater part of them were of opinion that this lease should bind the successor.—The opinion of the English judges was, that the lease was good. Dyer, 282, pl. 26. Jenk. 235.

(*c*) Dyer, 40. Co. Lit. 300. a.

(*d*) Dyer, *ibid*.

sisters, or of the fellows and scholars, to the disposition of such sole possessions, was equally requisite in these cases respectively as that of the chapter in the other (*a*).

THE case of an abbot or prior differed from that of a dean and of a master of an hospital or of a college; for the abbot or prior could have no possessions distinct from those of the house (*b*); and with respect to the possessions of the house, the whole estate, to certain purposes, was supposed to be vested in him; whereas in the cases of the master of an hospital, or of a college and a dean, the seisin of the joint possessions of the house, was jointly in the master and his brethren and sisters, the master, fellows, and scholars, and in the dean and chapter respectively (*c*).

THERE was, therefore, a difference in the manner in which conveyances were made of the possessions of these several houses: a grant or lease of the possessions of an abbey or priory, was regularly made by the abbot or prior, with the *assent* of the convent, because, the convent being composed of persons dead in law, could not with propriety be said to make a lease or grant; though if it had been said that the abbot *and* convent made the grant or lease, that would not have been a material objection (*d*).

BUT if a lease was to be made of any thing in which the dean and chapter were seised as dean and chapter, it must have been made by the dean and chapter *jointly*, and not by the dean with the *assent* of the chapter: but if it had been

(*a*) Vid. Co. Lit. 347. a.

(*b*) This is meant to apply only to their capacity as heads of their houses; for an abbot or prior, as well as any of their monks, might have been a prebendary, &c. and consequently have distinct possessions in that capacity. Vid. Registrum Brevium Originalium. 230. b.—and ante, page 21.

(*c*) Vid. Lit. f. 655, 656, 657.

(*d*) Plow. 199. Dyer, 40. pl. 1—97. pl. 45. Godbolt, 211.

of a thing belonging to the dean alone in his corporate capacity distinct from the chapter, it might have been by the dean by the *assent* of the chapter (*a*).

AND if the dean alone, in right of himself and the chapter, had made a lease for years, and the chapter by themselves had afterwards confirmed it; this would not have been good, because they are an entire body, and their acts cannot be severed; but it would have been otherwise, if, after the lease, the dean and chapter had jointly confirmed it; for then it would have been a new lease (*b*). What is said here of dean and chapter applies equally to the master of an hospital and his brethren and sisters; and to the master, fellows, and scholars of a college.

AND, wherever consent was required in the case of a sole corporation, it was only necessary to bind the successor; for without consent the grantor or lessor himself was bound during his life,—and a grant or lease by dean and chapter of the possessions of the chapter, without consent of the bishop, was good during the life of the dean who granted or demised.

WHERE any alienation, grant, or demise, was made without the consent of the proper parties, the common law had provided a remedy for the successor: in the case of any of those sole corporations which are supposed to have in law only an estate for *life* in their possessions, as a parson, vicar, or prebendary, such alienation, grant, or demise, without consent, was merely void against the successor, and he might enter into the land; and an alienation by the head of a corporation aggregate of many persons capable, of lands belonging to the corporation of which he was the head, without their consent was also void, and the successor might enter: this was the case of

(*a*) Dyer, 40. pl. 1. . (*b*) Id. ibid. 29 H. 8, cited Leon. 176.

an alienation of any of the the chapter lands by the dean without the consent of the chapter, or of the lands of an hospital or college, by the master without the consent of the house, in fee, in tail, or for life: but an alienation by a sole corporation of land of which the fee was supposed to be in him, was not merely void, but operated as a discontinuance, and the successor could not enter, but was put to his writ of entry; this was the case of an alienation, by a bishop, of lands belonging to his bishopric; by a dean, of lands belonging to his deanery distinct from those of the chapter; and by the master or warden of a college or hospital, of lands of which he had the sole and distinct possession: it was also the case of an alienation by an abbot or prior without consent of the convent; for though he had no distinct possessions, yet the fee was vested in him in right of his house, and not of the house jointly with him (a).

THIS writ of entry was called a writ of entry *sine assensu capituli*, of which there are various forms in the register suited to the different cases to which it was to be applied (b).

IN the case of *religious houses*, these restraints were found insufficient to prevent the defalcation of the revenues: It was therefore enacted by the statute of Westminster the second (c), That if abbots, priors, wardens of hospitals, and other *religious houses* founded by the King, or by his progenitors, from thenceforth should alienate the lands *given* to their houses by him or his progenitors, the land should be taken into the King's hands, and holden at his will, and that the purchaser should lose the recovery as well of the

(a) Vid. Co. Lit. 325 b. 341 b. 342 a. 346 a. b.

(b) Vid. Reg. Brev. Orig. 230, and F. N. B. 194. K.

(c) 13 Ed. 1, c. 41.

lands

lands as of the money he had paid for them; and that, if the house had been founded by an earl, baron, or other person, he from whom, or from whose ancestor the land so alienated was *given*, should have a writ to recover the same land in demesne. The writ was called a writ *contra formam collationis*.

THOUGH the words of this statute, in that branch which relates to the King, be only "that the lands shall be taken into the King's hands," yet he could not enter without an office found, and a *scire facias* grounded on it, against the holder of the land (*a*).

THE alienation must have been with the consent of the convent or house, and not merely by the abbot or other head; for in the latter case, the successor might recover the land, by the writ of entry *sine assensu capituli* before mentioned (*b*). And the writ *contra formam collationis* lay only of lands given in frankalmoigne; for the words of it, as prescribed by the statute, apply only to such a case; and therefore, after the statute of *quia emptores*, it became of little use; because, after that statute, land could not be given to an abbot or prior to hold in frankalmoigne, as all alienations were then to hold of the lord paramount of whom the tenant held before, unless the King gave a licence to alienate in mortmain to hold by that tenure (*c*).

THE writ was not confined to the founder and his heirs, for land given at the time of the foundation, but extended to land given by any donor at any subsequent time: but it lay only in favour of the donor and his heirs, and could not be sued by any stranger. If he who was intitled to the writ at the time of the alienation, died without suing

(*a*) F. N. B. 211 G. 2 Inst. 458.

(*b*) F. N. B. 211 D. 2 Inst. 458.

(*c*) 2 Inst. 459. F. N. B. 211 I.

it, then his heir might sue it, and it lay against the successor on an alienation made by his predecessor, and on an alienation for life, or in tail, as well as on an alienation in fee (a).

THE writ was sued against the abbot who alienated, or his successor, and not against the tenant of the land; and after recovery against the abbot or his successor, the course was to sue a *scire facias* against the tenant of the freehold of the land, who might plead in bar, any matter which might prove that the demandant had no title (b).

By statute 32 H. 8, c. 28, it is enacted, "That all leases thereafter to be made of any manors, lands, tenements, or other hereditaments, by writing, indented under seal for term of years or for term of life, by any person or persons — having any estate — in fee simple — in the right of their *churches* — shall be good and effectual in the law against the lessors — and their successors, according to such estate as is comprised and specified in every such indenture of lease, in like manner and form as the same should have been, if the lessors thereof, and every of them, at the time of the making of such leases, had been lawfully seised of the same lands, tenements, and hereditaments comprised in such indenture, of a good, perfect and pure estate in fee simple thereof, to their own only uses."

BUT it was provided, "That this act should not extend to any leases to be made of any manors, lands, tenements or hereditaments being in the hands of any farmer or farmers, by virtue of any *old* lease, unless the same *old* lease were expired, surrendered or ended, within one year next after the making of the said *new* lease, nor to any grant to be made of any *reversion* of any manors, lands, tenements, or hereditaments, nor to any lease of any manors, lands,

(a) F. N. B. 211 per tot. 2 Inst. 458.

(b) F. N. B. 211 A.
tenements

tenements or hereditaments, which had not *most commonly* been let to farm, or occupied by the farmers thereof, by the space of twenty years next before such lease thereof made; nor to any lease to be made *without impeachment of waste*; nor to any lease to be made above the number of twenty-one years or three lives at the most from the day of making thereof; and that on every such lease, there should be reserved yearly, during the same lease due and payable to the lessors—and their successors to whom the same lands should come after the deaths of the lessors, if no such lease had been thereof made, and to whom the reversion thereof should appertain, according to their estates and interests, so much yearly rent or *more* as had been *most commonly* yielded or paid for the manors, lands, tenements and hereditaments so to be let, within twenty years next before such lease thereof made; and that every such person to whom the reversion of such manors, lands, tenements, or hereditaments, so to be let should appertain, after the death of such lessor———should and might have such like remedy and advantage, to all intents and purposes, against the lessees thereof, their executors and assigns, as the same lessor should or might have had against the same lessees.”

It was also provided, “that this act should not extend to give any liberty or power to any *parson* or *vicar* of any church or vicarage, to make any lease or grant of any of their messuages, lands, tenements, tythes, profits, or hereditaments belonging to their churches or vicarages, otherwise or in any other manner than they might have done before the making of this act.”

THIS statute, from its having enlarged the power of all the persons particularly mentioned in it, has been called the *enabling* statute: The persons on whose account it is

introduced here, are an archbishop or bishop, in right of his archbishopric or bishopric, a dean in respect to his sole possessions in right of his deanery, an archdeacon in right of his archdeaconry, a prebendary in right of his prebend, and the like (*a*). The power which it gives them, is to make such leases as are therein described, under the limitations specified, of their own authority without the concurrence of any other person, so as to bind their successors. This statute was therefore made in favour of the incumbents, and for the protection of their lessees (*b*); and they might still, with the concurrence of the proper parties, have made the same estates they might have done before: but such improvident use was made of this power, that it was at last thought expedient to restrain it, which was accordingly done by a series of statutes made in the reign of Queen Elizabeth, which have for that reason obtained the name of the *disabling* or *restraining* statutes.

By the first of these, statute 1 El. c. 19, §. 5, it is enacted "That all gifts, grants, feoffments, fines, or other conveyance of estates, from the first day of the then present parliament, to be had, made, done or suffered by any archbishop or bishop, of any honours, castles, manors, lands, tenements, or other hereditaments, being parcel of the possessions of his archbishopric or bishopric, or united, or pertaining to any the same archbishopric, or bishoprics, to any person or persons, bodies politic or corporate, **OTHER THAN TO THE QUEEN'S HIGHNESS, HER HEIRS OR SUCCESSORS**, by which any estate or estates should or might pass from the same archbishops or bishops, or any of them, *other than for the term of twenty-one years or three lives*, from such time as any such lease, grant or assurance should begin, and on which the old accustomed yearly rent

(*a*) 1 Inst. 44 b.

(*b*) Id. 45 a.

or

or more should be reserved and payable yearly during the said term of twenty-one years or three lives, should be utterly void and of no effect to all intents, constructions and purposes whatsoever."

It appears from the preceding sections of this act, that the exception in favour of gifts to the Queen was intended in support of the crown; but it was soon turned into an instrument of evasion of the act, many conveyances having been made to the Queen by archbishops and bishops, with an intention to have the estates granted over to private uses; and the abuse became so glaring towards the end of her reign, that it was thought necessary by her successor, "out of his pious regard to the interests of religion," if we may believe lord Coke (*a*), and the preamble of the statute, to enact (*b*) "that every archbishop and bishop, their and every of their successors, should be from and after the end of that session of parliament, for ever wholly and utterly disabled in law, to make, do, levy or suffer any act or acts, thing or things, whereby or by means whereof, any of the said honours, castles, manors, lands, tenements, or hereditaments, or any part of them, or any of them, should or might be alienated, assured, given, granted, demised, charged, or in any sort conveyed to the King, his heirs or successors; and that all alienations, assurances, gifts, grants, leases, charges, and conveyances whatever, from and after the end of that session of parliament, to be done, suffered, or made to the King, his heirs or successors, by any archbishop or bishop, or their or any of their successors, of or out of any of the said possessions, or of or out of any part or parcel of them, or any of them, and all and every confirmation and confirmations of the same,

(*a*) 11 Co. 71. b.

(*b*) 1 Jac. 1. c. 3.

should

should be from the end of that session of parliament, utterly void to all intents, constructions, and purposes."

THE purpose of these statutes was to prevent "archbishops and bishops" from making, even *with* the consent of their chapters, any other estates of the possessions of their sees than such as are described in the statute of the first of Elizabeth.

By the 13th El. c. 10, s. 3, after reciting that long and unreasonable leases made by colleges, deans and chapters, parsons, vicars, and *others having spiritual promotions*, had been the chief causes of the dilapidations and the decay of all spiritual livings and hospitality, and the utter impoverishing of all successors incumbents in the same, "it is enacted, that from thenceforth all leases, gifts, grants, scoffments, conveyances, or estates, to be made, had, done, or suffered by any master and fellows, of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other having any spiritual or ecclesiastical living, or any houses, lands, tythes, tenements, or other hereditaments, being any parcel of the possessions of any such college, cathedral church, chapter, hospital, parsonage, vicarage, or other spiritual promotion, or any way appertaining or belonging to the same, or any of them, to any person or persons, bodies politic or corporate, *other than for the term of twenty-one years, or three lives, from the time when any such lease or grant shall be made, on which the accustomed yearly rent or more shall be reserved, and payable yearly during the said term*, shall be utterly void, and of no effect, to all intents, constructions, and purposes."

AND it is further provided by s. 4, "that nothing in this act shall be taken to make good any lease or other grant to be made, by any such college or collegiate church
within

within either of the universities of Oxford or Cambridge, or elsewhere within the realm of England, for more years than are limited by the private statutes of the same college" (a).

It has been often decided that, though this statute uses only the words "masters and fellows" of any college, yet whether the college be incorporated by that name, or by the name of warden and fellows, warden and scholars, warden, fellows and scholars, or by the name of master, fellows and scholars, or master and scholars, or provost, fellows and scholars, or by any other name of incorporation; and whether the college be temporal for the advancement of liberal arts and sciences, or merely ecclesiastical, or mixed, every such college is within the provisions of this act: and that, though the statute says, "the master or warden of any hospital," yet whether the hospital be incorporated by any other name, or whether it be a sole corporation, or a corporation aggregate of many, it extends to hospitals of all descriptions (b).

By 14 El. c. 11, s. 17, it is enacted, "that neither the former branch of 13 El. c. 10, nor any thing therein contained, should extend to any grant, assurance, or lease of any *houses* belonging to any the persons or bodies politic or corporate aforesaid, nor to any grounds to such *houses* appertaining, which *houses* are situate in any city, borough, town corporate, or market-town, or the suburbs of any of them, but that all such houses and grounds may be granted, demised, and assured, as by the laws of this realm, and the several statutes of the said colleges, cathedral churches, and hospitals, they lawfully might have been be-

(a) This act was continued by 1 Jac. 1, c. 25, and 21 Jac. 1, c. 28, to the end of the next session of parliament, and continued by 1 Car. 1, c. 4.

(b) Vid. 11 Co. 76. a. and 14 El. c. 14.

fore

fore the making of the said statute, or lawfully might be, if the said statute did not exist; so always that such *house* were not the capital or dwelling house used for the habitation of the persons above described, nor have ground, to the same belonging, above the quantity of ten acres."

"PROVIDED, f. 19, that no lease should be permitted to be made, *by the force of this act*, in REVERSION, nor without reserving the accustomed yearly rent at the least, nor without charging the lessee with the reparations, nor for longer term than forty years at the most; and that no houses should be permitted to be alienated, unless, in recompence thereof, there should be before, with, or presently after such alienation, good, lawful, and sufficient assurance made in fee simple absolutely, to such colleges, houses, bodies politic or corporate, and their successors, of lands of as good value, and of as great yearly value at the least, as those which should be so alienated; any law or statute to the contrary notwithstanding."

IT was the intention of the act 13 El. c. 10, to prevent all kinds of leases for more than the periods mentioned in it; but as it did not prohibit in express words a lease in REVERSION, or a CONCURRENT lease, many leases were made to commence at the *expiration* of the lease in being, and many to run during the *time* of the lease in being; as if fifteen years of a twenty-one years lease had elapsed, they would make another term to run along with the first, so that at the *end* of the first, there would be fifteen years of the second to come.—The statute of 18 El. c. 11, after alluding to this practice in the recital, enacts "that all leases thereafter to be made by any of the ecclesiastical, spiritual, or collegiate persons or others," mentioned in the 13th El. "of any of their said ecclesiastical, spiritual, or collegiate lands, tenements, or hereditaments, of which
any

any former lease for years was in being, not to be expired, surrendered, or ended within three years next after the making of any such new lease, should be void, frustrate, and of no effect." And it was further provided by s. 13, "that every bond and covenant thereafter to be made, for renewing or making any lease or leases, contrary to the true intent and meaning of this act, or of the said act made in the 13th year of the Queen, should be utterly void." And by a subsequent statute (*a*), which continues the 13th El. c. 10, "together with all and every explanations, additions, and *alterations* thereof, or thereunto made, by any other statute or statutes since the making thereof," it is further enacted, "that all judgments thereafter to be had, for the intent to have or enjoy any lease contrary to the said statutes, or any of them, should be void, in the same manner as bonds or covenants are appointed to be void which are made for that purpose."

It has been decided (*b*), however, that the statute 18 El. c. 11, did not relate to the 14th El. and that consequently a bond or covenant for renewing or making a lease within a city or town may be enforced.

(*a*) 43 El. c. 9, s. 8.

(*b*) *Crane v. Taylor*, Hob. 269. Crane brought an action of covenant against Taylor, one of the prebendaries of Ely; and the case appeared to be, that Doctor Tindall, dean of Lincoln, and this defendant, and all other the prebendaries, by their special names, had covenanted, jointly and severally, to make a lease of an inn within the city of London; on demurrer the covenant was argued to be void, on the 18th El. but judgment was given in favour of the plaintiff, and the covenant was held good in law, on the principle that it was not within the statute 18 El. for that though the statute 13 El. c. 10, was general against all leases and grants, other than for twenty-one years, or three lives, yet the 14th El. c. 11, enacted that that statute should not extend to houses in cities and towns, but created a new law with respect to them.

BUT it is presumed that this statute of 43 El. c. 9, does extend to the 14th El. The latter makes an *alteration* in 13 El. c. 10, and is therefore one of the statutes intended to be continued, and, by the enacting part, all judgments ———contrary to the *said* statutes, or *any* of them, are rendered void.

By rendering void *all* leases of lands, &c. of which any former lease was in being, not to be expired or surrendered within three years after the making of the new lease, this statute rendered impossible any distinction between *concurrent* leases and leases in *reversion*; but the statute of the 14th of Elizabeth only prohibiting, in direct terms, leases in *reversion*, some doubt was left whether, in cases within that statute, *concurrent* leases were also void (a). In their effects,

(a) John abbot of Westminster and the convent being seised, *jure ecclesiæ*, of certain lands in St. Martin's demised them for ninety-nine years in the 2 P. and M. and in 1637, there being seventeen years of the lease for ninety-nine years to run, John bishop of Lincoln and dean of Westminster, and the convent, made a lease to Sir Richard Winn, to commence presently, and to hold for forty years. John the bishop and dean died in 1651, and John Earles was elected dean, and in 1660 received 35*l.* or. 4*d.* for one year's rent. On the 13th of Feb. 1661, the dean and chapter entered for the purpose of bringing an ejectment to try the title, which was accordingly brought. We are not told what was in fact the judgment of the court, for Carter, who reports the case, tells us that he did not hear the arguments of Brown and Archer, justices, and he reports the arguments of Tirrel, justice, and Bridgeman, C. J. who ultimately differ in opinion, but he does not tell us what was the judgment of the *majority* of the court. Two questions were made by those two judges whose arguments are reported. 1. Whether this lease, being of houses within Westminster, and within the 14th of El. was warranted by that statute? Or, in other words, whether this was a lease in reversion? 2. If it was not warranted by the 14th of El. yet whether the acceptance of the rent should make it good? As to the first question, they both agreed in effect, though they differed

effects, they would certainly be productive of the same inconveniences as leases in reversion, and it has accordingly been decided that they are equally within the prohibition of the statute.

AFTER

differed as to the mode of considering the point, that this was a lease in reversion, for they contended that what was not a lease in possession, within this act, must be a lease in reversion; that this was not a lease in possession, because at the time it was to commence, another was in existence; that therefore it was not warranted by the 14th El. and the C. J. held that it must fall within the compass of the 13th El. and then it was not good, because for more than twenty-one years; and it was also void by the 18th El. because it was made before the end of three years before the expiration of the former lease. As to the second point, Tirrel thought that the acceptance of rent did not make the lease good, by the reason of Hunt and Singleton's case, cited in 3 Rep. 60, in Lincoln College case, though he admitted that during the life of the dean in whose time the lease was made, it was good. The C. J. held that the succeeding dean and chapter might accept the rent, in which, he said, he differed from his brothers. If dean and chapter, he said, made a lease not warranted by 13 El. and they accepted or did not accept the rent, it should be avoided by the succeeding dean and chapter. There had been so many resolutions on it, that he thought it scarce fit to be disputed. Hunt and Singleton's case. Bishop of Salisbury's case, 10 Rep. 58. Magdalen College case, 11 Rep. 73. Co. Lit. 44. If the law should be altered in that point, he said, many foundations would be shaken: there was a difference, where a thing was void by statute, and where by the common law; if by statute, the intent of the makers must be observed; as in Hunt and Singleton's case, not void against the grantor himself, but void against the successor; why should it not be so in the case of a dean and chapter? They were indeed bodies invisible, yet they must do natural acts; the *head* must do those natural acts. So, the law was always held 2 Ed. 3, 27. 3 H. 8, 13. If the dean die, the successor may avoid it, with the same chapter. The succeeding dean accepting a rent did not bind at all; he could not, without the chapter, do any thing alone to the making good or making void of leases, unless in some measure during his life; now this lease

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AFTER the 14th El. the dean and chapter of St. Paul's made a lease for forty years of a house in London to a stranger, which was then in lease for ten years; it was held by the whole Court of Common Pleas that this lease was merely void by the 13th El. and not warranted by the 14th El. which requires that it should not be made in *reversion* of any other lease; for though this lease was to commence immediately, yet it was in law a lease in reversion, and therefore within the words of the statute (a).

THE statute 13 El. 10, contained no clause in favour of alienations to the Queen; but notwithstanding this, many of the bodies politic mentioned in it, presuming on a maxim of law "that the King is not bound by an act of parliament unless he be expressly named," and, on this account, supposing that the Queen and her successors were not included in the words person or persons, bodies politic or corporate," conveyed estates to the Queen in the same manner as the bishops had done, after the statute 1 El. for the purpose of having them granted by her to private individuals: among the most remarkable of these circuitous conveyances, was the case of the master and fellows of Magdalen College, in Cambridge (b), of which the circumstances were these—Roger Kelke, professor of divinity, master, and the fellows of the college of St. Mary Magdalen, were seised in their demesne as of fee in right of their college, of a certain messuage in the parish of St. Botolph, without Aldgate, in the ward of Aldgate, Lon-

was not totally void *ipso facto* when it was made, but only voidable; for if it were void by the statute, it must be totally void *ab initio*.—This was the sum then; if the act of the head of a corporation did in many respects bind them during his life, so much more, *a fortiori*, the act of dean and chapter. Carter, 9—16.

(a) Cro. El. 564. (b) Magdalen College case, 11 Co. 66. b.

don,

don, and on the 13th of Dec. in the 17th of Elizabeth, by indenture between the Queen on the one part, and themselves on the other, inrolled of record in Chancery, "for divers considerations them thereunto especially moving," granted the messuage to the Queen, her heirs and successors, at a yearly rent of 15*l.* payable to the said master and fellows and their successors at Michaelmas, with a clause of distress for non-payment, and under a proviso, that if the Queen, her heirs and successors, should not sufficiently convey and assure, by letters patent under the great seal of England, the said messuage, with the appurtenances, to one Benedict Spinola, merchant, of Genoa, and his heirs, before the first of April then next ensuing, the indenture, and every gift, grant, and article therein contained, should cease, and be utterly void, and of no effect.—The Queen, according to the proviso, on the 29th of January, in the same year of her reign, by letters patent under the great seal, granted the messuage and appurtenances to Spinola, who was then a denizen, and his heirs and assigns for ever—Roger Kelke, the master of the college, died in the 44th of Elizabeth; on his death Barnaby Gooch was elected master of the college, and entered on the premises, claiming them in right of the college.

In the eighteenth of Elizabeth an act of confirmation of letters patent was made, by which, 'after reciting, that since the 18th of November, in the first year of the Queen's reign, several honours, castles, lands, tenements, rents, reversions, services, and other hereditaments, had been conveyed to the Queen, her heirs and successors, by divers and sundry persons, and bodies politic, as well for the discharge and satisfaction of great debts and sums of money, as for other good considerations,' it was enacted, "that for the further surety of these, all feoffments, fines, surren-

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ders,

ders, assurances, conveyances, and estates in any manner conveyed, had or made, or to *be* made at any time within seven years after the end of the then present session of parliament, to the Queen, by or from any person or persons, bodies politic or corporate, of any honours, castles, manors, lands, tenements, &c. for any debt, sum or sums of money, or *other* consideration whatsoever, should stand, remain, and be good and available in law, to all intents, constructions, and purposes, according to the true meaning, intent, and purport of the same" (a).

THE principal question in this case was, whether the conveyance made to Queen Elizabeth by Kelke, master, and the fellows, being after the act of the 13th, was restrained by it: but if this should be decided against the conveyance, it was contended by those who argued in support of it, that the last mentioned act of the 18th had supplied the defect, and made the conveyance perfect and effectual.

BESIDE insisting, by the citation of a great number of cases, on the maxim of law, "that the King is not bound by a statute, unless he be specially named," the, said it had been the practice in a great number of instances, since the 13th El. for masters and fellows of colleges, deans and chapters, masters or wardens of hospitals, and others having spiritual and ecclesiastical promotion, to make estates and leases to Queen Elizabeth, and the then present King (b), which had been granted over and transferred; that this had been done by the advice of men deeply learned in the law, and of the learned counsel of the Queen and of the present King; that the change of so common and

(a) This statute of 18 El. is said to be a public act, and therefore must be taken notice of by the judges without being pleaded. V. 1 Anderf. 249. (b) James the first.

constant

constant an opinion, on which the estates and interests of so many men depended, would be the occasion of much litigation, and the ruin of many, who had not only spent their substance, or the greatest part of it, on such estates and leases, but had also expended much on new buildings, and other charges on them.

To the argument drawn from the maxim of law, it was replied, that it did not extend to the present case, and that the authorities cited did not apply; with respect to the maxim itself, the general words of the act, "to any person or persons, bodies politic or corporate," extended to the Queen, because she was *persona mixta*, having both a natural and politic capacity, as had been repeatedly decided; that if the act were general, and the Queen clearly included within the general words, she could not be exempted but by construction of law, and in the present case the law could make no such construction, for reasons which were apparent from the act itself: it appeared by the preamble, that the legislature, of which the Queen herself was a part, had adjudged long leases, made by colleges and the other bodies there mentioned, to be an evil and against reason; an observation which applied more strongly to a conveyance in fee simple: an exposition of an act *contrary* to reason, could never be permitted by the law, which was the *perfection* of reason; and it would be absurd to permit the Queen to be the instrument of doing that which she had concurred in declaring to be against the public good: that it much concerned the public to promote the interests of learning and religion, and the parliament had declared, that those interests had been highly injured by the long leases against which it meant to provide: it was, therefore, unanimously resolved, that general statutes, of which the object was the maintenance of religion and the advance-

ment of learning, should be extended generally according to their words: it was further observed, that the parliament had itself confirmed this decision of the question; for that in the case of ecclesiastical persons (*a*), it had followed the opinion of the judges whom it had consulted, that the Queen was bound by this act; an opinion which was supported by the comparison between this act and that of the first of Elizabeth, relative to archbishops and bishops; the latter contained a clause of exception in favour of the Queen, which plainly indicated, that without that exception the Queen would have been comprehended within the general words "person and persons, bodies politic and corporate," and therefore she must be within the same words of the other act, which contained no exception in her favour; that at the parliament held 1 Jac. 1, when the bishops' bill was read to restrain them from conveying to the King, archbishop Whitgift had moved, that deans and chapters, and others having ecclesiastical livings, should be restrained and inserted in the same bill, as well as archbishops and bishops; on which it was again resolved by the judges who assisted at the time, that they were already sufficiently restrained, and therefore they were omitted in the archbishops' bill.

THE second reason offered in support of the present judgment was, that the King is not exempted by construction of law, out of the general words of acts made to suppress wrong, because he is the fountain of justice and common right, and this act was made to suppress wrong, namely, to prevent dilapidations and the diminutions of spiritual livings.

A THIRD reason given was, that the general words of a statute which tend to perform the will of the founder or

(*a*) 5 Co. 13.

donor,

donor, shall bind the King, though he be not named; and that on this principle it had been held that the King was bound by the statute *de donis*.

A FOURTH reason, which appears to be the principal, was, that in every grant, there must be a grantor, a grantee, and a thing to be granted, and when the grant of the thing is made void, the grantor is of course disabled to grant it; in the present case, the words were, that "all leases, gifts, grants, &c. except those permitted by the act, "should be utterly void:" the master and fellows therefore were disabled to grant, and the Queen could not take from them who were so disabled.

A FIFTH reason, more particularly applicable to the present case, was, that acts of parliament are to be construed according to the intent and meaning of the authors of them; the intention of the master and fellows was to convey the house to Benedict Spinola and his heirs, but because they could not do it directly, they attempted to do it evasively, by granting it to the Queen and her successors, on condition expressed in the same grant, that the Queen within three months should grant the house to Benedict Spinola and his heirs, so that it had been endeavoured to make the Queen, who was the fountain of justice, the instrument of injury and wrong.

THE sixth and last reason was, that the statute had made void all leases, grants, &c. other than for twenty-one years, or three lives, on which the accustomed rent or more was reserved, which being express and demonstrative of these two particular cases, excluded all others.

WITH respect to the number of leases which had been made since this statute, by masters and fellows of colleges, deans and chapters, masters of hospitals, &c. it was answered, that that had been more from the practice of the

clergy, who imitated precedents of leases made before the statute, than by the advice of men learned in the law, and that the inconvenience was greater, and concerned a greater number of persons, and in a higher degree, on this side than on the other; for that considering the number of colleges in the universities and out of them, the number of deans and chapters, archdeaconries, dignities, and prebends, in cathedral churches, parsonages and vicarages, and the number of hospitals within the kingdom, it would be productive of more inconvenience, to give all these and their successors power from time to time for ever, by indirect means to alienate their possessions, than could arise from the destruction of certain estates and leases made since the statute, of the possessions either of ecclesiastical persons, or of the poor, originally given for works of piety and charity, and now transferred to private persons, and converted to private uses.

As to the second point, it was resolved that the statute 18 El. c. 2, gave no effect to this conveyance to the Queen, but it remained of the same force as it had before this act, for by the words of the enacting clause coupled with those of the preamble, it appears, that only such conveyances were established by it, as were made for satisfaction of debts and sums of money, or other *good* consideration; but this conveyance was so far from coming under this description, that by the very terms of it, that which might be taken as a consideration, the payment of 15l. rent by the Queen, was rendered impossible, by the condition of granting it over before any rent could become due; and there was not only an omission of any *good* consideration, but the addition of a fraudulent practice to make the Queen an instrument of conveying the estate to a subject; admitting, however, that there had been a good consideration,

ation, yet that would not have brought the present case within this confirming statute; the only effect of that statute was to supply any defect of circumstance, as inrollment or the like, when the person granting had power over the land, and the deed was good and legal in other respects, but for want of that circumstance was not of effect to pass the thing intended to be granted (*a*).

To render valid a lease made under the authority of the enabling statute (*b*), certain requisites, by the terms of the statute, must be observed. 1. It must be by writing indented, under seal, and not by deed poll, or parol. 2. It must be made to begin from *the making*, or from the *day* of the making, the words of the statute being, at the *most* from the *day* of the making thereof, which implies that it may be from the making. 3. If there be an old lease in being, it must be surrendered, expire or be ended *within* one year next after the *making* of the new lease; and such surrender must be absolute and not conditional; for then the intent of the statute might be easily evaded, by setting up all such old leases again, for breach of the condition. 4. It must be *either* for twenty-one years, *or* for three lives, and not for both at the same time; for the words of the statute are in the alternative: and therefore, if a lease for years be made according to the statute, the successor cannot expel the lessee and make a lease for life or lives. 5. It must not *exceed* three lives, or one-and-twenty years, from the commencement (*c*), but it may be for a less term, or for fewer years, for the intention of the legislature was to prevent long and unreasonable leases *beyond* the terms of twen-

(*a*) Vid. the same case reported 1 Rol. Rep. 151.

(*b*) 32 H. 8, c. 28.

(*c*) Lord Coke says, "from the making of it," but that is evidently inaccurate, because it may be from the day of the making.

ty-one years or three lives (*a*). 6. It must be of lands, tenements, or such hereditaments, out of which a rent can be reserved, and that after the death of the lessor, the successor may have *such like remedy and advantage*, to all intents and purposes, against the lessees, their executors and assigns, as the lessor might have had against the same lessees (*b*). 7. It must be of lands or tenements which have been *most commonly* letten or occupied by the space of twenty years next before the lease made. 8. On every such lease, there must be reserved *yearly*, during the same lease due and payable to the lessor and his successors, so much yearly rent or more, as hath been most commonly yielded and paid, within twenty years next before such lease made. 9. Such lease must not be made without impeachment of waste.

LEASES made under the authority of the exception of statute 1 El. 19. s. 5, and 13 El. c. 10, must begin from the *making* (*c*), and not from the *day* of the making, in which respect they differ from those made under the authority of the statute of H. 8, which, as before mentioned, may begin from the *making* or from the *day* of the making (*d*).

LEASES made under the exception of the 13th El. also differ in this from those made under the authority of the statute of H. 8, that where any former lease for years is in being, it must expire, be surrendered or end, only within *three* years, from the commencement of the new lease; whereas in the other case, the existing lease must expire, end, or be surrendered within *one* year.

(*a*) Vid. 1 Leon. 306.

(*b*) Vid. post, a more particular account of what may be leased.

(*c*) The words of 1 El. 19. s. 5, are "from such time as any such lease, grant, or assurance shall begin," those of 13 El. c. 10, "from the time such lease or grant shall be made or granted."

(*d*) Vid. 3 Bac. Abr. Leases, E. 2, for a variety of cases on the commencement of leases.

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IN all other respects, leases made under the exceptions of either of the restraining statutes, must be warranted by the enabling statute of Henry the eighth. By the express words of those exceptions, they must be only for twenty-one years or three lives, and not for both at the same time, and the accustomed yearly rent or more must be reserved and payable yearly; and they must have the other qualities and properties prescribed by that statute, by equitable construction (*a*). So, that every lease made according to the exception of 13 El. c. 10, by any sole corporation, if not likewise warranted by 32 H. 8, c. 28, must be confirmed by those whose confirmation was required at common law. And as parsons and vicars are excepted out of the statute of Henry the eighth, they can in no case make a lease to bind their successors even under the exception of 13 El. c. 10, *without* the consent of patron and ordinary, nor *with* that consent any other lease than such as is warranted by that exception (*b*).

LEASES for twenty-one years, or three lives, by archbishops or bishops, are only exempted from the general disability imposed on these sole corporations by the first part of 1 El. c. 19, and therefore receive no sanction from that act but as far as they are conformable to 28 H. 8, and therefore if part of the land be not in possession, or the old lease be not surrendered or expired within one year before the new lease made, or in any other respect such new lease be not warranted by 32 H. 8, then in order to bind the successor, there must be the confirmation of the dean and chapter, because at common law such confirmation was necessary; and these leases, not being warranted by 32 H. 8, which is the only statute that enables bishops solely to make leases to bind their successors, are voidable by the

(*a*) Vid. 1 Inst. 44, 45. (*b*) Id. 44 a.

successors

successors as much as if they were made for an hundred years or more (a).

WITH respect to concurrent leases, the case of a bishop differs something from that of all other corporations sole, mentioned in the statutes, to whose acts confirmation was necessary at common law, and from that of the aggregate corporations within the statutes, to whose acts no confirmation was ever necessary. In the case of all the other corporations sole, though the new lease be confirmed by those whose confirmation was required at common law, and in the case of the aggregate corporations, the surrender or expiration of the old lease must be absolutely within the times respectively limited by the statutes. But with respect to bishops, it has been already shewn that, with the confirmation of the dean and chapter, they might have alienated the possessions of their church for ever, though without such confirmation, they could not have made a lease to bind their successors even for one year; the statute of Henry the eighth enabled them alone, without confirmation, to make leases under the restrictions prescribed; but if they wished to make leases or grants for any longer term, or in any other manner, than this statute warranted, they remained as at common law, and consequently must have had the like confirmation of dean and chapter, to bind the successor; and because many bishops made an improper use of this power, by procuring the confirmation of their deans and chapters to very long leases, or absolute alienations, the statute 1 El. c. 19, was made to limit it; and now, in consequence of that statute, no confirmation whatever can make a bishop's lease binding on the successor, if it exceed the term of twenty-one years or three lives, because the statute makes it void, and con-

(a) 3 Bac. Abr. Leases, E. 1.

frequently

frequently incapable of receiving any sanction from confirmation; but, in some degree to obviate this difficulty, the *concurrent* lease was invented, and has generally obtained, and been held good (a).

If a bishop solely make a lease for twenty-one years, according to the statute of Henry the eighth, and within four or five years or more of the expiration of this lease, make another for twenty-one years, to begin from the making; this lease, if it be confirmed by the dean and chapter, and be, in every thing else, pursuant to the exception of 1 El. c. 19, is held to be good as a concurrent lease for these reasons. 1. Because such lease, though it be not good within the 32d H. 8, by reason that the first lease is not surrendered or expired within a year after the making of the second; yet being confirmed by the dean and chapter, it remains a good lease at common law, and then, if it be not void within the exception of 1 El. c. 19, the successor shall be bound; and that it is not void within that exception, it is contended, appears both from the letter and meaning of the exception; for the words are, "other than for twenty-one years or three lives, from such time as any such lease shall begin;" now this second lease does not extend twenty-one years from the time it begins, being for twenty-one years only from the making, and so, within the express words of the exception. 2. It is contended that it is not void within the meaning of the exception, because, for so many years as were to come of the first lease, this is good only by estoppel and not in interest; for the second lessee can have no benefit of it, so long as the first lease endures, and then against the successor, there is in effect no more than a lease for twenty-one years, the second lease being in effect void for all the years that are to

(a) Vid. 3 Bac. Abr. Leases, E. 3.

come

come of the first lease, and those that will then remain of the second make in all no more than twenty-one years at one time, and so not against the meaning of the exception.

3. Such second lease is so far from being prejudicial to the successor, that it is rather for his benefit; for now he will have the rent reserved on the first lease during the residue of that term, and may also at the same time recover the rent reserved upon the second lease, that being only for years, because the lessee is estopped to say he did not take such lease under such reservation; and thus the successor will have two rents instead of one; and although, if the second lessee should enter and be evicted by the first lessee, this would cause a suspension of the rent reserved on the second lease; yet the successor suffers no prejudice: because, though he cannot distrain for the second rent during the continuance of the first lease, and though the re-entry of the first lessee should amount to an attornment, and give the rent reserved on the first lease, to the second lessee, yet the bishop, or his successor, may always maintain an action of debt against the second lessee for the rent, and will thus be always sure of one rent (a).

BUT, after such lease for years, the bishop cannot make a lease for *three lives* to be good, by way of concurrent lease, though it be confirmed by the dean and chapter; but such second lease, whether it be made to begin presently, or by way of lease or grant in reversion, and attornment upon it, is against the exception of 1 El. c. 19, and by consequence, shall not bind the successor; for the words of the exception are in the disjunctive, "other than leases for three lives, *or* twenty-one years; so that there ought to be only the one or only the other in being at a time against

(a) Vid. 3 Bac. Abr. Leases, E. 3.

the successor, and not both together: and if the lease in reversion for three lives should be good as a concurrent lease, then would the successor have no remedy for the rent reserved on it, during the first lease; not by distress, because the possession was only a pledge for the rent reserved on the first lease; not by action of debt, because that does not lie for rent reserved on an estate of freehold during the continuance of it; nor by assize, because he had no seisin of it: and though after the lease for years determined, the lessor may distrain for all arrears; yet that is only a possibility or contingency; for the lease for years may outlast the three lives, and then they, by reason of their reversionary interest, having the present rent of the lessee for years, the bishop and his successors will lose all that rent: And if the first lease be for three lives, and the second only for twenty-one years, yet that will not bind the successor; because, though an action of debt might be maintained against the lessee for years for the rent reserved on his lease during the lease for lives, yet such lease for lives and years at the same time is against the words of the exception, which are in the disjunctive. From hence it follows, the concurrent lease holds only where *both* are for *years*; so that the certain determination of the first and commencement of the second are known immediately upon the making of the latter, and that the successor will in all events be sure of a remedy by way of distress, for the one rent and the other as they respectively commence, and also by action of debt or covenant on the contract in the mean time, if such concurrent lease should be construed to pass a reversionary interest, and intitle the *second* lessee to the rent reserved on the first lease by an unwary or wilful attornment of the *first* lessee—Even this concurrent lease for *years* is open to observation, and has not escaped censure, though

though being at first recognized in the exchequer chamber, by a majority of ten judges, it has ever since been allowed as lawful: My lord chief justice Vaughan says, that it is neither within the letter nor the meaning of the statute 1 El. c. 19, because there is *another* lease in being *than for twenty-one years, or three lives*; for there are in fact two in being at the same time, and therefore more than the statute warrants; and that the statute intended, when the first lease expired, the bishop who should then be, should have the advantage of making a new lease, which by allowing such concurrent lease may be prevented perpetually except by way of remainder (a).

By the words of the statute of Henry the eighth, the sixth requisite to be observed in making these leases, is "that they must be of lands, tenements, or of such hereditaments as that out of them a rent can be reserved, and that after the death of the lessor, the successor may have *such like remedy and advantage* to all intents and purposes, against the lessees, their executors and assigns, as the lessor might have had against the same lessees"—hence it has been held (b) that all such leases must be of lands or tenements corporeal to which resort may be had for the rent reserved, by way of distress; for that otherwise the successor may be without any remedy for the rent, and thus dilapidations and all the other mischiefs against which the statutes intended to provide, may take place; therefore leases of fairs, markets, liberties, franchises, advowsons, commons, piscaries, *offices*, hundreds, *tithes*, or any other incorporeal inheritances, though with the confirmation of the dean and chapter, or of other persons required by law to confirm the same, will not bind the successor.

(a) 3 Bac. Abr. E. 3. 1 Inst. 45 a. vid. Elmer's case. 5 Co. 2.

(b) Vid. Jewel's case. 5 Co. 3.

ALL

ALL the books agree that a lease for *three lives* of tithes, or other incorporeal inheritances, will not bind the successor, though the ancient rent be reserved, and the lease or grant confirmed; because the successor would be without the tithes or other inheritance, and would have no remedy for the rent reserved; he could not distrain, because there would be no place in which he could take a distress, the things leased or granted being perfectly incorporeal and invisible; he could not have an assize, because either he had not seisin, or if he had, yet there would be nothing to put in view of the recognitors; and he could not maintain an action of debt during the lease, because being for three lives, it is an estate of freehold, which will endure no action of debt so long as it continues.

It is held likewise in some books, that a lease for twenty-one years of such incorporeal inheritances, though they have been usually demised, and the ancient rent reserved out of them, is notwithstanding voidable by the successor within these statutes, because, though the rent reserved be good by way of contract between the lessor and lessee, and debt may be maintained for the recovery of it; yet, they say, it is not such a rent as is incident to the reversion, nor shall pass with it to the successor; and that therefore the successor having no remedy for the rent, shall not be bound by the lease.

BUT this point seems to have been shaken by contrary resolutions; for some books expressly hold such lease for years to be good against the successor; because he has remedy for the rent by action of debt, and that it has been so adjudged; and they make a distinction between such a lease for years, and a lease for life; they say likewise that the rent issues out of the tithes by way of render, though not in point of remedy, because no distress can be taken for it;

it; but that this is supplied by action of debt which lies for such rent, and shall devolve to the successor; and that such rent does not lie only in privity of contract, as a sum in gross, but is incident to the reversion, otherwise the successor could not have it, being only privy to the estate, not to the personal contracts of his predecessor.

ALL the books, however, agree, that a lease for three lives or twenty-one years, of a manor, with the advowson appendant, or of lands or houses and of tithes usually let therewith, reserving the ancient rent, is good, and shall bind the successor within these statutes; for though the rent does not issue out of the advowson, tithes, &c. in point of remedy, yet the rent is greater in respect of them, and the successor has his remedy for the whole rent upon the lands, or other corporeal hereditaments let with them; and Vaughan proves this from the express words of 13 El. c. 10, which are, that all leases, by any spiritual or ecclesiastical persons, having lands, tenements, tithes or hereditaments, *other than for twenty-one years or three lives*, shall be void; so that the statute plainly shews, that in some way or other, tithes may be leased for twenty-one years or three lives; and if they cannot be leased singly, it must be with lands usually let with them (a).

BUT this doubt is now removed by statute 5 G. 3, c. 17, by which it is enacted "that all leases for one, two or three lives, or any term not exceeding twenty-one years, of any tithes, tolls, or other incorporeal hereditaments, solely, and without any lands or corporeal hereditaments, by any archbishop, bishop, master and fellows, or other head and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and

(a) Vid. 3 Bac. Abr. Leases, E. 5, where all the cases on the subject are put together.

every

every other person and persons, who are enabled, by the several statutes now in being, or any of them, to make any lease or leases for one, two or three lives, or any term or number of years, not exceeding twenty-one years, of any lands, tenements, or other corporeal hereditaments, shall be deemed as good and effectual in law against such archbishop, bishop, masters and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and other persons so granting the same; and their successors, in the same manner as any lease made by such persons or bodies politic of any lands or other corporeal hereditaments now are, by virtue of the statute of 32 H. 8, or any other statute now in being."

AND it is enacted further, "that in case the rent reserved on any such lease should be in arrear and unpaid, by the space of twenty-eight days after any of the days on which it is made payable, the lessors, or their executors, administrators and successors respectively, may bring an action or actions of debt against the lessee or lessees, their heirs, executors, administrators or assigns, for the recovery of such rent in arrear, in the same manner as any landlord or lessor or other person or persons may do for the recovery of arrears of rent due on any lease or leases for life or lives, or years, by the laws now in being."

BUT it is provided "that nothing in this act contained shall be construed to extend to enable any master and fellows, or other head and members of colleges, or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, or other ecclesiastical persons, to grant leases for any longer or other terms than by the local statutes of their several foundations, they were before respectively enabled to do."

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THE words of the statute of Henry the eighth, which expresses the seventh requisite to be observed with respect to the leases in question, are these, "That the act shall not extend to any lease of any manors, lands, tenements, or hereditaments, which have not most commonly been letten to farm, or occupied by the farmers for the space of twenty years *next* before such lease thereof made."

ON this clause it has been held, that where the temporalities of a bishopric come into the hands of the King, and he keep them twenty years or more, and during that time let to farm, for eleven years or more, lands which had not been before usually let, and then appoint a successor, and restore him the temporalities, the latter cannot, by any lease of those lands for the leasing of which he has no other warrant than this leasing by the King, bind his successor: For the King might have let the bishop's palace, or the demesnes about it, and then if the successor might likewise make a binding lease of them for twenty-one years or three lives, and should die or be removed, that which was intended to give the farmers a secure possession during their leases, would introduce a great inconvenience on the successor: It is therefore an established rule, that the previous letting which is required to make the lease for twenty-one years or three lives, binding on the successor, must have been by the persons intitled to the possession of the lands, or the occupation by the farmer, by their permission (a).

IT is certain that a letting or occupation for eleven years, at one or at several times, within the twenty years *next* before the making of the lease, is sufficient; but several inconveniencies may possibly arise from requiring that the eleven years' occupation should be *absolutely within*

(a) Vid. Co. Lit. 44 a. Palmer. 175. 3 Bac. Abr. Leases, E. 6.

the

the twenty immediately preceding the lease: If lands had been formerly let to farm ever so long, or ever so frequently, yet if the bishop or other persons, whose possessions they are, should keep them in their own hands fifteen or twenty years, these lands could not be leased for twenty-one years or three lives to bind the successor, till they had undergone a probation of eleven years longer in the occupation of a farmer: and several other cases might be put, in which, according to this construction, the successor could have no benefit of the statute till after eleven years at least.—And the difficulty does not seem to be solved in a satisfactory manner, in the books (*a*).

It seems, however, that, whatever difficulties may arise in some possible cases, by the whole tenor and the obvious intention of the act, the letting or occupation for eleven years or more must necessarily be *within* the twenty years *next* before the leasing under the statute: the restriction with respect to the rent reserved is expressed in similar terms, “so much yearly rent or more, as hath been most commonly yielded and paid within twenty years *next* before such lease made;” and as the intention of the act was to secure the interest of the successor, the most advantageous rent was certainly in contemplation, which is most likely to be that which has been most usually given within the latest period.

A DEMISE by copy of court roll is sufficient to warrant a lease under these statutes, for it is in judgment of law but an estate at will, and without question lands demised at will by those who have the proper title, rendering rent, are lands accustomably let to farm within the act (*b*). This indeed does not seem to be very material to the subject;

(*a*) Vid. 3 Bac. Abr. where all the cases are collected, Leases E. 6.

(*b*) Co. Lit. 44 a, dean and chapter of Worcester's case. 6 Co. 37.

for it has been several times held, that bishops, or other ecclesiastical persons, are not restrained either by the 1 El. c. 19, or 13 El. c. 10, from making grants of copyhold lands in fee, in tail, or for lives, or for any number of years according to the custom of the manor, and that no confirmation is necessary to make such grants good, because when the grant is made by any one who has a lawful estate or interest, the copyholder is in by the custom, without any regard to the estate or person of the grantor (*a*).

IF twenty acres of land have been usually let, and a lease be made of those twenty, and of one acre more which was not usually let, reserving the usual yearly rent, and so much more as exceeds the value of the other acre, this lease is not warranted by the statutes, for as part was not usually let, and the rent issues out of the whole, the usual rent is not reserved (*b*).

THE eighth restriction is expressed in these terms, "That on every such lease there must be reserved *yearly*, during the same lease, due and payable to the *lessor* and his successor, so much yearly rent or more, as hath been most commonly yielded and paid, within twenty years next before such lease made."

ON this clause, it has been determined, that where the rent has been, before the letting under the statute, usually paid at four feasts of the year, yet if, by the lease, it be made payable at two feasts, or at one time, this is sufficient, because the words of the statute are, "that it shall be reserved yearly," without prescribing the portions in which it is to be paid (*c*).

AND where not only a yearly rent was formerly reserved, but things not annual, as heriots or any fine or other profit on the death of the farmer, yet if the yearly rent

(*a*) 4 Co. 23 b. (*b*) Co. Lit. 44 a. (*c*) Id. *ibid*, and 6 Co. 37.

alone

alone be reserved in a lease under the statute, that is sufficient (*a*).—If a prebendary make a lease for years, rendering rent, and reserving the running of a colt; and at the expiration of this lease, a new one be made, rendering the same rent, without reserving the running of the colt, this is good; but if a lease be made of a manor, excepting the woods, rendering rent, and after the expiration of it, there be a new lease rendering the same rent without such exception, this second lease is bad (*b*).

If two farms have been usually let separately, the one for 20*l.* and the other for 10*l.* and a lease be made of both together, rendering 30*l.* this shall not bind the successor, for the ancient rent which formerly issued out of the two farms separately, according to the aforesaid proportion, now issues wholly out of each, and out of every part of each; and if two farms might be joined in one lease, twenty might be joined, which would be very prejudicial to the successor, because, when two are joined, the loss would be the greater if the tenant should prove insolvent (*c*).

BUT a part of lands usually let at a certain rent, may be let at a rent in proportion to the extent and value of the part so let, for this is, in effect, reserving the ancient rent, and perhaps, it might be impossible to make a lease of all, if it were not permitted to divide the great farms (*d*). But if a bishop seised of two manors, in right of his bishopric, which have been usually let together, make a lease of both manors, reserving the ancient rent out of one of them only, this will not be a good lease to bind the successor, because, his remedy for the rent is confined to part of the lands only,

(*a*) *Id.* *ibid.*

(*b*) *Harg. Notes to Co. Lit.* 44 *a.*

(*c*) *Vid.* *Lord Mountjoy's case.* 5 *Co.* 4, *Cro. Car.* 23. 3 *Keb.* 380.

(*d*) *Co. Lit.* 44 *a.*

whereas before the whole was chargeable—Yet, if the bishop let one of the manors, reserving the rent formerly reserved on both, this will bind the successor, for though the distress for the ancient rent be not so extensive, yet the successor cannot complain, having the residue in his own hands or out upon another lease (*a*).

THE *whole* rent must be reserved, payable not only to the successor, but to the *lessor* himself, and therefore, if a bishop make a lease of land, the ancient rent of which was 10*l.* and reserve but 5*l.* per annum during his own life, and 10*l.* per annum after his death to the successor, this shall not bind, because the rent originally reserved was not pursuant to the statutes (*b*).

THE next and last rule is, that these leases must not be without impeachment of *waste*. This is expressly provided for only by the statute of Henry the eighth, but it has been resolved on the statutes of Elizabeth, that the several persons therein respectively mentioned, are by equitable construction restrained from making leases punishable of waste (*c*); for if, as the preamble speaks, long and unreasonable leases be the chief causes of dilapidations, and the decay of all spiritual livings and hospitality, much more would they be so, if they were made punishable of waste; and therefore those statutes, being made to prevent such unreasonable leases for the future, must by consequence prohibit the power of committing or suffering waste. But it is not necessary that there should be in the lease an express *prohibition* of waste; it is sufficient, if the estate conveyed be not, by legal construction, punishable of waste.—If a lease be made for life, remainder for life, this is punishable of waste, be-

(*a*) 3 Bac. Abr. Leases, E. 4, and the cases there cited.

(*b*) 5 Co. 6 a.

(*c*) Co. Lit. 45 a. 6 Co. 37 a.

cause

cause in waste, the place wasted is to be recovered, as well as treble damage, which cannot be, in this case, by the reversioner, without destroying the intermediate estate for life. But if a lease be made to one for three lives, this lease is good, and the occupant, if any happen, shall be punished for waste, within the statute of Gloucester, which gives an action of waste against any one who holds in any manner for life or years; and an occupant in this case holds for term of life (a).

HOSPITALS erected under the authority of the 39 El. c. 5 (b), are put under the same restrictions with the other corporations we have been here considering; for by the second section of that statute, it is provided "that all leases, grants, conveyances or estates to be made by any such corporation, exceeding the number of twenty-one years, and that in possession, and on which the usual rent or more by the greater part of twenty years next before the making of such lease, should not be reserved and payable yearly, shall be void."

AND it is further provided, by the fifth section, "that no corporation to be founded by the force of that act shall do, or suffer to be done, any act or thing, by means of which any of the lands, tenements, hereditaments, stock, goods, or chattels of such corporation, or any estate, interest, possession or property of or in the same, or any of them, shall be vested or transferred in or to any other whatsoever, contrary to the true meaning of that act" (c).

BESIDE the *general* restrictions imposed on the corporate bodies mentioned in the 13 El. c. 10, there is

(a) Vid. Dean and chapter of Worcester's case. 6 Co. 37.

(b) Vid. page 57.

(c) Vid. the Case of — Clements, Esq. et al. Exors. of Dr. Baldwin, v. — Waller, Esq. 4 Bur. 215, 4.

*Johnson
which
College leases
are to be
granted.*

another *particular* restriction with regard to college leases, and another with respect to the leases of beneficed clergymen: The first is imposed by 18 El. c. 6. which enacts, "That no master, provost, president, warden, dean, governor, rector or chief ruler of any college, cathedral church, hall or house of learning in either of the universities, nor any provost, warden or other head officer of the colleges of Winchester or Eaton, nor the corporation of any of the same,—shall make any lease for life, lives or years, of any farm or any their lands, tenements or other hereditaments to which any tithes, arable land, meadow or pasture doth or shall appertain, unless the *one third part at the least* of the old rent be reserved and paid in corn, for the said colleges, cathedral churches, halls or houses, that is to say, in good wheat, after six shillings and eight-pence the quarter or under, and good malt at five shillings the quarter or under, to be delivered yearly on days prefixed at the said colleges, cathedral churches, halls, or houses; and for default thereof, to pay to the said colleges, cathedral churches, halls or houses, in ready money, at the election of the lessees, their executors, administrators and assigns, after the rate at which the best wheat and malt in the market of Cambridge for the rents that are to be paid to the use of the house or houses there; and in the market of Oxford for the rents that are to be paid to the use of the house or houses there; and in the market of Winchester for the rents that are to be paid to the use of the house or houses there; and in the market of Windfor for the rents that are to be paid to the use of the house or houses at Eaton; is or shall be sold the next market day before the said rent shall be due, without fraud or deceit; and that all leases otherwise thereafter to be made, and all collateral bonds or assurance to the contrary, by any of the said corporations, shall be void

void in law to all intents and purposes; the same wheat, malt, or the money coming of the same, to be expended to the use of the relief of the commons and diet of the said colleges, cathedral churches, halls and houses, and the fellows and scholars in the same, on pain of deprivation of the governor and chief rulers of the said colleges, cathedral churches, halls and houses, and all others thereunto consenting."—With respect to the leases of beneficed clergymen, it is enacted by 13 El. c. 20, "That no lease to be made of any benefice or ecclesiastical promotion with cure, or any part thereof, and not being impropriated, shall endure any longer than while the lessor shall be ordinarily resident and serving the cure of such benefice without absence above fourscore days in any one year, but that every such lease, immediately on such absence, shall cease and be void, and the incumbent so offending shall for the same lose one year's profit of his said benefice, to be distributed by the ordinary among the poor of the parish;" and by 18 El. c. 11. s. 7, it is directed "that after complaint made to the ordinary, and sentence given on any offence committed by the incumbent, by which he ought to lose one year's profit as before mentioned, the ordinary within two months after such sentence given and request to him made, by the churchwardens of the parish, or one of them, shall grant the sequestration of such profits, to such inhabitant or inhabitants within the parish, where such benefice shall be, as to him shall seem meet and convenient; and that on default by the ordinary, every parishioner where the benefice is may retain his tythes, and the churchwardens may enter and take the profits of the glebe lands, and other rents and duties of every such benefice, to be employed to the use of the poor, till such time as sequestration shall be committed by the ordinary, and that then, as well the churchwardens

as

as the parishioners shall yield account and make payment to him or them to whom such sequestration shall be committed."

BUT it is provided by 13 El. c. 20, f. 2, "That every parson, by the laws of this realm allowed to have two benefices, may demise the one of them, on which he shall not then be most ordinarily resident, to his curate only, that shall there serve the cure for him; but that such lease shall endure no longer than during such curate's residence without absence above forty days in any one year."

As a further guard to these restrictions, it is by 14 El. c. 11, f. 15, enacted "That all bonds, contracts, promises and covenants, thereafter to be made for suffering or permitting any person to enjoy any benefice or ecclesiastical promotion with cure, or to take the profits or fruits thereof—shall be to all intents and purposes adjudged of such force and validity, and not otherwise, as leases, by the same persons made, of such benefices and ecclesiastical promotions with cure."

AND by f. 16, it is declared, "That all leases, bonds, promises and covenants of and concerning benefices and ecclesiastical livings with cure, to be made by any curate, shall be of no other nor better force, validity or continuance, than if the same had been made by the beneficed person himself that demised the same to any such curate."

THE purpose of the restraining statutes was solely to protect the interest of the successor, and therefore, though the words of them be, that all grants, leases, and other conveyances or estates made in any other manner, than by these statutes is pointed out, shall be utterly void, and of no effect to all intents and purposes. It has been repeatedly decided, that all grants or leases, though not warranted by these statutes, are good, against the grantor or lessor in the

the case of a *sole* corporation, and that in the case of an aggregate corporation, they are valid during the continuance of the head, in whose time they were made (*a*). Thus if a bishop grant the next avoidance of a church, which is not warranted by 1 El. c. 19, because it is a thing which lies merely in grant, out of which no rent can be reserved; or make a lease of the advowson of a church, or grant an annuity out of the possessions of his bishopric, or make a lease of tithes for three lives, or a lease of any other of his possessions, without pursuing all or any of the rules before mentioned; yet, in none of these cases, is such lease or grant void or voidable by the bishop himself who made it, but remains good against him during such time as he continues bishop (*b*).

So, a lease made by a dean and chapter against the statute 13 El. c. 10, shall not be avoided, nor any covenants therein contained, during the life and continuance of the dean that made the lease; so that, if they have made a lease for years of any of their possessions, and before the expiration of it, make a concurrent lease also for the same lands, and then make a third lease for lives, with an express covenant, that the grantee for lives shall enjoy the land against the second or concurrent lease, and the grantee for lives being in possession be evicted, and bring covenant against the dean and chapter; in such a case, though the lease for lives be void by the 13th El. c. 10, yet if the dean who made it be living and continue dean at the time of the eviction, the action will be maintainable for breach of the covenant therein contained (*c*).

So, where a master and fellows of a college, by deed inrolled, made a lease for years, not warranted by the

(*a*) Vid. 3 Co. 59, 60, Lincoln College case.

(*b*) 3 Bac. Abr. Leases, H. 1.

(*c*) Vid. eund. ibid.

statute,

statute, and afterwards suffered a fine and five years to pass without claim; though this was void against the succeeding master, yet by construction the lease and fine were held good against the college, though a corporation aggregate, during the life of the master, who was party to the lease, and made no claim, because he was the head and principal part of the corporation, and chiefly concerned in interest (*a*).

So, if a dean, archdeacon, prebendary, parson, or other sole corporation, make leases of their sole possessions, not warranted by the statutes, yet they shall bind themselves during their whole time, because the statutes were made chiefly for the benefit of the successors, and not to relieve the parties themselves against their own acts or grants (*b*).

BUT, where there is a chapter without a dean, as the chapter of the collegiate church of Southwell, grants or leases made by them contrary to 13 El. c. 10, are void from the beginning against themselves; and so it is of leases or grants by any other corporation aggregate, who have no head or principal; for they must be either void from the beginning, or good for ever, because they continue always the same, and one has no superiority or power more than another.—And if the dean and chapter, or master and fellows, were all *equally* seised, and the dean or master solely should make a lease, though it were in all respects warranted by the statutes, yet it seems it would be void from the beginning, at common law, because the dean or master had no sole seisin by which he was authorised to make any lease at all; but the chapter in the one case, and the fellows in the other, having an equal estate and interest, ought to have joined in such lease or grant, and for want of their

(*a*) 11 Co. 67. 78. 1 Rol. Rep. 169.

(*b*) Hetley, 24 a. Co. Lit. 45 a.

joining

joining it seems void, and the lessee cannot hold it against the dean and chapter, or master and fellows, if they seek to avoid it (a).

As leases and grants, not warranted by the statutes, are not void against the lessors and grantors themselves, so neither are leases or grants made without due confirmation, where confirmation is necessary, but only by the grantor's death or amotion (b).

AND as all leases not made according to the statutes, are notwithstanding binding on the lessors, so, in many cases, the successors, by their own acts, may make them binding on themselves. That this may be the better understood, it is necessary to observe that, at common law, when the confirmation of the proper parties was wanting, the lease was in some cases absolutely void against the successor, and in others only voidable at his option.—And the law is nearly the same at this day with respect to leases not made in perfect conformity with the requisitions of the statutes.

AT common law, there was a distinction between the case of those sole ecclesiastical corporations who were supposed to have the fee simple absolutely in them, such as bishops and deans, with respect to the possessions of which the latter were sole seised, and that of those who were supposed to have only a qualified fee simple, such as parsons, vicars, prebendaries, provosts in cathedral churches, and others who were presentative or collative, and not elective.

LEASES, whether for years or for lives, by the former without confirmation, were not void, but only voidable by the successor, and continued good till some act was done by him to avoid them.—But with respect to the latter, there was also a distinction between leases for years, and leases

(a) 3 Bac. Abr. Leases, H. 1.

(b) Id. ibid.

for lives : leases for years, without confirmation, were absolutely void without entry or other ceremony, so that no acceptance of the rent, or any other act done by the successor, could affirm or make them good or binding against himself : but leases for life or lives, though without confirmation, were good against the successor till some act was done by him to avoid them ; and the reason was, that a lease for life or lives, being an estate of freehold, could not pass without the solemnity of livery and seisin ; and therefore to defeat such a lease, there must have been an act of equal notoriety, the entry of the successor ; and consequently, if the successor, before entry, accepted the rent, or did any other act signifying his consent to such lease, this affirmed it during his own time, so that he could never afterwards avoid it, because it was only voidable, and not actually void by the death or removal of the lessor.—The law is the same at this day where the statutes are not pursued.

At common law there seems to have been no distinction between leases of things in livery, and of things in grant, either in the case of bishops and deans, or in that of parsons and vicars, and other similar corporations : but in the case of bishops and deans, the statutes before mentioned seem to have introduced a distinction between a lease for years and a lease for lives of things that lie in grant, which did not exist at common law. Thus, if a bishop before the late statute of 5 G. 3, c. 17, had made a lease for lives of a portion of tithes, or other things not manurable, reserving the ancient rent, and had died or been removed, and his successor had accepted the rent, yet this acceptance should not have bound him, because the lease was absolutely void by the death or removal of the lessor, without entry or other ceremony ; for the lease being of things lying only in grant, no rent could be reserved out of them recoverable

able by the successor; he could not distrain, because there was no place where a distress might be taken; and an action of debt would not lie, because, the lease being for lives, no action of debt was maintainable till after the expiration of the lives; and therefore, since his acceptance of the rent due at one day would not enable him to sue for future arrears, if payment should be refused, he was not to be bound by such acceptance.—But if the tithes or other things lying in grant, had been let for years, there the successor's acceptance of the rent would have bound him during his time; because then he might have an action of debt for any arrears that might accrue afterwards: and in this respect the law upon these statutes, as to bishops, appears to be the reverse of the common law as to parsons, vicars, &c. for as their leases for *years* were absolutely void, by their death or removal, but their leases for *life* or *lives* only voidable; so, here the bishops leases for *lives* are absolutely *void*, whereas their leases for *years* are only *voidable* by the successor (*a*).

THE late statute of 5 G. 3, c. 17, has put an end to this distinction between a lease for life or lives, and a lease for years, where the only objection to them, as not pur-suing the statutes, is that they are made of things that lie in grant.

If a bishop make a defective or voidable lease or grant, not only the successor may avoid it, but also the King, when the temporalities come into his hands, may take advantage of the defect, so far as to avoid it during the vacancy of the bishopric, in privity and right of the bishop; but this shall not so absolutely avoid the lease, but that the succeeding bishop may make the same either good or void, at his election, as to himself; and this either expressly, as

(a) Vid. Bac. Abr. Leases, H. 1.

by

by actual agreement to the lease or grant of his predecessor; or by implication, as by acceptance of rent accrued after the death or removal of his predecessor; or by doing any other act, which amounts to an agreement in law: and therefore this case of an avoidance by the King, differs from the case of an avoidance by the successor himself; for an avoidance by the successor, avoids it not only for his own time, but also against all his successors; so that they never can set it up again, or affirm it by any act of theirs whatever: because it was avoided by one who had the whole fee simple in him as much as any of the successors can have; but the King has not the fee simple in the temporalities, but only the custody or guardianship of them during the vacation of the bishopric, which is but a temporary and qualified interest (a).

It is further to be observed, that the acceptance of rent which is to affirm a voidable lease, must be by him who is perfect successor: therefore, where the successor of a bishop, before he had a restitution of the temporalities from the King's hands, accepted a rent reserved by his predecessor on a voidable lease, yet it was held that notwithstanding this acceptance, he might enter and avoid the lease; because before such restitution he was not perfect successor; and then such acceptance of the rent should not bind him, any more than if he had been a perfect stranger (b).

With respect to leases by corporations aggregate restrained by these statutes, the distinction between a void and voidable lease cannot exist, where the lease is made by the head with the concurrence, properly expressed, of the rest of the corporation; because they have the estate ab-

(a) Earl of Bedford's case, 7 Co. 7, cited 3 Bac. Abr. ubi supra.

(b) Palm. 517, Bishop of Oxford's case, cited 3 Bac. Abr. ubi supra.

solutely

folutely in fee simple : when, therefore, a lease *ſo* made is not warranted by the ſtatutes, it is merely *voidable* by the ſucceſſor of the head with the reſt of the corporation : but if, in ſuch a caſe, the ſucceeding dean or maſter, without authority in writing from the corporation, accept rent ; this ſhall not affirm the lease during the life or continuance of ſuch maſter or head who ſo accepted it ; for the right being as much in the fellows or other members of the corporation, as in the maſter himſelf, he cannot by any act of his own conclude or bind them from their entry on any voidable lease : and he himſelf in their right may enter to avoid ſuch lease, notwithstanding his own acceptance of the rent (a).

DEANS and chapters, and other perſons included in the reſtraining ſtatutes, for fear of incurring the penalties of them, have been careful to preſerve the ſame deſcriptions in their leases *ſince* thoſe ſtatutes which had been uſed before ; and poſſibly at the time of the old leases, there might be barns or ancient buildings, which after ſuch a length of time, muſt have been long ſince decayed and gone ; and therefore it would be hard to decree a defendant at this day, at the expiration of his lease, to deliver up the premises with ſuch buildings on them, when there is not the leaſt proof, that they were in being at the time of making the lease : and for this reaſon, where the leases of a dean and chapter are of long ſtanding, and have been continued down to this time without any variation as to the form, they cannot have a decree in chancery, for a ſpecific performance of covenants for repairs, againſt the preſent tenants, but muſt be left to their legal remedy of an action at law for non-performance (b).

(a) 11 Co. 79 a. cited 3 Bac. Abr. ubi ſupra.

(b) Per Lord Hardwicke, in the caſe of the dean and chapter of Ely v. Sir Simeon Stewart. 2 Atkyns 44, 45.

M

ON

ON these statutes it yet remains to be considered, what the law is with respect to grants of offices by bishops and other ecclesiastical persons.

AT common law, grants of offices might be made by all ecclesiastical persons in as absolute a manner, as a grant of any part of their possessions, and were subject to the same condition of being void against the successor; unless confirmed in the same manner as other grants. The statute of Henry the eighth, which, under the limitations and restrictions specified, enabled bishops and the other ecclesiastical persons, to make grants of their own authority without confirmation, does not extend to grants of offices; they remained, therefore, *after* that statute, as at common law, and consequently, in order to bind the successor, must have been confirmed by those parties, whose confirmation was necessary to *all* grants *before* that statute; and with such confirmation, *any* grant of an ancient office, whether in the *usual* manner or in any other, with the *usual* or any *other* fee, or of any *new* office, in any *manner* or with any *fee*, would have been binding on the successor. Thus, if an ancient office belonging to a bishopric had been usually granted only to *one*, yet a grant of it to two for their lives, with consent of the chapter, would have been good (a).

THE statutes of 1 Eliz. c. 19, and 13 El. c. 10, do not expressly impose any restriction on the grant of offices; but, by equity of construction, they have introduced a very important alteration in the law on this subject.—Patents or grants of offices, with fees, salaries, or profits annexed to them, are not *mentioned* in these statutes. There are no general words adapted to the case of *offices*; and yet

(a) 10 Co. 60 a.

there

there was not a single bishopric at the time, *without* some office *granted*.

HAD the legislature intended to restrain the regranting of them, as they should drop in, it must have been done by a special provision, with an exception of some, at least, of judicial offices. As the general restraint is not extended to the case, there was no occasion to make exceptions.

THE purpose of these statutes was to prevent *dilapidations*; the contemplation of which gave rise to the distinction between the grants of *ancient* offices, with the *ancient* fee, and in the *usual* manner, and grants in any respect differing from these.—To continue *ancient* offices, with the *ancient* fees, and in the *usual* manner, was not a *dilapidation* of the revenues: every incumbent left this power to be exercised by his successor, as his predecessors had left it to be exercised by *him*. *Such* grants were no *new* charge on the bishopric or other ecclesiastical promotion; which only remained liable to the *same* fees or salaries, to which it was *liable before* (a).

BUT a grant of a *new* office with a *new* fee, or of an *old* office with an *additional* fee, or in a different manner from that in which it had been *usually* granted, would be a *new* charge, and might operate as a complete *evasion* of the statutes.

WHETHER the bishopric or deanery to which the office belongs, be of ancient or of new foundation, is immaterial; for though offices belonging to the latter cannot, when referred to the time of the statutes of Elizabeth, be strictly said to be *ancient* offices, nor to have been granted with *ancient* fees, yet if any question arose *after* these statutes,

(a) Per Lord Mansfield. 1 Bur. 222.

M 2

with

with respect to the *validity* of such grants, it would naturally be decided by the *usage* which had obtained *before* (a).

THESE grants appear generally to have been made for the life of the grantees; for it was considered to be too severe and rigid a construction, to confine them to be made determinable on the death, translation, or promotion of the grantor; because this would have discouraged men of ability and capacity to undertake the exercise of them: and to grant such offices for twenty-one years, or for any other term of years, would introduce many inconveniences, by letting in executors, strangers, and other unqualified persons; and therefore any grant of such offices for years seems against the policy of the common law, and the benefit of the successors, for which those statutes intended to provide, and by consequence will not bind them (b).

BUT if such offices have been anciently granted to one for life, this induces no necessity of their being granted to two for their lives; and therefore such a grant will **not** bind the successor, though one of the grantees should die in the life of the grantor, so that there would be but one life in being against the successor; because such a grant to two was improper in its foundation.

So, if an office has been usually granted to one with an ancient fee, and afterwards a grant is made to another in reversion, after the death of the first grantee; this shall not bind the successor; for, if where an office has been usually granted but to one, it might afterwards be granted to two, or in reversion; the power might be abused, and grants made to twenty, or for twenty lives in reversion one after another (c).

(a) Vid. 10 Co. 61 b.

(b) 10 Co. 61 a.

(c) Id. ibid.

BUT

BUT if an office has in fact been usually granted to two or more for their lives, or has been granted in reversion, such a grant will be good; and the grand criterion of the validity of the grant, is not the *utility* or *necessity* of the office, but the *usage* previous to those statutes (a).

IN some of the earlier cases, however, the distinction between bishoprics of the *old* and *new* foundation, introduced, from inadvertence, the consideration of the necessity of the office in the case of the latter, and the reasonableness of the fee attached to it. In the case of the bishop of Chester, it was resolved, says Lord Coke (b), "that though the bishopric was founded of late time, that is, in the time of Henry the eighth, yet a grant of offices of *necessity* to one in possession with a *reasonable* fee, the reasonableness of which shall be decided by the court of justice in which it shall depend, is good, and exempted from the general restraint of the act of 1 El. c. 19."

FROM an apprehension likewise, that *offices* were not within this statute, the validity of a grant of a *new* office with a fee was at *first* decided on from the *supposed* necessity of the office and the *reasonableness* of the fee, even in the case of an old bishopric.—The bishop of Ely, on the 20th of April 1558, a few months only after the passing of the statute 1 El. c. 19, made a grant of the office of *keeping his house and garden*, which was never granted before, with a fee or salary of three pounds a year. This came in judgment, as it is cited in some of the books (c), in Hilary, the 10 El. and it was held good, because the office was thought to be a *necessary* office, and the *fee reasonable*, which, it was said, was the proper measure, by which to judge, "whether it was an indirect *alienation*, under colour

(a) Per Lord Mansfield. 1 Bur. 223.

(b) 10 Co. 61 b. (c) Ley 78.

of a new grant." Though it was extraordinary, says Lord Mansfield, to hold this office *necessary*, or the fee *reasonable*; or indeed to imagine that *any* office could be *necessary*, which never existed before.

IN the case of the bishop of Chester, before mentioned, it appeared, that the bishop, after the statute of the 1 El. granted to George Bolton, an annuity of five marks per annum for his life, *pro consilio impenso et impendenda*, which was confirmed by the dean and chapter; that after the death of the bishop, Bolton brought a writ of annuity against the successor, and in his declaration averred, that the predecessors of the bishop had granted reasonable fees, but did not aver that *this* fee had been granted before; the opinion of the court was against him, and he never had judgment. But the reason of the opinion was, "that this was a voluntary thing, and not an office" (a).

IN the 43d of Elizabeth, the true distinction seems to have been taken: It appeared that the archbishop of Canterbury had granted the office of surveyorship, with the ancient fee, *and more*: it was held void on account of the new addition, that being an injury to the successor (b).

THE next remarkable case on this subject is that of the bishop of Salisbury, which was decided in Trinity 11 of James the first, as reported (c) in Coke's reports. It was a writ of second deliverance brought by Simon Stanton and Henry Knap against John Green, for taking 127 sheep at Blewbury in the county of Dorset; the defendant avowed the taking, because John, bishop of Salisbury, being seised in his demesne as of fee in right of his bishopric of the manor of Sherborne, in the county of Dorset, of which the place where, &c. was parcel, granted,

(a) Ley 75, cited 10 Co. 61. (b) Ley 75. (c) 10 Co. 58 a.

on

on the last day of September, in the 27th of Elizabeth, to Edward Green, and the said John Green, and to each of them, the office of surveyor of all his manors in the county of Dorset—and elsewhere in the kingdom of England, to be exercised by them and their deputies, for whom they should answer, to have and to hold to them, for the term of their lives; and further, that the said bishop by the same deed granted to them a rent of twenty nobles a year issuing out of the said manor of Sherborne, with a clause of distress; and that the grant was confirmed by the dean and chapter, on the 5th of September, in the 28 of El. in the life of the said John, bishop of Salisbury; and he averred, *that the said office was an ancient office, and that the said office, together with the aforesaid fee of 6l. 13s. 4d. had been granted by the said John bishop of Salisbury, and his predecessors, “to such person or persons as they pleased.”*—He then shewed the death of Edward Green, alledged that he demanded the rent, and in default of payment, distrained.——In bar of this avowry the plaintiff pleaded the statute of 1 El. c. 19; and, “that neither the office aforesaid, nor the annual rent aforesaid, before the grant aforesaid, were ever granted by the said bishop nor by any of his predecessors for any longer time than for *one* life, by which the grant aforesaid, by the aforesaid John, late bishop of Salisbury, by force of the act aforesaid, was void.” On which the avowant demurred.

AFTER stating several objections to the pleadings, the reporter goes at full length into the merits of the question, the substance of which having been given on several former occasions, it is not intended to repeat here; the chief purpose for which the case is here introduced, is merely to shew that the question of the *necessity* of the office, or of the *reasonableness* of the fee, was not before the court, although

in the course of the argument much matter is introduced concerning both.—By the fifth resolution (*a*), in this case, it was declared, “that the grant of an ancient office to *one* with the ancient fee, by a bishop, shall not bind his successor, *unless* it be confirmed by the dean and chapter, for that such grants are not restrained by the statute of the first of Elizabeth, and therefore remaining at common law, ought to be confirmed by the dean and chapter.”

As this was a grant for more than *one* life, contrary to the usage stated in the bar to the avowry, judgment was given for the plaintiffs.

THE bishop of Chichester was seised in fee of a park in right of his bishopric, and had the office of park-keeper, which he granted by deed in the 44th of Elizabeth, to one Freedland for life, and also granted him, for the execution of the office, an annual rent of 3l. 6s. 8d. together with a livery of 13s. 4d. by the year, with pasturage for two horses in the park yearly, and the windfalls in the park, with a clause of distress for the rent of 3l. 6s. 8d. and the livery of 13s. 4d. and this grant was confirmed by the dean and chapter: for non-payment of the rent of 3l. 6s. 8d. Freedland took a distress, and in avowry averred, that the office and fee of 3l. 6s. 8d. were ancient, but made no averment for the residue. The plaintiff, the succeeding bishop, in bar of the avowry, confessed the grant, but pleaded the statute of 1 El. c. 19, and averred that the pasturage was never granted before, and entitled himself as successor to the grantor—to which the defendant demurred—and it seemed to be agreed by all the judges, that if the new additional fees had been in another clause distinct from the grant of the office and the fee 3l. 6s. 8d. or had been granted for another consideration; or if the bishop

(*a*) Id. 62 a.

had

had granted the office and 3l. 6s. 8d. for him and his successors, and had granted the pasturage and other *additional* fees during his own life only; the grant, in either of these cases, would have been good for the ancient office and fee, but not for the additional fees: they agreed too, that if the grant of the office had been with a fee of 5l. where the ancient fee was but five merks; there the grant being intire would have been void in the whole against the successor.—But the court was divided on the point whether these clauses were two distinct grants or only made one intire grant; two judges held that they were several and distinct, and two that they were intire and depending on each other, and therefore void in the whole against the successor (*a*).

IN replevin, the defendant avowed on a grant made to him by a dean and chapter of the office of catership of the church for life, with an annuity of 6l. per annum, for exercising the office, and a clause of distress; and averred that it was an ancient office pertaining to the dean and chapter, but did not aver that the annuity was an ancient annuity: the plaintiff in bar of the the avowry pleaded the 13 El. c. 10, and shewed the death of the dean grantor, and the election of another; and on demurrer the grant was adjudged to be void (*b*).

IN an action on the case for disturbing the plaintiff in the exercise of the office of register to the bishop of Rochester, it was alledged that the office was an ancient office, and grantable as well in reversion as in possession; and that in the year 1622 it was granted to the plaintiff by the then bishop of Chester, to be held after the death or surrender of J. S. who held it for life, to be exercised by

(*a*) *Gee Bishop of Chichester v. Freedland*, Cro. Car. 47.

(*b*) *Humphrey v. Parsel*, Brownl. 182.

himself

himself or his sufficient deputy; on not guilty pleaded, a trial at bar was had, and the plaintiff, to prove that it was an ancient office, and grantable in reversion, shewed a grant of the fourth of Edward the sixth to one Robinson, in reversion after the death of Bushfield and Bushfield, which was confirmed by the dean and chapter, and was subsisting in the first of Elizabeth; and that in the seventh of Elizabeth he surrendered and took a new grant to him and another. It was held by all the court that this was good evidence to shew that the office was anciently grantable in reversion, but that as it was matter of fact, it was to be left to the jury; but they conceived, that if it had not been usually and anciently granted in reversion, yet being granted before the statute of the first of Elizabeth, and subsisting at the time of that statute, and having been confirmed by the dean and chapter, it was a good grant: and the court said the jury might find the matter specially if they would, but they gave a general verdict for the plaintiff (*a*). About six years after this (*b*), the same plaintiff brought another action on the case for disturbing him in the execution of the same office, in which, on a plea of not guilty, a special verdict was found, to this effect:—That from time immemorial, the bishop of Rochester for the time being had used to grant the office of the register for all causes within the diocese of Rochester, as well in reversion as in possession, for life, to be held and exercised when the office came in possession, by the grantee or his sufficient deputy. The statute of the first of Elizabeth was found, and the facts with respect to the grant to the plaintiff to the same purpose as had been shewn in evidence on the trial in the former case, except that there was some variation in the

(*a*) Young v. Stowel. Cro. Car. 279, M. 8. Car.

(*b*) Young v. Fowler, H. 14 Car. Cro. Car. 555.

dates.

dates.—It was further found that the plaintiff, at the time of the grant, was an infant of the age of eleven years and six weeks, and not more; but that he attained his full age in the life-time of the bishop and of the tenant for life; and that the defendant disturbed him in the exercise of his office.

HERE two questions were made. 1. Whether this grant to an infant, *to be exercised by himself, or his deputy*, in reversion after the death of the tenant for life, was good or not; and, 2. Whether an office for life, *usually granted in possession or reversion*, being granted in reversion, and confirmed by the dean and chapter, was good to bind his successors.

As to the first, the court held that the infancy at the time of the grant, was no cause to avoid it; because at the time it fell into possession, he was of sufficient age to execute the office, and that, if it had become vacant during his minority, yet the grant would have been good, because it was to be exercised by *himself or his sufficient deputy*, and was a *ministerial* not a *judicial* office (*a*).

As to the second point, they held that the office being found to have been usually granted in possession for life, or in reversion for life, every bishop for his time might grant the office, because it was a *necessary* office, and ought always to be full; so that when one died, there might always be another officer immediately to execute the office for the benefit of the King's subjects; and that when it had been usually granted for life in reversion, there was not any prejudice to the successor, because no matter of profit was taken from him, and he had an officer who was *necessary*, and that this was well warranted by the case of the bishop of Salisbury.

(*a*) Vid. the report, where an opinion of Co. Lit. 3 b. is examined.

IN

IN an action on the case for disturbing the plaintiff in the exercise of the office of commissary of the bishop of Lincoln, and of official to the archdeacon of Leicester, on the plea of *not guilty*, it was found that these were ancient offices of judicature, always granted to one person for life, the one by the bishop, and the other by the archdeacon, till 1609, when they were granted by the bishop and archdeacon severally to doctor Chippendale and one Edward Clerk for their two lives; that afterwards, in 1614, they were granted to Edward Clerk and Sir John Lamb, the one by the bishop and the other by the archdeacon; that the bishop's grant was confirmed by the dean and chapter, and the archdeacon's by the bishop, dean and chapter; and that after the death of that bishop and that archdeacon, their successors severally granted both offices to the plaintiff, who, being disturbed by Sir John Lamb, brought this action."—The whole court held these offices to be *parcel* of the possessions of the bishopric and archdeaconry, and expressly within the word *hereditaments* in the statutes 1 El. c. 19, and 13 El. c. 10, and that therefore, as they were usually granted in possession, the grant in reversion was without warrant, and that no *necessity* could be urged for it; they therefore gave judgment for the plaintiff (a).

THE next case we meet with on this subject, is that of Ridley and Pownell in the 27th of Charles the second. It was an action on the case for disturbing the plaintiff in his office of register to the bishop of Bristol, and on the plea of not guilty, a special verdict was found "that Bristol was a new bishopric, founded in the time of Henry the eighth, and taken out of the bishopric of Salisbury; that

(a) Walker v. Sir John Lamb, Cro. Car. 258.

the

the office was a *necessary* office, and had been granted several times since the foundation of the bishopric, to one and his assigns for three lives; that the late bishop had granted it to Israel Pownell and his assigns, for the lives of Nathaniel, Edward, and Israel Pownell, of whom Edward was yet living; and that the present bishop granted it to the plaintiff for life; and that both these grants had been confirmed by the dean and chapter."

My Lord Hale, who, as Lord Mansfield observed (*a*), distinguished what he read, and thought and reasoned from himself, said, "that before the statute of 1 El. there was no difference between the grant of offices of old and new bishoprics; that both the old and the new bishops made their grants as owners, and not by prescription; and that if either *usually* granted for three lives, before the statute, they might do so still; but that in this case the verdict was defective in this, that it did not find that it was *usually* so done before the statute: but it had found, that it was so done *several times* since the foundation of the bishopric, which might have been *since* the statute, and not before it." He therefore recommended to the parties to have a *venire de novo* to ascertain the usage (*b*).

THE case of Jones and Beau (*c*) was an issue directed out of Chancery to try whether it had been the *usage* in the diocese of Landaff, previous to the statute of Elizabeth, to grant the office of chancellor to the bishop to two: the jury, on the evidence produced to them, found a special verdict, which being brought before the court, they said that nothing could support this grant but *usage*, and enough being found to induce the court to be of opinion, that this office was anciently granted to two before the statute, *therefore* they held this grant to be good.

(*a*) 1 Bur. 225.

(*b*) 2 Lev. 136.

(*c*) 4 Mod. 16.

THE last case I shall mention on this subject, is that of Sir John Trelawney against the bishop of Winchester (*a*), which was an action of debt for 600*l.* for five years salary of the offices of chief steward to the bishopric, and all its castles, lordships, manors, &c. and conductor of the men and tenants of the bishop, with a salary of 100*l.* per annum; and of master, keeper, or preserver of the wild beasts in all the forests, parks, chases, and warrens belonging to the bishop, and chief governor of all birds, fish, and beasts of warren, commonly called chief parker, with a salary of 20*l.* per annum; which offices and salaries were granted to the plaintiff by Sir Jonathan Trelawney, baronet, late bishop of Winchester, by letters patent, with a clause of distress in case of non-payment.

THE bishop pleaded the statute of 1 El. c. 19, and also "that the offices aforesaid, were not *ancient* offices of the bishopric, nor were usually granted for life; that the said fees were not the *ancient* fees; that the said offices were useless and merely nominal, and no duty or service to be done for or in respect of them; and that the grants were grants of hereditaments parcel of the possessions of the bishopric.

THE plaintiff replied that they were ancient offices; and the fees the ancient fees; and that they had been usually granted for life, without this, that they were useless and merely nominal.

THE bishop rejoined, that the offices were useless and merely nominal; and without any duty or service to be done for or in respect of them, in manner and form aforesaid; and on this issue was joined.

A SPECIAL verdict was found to this effect, "That the offices of chief steward, and of conductor of the men and

(*a*) 1 Bur. 219.

tenants

tenants of the bishopric, were *ancient* offices of the bishops, and had been anciently and usually granted for life, with an annuity, and that the annuity of 100*l.* was the ancient fee; that they were granted to the plaintiff by Jonathan late bishop of Winchester, on the 4th of July, in the 10th of Queen Anne, and that the grant was *approved* and *confirmed* by the dean and chapter.—That these offices, at the time of making the act of 1 El. c. 19, and *then*, were merely nominal, and that no duty, attendance, or service was to be done for or in respect of them: in manner and form as the bishop had alledged.”

As to the other office, it was found, that it was not an *ancient* office; and that the bishop for the time being had not anciently and usually granted it, nor the annuity for the life of the grantee; and that *this* office also was merely nominal.

THE only question on this special verdict was, whether Sir John Trelawney was entitled to hold the two first mentioned offices, and to recover the arrears due on them, against the *present* bishop; for as to the last office, that of chief parker, the facts found by the special verdict made an end of any question concerning it, and the point was given up.

LORD Mansfield, in delivering the opinion of the court, after commenting on the terms of the 1 El. c. 19, and several of the cases that had occurred soon after the making of it, proceeded to observe, that the legislature, in the first year of the reign of James the first, had this act and the subject of it under consideration. The first of James the first, c. 3, he observed, extends to the *King*, that restraint which the first of Elizabeth laid upon grants made by a bishop to a *subject*. But though questions had arisen on grants of offices; though in fact during the whole long reign

reign of Queen Elizabeth, the bishops had *re-granted* their ancient offices as they fell in; yet the legislature did not interpose; and therefore must have meant that this power should continue. They were satisfied with the distinction taken in the case of the archbishop of Canterbury in the 43d of Elizabeth, "That no *new* charge should be brought upon the see."

FROM the 10th of Elizabeth, the time of the bishop of Ely's case, to that day, no grant of a *new* office with a *new* fee, had ever been held to be good. *Such* a grant was within the meaning of 1 El. by construction, because it is a *colourable alienation*; and under that pretext the whole statute might be *evaded*.

FROM the first of Elizabeth to that day there had been no case, where the *re-grant* of an office in *being before* the 1 El. in the *usual* manner, with the *ancient* fee, had been adjudged to be within the restraint of that statute.

IF these grants were not within the statute, but stood as they did at common law, the *utility* or *necessity* of them could never be material. A bishop, at common law, with the confirmation of his dean and chapter, might bind his successors by grants from which they could have no benefit.

THERE was no case since the 10th El. that had judicially turned upon the *utility* or *necessity* of the office; the only question had been, "whether the grant was agreeable to the *usage* before the 1 El. c. 19."

THE bishop of Salisbury's case, he observed, came before the court on a demurrer. It was not alledged in the pleadings of either side, that the office was, or was not, *necessary*; the plea in bar to the avowry was singly, that the office *never* was granted *before*, beyond *one* life——
If the doctrine in the fifth resolution was true, the *utility* or
necessity

necessity of the office was not at all material: for by the common law, the utility or necessity of an office was *no* requisite towards rendering the bishop's grant of it, confirmed by his dean and chapter, good and valid.

THE bishop of Chichester's case too, came before the court on a demurrer.—There was no allegation in the pleadings of either side as to the office being *necessary* or not; the question turned solely on the *addition* of a *new* fee.

THE case of the register of Rochester (*a*), came before the court on a special verdict. There was not a word as to the office or reversionary grant of it being *necessary*; but it was found to have been *usually* granted in reversion; and *therefore* the court adjudged such a grant in reversion to be good against the successor.

THUS stood the construction of this statute, on the reason and words of the law, the practice and the judicial determinations. But it happened that beside the real grounds of the judgment, in the bishop of Salisbury's case, they echoed the reasoning of the bishop of Ely's, without *distinguishing* the essential difference between the two cases; and laboured to prove, "that the office was *necessary*."

UNDER the great authority of the reporter, the same reasoning had been repeated in the subsequent cases: and where the grant was good, because it was warranted by the usage before the 1 El. they had, *ex abundanti*, laboured to shew, that the office was *necessary*, by arguments so inconclusive, and so contradictory, that one was sorry to read or repeat them. "It is necessary to grant for one life, but not necessary to grant for two, or in reversion;" and then, "It is necessary to grant in reversion, that when the first

(*a*) Here is meant the second case, *Young v. Fowler*. Cro. Car. 557.

life drops, there may be another immediately to fill the office." Whereas, in *real truth*, few of these patent offices, except the judicial, are *useful*, or *necessary* in any sense; fewer are *necessary*, or even *expedient*, to continue beyond the bishop's *own* time; none *necessary*, by any colour of argument, to be granted in *reversion*, or for more than one life. But if they existed before the 1 El. they are not within the statute, they are governed by the common law; and *therefore* grants of them bind the successors, how useless soever they may happen to be.

IN the case of Ridley and Pownell, the special verdict had found the office to be a *necessary* one, which was the first instance where it appeared *judicially* to the court that the office was *necessary*.—But by the opinion of my Lord Hale, finding it to be *necessary*, was totally *immaterial*.

WITH respect to the case of Jones and Beau, he observed, "that no man alive would say, that it was necessary that the office of a bishop's chancellor should be granted to *two*."

THE office in question, he said, was found, "*never* to have been more *useful* or *necessary* than it was at the time of the verdict; and yet *all* the bishops of Winchester from the 1 El. had thought the grants of it valid; and every succeeding bishop had submitted to the grant made by his predecessor: and the greatest men of the kingdom, or the nearest relations to the bishops, had successively held the office. The present bishop had thought this grant good for *eleven* years; but had conceived a doubt, from the misapplication and repetition of inconclusive and contradictory arguments about the office being *necessary*, which are to be found in the reports of the cases before the 27th of Charles the second.

THE court was unanimously of opinion, that an *office* and *fee*, which existed *before* the first of Elizabeth, was
not

not within the statute; but might be granted *since* precisely in the *same manner* in which it was granted *before*.

IN order to prove the *usage* previous to the making of the statutes, it is not absolutely necessary that direct evidence of its existence before that time should be produced; it is sufficient to produce such evidence of usage subsequent to the statutes as to raise a legal presumption that it existed before.

IN the case of Jones and Beau, before mentioned (*a*), the plaintiff produced four grants of the office to two persons, of which three were made in the time of one bishop; the last was made in the year 1620, and the earliest was fifty years after the first of Eliz. it appeared likewise, that subsequent to the year 1620 no such grant had been made till 1672, when the one in question was made; an objection being taken to this evidence, Justice Dolben said, he recollected, that in the case of the register of Bristol (*b*), Lord Hale was of opinion, that if it could be shewn that such grants were made some time *after* 1 Eliz. it would be an evidence that such were also made before the statute. The jury found a special verdict, and the court thought there was enough to induce them to be of opinion that the office was usually granted to two *before* the statute.

WHERE the succession, in the case of a charitable corporation, is vested in trustees, these, of course, have no interest, but are only employed as instruments to effectuate the purposes of the institution; in such a case, if, at the

(*a*) Vid. ante, page 173, 178.

(*b*) Vid. ante, page 172.

foundation, the annual income of the land appointed for the maintenance of the objects of the founder's bounty amount to a certain sum, and be distributed in a certain proportion by him, and if afterwards the revenues increase by a rise in the rents of land, the increase shall be employed in making a proportionable increase in the allowance to the objects of the charity (a).

If Grants by Corporation

THE capacity of a corporation, and of the members of which it is composed, as individuals, is totally distinct (b); the corporation at large may therefore grant to any individual member: thus the dean and chapter may present any of the prebendaries to a living, or make a lease to him of the chapter lands; and a mayor and commonalty may make a grant to any ordinary member of the corporation. But the head of a corporation differs in this respect from any other member: a lease cannot be made by the chapter without the concurrence of the dean; therefore the chapter cannot by themselves make a lease to the dean, and he cannot take it as from dean and chapter, because, being an integral part of the corporation, he would in such a case be both lessor and lessee; neither can they present the dean; nor can the mayor and commonalty grant to the mayor: because the corporation is complete without any particular individual member, and his concurrence is not necessary to any act of the corporation;

cannot grant to the mayor

(a) Vid. the case of Thetford School, 8 Co. 130. Att. Gen. v. Johnson, Ambler, 190. Att. Gen. v. Sparks, Id. 201.

(b) Vid. 8 H. 6, 1, 14. Bro. Corpor. 24. 19 H. 6, 64. Bro. Cor. 27.

but

but it is not complete without the head (*a*). But if a lease for years be made to A. one of the commonalty of London, and afterwards he become mayor, this lease is not extinct; and so it is of a dean and chapter; for the member of the corporation in this case does not make the body corporate, nor, at the time of the lease made, was he head of the corporation (*b*).

IF a corporation consist of two bailiffs and burgesses, one of the bailiffs and burgesses cannot make a lease of the corporation lands in their *politic* capacity to the other bailiff in his *natural* capacity: for the bailiffs are an integral part of the corporation, and they both make but one officer; and therefore where one is severed in any corporate act, that act becomes void; for if one bailiff could do a corporate act separately, this inconvenience would follow; they might act directly contrary to one another: the meaning and intent of the charter in making two bailiffs was, that they should be both present, and concur in every corporate act; one, therefore, with the burgesses, cannot make a lease to any one, much less to the other; and if both concur, the one to whom the lease is made will be both lessor and lessee (*c*).

IF J. S. be dean of P. land, it is said, may be given to him by the name of dean and his successors, and J. S. clerk, and his heirs; in which case he will take in two capacities, as dean and as a private man, and will be tenant in common with himself (*d*). The same law will

(*a*) Vid. 14 H. 8, 2. 29 Bro. Corpor. 34. Salk. 398. 8 Mod. 304. 2 Ld. Raym. 778.

(*b*) Jenk. 200.

(*c*) Salter, v. Grosvenor, 8 Mod. 304. Lord Hardwicke held it to be a good rule, that no member of the committee of city lands should be a buyer or seller of them. 3 Atkyns, 483, (516).

(*d*) Vid. ante, page 72.

hold, if rent be granted to J. S. dean, and J. S. clerk, who is the same person; he shall join with himself in avowry: so where dean and chapter are lords of a fee, and the dean purchases the tenancy to him and his heirs; it has been said, he is tenant to himself and chapter; and he and his chapter shall make avowry on himself (a). Qu.?

It has been before (b) observed, that, by the general rule of the common law, a body corporate is capable of taking any grant of privileges and franchises in the same manner as private persons; to enumerate, therefore, the privileges and franchises of which they are capable, would be to enumerate all the franchises and privileges known to the law, which is not the object of the present work.

Of all privileges and franchises belonging to corporations, the *inheritance* is in the body *collectively* taken, though every individual member is particularly interested in them (c). Of some the exercise and enjoyment can be only by the corporation at large; of others, the exercise and enjoyment may be by the particular members. Of the former kind, are the privilege of holding courts, the franchise of a market, the privilege which some cities and towns enjoy of being counties of themselves, and exempted from the general jurisdiction of the sheriff of the county in which they are, and many others; of the latter kind the following are examples.

If a grant be made to the mayor and commonalty of a city, that the citizens shall not be compelled to serve on juries *out* of the city, each individual citizen shall take ad-

(a) 14 H. 8, 2, 29. Bro. Corpor. 34.

(b) Vid. page 74.

(c) Vid. 1 Saun. 344. 2 Ld. Raym. 951.

vantage

vantage of this grant, when he comes to the book to be sworn (a); and it is said, that this is the only way in which advantage shall be taken of the privilege, and that a return of the charter made by the sheriff to the *venire facias*, will not be allowed (b). But if any of the citizens should, notwithstanding such a grant, permit himself to be impanelled out of the city, without insisting on his privilege, this shall not preclude the citizens from taking advantage of it at another time (c).

So, where the King granted to the mayor and commonalty of the city of London, that no prisage should be paid of the wines of the citizens and freemen of London, it was resolved, that though the grant was to the corporation, yet it should not enure to the body politic of the city, but to the *particular* persons of the corporation who should individually assert their claim to the exemption (d).

BUT this privilege shall extend only to those goods of which the citizen is *sole* owner, and not to those of which he is owner jointly or in common with another who is not a citizen, and therefore, for all goods of which he is owner jointly or in common, prisage shall be paid: so, he who would claim the benefit of such a charter, must be the *intire* owner, and therefore a citizen, who has the goods as a pledge, shall not have the benefit of it, because he has only a *special* property: so, he must have the *real* and *true* property in the goods; and therefore if a stranger import goods and sell them to a citizen, with an intent to have them resold to himself after they are unloaded, he must

(a) 21 Ed. 4. 55, 56. Bro. Corpor. 65.

(b) Vid. 1 Keb. 840.

(c) 21 Ed. 4, ubi sup.

(d) Vid. Waller v. Hanger, Mo. 832, 833, cited 2 Ld. Raym. 952.

pay the duty: so, if a citizen be disfranchised before the goods be unloaded, he must pay the duty; so, if he *sell* them to another before they are unloaded: so the citizen who would claim the privilege must be commorant in the city, and not elsewhere.

BUT if the citizen who is the real owner of the goods die before the arrival of them at the port, which is the period when the duty accrues, yet the exemption continues, because it is a privilege for the discharge of his debts, and for his will; the executor or administrator has no property in them for his own benefit merely in that character, nor can they be affected by any act of his (a).

WHERE a corporation claims common by prescription for all the freemen, each particular freeman shall enjoy the fruit and benefit of it, though the inheritance be in the body politic, and may put his cattle in the common; and on an action of trespass being brought against him, may justify under the prescriptive right of the corporation (b).

IF a grant be made to the mayor and commonalty of a city, that the citizens shall be quit of toll, or other similar duties, every citizen individually shall take advantage of the grant, and assert his right to the exemption by action (c).

THE same observation is applied by Lord C. J. Holt to the right of electing members of parliament granted to a corporation; "the *inheritance* of this right of election itself is in the whole body politic, but the exercise and enjoyment of it is in the particular members," to whom by the provisions of the charter it is committed, and any one

(a) 1 Rol. Rep. 142, 148. 3 Bulstr. 1, 26.

(b) Mellor, v. Spateman, 1 Saund. 343, cited 2 Ld. Raym. 953.

(c) Vid. mayor, &c. of Lynn, v. mayor, &c. of London, 4 Term Rep. 130, et seq.

intitled

intituled to a vote, may maintain an action against the presiding officer for refusing his vote (a).

HAVING considered the capacity of corporations with respect to their property and privileges, it follows naturally that we should say something with respect to their capacity of *suing* and being *sued*. This part of the subject resolves itself into two questions. 1. What actions they can bring? and, 2. What actions may be brought against them?—To both which one general answer may be given, that they may maintain all such actions as are necessary to assert their rights when invaded, or to give them a recompence for any injury that can be done to them; and that all such actions may be maintained *against* them, as are necessary to enforce the claims of others in *opposition* to them.

ALL corporations aggregate, having the fee simple of *their possessions*, may maintain a writ of right, as any *tenant in fee simple* may (b), and so may those sole corporations who have the fee simple absolute in their possessions; a bishop for the possessions of his bishopric; a dean or master of an hospital, for those possessions which they hold distinct from the chapter or the hospital respectively; and so might an abbot or prior for the possessions of their monastries. But those sole corporations which have not the fee simple in them, as a parson, vicar, prebendary, and in ancient times a chauntry priest, cannot maintain a writ of right, but the highest writ which they can have is a

(a) Vid. *Ashby, v. White, et al.* 2 Ld. Raym. 938, 951. Salk. 19.

(b) Vid. case of All Souls college, Cro. El. 232. Co. Lit. 341 b. F. N. B. 5. C.

juris

juris utrum (a), which is a writ in the form of an affize, but determines both the right and the possession (b). It lay, and still lies, though obsolete, where lands or tenements were alienated by the predecessor, or where a recovery had been had against the predecessor by default or by surrender, or where the predecessor had not pleaded or prayed in aid of the patron and ordinary. But if he had prayed in aid of the patron and ordinary, and they had joined in aid, and rendered the land or confessed the action, then the successor could not have this writ against the recoverer.

If a parson had been disseised of lands and tenements, parcel of his rectory, and died; or if, after the death of a parson, a man had intruded into such lands and tenements, the successor should have had this writ (c).

As these corporations which had not the fee simple absolutely in them, could not have a writ of right properly so called, so neither could they have a writ of *customs and services*, ne injuste vexes, *rationabilibus divisis*, quo jure, or such other writs as were grounded on the mere right (d).

BUT they might have a writ of *waste*, a writ of entry *ad communem legem*, a writ *de consimili casu*, *ad terminum qui præteriiit*, or a *quod permittat*, a writ *contra formam col-*

(a) Rex vice comiti salutem. Si A. persona ecclesiæ de E. fecerit te securum, &c. tunc summonneas, &c. 12 liberos, &c. de vicineto de E. quod sint coram justitiariis nostris ad primam assisam, &c. vel coram justitiariis nostris tali die, parati sacramento recognoscere, *utrum* messuagium cum pertinentiis in E. sit libera eleemosyna perti-
nens ad ecclesiam ipsius A. de E. an laicum feodum S. et interim messuagium illud videant et nomina eorum imbrevari facias. Et summonneas per bonos summonitores, prædictum S. qui messuagium illud tenet, quod tunc sit ibi ad audiendum illam recognitionem. Et habeas, &c. summ', &c. et hoc breve. Teste, &c. *Reg. Brev. Or.* 32 b.

(b) Vid. Reeves's History of English Law, vol. 1. 366, 368.

(c) F. N. B. 49. A. (d) F. N. B. 49. L. Co. Lit. 341. b.

lationis,

lationis, or *contra formam feoffamenti*, a writ of mesne, and such other *possessory* writs as were applicable to their case (a).

If a dean and chapter had been disseised, and afterwards the dean had died, the succeeding dean and the chapter might have had an assize of *novel disseisin*, because, though the dean disseised was dead, the chapter remained, which was composed of persons capable.—But, it was otherwise of an abbot and convent, because, if the abbot died, there remained no persons capable, and therefore the succeeding abbot must have had recourse to his writ of entry in *le quibus* (b).

THE modern method of trying the title of land by ejectment, extends to corporations of every kind, whether in the character of plaintiffs or defendants (c).

If a trespass be committed on the lands or possessions of a corporation, they may have an action of trespass as well as a private person (d).

So, they may maintain an action of trespass on the case for a disturbance in holding their leet, or taking the profits of liberties granted to the corporation (e).

A GREAT part of the revenues of corporations consists of certain duties leviable within the limits of their jurisdiction, and if payment of any of them be refused, they may recover them by action of debt (f), or *indebitatus assumpsit*.

AN *indebitatus assumpsit* was brought for the duty of scavage, in which the declaration was on the custom of

(a) Id. *ibid*.

(b) 1 Ed. 5, 5. a. Bro. Corpor. 86.

(c) For some examples *vid.* 1 Anders, 202, 248. Rector of Cheshington's case, 1 Co. 153.

(d) 21 Ed. 4, 75. 1 Ed. 5, 5. 7 H. 7, 9.

(e) 45 Ed. 3, 2. b. 18 H. 6, 11. cited Com. Dig. Franchises, F. 19.

(f) Hardres, 486.

London,

London, "that every one who exposed foreign goods to sale, which had been entered in the custom-house, should pay so much for shewing them:" after verdict, it was alledged in arrest of judgment, that no *assumpsit* lay for such a duty, because to maintain assumpsit there ought to be a contract express or implied; and it was further said, that as the customs of the city were confirmed by parliament, this was a duty by record: but the objection was not allowed, because there were a multitude of precedents in similar cases (a).

FOR such duties they may likewise authorise their officer to distrain.

AN action of trover was brought against the defendant for an anchor, sails, and cables—on the plea of not guilty, a special verdict was found to this effect; "that the town of Newcastle upon Tyne was, time out of mind, an ancient town in which there was an ancient port; that the mayor and burgeses had, time out of mind, been used to cleanse and maintain the said port for the safe navigation of ships, and for the benefit of exportation, in consideration of which they had used to have a toll of 5d. per chaldron for all coals exported; that for default of payment, they had used, by their water-bailiff for the time being, to distrain *whatever goods* of the exporter, who refused to pay the toll, were distrainable by the law of England; that the defendant was water-bailiff, constituted by the mayor and burgeses in due form; that the plaintiff loaded so many chaldrons

(a) *City of London v. Goree*, 1 Ventr. 298. Vid. the case of the mayor of Exeter v. Trimlet, 2 Wils. 95. The case of the mayor of Yarmouth v. Eaton, 3 Bur. 1402. Mayor of Kingston upon Hull v. Horner, Cowp. 102: and *Seward v. Baker*, 1 Term. Rep. 616—all of which shew that a *general* indebitatus assumpsit will lie for such duties.

of

of coals, the duty of which for toll amounted to 7l. and that on payment being refused, the defendant distrained the anchor, sails, and cables, which were part of the tackle of the plaintiff's ship.

SEVERAL objections being taken on the part of the plaintiff, Lord Chief Justice Holt said, "that there was no necessity to aver here that the port was actually in repair, for that the consideration was alledged to be, that they had, time out of mind, been *used* to repair, which was, in fact, that they were *obliged* to repair, and not the actual repairing: that the duty of 5d. per chaldron was not unreasonable, for that the court could not take notice of the price for which the coals were sold; that to speak properly, in the way of trade, the owner of the goods was the exporter; but that as to the duties of the port, the master of the ship was the exporter, and satisfied and discharged all such duties; for that it would be highly unreasonable to drive the mayor and burgessees, or the owner of the toll, to send to seek the merchant; that this was the constant usage: that it was reasonable that such duties should be paid, for that without ports there would be no navigation, and that without a duty the port would not be repaired." He cited the case of Maldon in Essex (a), where the corporation prescribed, that they and all those whose estate they had, had used for time immemorial to repair the port, in consideration of which, they had immemorially used to receive, for all lands sold within the precincts of the borough, a certain rate of 10d. in the pound out of the purchase money: he observed, "that this was adjudged a good custom, notwithstanding an objection to the prescription in a *que estate*, for that a man might have had the borough, and granted it to the corporation, and that the landholder

(a) 3 Keb. 287, 532.

reaped

reaped a benefit by the trade coming to the town by reason of the port; that the present case was much stronger, the duty being paid by the trader who reaped the benefit of the port more immediately; that the duty in this case arose out of the goods laden to be exported; so that, by their being laden the duty commenced, and the ship became chargeable, and that without doubt any *other goods* of the person who ought to pay the duty might be distrained as well as those for which the duty was payable" (a).

IF a grant be made to the corporation of a town that they shall have the return of writs within the town, and that the sheriff of the county shall not intromit, they may maintain an action on the case against the sheriff, if he enter and serve process (b).

IF an injury be done to one of the members of a corporation, by which the corporation at large are put to any damage, the corporation may have an action on that account. Thus where the corporation are bound to elect a new mayor every year, on a particular day, under the penalty of 10l. and the mayor be imprisoned unjustly, so that they cannot observe the day by which they incur the penalty; or if they are bound to appear annually in the exchequer under a penalty, and they cannot observe the day on account of the mayor's imprisonment, by which they lose the penalty, the corporation shall have an action for that imprisonment (c).

(a) *Vinkensterne v. Ebdon*. 1 Ld. Raym. 384. 1 Salk. 248. 5 Mod. 356. Carth. 357.

(b) 1 Rol. Rep. 118. This was a grant to the town of Darby by James the first, and it was objected that the King could not at that day, by his charter, grant *retorna brevium*; but it was held that he could.

(c) Per Brian C. J. 21 Ed. 4, 7, 12, 27, 67, Bro. Corpor. 63. Com. Dig. Franchises F. 19.

THE mayor and commonalty of Lincoln brought an action of covenant against the mayor, bailiffs and commonalty of Derby, and counted, that the predecessors of the defendants, by their deed, had granted to the predecessors of the plaintiffs, that the mayor and the commonalty of Lincoln should be quit of murage, pontage, custom and toll within the town of Derby for all their merchandizes, and averred that the officers of Derby had taken toll and custom wrongfully of some burgesses of Lincoln, contrary to the covenant: the action was held to be maintainable, though it was objected that the corporation ought not to have the action, but that the action should have been brought by the particular persons whose goods were taken, against the particular persons who took them (*a*).

HAD such an exemption been claimed by grant from the King, or by prescription, it would seem that the action could not have been maintained by the corporation at large, but must have been brought by the members particularly injured, because, in such an exemption, it is not the corporation in its aggregate capacity that is particularly interested, but the several members in their individual capacities.——It is at least certain, that the individuals injured could have maintained the action, as is evident from the following case.

MELLOR brought an action of trespass against Spate-man, in which he declared that the defendant, with force and arms, broke the plaintiff's close at Derby, and with his horses, oxen, cows, hogs, and sheep fed, trampled down and consumed the grass there growing: the defendant, as to all the trespass with his beasts, except two geldings and two mares, pleaded not guilty, and as to the trespass with the said geldings and mares, he pleaded in bar, that the

(*a*) 48 E. 3. 17, cited Saund. 344, and Sawyer's Arg. quo. war. 33.
place

place where the trespass was alledged to have been committed, was twenty acres of land in Derby aforesaid, and from time immemorial had been parcel of a common field called *Littlefield*, and that the borough of Derby was an ancient borough, and that the defendant at the time when, &c. was a burgess of the said borough: he further said, that the burgesses of the borough from time immemorial till the 11th day of July, in the fourteenth year of Charles the first, were a body politic and corporate by the name of bailiffs and burgesses of the borough of Derby, and that on that day the King by his letters patent, under the great seal, changed the name of the corporation to that of mayor and burgesses. He then laid a prescription for common in the corporation in such terms as these, that the bailiffs and burgesses from time immemorial, till the said 11th of July, and the mayor and burgess ever since had for themselves and for each burgess of the said borough, common for all their commonable beasts in the said field called *Littlefield*, of which the place where the supposed trespass was committed was parcel, in the manner which he then particularly described. To this plea the plaintiff demurred.

SAUNDERS, who was counsel for the defendant, contended "that a corporation might prescribe for the benefit of their particular members, as well as a natural person might prescribe for common or other profit or easement for himself and his tenants; that a corporation could take a grant for the benefit of the particular members, appeared by the case of Lincoln and Derby before mentioned; and he argued, that if a corporation could take a *grant* for the benefit of their particular members, they might *prescribe* to have the same thing to the same intent, for that whatever might commence by *grant* might be claimed by *prescription*;" which the court, says the report, did not much deny;

deny; and Keeling C. J. in particular, said the plea would have been good had it stated that the cattle were *levant* and *couchant* within the vill, but that for want of this *only*, it was bad, because there could be no such thing as *common in gross without number*, and judgment was for *that* reason given for the plaintiff. The defendant's council advised him to bring a writ of error; but as the action was commenced by original, and consequently a writ of error lay only to parliament, and not in the exchequer chamber, nothing further was done (*a*).

THE reasoning of Saunders would, perhaps, have been more correct had it been expressed thus, "that as a corporation can take a grant for the benefit of the particular members, of which each particular member might avail himself in pleading, so each particular member might prescribe in right of the corporation, for a thing which they claimed by prescription for the benefit of the particular members;" at least the reasoning so expressed would have been more applicable to the case in question, because there, the prescription was not *by* the corporation for the benefit of the particular members, but by a particular member *in right* of the corporation.

THIS is indeed the case of prescription by a particular member in a *plea*, but I conceive that had the plaintiff in the present case, instead of bringing an action of trespass against the defendant, distrained the defendant's cattle, the defendant might have enforced his title to the common in the character of plaintiff.

THE question whether the corporation at large can maintain an action for the infringement of a privilege claimed by an individual, as member of the corporation, in consequence of a grant from the King to the corporation for the benefit of its members, was agitated in the late case of the corporation of London against the corporation of Lynn (*b*).

(*a*) 1 Saund. 343.

(*b*) H. Blackstone's Reports, C. B. 206.

THIS was an action on a writ *de essendo quietum de theolonio*, brought by the mayor, commonalty and citizens of the city of London against the mayor and burgesses of the borough of Lenne Regis, commonly called King's Lynn, in the county of Norfolk, to establish a claim of the freemen of the city of London to be exempt from the payment of all tolls and port duties throughout England, except the priage of wine, in whatever place they reside, and though they have obtained their freedom by purchase (a).

THE

(a) As this was a very unusual proceeding, we shall give the writ, the declaration and the pleas, at full length—The writ was thus :

“ George the third, &c. To the mayor and burgesses of the borough of Lenne Regis, commonly called King's Lynn, in the county of Norfolk, greeting. Whereas our city of London is, and, from time whereof the memory of man is not to the contrary, hath been an ancient city; and the citizens of the said city, during all the time aforesaid, have been a body corporate and politic in deed, fact and name, by divers names of incorporation; and for divers, viz. fifty years last past, have been a body politic and corporate, by the name of the mayor, and commonalty, and citizens of the city of London: and whereas also, amongst other the liberties, free customs and privileges, from time immemorial used and enjoyed by the *said citizens*, they the *said citizens*, from time, &c. have been used and accustomed to have and enjoy a certain ancient liberty and privilege; that is to say, that the citizens of the said city, and all their goods, should be quit and free of and from all toll and passage, and lastage*, and other customs, throughout the whole kingdom of England, and the ports of the seas (except only our due and ancient custom and prizes of wines); all which said liberties and privileges have been confirmed by divers charters of our progenitors, and also by divers acts of parliament: nevertheless you require the *said citizens*, as it is said, to yield toll, passage, lastage, and other customs to you, of their goods and things within the said borough and the port thereof, and do many ways unjustly disquiet them on that occasion, to the

* Lastage was a duty of one penny for every quarter of corn, i. e. ten-pence for every last, exported from Lynn.

THE writ was an original issuing out of chancery, as all writs of that nature are, without requiring a return

the great damage of the said *citizens*, as we have received information from their complaints : We, willing that no injury should be done to the said citizens, command you, that if it be so, then, desisting for the time to come from bringing such disquietudes on the *said citizens*, you permit them to be quit of yielding such toll, passage, lastage, and other customs as aforesaid, to you, of their goods and things in the said borough and the port thereof. Witness ourself at Westminster, the 19th day of July, in the 27th year of our reign."

THE *alias* was in the same terms as the original writ, except that after the words, "We willing, &c. command you," were added, "as formerly we commanded you" &c. "or signify to us the cause, wherefore you would not, or could not execute our command, formerly directed to you therein. Witness ourself at Westminster, the 23d day of July, in the 27th year of our reign."

THE *pluries* was also in the same terms as the original, except that after the words "command you," were added "as we have often commanded you," &c. "or signify to us the cause, wherefore you would not, or could not execute our command, formerly directed to you therein, and you slighting our said commands, as we are informed, have neglected hitherto to permit the said citizens to be quit of yielding such toll, passage, lastage, and other customs as aforesaid, to you of their goods and things in the said borough, and the port thereof, according to the liberty, free custom and privilege aforesaid; or leastwise to signify to us the cause wherefore you would not or could not do it; in manifest contempt of us and of our said commands, and to the great damage and grievance of them the said *citizens*; to our great surprize and displeasure: we again command you, strictly enjoining, that you permit the *said citizens* to be quit of yielding toll, passage, lastage, and other customs to you, of their goods and things, within the said borough and the port thereof, according to the tenor of our said commands, formerly directed to you therein, or that you be before our justices at Westminster, on the morrow of All Souls, to shew wherefore you have contemned to execute our commands so often directed to you therein; and have you then there this writ. Witness ourself at Westminster, the 26th day of July, in the 27th year of our reign.

turn either there or into any other court : after reciting the claim of the citizens, it alleged that the mayor and burgessees of Lynn, to whom it was directed, nevertheless, required them to yield toll and the other duties, and many ways

THE declaration was thus:—Norfolk, to wit. The mayor and burgessees of *Lenne Regis*, commonly called *King's Lynn*, in the county of *Norfolk*, were summoned to answer the mayor, commonalty and citizens of the city of London, of a plea wherefore they require the citizens of the said city to yield toll, passage, and *lastage*, of their goods and things, within the said borough and the port thereof; and thereupon the said mayor, commonalty and citizens of the said city, by Rowland Lickbarrow, their attorney, complain, for that whereas the city of London is, and, from time whereof the memory of man is not to the contrary, hath been an ancient city; and the citizens of the said city, during all the time aforesaid, have been a body politic in deed, fact and name, by divers names of incorporation; and for divers, to wit, fifty years last past, have been a body politic and corporate, by the name of the mayor, commonalty, and citizens of the city of *London*. And whereas also, amongst others, the liberties, free customs, and privileges, from time immemorial used, and enjoyed by the said citizens, they the said citizens, *from time whereof the memory of man is not to the contrary, have been used and been accustomed to have, and enjoy, and still of right ought to have and enjoy a certain ancient liberty and privilege, that is to say, that the citizens of the said city, and all their goods, should be quit, and free of and from all toll, passage and lastage, and other customs throughout the whole kingdom of England, and the ports of the Lord the King, except only his due and ancient custom, and prises of wines; all which* said liberties and privileges have been confirmed by divers acts of parliament: and whereas our said Lord the King did, by his certain writ, under his great seal of Engand, command the said mayor and burgessees, that they should permit the said citizens, to be quit of yielding such toll, passage, lastage, and other customs as aforesaid, of their goods and things in the said borough, and the port thereof; or on a certain day now last, signify to him cause, wherefore they had not executed his commands to them for the said purpose, before then directed: yet the said mayor and burgessees, not regarding the said writ of our said Lord the King, have not signified to him as by the said writ was commanded;

ways unjustly disquieted them on that occasion; it then commanded them to desist for the time to come from bringing such disquietudes upon them, and permit them to be quit of yielding such toll and the other duties. The *alias* was to the same purpose, except that it commanded the mayor and burgeses of Lynn, in the alternative, either to *permit* the citizens to be quit, or to signify the cause

manded; and since the time of the aforesaid writ of our said Lord the King, to them directed, to wit, on the first day of December in the Year of our Lord 1787, at the borough aforesaid, in the county aforesaid, *did disquiet the said citizens* on the occasion aforesaid, and did then and there require of *Osbert Denton, James Denton, Thomas Carr, Thomas Turner, and Samuel Baker*, citizens of the said city, *toll, passage, and lastage*, other than the custom and prises of wines (above excepted), of their goods and things, within the said borough, and the port thereof; in contempt of our said Lord the King, and to the damage of the said mayor, commonalty, and citizens, of one hundred pounds, and therefore they bring their suit, and so forth.

Plea—And the said mayor and burgeses, by *Joseph Lyon*, their attorney, come and say, that they *the said citizens, from time whereof the memory of man is not to the contrary, have not been used and accustomed to have and enjoy, and still of right ought not to have, and enjoy, the said ancient liberty and privilege*, that is to say, that the said citizens of the said city, and all their goods, should be quit and free, of and from all *toll, passage, and lastage*, and other customs *throughout the whole kingdom of England*, and the ports of the Lord the King (except only his due and ancient custom and prises of wines) as the said mayor, commonalty and citizens, have in their said declaration above alleged; and of this they the said mayor and burgeses put themselves upon the country, &c. and the said mayor and burgeses, for further plea in this behalf, by leave of the court here, for this purpose first had and obtained, according to the form of the statute in such case made and provided, say, that the said *Osbert Denton, James Denton, Thomas Carr, Thomas Turner, and Samuel Baker* are not citizens of the said city of London, as the said mayor, commonalty and citizens, have above in their declaration alleged, and of this they, the said mayor and burgeses, put themselves upon the country, &c.

ON these pleas issues were joined.

why they would not or could not obey the command; and therefore admitted of a return.

THE *pluries*, after repeating the command in the alternative in the same manner as the *alias*, proceeded to allege that the parties, to whom it was directed, slighting the commands of the King, had neglected hitherto to permit the citizens to be quit of toll, or to signify the cause why they had not done so; it therefore again commanded them to permit the citizens to enjoy the exemption, or to be before the justices of the bench, at Westminster, on the morrow of All Souls, to shew wherefore they had contemned to execute the commands so often directed to them, and to have the writ there at the same time.

ON the 17th of November, a rule was granted to shew cause why the writ should not be quashed, and all the proceedings on it stayed; chiefly on the ground that it was merely a *prohibitory writ* issuing from the crown to its bailiffs, to whom, or to the collectors of the toll, it ought to be directed; that it was returnable in chancery and not in the court of common pleas; and that it was not calculated to bring the question of right between the parties fairly to issue on the record. That it is not returnable in the court of common pleas is expressly contrary to the authority of Fitzherbert, who says expressly "that the *pluries* is returnable in the King's Bench, or Common Pleas, at the will of him who would have it" (a); and that it was a remedial writ, on which the parties might plead to issue, Lord Loughborough declared to be the opinion of the court, on the authority of Madox's *Firma Burgi* (b).

AFTER

(a) F. N. B. 227, A.

(b) C. 7, f. 10. "In the 22d year Ed. 1st, the citizens of Lincoln, by the name of *Rogerus Beaufou, Adam Hokerell, et alii cives*, brought an action in the exchequer against *Gilbert de Gaunt*, Lord of the town of

AFTER several proceedings to compel an appearance, the defendants at length appeared, and a declaration was delivered. It recited that among other liberties, free customs

of Barton in Lincolnshire, and his bailiffs of that town, for taking toll of the said citizens coming with their merchandizes to the town of Barton. The parties plead to issue." Thus far the text; and in the note he recites the following record. Lincolnscira: Gilbertus le Gaunt, Henricus Gascriet et Hugo Dorilot Ballivi de Barton attachantur ad respondendum Regi et Rogero Beaufou, Adæ Hokerell et aliis civibus civitatis Lincolniz, de hoc, quod cum prædicti cives per cartas progenitorum Regum Angliæ de Theolonio præstando semper hætenus infra regnum Angliæ liberi et quieti extiterint, et quieti esse debent, ac super hoc præfatis Gilberto, Henrico et Hugoni Ballivis villæ de Barton, qui in eadem villa hujusmodi theolonium ab eisdem civibus exigebant, per breve regis de magno sigillo mandatum fuisset, quod hujusmodi demandæ quam fecerunt prædictis civibus occasione prædicti theolonii superfederent, nisi habito super hoc aliquo jure speciali per quod ab eisdem civibus theolonium habere debuissent. Et si aliquam hujusmodi specialitatem habuissent coram Rege illam detulissent et offendifsent certis diebus præteritis, ad recipiendum inde quod secundum legem et consuetudinem regni Angliæ esset terminandum, iidem Gilbertus et alii hujusmodi mandatum Regis parvi pendentes id facere distulerunt, et prædictos cives a tempore prædicti mandati Regis eis directi *majoribus districtionibus gravaverunt et inquietaverunt* occasione supradicta, in contemptum Regis manifestum, et damnum prædictorum civium, 100l.

Et prædictus Gilbertus venit et dicit pro se quod ipse et antecessores sui a tempore quo non extat memoria, semper usi sunt hucusque capere theolonium de prædictis civibus et aliis hominibus, venientibus cum mercimoniis per prædictam villam de Barton, et quod nullum breve de prohibitione super exactione prædicti theolonii sibi venit. Petit quod inquiretur.

Et prædicti Henricus et Hugo veniunt, et dicunt pro se quod ceperunt theolonium de prædictis civibus et aliis mercatoribus venientibus per prædictam villam de Barton prout decet juxta libertatem prædicti Gilberti Domini sui. Et quoad breve Regis de prohibitione, dicunt præcisè quod nullum tale breve eis venit, et hoc petunt quod inquiretur. Postea

toms and privileges, from time immemorial used and enjoyed by the citizens of London, they had immemorially *been accustomed to have and enjoy, and still of right ought to have and enjoy a certain ancient liberty and privilege*, that is to say, *that the citizens of the said city, and all their goods, should be quit and free of toll*, and other duties particularly specified; which liberties and privileges had been confirmed by several acts of parliament: it then recited that the King by his certain writ had commanded the mayor and burgeses of Lynn to permit the citizens to be quit of yielding toll and the other duties, or on a certain day, now passed, to signify to him cause, wherefore they had not executed his commands for that purpose before then directed to them: it then alleged that, notwithstanding this, they had not signified to him as by the writ was commanded; and that they had since the time when the writ was directed to them, specifying the day, *disquieted the said citizens* on the occasion aforesaid, and had required of certain persons whose names were mentioned, citizens of the said city, and other citizens of the said city, toll and the other duties within the borough and its port.

tea habent diem usque a die sanctæ trinitatis in 15 dies prece partium. Ad quem diem partes prædictæ venerunt. Et prædictus Gilbertus bene advocat prædictam distinctionem, quia dicit quod ipse et antecessores sui a tempore quo non extat memoria semper usi sunt theolonium capere de hominibus Lincolnæ et aliis ibidem venientibus cum mercimoniis.

Et super hoc venit Nicholaus de Warrewico qui sequitur pro rege, et dicit quod prædictum manerium est Regis in dominico et in servitio; et petit quod in nullo super præmissis procedatur ad iudicium, quod in posterum possit verti in præiudicium regis. Ideo datus est partibus prædictis dies in crastino animarum. Et præceptum est Vicecomiti ut prius, &c. et interim loquendum est cum domino rege. Ad quem diem prædictus Gilbertus non venit. Ideo distringatur, &c. in octabis Purificationis. *Placita coram Baronibus 22 Ed. 1 Rot. 33, a.*

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THE defendants pleaded, first, that the citizens of the city of London had not been immemorially intitled to the exemption claimed; and secondly, that the persons named in the declaration were not citizens of the city of London; and issue was joined on these pleas.

THE case was tried at bar in Easter term, 1789; and on the part of the plaintiffs, it was proved, that the persons named in the declaration were citizens and freemen of London, and that they had obtained their freedom by purchase; but it appeared that they were not *resident* in London, but were inhabitants of Lynn. The claim of exemption was proved by several charters and other documents: it was also proved by parol evidence, that non-resident freemen of London had been nominated to the office of sheriff, that they had paid the fine for not serving it, that they had been aldermen, and that they had a right to vote in the election of members of parliament for the city. It was also proved, that they were exempted at *Exeter* from the payment of tolls and port duties; at which place an action had been brought by the corporation against a freeman of London there resident, to compel such payment, but the record being withdrawn, the defendant obtained judgment as in case of a nonsuit, and afterwards himself brought an action against the corporation, for taking his goods on the same account, in which the corporation suffered judgment by default. It was proved by parol evidence, that the same exemption was allowed at Plympton Fair, Exmouth, Bristol, Newcastle, Dartmouth, and other ports, to freemen of London, resident at those places. From the testimony of one of the witnesses it appeared, that a non-resident freeman of London, being in partnership with a non-freeman, and having a certain share in the trade, his share was exempted from
the

the payment of port duties at Dartmouth; but that those duties were paid by the non-freeman partner for *his* share.

ON the part of the defendants, the title to the duty of *lastage* was deduced from Henry de Hammell, in whose family it had been the subject of family settlement so early as the reign of Henry the third, down to the time of Henry the eighth, in whom it was vested by a private act of parliament, and who, in the 29th year of his reign, had granted it to the corporation of Lynn, in whom it had continued to the present time.

LORD Loughborough, having summed up the evidence, observed to the jury, that as on the part of the defendants, the right to the duty of *lastage* had been traced up to the family of de Hammell, early in the reign of Henry the third, and was at that time so established in them as to be the subject of a family settlement, it was fair to presume, that it was vested in them before the time of legal memory. But allowing that presumption, the general right of the corporation of Lynn did not destroy the particular exemption proved by the city of London, as it had not been shewn that the citizens of London ever in fact paid the duty at Lynn. The two rights, therefore, not being inconsistent, might exist together; the corporation of Lynn might have the same right to *lastage* as the de Hammells had enjoyed, but that right might be with an exception in favour of the citizens of London; which exception had been clearly proved on the part of the plaintiffs, and not contradicted by the defendants.

HIS lordship observed further, that the other part of the case was resolved into a question, whether the persons mentioned in the record, not being *resident* citizens of London, but in fact residing at Lynn, and having lately purchased their freedom for the express purpose of being
exempt

exempt from lastage at the port of Lynn, were intitled to the privilege they claimed? As to this, he stated, that the counsel had insisted strongly on a parliamentary declaration in the reign of Henry the fourth, that the freemen of London must be there resident to intitle them to an exemption from prisage of wines, but that residence in London was not necessary with respect to other franchises: this, he said, was of considerable weight; and as the non-resident freemen were liable to serve offices, and bear other burthens in consequence of their freedom, there seemed to be no reason why they should be deprived of the beneficial rights of that freedom; or why the term *citizens of London* or *men of London* should be confined to such citizens or men as were resident in London, as had been contended in favour of the defendants; that in point of fact, this distinction was not made at Bristol, Newcastle, or other places; that the point was given up by the city of Exeter, the only place where it had been contested, and the defendant, a non-resident citizen of London, left in the enjoyment of his right.

On the whole, he said, he saw no reason to say, if the jury thought upon the evidence, that the right claimed by the citizens of London, and which had been proved to be enjoyed by those who were non-resident, was the same right which the plaintiffs had made out in evidence, that there was any legal ground, which by a legal conclusion, could deprive them of that right.

THE jury found a verdict for the plaintiffs on both issues, and is. damages (a), on which verdict the court gave judgment, "That the citizens of the said city, and all their goods, be quit of yielding such toll, passage, lastage, and other customs as aforesaid, of their goods and

(a) 1 H. Blackstone's Rep. C. B. 216.

things

things in the said borough and port thereof; and the said mayor and burgesſes of the said borough, in mercy, &c.”(a) on which the defendants removed the record into the court of King’s Bench by writ of error.

ON behalf of the plaintiffs in error four objections were taken to these proceedings. 1. That the writ was only a *prohibitory* and not a *remedial* writ, on which the parties could plead. 2. That, even if this *were* a writ on which the plaintiffs could count, yet they had not stated any injury on the record, for which the law could give redress. 3. That at all events the action should have been brought by the party grieved, and not by the corporation at large, and, 4. That the count ought to have stated, by citizens of what description the exemption was claimed; for that *all* the citizens, whether resident or *not*, could not be intitled to the exemption.

IN support of the first objection, it was observed, that Fitzherbert, treating of this writ, seemed to have considered it as merely prohibitory, for that the example he gave was that of a mere command by the King to his bailiffs (b); and that, commenting on it, he said, “and upon that he may have an *alias*, a *pluries*, and an attachment;” that therefore the only consequence of not obeying the *pluries* was that an attachment might issue against the party to whom the writ was directed, for his contempt; but that no further proceedings could be had on it: that Finch also considered this as a *prohibitory* writ; for that he gave it as one of the instances of “certain special writs wherein no process lieth” (c); and that after having enumerated the common actions, he said, “beside which, there be certain

(a) 4 Term. Rep. 131.

(b) Rex Ballivis suis de J. salutem. F. N. B. 227. A.

(c) Finch, 490, 506.

other

other originals out of chancery, which are, as it were, special anomalies and exceptions from the former, being not deductory to bring any matter into plea or solemn action, but only *commendatory* or *prohibitory* to do something or to leave something undone; and therefore *no process at all lieth in these writs, but only an attachment upon a contempt*, for not executing or obeying them." That Lord Ch. B. Comyns too, treating of the remedies which a party has who is exempted from paying toll, says, "there are two remedies (*a*), first by writ *de effendo quietum de thelonio*, if he who ought to be quit of toll be charged. Secondly, by *action* if the toll be taken;" that he therefore distinguished between the cases of *demanding* and *taking* toll; and was of opinion, that in the latter only could an action be maintained: and that Fitzherbert, in his comments on the writ of *monstraverunt*, which was framed for the benefit of tenants in ancient demesne (*b*), says, "the plaintiffs may count and recover damages," but that in his comment on the writ in question, he said nothing on the pleadings on it; beside this, it was observed that this count was on the *pluries*, and not on the attachment; and that even in *monstraverunt*, the count must be on the attachment.

In answer to this objection, it was contended on behalf of the defendants in error, that it appeared from the precedents of proceedings on this writ, as well as from analogy to other cases of a similar nature, that this was a *remedial* writ on which an action might be maintained: that in the register (*c*), the writ, the alias, *pluries*, and attachment, are set out at length; and that the latter began as

(*a*) Com. Dig. Tit. Toll. H. 1. 2.

(*b*) F. N. B. 16 a.

(*c*) Reg. Brev. Orig. 518 b.

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the writ in trespass (*a*) : that in Ryley (*b*) the proceedings on this writ were stated, where an issue was directed on the action commenced on it : that there was also another instance in Madox's Firma Burgi (*c*) of an action which was supported on this writ ; that that was indeed a *qui tam* action, but that it shewed that this was the subject of *some* action, and furnished a sufficient answer to this objection : as to the observation that this count was drawn on the *pluries* and not on the attachment, it was not warranted by the terms of the record, on which neither the *pluries* nor the attachment was set forth, and that therefore all that could be concluded from this, was that there was no original writ, the want of which, however, was cured by 18 El. c. 14.

MR. Justice Grose, in delivering his opinion, said, that as to this objection, he thought there was a strong analogy between this writ and that of *monstraverunt* ; that the latter was brought by the tenants in ancient demesne, in order amongst other things to be quit of toll, and that it only took its name from one of the Latin words used in the beginning of it : that Finch indeed considered this only as a prohibitory writ ; but that in this he differed from him, and considered it as remedial as well as prohibitory : that in the first instance it was to prohibit the party to take the toll from those who claimed the exemption ; and that on that prohibition not being attended to came the attachment, which was the remedial part of the writ, under which those who had suffered by the disobedience of the former writ might recover damages.

IN support of the second objection it was observed, that the only matter alleged as a grievance was that the defendants, in the court below, *required*, not that they *took*

(*a*) Si fecerit te securum, &c. tunc pone, &c.

(*b*) Ryl. Plac. Parl. 13.

(*c*) Vid. ante, page 198, etc.

the

the toll from the plaintiffs; but it was contended that this was not a damage for which the law would give an action, and that an actual injury must be stated; but that if *any* action could be maintained in this case, it must be a *qui tam*, and the complaint laid to the contempt of the King and the damage of the plaintiffs.

To this it was answered, that it was not necessary that the plaintiffs should have received an actual injury to intitle themselves to this action; that in the precedent in the register, no distress was stated either in the writ de *theolonio* or in the attachments upon it (*a*). There were several other writs of the same nature with this, on which actions might be maintained; one of which was that of *monstraverunt*; between which and the present there was no dif-

(*a*) It is true that in the attachment as given in the register no distress is stated, but there appears to be some defect or omission in it.—It runs thus. Si fecerit, &c. tunc pone, &c. B. et C. ballivos civitatis nostræ Leycestriæ, quod sint coram nobis tali die, ubicunque, &c. ostensuri quare cum per chartam nostram, &c. burgenfes, &c. in perpetuum essent quieti de theolonio per totum regnum nostrum, &c. et potestatem nostram per quod eidem ballivis præceperimus, quod ipsos burgenfes de theolonio eis in civitate prædictâ præstando quietos esse permetterent juxta tenorem cartæ nostræ prædictæ, vel causam nobis significarent quare mandatis nostris alias eis inde directis minime paruerunt: iidem ballivi spretis mandatis nostris prædictis, ipsos burgenfes de theolonio eis in civitate nostrâ prædictâ præstando, quietos esse permittere, vel causam quare id facere minime deberent, nobis significare hætenus non curaverunt, in nostri et mandatorum nostrorum prædictorum contemptum manifestum et *ipsius A.* damnum non modicum et gravamen.—Here a damage is alleged to a *particular* person in the end of the writ, without any mention having been made of him before, though a relative be coupled with the name; which implies that he must have been introduced in some preceding part.—I am from hence inclined to think that the writ is inaccurately given, and that there must, in the perfect form of it, have been an allegation of some special damage done to *A.* which could be no other than a *distress*.

ference :

ference : that they resembled each other so strongly, that when the writ de theolonio was sued by the tenants in ancient demesne, it was exactly like the *monstraverunt*, and that Fitzherbert (*a*) spoke of them both together : that neither the writ de *theolonio* nor the *monstraverunt* was directed to the sheriff ; there was an attachment in both, and it was admitted by the passage from Fitzherbert (*b*), that in *monstraverunt* the parties might plead to issue, and in 2 Inst. (*c*), there was a precedent of a judgment on that writ : the attachment on both was not for a contempt, but was process to bring the parties into court, and having had that effect, it had answered the purpose for which it was prosecuted, and needed not to appear upon the record : that what was said by Lord Ch. B. Comyns was by no means conclusive that such an action as the present cannot be maintained ; it did not follow that because he says an action may be maintained for *taking toll*, no action lies for *demanding* it ; that even if such *were* his opinion, it could not be supported in opposition to the records stated in Madox, Ryley, and 2 Inst. That Lord Coke (*d*), commenting on the writ of *mesne*, says, "there be six writs in the law, that may be maintained *quia timet*, before any molestation, distress, or impleading ; 1. A writ of *mesne* before he be distrained ; 2. *warrantia chartæ*, before he be impleaded ; 3. a *monstraverunt*, before any distress or vexation, &c. 4. an *auditâ querelâ*, before any execution sued ; 5. a *curia claudenda*, before any default of inclosure ; 6. a *ne injuste vexes*, before any distress or molestation ; and these be called *brevia anticipantia*, writs of prevention." And that afterwards he proceeds thus ; "It is to be known that there be two several judgments in a

(*a*) F. N. B. 228 A.

(*b*) Id. 16 A.

(*c*) 2 Inst. 654, 5.

(*d*) Co. Lit. 100 a.

writ

writ of *mesne*, one at common law, the other by the statute Westm. 2. c. 9. At the common law he shall have judgment to recover his acquittal; and if he be distrained or damnified, his damages and costs;” so that if he sued before distress, he might have judgment to be quit; if a distress were taken, he might also recover damages. The writs de *theolonio*, *monstraverunt*, *ne injuste vexes*, and that de *warrantia chartæ*, were all analogous; they might be sued out merely for the purpose of bringing the question of right into dispute, without regard to any actual injury to the parties suing. Fitzherbert, it was observed, in his comments on the writ de *warrantia chartæ* (a), said, “a man may sue forth this writ before he is impleaded in any action, but yet the writ doth suppose that he is impleaded: and if the defendant appear and say that he is not impleaded, by that plea he confesseth the warranty, and the plaintiff shall have judgment to recover his warranty.” The truth or falsehood, therefore, of the allegation that the party is impleaded, was so totally immaterial, that the plaintiff might have judgment to recover his warranty, though he were not impleaded. It was the same in a writ of *mesne*; Fitzherbert said (b), “and if a man bring a writ of *mesne* where he is not distrained, yet the writ is maintainable; but then he shall not recover damages, for the writ is brought only to recover the acquittal;” that in *monstraverunt*, though only those who are injured recover damages, yet the other tenants may recover a judgment of acquittal (c). From all these authorities, it was contended, the principle was clear that these several writs might be sued out *quia timet*, before any actual injury was done, on which proceedings might be had; and the party com-

(a) F. N. B. 134. T.

(b) Id. 136 E.

(c) Id. 16 B. but this does not expressly appear.

plaining might recover a judgment *on the right claimed*, though before distress he could not recover damages. In the proceedings on the writs of *mesne* and *warrantia chartæ*, the party alleged his being distrained or impleaded; yet the allegation was mere form, and the want of it cured by a verdict. In the present case, the question of right as to the exemption claimed, was the only substantial question which might be disposed of, though the question of form did not arise: in the precedent cited from 2 Inst. there was a separate judgment to be quit of toll, unconnected with the fact of demanding or taking it: the judgment in Ryley also shewed, that it was not necessary that a distress should actually have been taken; for at the conclusion of it the court ordered the distress to be returned, *if any had been taken*; and the same hypothetical judgment was given in other cases. In that judgment *no damages* were given, which shewed that the action did not proceed on the ground of an actual injury having been sustained.

IN reply, it was said, that the precedents cited rather confirmed than answered this objection; for they all alleged an actual injury done to the party complaining, and proceeded on the ground of a distress. In that in Ryley it was expressly stated, that the defendants distrained the abbot and his men; this then was only an action of trespass for taking toll; the case in Madox was open to the same answer (a); in the text he gives an account of an action brought in 22 Ed. 1. for *taking* toll; in which he is warranted by the copy of the judgment which is inserted in the notes: the record cited from 2 Inst. was also in the case of a distress: the passage from Co. Lit. did not prove that the party may *count* on the prohibitory writs there enumerated, before he has sustained any injury: it only

(a) Vid. ante, page 198, &c.

shewed,

shewed, what need not be disputed, that those writs of *prohibition* may *issue* before distress; and the judgment of acquittal, which he mentions in the next comment on the writ of *mesne*, must be taken to refer only to a case, where, after the distress, the tenant sued the lord. That the party could not count even in the cases mentioned in *Co. Lit.* before he is injured, was clear from all the precedents of proceedings on those writs: the several precedents on the writ of *mesne* (a), all alleged a distress; those on the *warrantia chartæ* stated expressly that the party *was impleaded* (b); so also did that in *Madox* on the writ of *monstraverunt*; which writ, Fitzherbert says (c), was framed for the tenants in ancient demesne who are *distrained*, "and in the writ of attachment, he ought or may name all those tenants by their proper names which are *distrained* after the prohibition delivered to the lord." The precedents on the writ *ne injuste vexes* also stated the *taking* (d); all these different precedents, therefore, in the several cases, so far from proving that the allegation that the party has actually sustained an injury is immaterial and mere form, shewed the reason; for there was no one instance in which it was omitted.

THE judgment of the court was given against the defendants in error, and the plaintiffs below, principally on this objection. It was admitted, that for near five centuries no such proceeding as the present had been instituted; it did not appear for what useful purpose the *corporation* of London had thought proper to have recourse to it now; no reason could be suggested for it, except it were done with a view of preventing a jury from exercising their judgment on the question of right on any future occasion.

(a) Raft. Ent. 433, 434.

(b) Id. 397 b. 398 a. & Co. Entr. 691.

(c) F. N. B. 15 F.

(d) Raft. Entr. 437 b.

If such were the intention, they could not expect that the inclination of the court would be in their favour—generally speaking, the object of the laws, in civilized countries, was to secure to every subject his rights, and to afford him protection when those rights were invaded; and that principle was founded in good sense: but this declaration did not complain of any injury having been done to any individuals; it only alleged that the defendants below *disquieted* the plaintiffs, and *required* of five citizens by name, certain tolls, and other duties; arguing from policy, the inclination of the court must be against such a proceeding as this; for if this action could be maintained against the corporation of Lynn, it might equally be supported against any individual in the kingdom for the most minute toll, such as toll in a market; and it frequently happened that such tolls were in the hands of persons who were neither able nor willing to dispute such a toll as the present. In point of policy therefore, it was to be wished that a party who had done no act to enforce his claim, and who would rather abandon his right than be at the expence of disputing it, should not be dragged against his will into a court of justice, to agitate speculative questions of right. It must therefore be considered whether the proceedings could be supported by the precedents which had been cited on this very writ, or by arguments drawn from analogy to other proceedings of the same nature. It was not necessary to go through each of these, but the result from them all was, that they *complained of a damage* to the party; and in the subsequent proceedings on the writ, uniformly stated what the nature of that damage was: that Fitzherbert says, in commenting on this writ, “and upon that he may have an alias and a pluries, and an attachment against those who take the toll;” and a complete answer was given to the arguments drawn from the precedents, by the counsel for the plaintiffs

tiffs in error ; with respect to the comment of Lord Coke on the text of Littleton, it would be found on examination not to govern this case : the text was confined to the case of actual damage by distress ; it was thus, "and if he (the lord) doth not acquit him (the tenant), but suffereth him to be distrained, &c. he shall have against his lord a writ of mesne, and shall recover against him his damages, &c." that Lord Coke does not comment on the section at large, but he comments in his usual manner, first on one part of it, and then on another ; that in the course of his note on the writ of mesne, he enumerates other writs of prevention, of which the writ in question was not one : then having dismissed those writs, he takes up the comment again on another part of the text, which applies only to the writ of mesne, and what he says respecting the judgment of *acquittal*, applies only to that writ : but the objection was not to the writ itself, but to the subsequent proceedings on it ; and Lord Coke does not say that the tenant may *count* on that writ unless *damage* be done to him.

As to the third objection, the authority of Fitzherbert was cited, who says (a), "the particular person who is *grieved* may sue forth the writ ;" and, who, commenting on the writ *de libertatibus allocandis*, observes that "those writs are of several forms, and may be sued by a body corporate, or by a single person, as the case shall happen" (b). Here the corporation of London had sued out the writ, and alleged a grievance to five particular persons, from whom the toll was demanded ; but even if the corporation might have sued out the writ, the individuals who were injured should have counted. To this it was answered, that the precedents cited shewed, that the action need not be brought by the party *grieved* ; in

(a) F. N. B. 228 B.

(b) Id. 230.

that in Ryley it was not pretended that the abbot's goods were taken, and yet he brought the action; it was laid *ad damnum ipsius et hominum suorum*, and the judgment was, that the abbot and all his men should go free. So, in the precedent in 2 Inst. the judgment was that all the tenants of the manor should be quit of toll. The action might be brought by those in whose favour the exemption was claimed. This was the privilege of the citizens of London in their corporate capacity; it was granted to them in that capacity, though to be enjoyed by the individual members of it. It was a corporate franchise, for any injury to which they, as a corporation, had a right to complain; and Fitzherbert says, "all the corporation may bring the writ by the name of the corporation" (a). and as to the argument, that though the corporation might sue out the writ, yet the individuals who were grieved should count upon it; it was answered that one party cannot declare on a writ sued out by another: but to this it was replied, that this was not like the case of one party declaring on a writ sued out by another; for that the plaintiff must count on the *attachment*, which should be sued out by the party grieved, though the writ of prohibition might be sued out by the corporation at large.

THAT part of the court who took notice of this objection (b), delivered their opinions to this effect: that the action was brought by the corporation at large, and not by the individuals; whereas the injury, if any, must have been sustained by the latter; that the corporation could not be injured as a corporation: it had indeed been urged, that in *monstraverunt* the corporation at large might declare; but how was that established? Fitzherbert, in every instance, except one, states that there must be an

(a) Id. 227 E. (b) Ashhurst and Buller, J.

actual

actual distress in order that the attachment may issue, and that it must be stated to the damage of the persons *suving*; and in that one passage he says, "if any city or borough ought to be quit of toll for the merchandizes which they buy in another town or place, *if any of them be compelled to pay toll, all the corporation may bring the writ*, by the name of their corporation, and may have an *alias*, and an attachment thereupon if need be, with these words at the end of the writ, *et districtionem, si quam eis ea occasione fecerit, &c*" (a). But even this fortified the first objection that the toll must be taken; and though he said that the writ may be sued out by all the corporation, yet he did not say that they might *all* maintain the action; so that all the passages might be reconciled. The attachments spoken of by Fitzherbert were of two sorts; one was in the nature of a criminal proceeding for a contempt in having disobeyed the King's writ; and that might be sued by *all* the corporation; the other was to bring the parties into court to answer in an action. And it was clear that the attachment which he mentions in the last passage, was the criminal attachment for a contempt; on which no further proceedings could be had.

To shew the distinction between these different attachments, a precedent was cited from Lord Hale's manuscripts, which was to this effect (b), "*East. 1 Ed. 2. Suffex.*
The

(a) F. N. B. 227 E.

(b) Mr. J. Buller observed that this was an extract from a manuscript of Lord Hale's in Lincoln's Inn Library, containing "*Placita coram Rege*," from the 1st to the 22d Ed. 2. *Præceptum fuit ballivis Willielmi de Brewosa de Shoreham, quod desisterent capere theolonium ab Episcopo Cicestræ et hominibus suis, juxta chartam domini Regis Henrici, proavi regis nunc, per quam quieti esse debent per totum regnum; qui post diversa breviam eis missa, tam de prohibitionem*

The bailiffs of William de Brewosa of Shoreham, were commanded to desist from taking toll of the bishop of Chichester and his men, according to a charter of King Henry, &c. by which they ought to be quit through the whole kingdom; who, after several writs sent to them, as well of *prohibition* as *to answer*, returned that no writ was ever sent to them in the time of the present King, and that they cannot deliver the *distress* taken from the men of the said bishop, because the said William and his ancestors, from time immemorial, hitherto were seized of toll of the men of the said bishop, and their predecessors, notwithstanding the charter of King Henry aforesaid. *And because the return aforesaid sounds in contempt* of the Lord the King, and to the damage of the said bishop and his men aforesaid, therefore let the sheriff be commanded to attach them, &c." This, it was said, was clearly a criminal attachment: it deserved, therefore, to be considered, whether there was not something further, which shewed that that was not an action, at least by the persons grieved. The persons grieved were the bishop of Chichester or his men: but no precedent could be found to shew that *all* a person's *tenants*, as such, can stand in judgment in a court of law. And if any action had been brought in that case, it must have been by the bishop or by the persons whose goods were actually seized. And therefore, though civil

quam *ad respondendum*, retornaverunt quod nunquam tempore regis nunc aliquod breve eis directum fuit, et quod *distractionem captam* super homines dicti episcopi sine exheredatione domini sui deliberare non possunt, eo quod ipse Willielmus et antecessores sui, a tempore quo, &c. hucusque seisiiti fuerunt de theolonia hominum dicti episcopi, et predecessorum suorum, non obstante carta domini regis Henrici predicti. *Et quia retornum predictum sonat in contemptum* domini regis, et dicti episcopi et hominum suorum predictorum dispendium, ideo preceptum esto vicecomiti quod attachiet eos, &c.

proceedings might be instituted on a writ founded originally on the prohibitory writ, yet that writ, whatever it be, which brings the parties into court, must be considered as the original writ in the cause; it must be founded on damage actually done, and must be sued out by the party actually grieved: it was stated in the books that the attachment, sued out by the party grieved, is that writ, the foundation on which, according to Fitzherbert, the plaintiffs proceed and count,

To the fourth objection, it was answered, that in this stage of the proceedings there was no foundation for it. The defendants in error claimed this exemption for *all* the citizens: and if it had appeared on the trial that any particular class was not intitled to it, they must have failed in proving their allegation: but it was claimed in a general unqualified way, extending to all the citizens; and the verdict was coextensive with their claim.

MR. J. BULLER said, that on this last point, he thought the court were bound to give some opinion, and that it could not have escaped the attention of the counsel for the city of *London*, how very material it was to their case. The printed report of this case referred to a manuscript of Lord Hale, published by Mr. Hargrave (*a*), in which it is said "*bona civium* must not be intended of *every freeman* of *London*; but first he must be a *freeman* of *London*; secondly, he must be a *freeman* and *inhabitant* of *London*; for though he be a freeman, yet if he inhabit out of *London*, he shall not be exempted from prisage even for the wines imported into *London*." The answer which the council for the defendants in error had given to this objection, amounted to this, that it was a question of fact which the jury had determined; but he thought it involved

(*a*) Hargr. Law Tracts, 128.

in it a question of law as well as of fact. The objection arose on the record; for it was contended by the counsel for the city, that the word *citizens* includes all freemen, whether resident or not: if it did, such a custom could not exist in point of law (a). If such a custom could be supported, it might be attended with the most serious consequences; since it would be in the power of the city of London, which is one of the oldest corporations in the kingdom, to sell the privileges of every other corporation (b).

WHERE an action is given to a common informer to sue for a penalty, by the words *any person or persons*, a corporation aggregate cannot sue as a common informer (c).

By the common law all ecclesiastical persons are bound to keep the houses belonging to their benefices in repair, and if they suffer them to fall to decay, they or their executors or administrators are liable to be called on by the successors on account of the dilapidations. In order to evade this duty, it had become a frequent practice, previous to the 13 El. c. 10, for incumbents to make "deeds of gift, colourable alienations, and other conveyances of

(a) 3 Bulstr. 1. Thomf. Entr. 302. 30 Ed. 3, f. 16, and Robinson v. Marshall, C. B. lately.

(b) 4 Term Rep. 130—146.

(c) In C. B. it was held on 7 G. 2, c. 7. a marginal note in Strange 1241.

like

like effect, of their goods and chattels in their life-time, in order, after their deaths, to defeat their successors of such just *actions* and *remedies* as otherwise they might have had against their executors or the administrators of their goods." To provide a remedy for this practice, it was enacted by that statute, "that if any archbishop, bishop, dean, archdeacon, provost, treasurer, chaunter, chancellor, prebendary, or any other having any dignity or office in any cathedral or collegiate church; or if any parson, vicar, or other incumbent of any ecclesiastical living whereunto do belong any house or houses, or other buildings, which by law or custom he is bound to keep and maintain in reparation; should from thenceforth make any deed or deeds of gift or alienation, or other like conveyances of his moveable goods or chattels, to the intent and purpose aforesaid; then the successor and successors of him that should make such deed, &c. should and might commence suit, and have such remedy in any court ecclesiastical of this realm competent for the matter against him or them to whom such deed or deeds, &c. should be so made, for the amendment and reparation of so much of the said dilapidations and decays, or just recompence for the same, as hath happened by his *fact* or *default*, in such manner as he might, should or ought to have, if he or they to whom such deed, &c. should be so made, were executor or executors of the testament and last will of him that made such deed, &c. or were administrator or administrators of his goods or chattels" (a).

AND by 14 El. c. 11. all sums of money to be recovered for, or in the name of dilapidations, by sentence, composition or

(a) Here is no appearance of this statute being temporary: yet it is continued as temporary by the 1 Jac. c. 25, and further by 21 J. c. 28, and

or otherwise, shall, within two years after such receipt, be truly employed upon the buildings and reparations in respect whereof such money for dilapidations shall be paid; on pain that every person so receiving and not employing as aforesaid, shall forfeit double as much as so shall be by him received and not employed; which forfeiture shall be to the use of the Queen's majesty, her heirs and successors.

IN former times, considerable doubt was entertained whether an action on the case for dilapidations could be maintained against ecclesiastical persons or their personal representatives (a).

SIR Simon Degge says, "suits for dilapidations are most properly and naturally to be brought in the ecclesiastical courts;" and that no prohibition lies: yet he says, the successor may, if he will, upon the custom of England, have a special action upon the case against the dilapidator, his executors or administrators (b).

IN the beginning of the reign of William and Mary (c), an action on the case was brought by a parson for dilapidations against his predecessor, who had accepted another benefice, and left the houses out of repair, setting forth that by the custom of the realm he ought to pay to the successor so much as shall be sufficient to make the reparations, and

and not further *indefinitely* (as a great many other statutes were) by 16 C. 4. "So that," says Burn, "upon the whole there may perhaps be some doubt whether this statute is now in force." But I apprehend there can be no doubt about it, as the other branches of the statute have been hitherto acted upon as *existing* law, vid. ante, page 122, &c.

(a) Per Buller J. 2 Term Rep. 637.

(b) Deg. p. 1, c. 8. Wats c. 39. 1 Bac. Abr. 63, cited Burn's Ecc. Law, tit. Dilapidations.

(c) Jones v. Hill, East. 2 W. and M. in C. B. 3 Lev. 268.

that

that the repairs amounted to so much, which the defendant had not paid; after verdict for the plaintiff, it was moved, in arrest of judgment, that the action could not be maintained, of which opinion Chief Justice Pollexfen, who tried the cause at Warwick, had been, and still continued to be, on the ground that the remedy was only in the ecclesiastical court: in support of the action the authority of Degge was cited, and several instances of such an action being brought; but on searching the rolls, no judgment appeared to have been given in some of them, but only verdict and several continuances entered: one case, however, was found (*a*), in which judgment had been given for the plaintiff on demurrer. Notwithstanding this, the court inclined to Pollexfen's opinion: but the case being in the paper to be argued again, and Pollexfen and Ventriss dying in the mean time, it was argued a second time before Powell and Rookeby, who gave judgment for the plaintiff.

IN the case of Dr. Sand (*b*), on an application for a prohibition to the spiritual court to stay proceedings there, in a suit for dilapidations against a prebendary of Wells, it appeared that there were eight prebends, and eight prebendal houses belonging to that church, but that no house in certain was allotted to each prebend, the bishop having the privilege of assigning to each what house he chose. It was objected that the house in question was not part of the prebend; but the court held that when the bishop had assigned a house, it became part of the prebend, and that the prebendary was liable to a suit for dilapidations, and therefore refused the prohibition.

EVER since it was decided that an action on the case for dilapidations will lie in the case of a parson, it has been

(*a*) Day v. Hollington, 3 Jac. 2, C. B.

(*b*) Skin. 121.

usual,

usual, in the declaration, to state that all *prebendaries*, rectors, vicars, &c. are bound by law to repair (a): notwithstanding this, however, it was very lately contended (b) that an action by a *prebendary* against his predecessor for dilapidations could not be maintained; for that no case could be found in which such an action had been brought; that the cases cited to prove the position, were not adequate to the purpose for which they were produced; that they were actions against rectors or vicars, and that the bare recital in the declarations that *prebendaries* were bound to repair was not sufficient. The court (c), however, held that, in point of law, there was no distinction between a prebendary and any other ecclesiastical person, as to his liability in this sort of action; that the form of the declarations was very material in a case where no direct determinations could be found one way or the other; that precedents which had prevailed for a century past, were strong to shew what the law is; and that prebendaries, as well as other ecclesiastical persons, were under an obligation, both in point of morality and of policy, to keep their houses in repair; that the successors should not suffer by the neglect of their predecessors; and that therefore the late incumbent, or his executors, must make good to the successor any damage which he might thus sustain; and there was no distinction whether the action was brought against the executor of the former incumbent, or against the former incumbent himself, who had other preferment. With regard to the case of Dr. Sand, though it was only a suit in the ecclesiastical court, yet it was a strong authority on the point; for there was no difference whether the proceedings

(a) Vid. *Lutw.* 116, 117. 2 Term Rep. 636.

(b) *Radcliffe v. D'Oyly.* 2 Term Rep. 630.

(c) *Ashhurst, Buller and Grose, J.*

for

for dilapidations were in the common law, or in the spiritual courts; though the remedy in the former was more effectual.

It is laid down as a general rule, that an action of trespass cannot be maintained against a corporation aggregate, and the technical reason given, is that *capias* and *exigent* do not lie against a corporation, which are the proper process in an action of trespass (*a*). But if any of the *members* or *servants* of the corporation commit a trespass in asserting the *right* of the corporation, the action must be brought against *them* individually, and they may justify in the right of the corporation. Notwithstanding this, there are several cases, in the year books, of actions of trespass brought against a mayor and commonalty, in which, though many objections appear to have been taken on other points, none appears to have been taken to the action itself (*b*). Among others, an action of trespass is reported to have been brought against the mayor and commonalty of York, to which, instead of demurring, they pleaded, that all the inhabitants had common for a certain time in the place where the trespass was alleged to have been committed, and that they put in their beasts, to wit, two of them an ox, and other two a horse, &c. and this was ruled to be no plea, because the action being brought against the *corporation*, they could not justify for *particular* persons, for the trespass being assigned in the *body politic*, it could not be justified in the right of an individual (*c*).

(a) 22 Aff. pl. 67. Bro. Corpor. 43.

(b) Vid. 38 Ed. 3, 18. 8 H. 6, 1. 9 H. 6, 36. 20 H. 6, 9. 4 H. 7, 13. Bro. Corp. 48.

(c) 4 H. 7, 13. Bro. Cor. 48.

ANOTHER

ANOTHER of these actions was an action of trespass against a mayor and commonalty, and a private person, a member of the corporation, jointly; in which the plaintiff declared on a right of exemption from toll, and alleged that the mayor and bailiffs and the *individual* had distrained certain beasts of the plaintiff for the toll: much was said on the impropriety of joining the individual in an action against the corporation; but no question was made whether such an action could be maintained or not against the corporation simply (a).

THE archbishop of York brought an action of trespass against the mayor and commonalty of the town of Kingston upon Hull, and a private person, in which he alleged that he and all his predecessors, from time immemorial, had used and enjoyed the franchise of having all deodands and other profits in the water of Hull, in Kingston upon Hull, and that the defendants had disturbed him in taking the said profits: the private person pleaded in abatement of the writ, that he was named with the mayor and commonalty; in support of which it was contended that there ought to have been several actions, because the process was several, being *capias* and *exigent* against the individual, and *distingas* against the mayor and commonalty. The mayor and commonalty alleged that they held the town at ferm of the King, rendering 40l. rent by the year, by a charter which they produced, and said that the water was parcel of the town, and that they had held it immemorially as parcel under their charter, and then prayed aid of the King, which was granted: but it was not objected that such an action would not lie against a corporation (b).

THE prior of St. Martin's brought a writ of trespass on the case against the mayor and burgesses of New

(a) 3 H. 6, 1. 9 H. 6, 36.

(b) 45 Ed. 3, 23.

Windfor,

Windfor for disturbing him in holding a leet which he claimed to be entitled to hold, within the town of Windfor, and for other wrongs there done to him: as to all the trespasses except the disturbance, the mayor and burgesses pleaded *not guilty*, and as to the disturbance they justified under a grant of Edward the first; but no objection was taken to the form of the action (a).

NOTWITHSTANDING these examples, however, it may well be doubted whether, at this day, such an action could be maintained against a corporation aggregate; the action supposes a *personal* act of which the corporation is incapable in its collective capacity; the act therefore which is the foundation of the action must be done by some individual in order to assert the right of the corporation, and the action being brought against that individual will answer the purpose of bringing the right to a judicial determination.

IT is accordingly decided that a *replevin* cannot be maintained against a corporation aggregate, because it is founded on a distress, which the corporation cannot take but by its bailiff (b).

IF a corporation has been *used* for time immemorial to repair a creek, that creates an obligation to keep it in repair, and an action may be maintained against the corporation for not repairing it, by any one who has sustained any damage from its not being in a state of repair (c).

IT seems likewise, that in such a case as this, or where a corporation is bound to keep a bridge or a highway in repair, an indictment will lie against it for not repairing. It is, indeed, reported to have been said by Lord Chief

(a) 18 H. 6, 11.

(b) Brownl. 175. Bac. Abr. tit. Corporations, E. 2.

(c) Vid. the mayor of Lynne v. Turner, Cowp. 86.

Justice Holt (*a*), that "a corporation is not indictable, but the particular members of it are;" but I apprehend that this can apply only to the case of a crime or misdemeanor, and that an indictment may lie against a corporation, in the cases mentioned, as well as against a county or a parish (*b*).

SECTION II.

Of the Mode prescribed by the Law, in which Corporations must act, and which must be observed by others in acting against them.

THE subjects which fall under this head are these. 1. The law respecting the *name* of a corporaton. 2. What acts it must do by deed, and what it may do without deed. 3. Its common seal. 4. When it must act by attorney. 5. What process must be used against it; and 6. How it must plead and be impleaded.

1. *Of the Name of a Corporation.*

EVERY corporation must have a name by which it may be known and distinguished; by which it must take and

(*a*) 12 Mod. 559.

(*b*) Vid. in Dogherty's Crown Circuit Assistant, 398, a precedent of an indictment against the mayor and burgesses of the city of Gloucester for not repairing the Gaol.

grant,

grant, must sue and be sued, and do all corporate acts; it is, says Sir Edward Coke, as essential to a corporation, as a name of baptism to a natural person (*a*).

BUT when it is said that a corporation must have a name, it must be understood that this name may either be expressed in the patent of incorporation, or implied in the nature of the thing: as, if the King should incorporate the inhabitants of Dale, with power to choose a mayor annually; though no name be expressly given, yet it is a good corporation by the name of Mayor and Commonalty. So, the city of Norwich, by a charter of Henry 4, is authorised to have a mayor and sheriffs, and yet the corporate name is Mayor, Sheriffs, and Commonalty (*b*).

THOUGH the name of a corporation be compared to the christian name of a man, yet that comparison is not in all cases perfectly correct: a christian name consists, *in general*, but of a single word, as Oliver, Robert; and if there be an alteration in a letter, that may frequently make a material alteration in the name: thus if a man intending to sue Oliver, name him Olive, the writ must abate, because Olive is the name of a woman, and Oliver that of a man, and the two names of course totally different in sense: but the name of a corporation frequently consists of a great number of words, and the transposition, interpolation, omission, or alteration of some of them *may* make no essential difference in their sense (*c*).

IT is not requisite that there should be truth in the name of a corporation, whether it be an hospital, or any other body politic (*d*).

(*a*) 21 Ed. 4, 56 b. 1 Rol. Rep. 512. 10 Co. 28, 29.

(*b*) Per Holt. 1 Salk. 191. 3 Salk. 102, (182).

(*c*) Per C. Baron Manwood. 1 Anderf. 207.

(*d*) Vid. 10 Co. 32 juxta finem.

It is generally denominated of some place, and that is in many cases the principal part of the name by which one corporation can be distinguished from another (*a*). It is not necessary, however, that the place of which it is named should be actually in England, but it must either be actually there, says Lord Coke, or supposed so to be.—There were numberless instances of fictitious names, in the times of popish superstition: such were the hospital of St. John of Jerusalem in England; the hospital of St. Lazarus of Jerusalem in England; the master of the Knights Templars of Jerusalem in England; the prior and brothers of St. Mary of Mount Carmel in England (*b*). These names, however, may be so resolved as to exclude the necessity of a fiction, that the places comprehended in them were in England. We have only to suppose that the saint, or the description of men, had their denomination from Jerusalem, and that afterwards a house dedicated to that saint, or belonging to those men, was established in England. Thus, “there is such a description of men as the Knights Templars of Jerusalem,” and “there is a master or a house of that order in England.”

In the name of a corporation is generally inserted the enumeration of the component parts of its government, as mayor, aldermen, and citizens; mayor, aldermen, and commonalty.—But sometimes, instead of some of these component parts, a more general designation is used: thus, though the aldermen are a principal part of the government of the city of Bristol, yet by a charter of Charles the second, the corporate name is Mayor, Burgesses, and Commonalty (*c*). So, though the component parts of the corporation of the city of London are mayor, alder-

(*a*) Vid. 10 Co. 125. 1 Rol. 512.

(*b*) Vid. 10 Co. 32 b. 123 b. 1 Rol. 512.

(*c*) Vid. Lutw. 1330.

men

men, and commonalty (*a*), or citizens, yet the corporate name is Mayor, Commonalty, and Citizens (*b*).

A CORPORATION may have one name by which it may take and grant, and another by which it may plead and be impleaded: thus, a corporation may purchase and grant by the name of Master, Wardens, and Brothers, and may be empowered to plead and be impleaded by the name of Master and Wardens only (*c*). But in this respect there is a distinction between the case of a corporation by prescription, and that of a corporation by charter; the former may have several names to the same purpose; thus a writ was brought by the master of St. Lazarus of Burton, who said that he and all his predecessors, masters of the hospital aforesaid, had been from time immemorial called and known, and had impleaded and been impleaded, as well by the name of Master of the Hospital of St. Lazarus of Burton, of the order of St. Lazarus of Jerusalem in England, as by the name of Master of Burton of St. Lazarus of Jerusalem in England (*d*).

AND a *scire facias* will lie in one of the names, on a judgment obtained in a writ by the other.—Thus, where a

(*a*) Though the common council be a select body, and the livery another, yet I do not conceive that either of them is a distinct integral part of the corporation.

(*b*) Vid. 1 H. Black. Rep. 207. 4 Term Rep. 130.

(*c*) 11 H. 7, 27. Bro. Corpor. 95.

(*d*) 9 Ed. 4, 19. Bro. Corpor. 32. But a distinction is taken between the case of a corporation plaintiff and a corporation defendant; when the corporation are plaintiffs, it is said, it is not a good replication to say, they are known by one name as well as the other, because they ought to know their proper name; but if the defendants be named by the plaintiff by their known name, that is sufficient. 1 Ed. 4, 6. Bro. Corp. 82; the latter says, “tamen quæ: whether there be not a diversity between action real and personal.” I can see no reason either for the distinction or the diversity.

writ of waste was brought by the prior of the *hospital* of St. John of Jerusalem, and he recovered and took execution by *elegit*; the defendant, after the money levied, brought a *scire facias* to have the land returned, and it was sued against the prior of St. John of Jerusalem; and it was held well, because he was known as well by the one name as the other (*a*).

BUT a corporation by charter, it is said, though it may either by charter or by act of parliament be empowered to purchase and grant by one name, and sue and be sued by another (*b*), yet cannot have two names to the same purpose (*c*). This may be true with respect to a grant by charter; but there seems to be no reason why an act of parliament might not empower a corporation by charter to use two names for the same purpose.

THE King may incorporate a town by one name, and afterwards by another name, and then they ought to use the name of the second incorporation (*d*). Queen Elizabeth by her charter incorporated the inhabitants of Wells by the name of Mayor, *Masters*, and Burgeffes; King Charles the second granted to them, that they should be known by the name of Mayor, *Aldermen*, and Burgeffes; by this last name they entered into a bond, and the obligee sued them by their former name. They pleaded *non est factum*, on which a special verdict was found, stating the preceding facts, and the question made was, whether this was the bond of the mayor, *masters*, and burgeffes; and it was adjudged that it was not, on the ground that by taking

(*a*) 44 Ed. 3, 16. b. Bro. Corpor. 10. Misnom. 15.

(*b*) Vid. Sir William Jones, 262.

(*c*) Vid. 3 Salk. 102. Lutw. 508, 519. Hardres, 504, (405).

(*d*) 21 E. 4, 59. 1 Rol. 513.

the

the second letters patent, the first name was entirely extinguished (a).

BUT with respect to the extinction of the old name by a new charter, Holt, C. J. afterwards took this distinction: that where the new charter alters the constitution of the corporation and new models it, there they shall lose their old name; but that if the constitution, as to all its integral parts, remains the same, though the new charter give them a new name, the old one remains. Thus, if a mayor be added, or a mayor and *masters* be made mayor and *aldermen*, or an abbot and convent translated into a dean and chapter, there they lose their old name, because the integral parts of the corporation no longer remain the same. But if the bailiffs and burgeses *villæ de Gippo* accept a charter constituting them bailiffs and burgeses *villæ Gipwici*, this is a new name only, and they may still use their former name, because the town is the same, and the old constitution remains (b).

THOUGH the name given by charter to a corporation may seem to express only a definite number of persons by their names of office, yet in all legal acts, and legal proceedings, it must uniformly be understood to mean the whole corporate body. Thus, the merchant taylors of London were incorporated by the name of Master and Wardens of the Merchant Taylors of the brotherhood of St. John the Baptist, in the city of London, and their successors; and it was granted to them, that they should purchase and sue by the name of Master and Wardens of the

(a) Knight et ux' v. mayor, masters, and burgeses of Wells. 1 Ld. Raym. 80. Lutw. 508.

(b) 2 Ld. Raym. 1239. Salk. 435; in the latter book the examples mentioned are of "bailiffs and burgeses" being changed into "mayor and burgeses," or "mayor and aldermen."

Merchant Taylors : and that the same *master and wardens* should make statutes and ordinances. It was held that by this name, *the Master and Wardens*, should be understood, not the five individual persons who were the master and four wardens, but the whole company in their politic capacity (a).

WHERE any alteration is made in the name of a corporation, whether by the addition of another component part or otherwise, they retain the property, franchises, rights and privileges, which belonged to them before the alteration, and are equally liable to all claims to which they were subject before (b).

THUS the people of York prescribed as mayor, bailiffs, and citizens, to take and seize as forfeited, all goods *foreign bought and foreign sold*, till the time of Richard the second, when they were incorporated by the name of Mayor, Sheriffs, and Citizens, after which they claimed the same privilege as mayor, sheriffs, and citizens, and the claim was allowed (c).

So, if liberties be given by the King's charter to the bailiffs of a town, and afterwards they are incorporated by the name of Sheriffs, and the privilege conferred upon them that they shall implead and be impleaded by that name, they shall retain under the name of Sheriffs, all their franchises, which they had as bailiffs (d).

So, where a corporation under the name of a *Commonalty*, have certain possessions, and grant several covenants and annuities, and afterwards by the King's grant they have bailiffs added to them, and their name altered to that of Bailiffs and Commonalty, they are not discharged from

(a) Moore, 582. (b) 2 H. 6, 9. 21 Ed. 4, 56 et seq. 4 Co. 87.

(c) Dyer, 279, cited Moore, 582.

(d) 14 H. 6, 12, cited Moore, 581. Jenk. 99.

- annuities,

annuities, covenants, &c. to which they were liable before, nor is their previous property affected by it (a).

HOWEVER frequently the name may have been changed, the law, with respect to their ancient property, franchises and duties still continues the same (b).

So,

(a) 2 H. 6, 9. 21 Ed. 4, 56. 4 Co. 87.

(b) From time immemorial to the 14th of Richard the 2d, there existed in the city of London an association of men, who, by the name of Taylors and Armorers, *Linearum Armiturarum*, were accustomed to make ordinances for the government of the men of that mystery, and for the maintenance and relief of their poor, and to enforce these ordinances by the imposition of penalties.—Ed. 3, in the first year of his reign, granted by charter that they should hold a guild once a year, *as they had been accustomed*, make ordinances, and correct the defaults of servants under the inspection of the mayor or his deputy. Richard the second, in the 14th year of his reign, confirmed the charter of Ed. 3, and granted to them and their successors, that they might use the good customs relating to the guild, which they had used, but which were not expressed in the patent of Ed. 3. — That they might elect from among themselves a master and four wardens, for the better government of the company for ever; and that the master, wardens, and brothers of the company, might assemble and make ordinances, as they had been of old accustomed.—Henry 4th, in the 4th year of his reign, confirmed the last mentioned charter, and incorporated them by the name of Master and Wardens of the Company of Taylors and Armorers, *Linearum Armiturarum*, of St. John the Baptist, in the city of London: these several charters, and all the privileges and franchises granted in them, were confirmed by act of parliament in the 1st year of Ed. 4, to the *then* master and wardens of the company of taylors and armorers, *linearum armiturarum*, of St. John the Baptist, and their successors.—Henry the 7th, in the 18th year of his reign, changed the name to “the Master and Wardens of Merchant Taylors of the Company of St. John the Baptist, in London, and granted that they should purchase and implead, &c. by the name of Master and Warden of the Merchant Taylors. — It was held, that under this latter name, they should enjoy all the rights, privileges, &c. which they had obtained by prescription, or by means of

So, all grants made to the *inhabitants* and *good men or citizens* of such a place, shall be enjoyed by the *corporation* of the same place, if they be afterwards incorporated by the name of mayor and commonalty, or by any other name (*a*).

It is a general rule that a corporation cannot *take*, but by their corporate name. The chapel of St. Stephen was incorporated by the name of dean, canons, and vicars, and then a *grant* of land was made to them by the name of presbyters or chaplains of St. Stephen and their successors, and the grant was adjudged void (*b*).

BUT a grant made to *Richard* Abbot of D. where his name was John, was held good, because it would have been good by his corporate name of Abbot without the word Richard (*c*).

of any of the former charters. Vid. Moore 576. In Haddock's case, Raym. 439. 1 Vent. 355, all the court held "that a *new* charter does not merge or extinguish any of the ancient privileges; but that the corporation may use them as before; that if it should be otherwise, it would be very mischievous to most of the corporations in *England*, who have taken new charters, but were ancient corporations before." And in the case of the *mayor, aldermen, and burgesses of Scarborough v. Butler*, in 3 Lev. 238, which was an action brought by the corporation by this their *new* name, for a debt which had originally become due to the *old* corporation by the name of bailiff, &c., judgment was given for the plaintiffs, and at the end of the case it is said that "no doubt was made of the debt due to the first corporation *remaining due* to the new, *after* the *name* changed by the letters patent." The form of all the pleadings, where, *after* the change of the name, a corporation claims something to which it was intitled *before*, shews that the alteration of the name makes no change in their rights, &c. vid. Mellor v. Spateman. 1 Saund. 339.

(*a*) 21 Ed. 4, 55, cited Moore 581.

(*b*) 21 Ed. 4, 55, 56. Bro. Corpor. 65.

(*c*) 27 Ed. 3, 85. Bro. Corpor. 80.

So,

So, a bond given to Dr. Craven (master) and the fellows and scholars of Suffex and Sidney College, *to be paid* to the master, fellows and scholars, is a bond to master, &c. in their corporate capacity, and not to the master whose name is mentioned in the beginning of the bond, in his natural capacity (*a*).

IF, by a charter granted to the inhabitants of a place, it be granted that they shall be incorporated by the name of mayor, citizens and commonalty, and there be a subsequent clause in the same charter to this effect; "we grant to the citizens aforesaid that they shall not be impaneled on any jury out of the city;" this shall be effectual to confer the privilege of exemption on each particular citizen. The arguments against it all proceed on the principle that this latter grant being "to the citizens aforesaid," and not to the "mayor, citizens and commonalty," it is not a grant by the corporate name, and is therefore void: the best answer seems to be, that the words "we grant" are equivalent to "we will;" and that instead of being a grant by a wrong name, it is nothing more than the expression of the King's will, that the members of the corporation before constituted, should enjoy a particular privilege (*b*).

THE corporate name of the abbot of York was "Abbot of the Monastery of the blessed Mary of York;" a bond was made to him by the name of "Abbot of the Monastery of the blessed Mary *without the walls of the city* of York:" the abbey was in fact without the walls, but was within the city, and *therefore*, it is said, the bond was held good (*c*); I do not, however, see the force of that reason, and I conceive that if the abbey had *not* been within the city, that would have made no difference, though if it had been *within the walls*, it might.

(*a*) The master, fellows, and scholars of Suffex and Sidney College v. Davenport. 1 Wilson 184.

(*b*) 21 Ed. 4, 55, 56. Bro. Corp. 65.

(*c*) 10 Co. 125 b.

KING HENRY 8th granted to the mayor, burgesses, and inhabitants of Lynne, that they should have the name of "Mayor and Burgesses of his borough of Lynne Regis," and be called by the *same name and by no other*; a bond was made to them by the name of "Mayor and Burgesses of Lynne Regis:" it was contended, that the omission of the words "the King's borough" before the words "of Lynne Regis," made a material variance from the name of the corporation, for that these words were *parcel* of the name; and that this objection was stronger here, than it might have been in a common case, because the King, after having given them their name, had not only said in positive terms that they should be *called* by that name, but had added negative words "and by no other." After several arguments at the bar, the court gave judgment that the bond was good; for that the words "by the *same name and by no other*" might be understood in two different senses; they might mean "the same in words and syllables," and "the same in sense;" that in grants and conveyances, it was sufficient if the name of a corporation was the same in sense, though it was not the same in words and syllables, and that the present variance was in words and syllables only, and not in sense, and therefore not material (*a*).

THE misnomer of a corporation in a grant by act of parliament or by devise shall not in general avoid the grant, for these are to be taken according to the intention of the grantors; and therefore when the description of a corporation in an act of parliament or in a will is such, that the corporation really intended is apparent, and it is impossible that it should be applied to any other corporation, the act of parliament and the will shall take effect, though the right name of the corporation be not precisely

(*a*) Case of the mayor and burgesses of Lynne. 10 Co. 122—126.
followed

followed (a): and therefore where one devised certain tene-
ments in London for life, with remainder *ecclesiæ Sancti
Andree de Holb'*, it was adjudged that "this devise was good
to the corporation of the parson of the church of St. An-
drew in Holborn, and his successors, for that such descrip-
tion in a will, was sufficient for that purpose" (b). So, if
a devise be made to the university of Oxford, or to the city
of London, or to Trinity College in Cambridge, it would
be good, and the true name of incorporation implied; for
by these descriptions it is apparent that the deviser meant
that the incorporate body, in each case respectively, should
take (c). So, where the parliament gave a benefice to the
chancellor and scholars of Oxford, and their successors,
this description was held sufficient to express the meaning
of the makers of the act, that the corporation of the uni-
versity of Oxford, which has a chancellor and scholars,
should take it, and that no other corporation could (d).

It is a general rule that a corporation shall grant only by
its proper name of incorporation, though every minute
variation in the name is not material to avoid its grant;
but what variation shall be material or immaterial for
that purpose, it is difficult to say, with any precision:
many of the cases on that subject (and they are very
numerous) seem to have been decided on principles very
remote from those of good sense—some of the most re-
markable here follow:

AN almshouse was incorporated by the name of the
"Almshouse of John Isbury, founded at Lambourne," and
the poor of the same almshouse were empowered by that

(a) 10 Co. 57 b. in the Chancellor of Oxford's case.

(b) 21 R. 2, Devise 27, cited 10 Co. ub. sup.

(c) Id. ibid. vid. ante, page 101, 102.

(d) 10 Co. 57 b. ubi supra.

name to purchase, demise, &c. and by the deed of foundation, after the death of the founder, the "warden of the college of the blessed Mary of Winchester in Oxford," and his successors, were appointed visitors: an indenture was made between "Thomas White, the warden of New College in the university of Oxford, visitor of the almshouse of John Isbury at Lamborne in the county of Berks, and the *poor men* of the same almshouse on the one part, and the lessee on the other. The name of the visitor in the lease, differing from the name in the deed of foundation, was held a misnomer; the joinder of the warden in the lease was also held fatal, because he appeared by that to be the head of the corporation, and there was no such corporation founded by John Isbury; the words "*poor men*" too were held to make a material variance, because under the general word "poor" might also be included poor women (a).

THE corporation of the college of Eaton was erected by H. 6, by the name of *Præpositi et focii Collegii Regalis Collegii, beatæ Mariæ de Eaton juxta Windsor*. In the time of Edward the sixth, Sir Thomas Smith, knight, being provost, a lease was made by the name of "*Præpositi et focii Collegii Regalis de Eaton*," omitting "*Collegium beatæ Mariæ*," and by the opinion of all the justices this lease was held void (b).

KING Henry VIII. incorporated the scholars of Trinity College, Cambridge, by the name of "master, fellows, and scholars of the college of the holy and undivided Trinity in the town and university of Cambridge;" in the time of Edward 6th they made a lease by the name of master and fellows of Trinity College in Cambridge: by those who wished to impeach the validity of this lease, it was argued

(a) Moore 285, 287.

(b) Dyer 150, pl. 84.

that

that there being two places, the town and the university, mentioned in the name of incorporation, one of them could no more be left out in a lease than the other; that if the lease had been made by the name of the master——of the college——in the *town* of Cambridge, this would have been an express exclusion of the university, and for that reason the lease without question would have been void; the case, it was said, was the same here where the exclusion was implied: that if a stranger demanded possessions of them in a *præcipe quod reddat*, he must sue them certainly and precisely; much more, therefore, when they parted with their possessions by their own act, must they be supposed acquainted with their own name (*a*).——In support of the lease it was said, that though every corporation must be limited to some place certain, that could not support the objection here, for that in fact a place was mentioned; and as to two places being mentioned in the name of incorporation, that was not an objection well founded, for as a *material* body could not be in more than one place at one and the same time, so neither could a body corporate, which always continues its resemblance to the body natural: but admitting that a body corporate might be founded as of two places, yet it was insisted that was not the case here, for that an university was not *local* but *personal*; in confirmation of which assertion were cited an instance of a writ addressed to the chancellor and university of Oxford by H. 3, to remove the university to another place, when he intended to hold a parliament there, and was afraid there would not be room for the parliament and the students together, and of another writ directed in the same manner, desiring them to return: a record was also

(*a*) The fair inference from this seems to be, that if they do not use their right name, the lessee ought not to suffer for their neglect or fraud.

cited

cited to the same point of the 49 Ed. 3, which recited that there had been contention between the scholars of Cambridge, and the townsmen there, and that the former had gone to Northampton, and petitioned the King for permission to erect an university there; that the King had sent his writ to the mayor of Northampton, commanding him not to suffer the scholars to remain there, and declaring that he would not there erect an university.—These, it was contended, proved that an university was not properly a place, and that therefore the omission of it could not prejudice the lease.

Two of the justices (*a*) argued that the lease was good; the chief with the two others that it was bad (*b*); the case however was adjourned, that the parties might have an opportunity of settling it without the judgment of the court: this, however, not taking place, Williams the next term brought into court, a decree of the Court of Wards, in a case respecting this very college, in which it appeared, that they claimed certain land by virtue of a devise made to them by the name of “Master, Fellows, and Scholars of Trinity College in Cambridge;” in this decree the point immediately applicable to this case was, whether, as the name by which the corporation was incorporated, was that of “Master, Scholars, and Fellows of the holy and undivided Trinity in the University and Town of Cambridge,” this devise was good by the other name, and the judges had declared that it was (*c*).—Williams offering this record in support of his opinion, said, that he conceived there was no difference between a grant and a devise, nor between an estate or conveyance made

(*a*) Croke and Williams.

(*b*) Flemming, C. J. and Fenner and Yelverton, J.

(*c*) Vid. ante, page 102.

to them, and a conveyance made *by* them.—The judges who supported the other side of the question, said there was great difference between a devise and a grant, for that in a will, it was sufficient that the name was so described that the intent of the testator might be known; and as to there being no difference between a conveyance made *by* them and one made *to* them, they agreed thus far, that where they were parties to the conveyance, and must necessarily be consant of it, there the comparison would hold (*a*)

THE dean and chapter of Carlisle were incorporated (*b*) by the name of the “Dean and Chapter of the Cathedral Church of the holy and undivided Trinity *of* Carlisle,” and they made a lease by the name of “Dean of the Cathedral Church of the holy Trinity *in* Carlisle, and the whole Chapter of the Church aforesaid:” four objections were made to this lease; 1. That the word “undivided” was omitted. 2. That *in* Carlisle was used instead of *of* Carlisle, which was the true name. 3. That the word whole was added; and 4. That the regular order of the words was not observed. But it was resolved that the lease was good, notwithstanding these variances, because they were only in *words and syllables*, and not in the *substance* of the name (*c*).

THE dean and chapter of Worcester were incorporated by the name of the “Dean and Chapter of the Cathedral Church of Christ and the Blessed Virgin Mary of Worcester:” they made a lease by the name of the “Dean of the Cathedral Church of Christ and of our blessed Lady

(*a*) Brownl. and Goldf. pl. 2, 243—247. Vid. the case of the corporation of Minister Dei pauperis domus de Donington et pauperes, &c. 2 Anderf. 116. (*b*) 33 H. 8.

(*c*) 10 Co. 124. b. Moore, 233. 1 Anderf. 203, 206, 208. 1 Leon. 159. 2 Bullstr. 303. Dyer, 278, pl. 1.

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the Virgin of Worcester, and the Chapter thereof:" and notwithstanding the alteration, and transposition, this was held to be no material variance (*a*).

THE dean and canons of Windfor were incorporated (*b*), by the name of "the Dean and Canons of the King's free Chapel of St. George *the Martyr* within *his* Castle of Windfor:" in the time of King Philip and Queen Mary, they made a lease of lands by the name of "the Dean and Canons of the King and Queen's free Chapel of St. George within *the* Castle of Windfor:" here three variances were observed. 1. That instead of "the *King's* free chapel" were used "the *King and Queen's* free chapel." 2. That the word "martyr" was omitted; and 3. That instead of *the* was used *his* castle. The two latter variances were held to be immaterial, because, they were variances in *words and syllables* only, and not in *substance*; for that "St. George" included the "martyr," as the "Trinity" implied and included the word "undivided," and that "within *his* castle of Windfor" and "within *the* castle" were in fact the same, for they both meant "within the *King's* castle:" but the first was held to be a variance in *substance*, for that though at the time of making the lease the chapel was, in truth, the King and Queen's free chapel, "yet the corporation ought to be such as was given by the founder, and that should not be altered by the alteration of the name of the founder or of the owner of the castle; as if a college had been incorporated in the time of Edward 6th, by the name of Master and Fellows of *King's* College, they could not in the reign of Queen Elizabeth have made a lease by the name of Master and Fellows of *Queen's* College" (*c*).

(*a*) 2 Bulstr. 302.

(*b*) By act of parliament in the 22 Ed. 4.

(*c*) 10 Co. 124. b.

A COLLEGE in Oxford was incorporated by the name "*Gardiani et Scholarium domus five Collegii Scholarium de Merton in Universitate Oxoniæ*;" they made a lease by the name "*Custodis domus five Collegii de Merton in Oxonia et Scholarium ejusdem domus*:" four objections were taken on account of variance. 1. That the word *custos* was used instead of *gardianus*. 2. That the lease was by the name "*domus five collegii de Merton*," *scholarium* being omitted before *de Merton*. 3. That the lease was "*in Oxonia*" instead of "*in universitate Oxoniæ*." 4. That the order of the words was not observed, for that the word *scholares* was removed out of its place, and put at the end, instead of coming immediately after the guardian. The second variance was held to be a variance in substance, "for that the act of incorporation had baptized the college by the name of the College of *Scholars* of Merton, and they had made the lease by the name of the College of Merton himself, who in truth was the founder:" but the other three variances were held to be immaterial, "for that *gardianus* was the same as *custos*, and *in Oxford* and *in the university of Oxford*, meant the same thing, and the sense remained the same, notwithstanding the transposition of the word "*scholares*" (*a*).

KING Henry 8th incorporated the hospital of the Savoy by the name of "the Master and Chaplains of the Hospital of the *late* King Henry 7th of the Savoy:" they made a lease by the name of "William Ogle, Master of the Hospital of King Henry the 7th, *called* the Savoy, and the Chaplains of the same."

AFTER a long argument at the bar of the Exchequer, this case was argued by the barons, and two of them (*b*)

(*a*) 10 Co. 125 a. Moore, 266. 1 Anderf. 196: in this last book the case seems very incorrectly reported.

(*b*) Clark and Gent.

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against

against the Chief Baron (*a*), were of opinion that the name by which the lease was granted, was materially variant from the name of incorporation, which opinion they supported on this argument, "that in substance many things are not as they are *called*, but one thing is the thing in truth, and another the thing in appellation; that therefore the lease being made by the master and chaplains of the hospital *called* the Savoy, it was not certain that it was the lease of the master and chaplains *of* the Savoy; for that one hospital might be *called* the Savoy, and another actually *be* the Savoy, and that therefore it was not to be intended that the hospital *of* the Savoy, and the hospital *called* the Savoy were the same corporation.

IN order the better to answer this argument, the Chief Baron made a distinction between a place generally which contained within itself several particular places, having each a distinct known name, and a particular place which comprehended no other place within it: thus, London comprehends several wards, several parishes, several streets of different names, in which place it would be absurd to call the particular by the name of the general, as to say the Black Friars *called* London, instead of the Black Friars *in* London; but the hospital *of* Christchurch, or the hospital *called* Christchurch in London is the same, because Christchurch is a particular name, which does not comprehend other places of other names in itself.—Again, the abbey of Bermondsey, and the abbey *called* Bermondsey is the same, and yet the abbey *of* Westminster, and the abbey *called* Westminster is not the same, because Westminster is the name of a place general, which contains several particulars.—He contended, therefore, that the hospital *of* the Savoy, and the hospital *called* the Savoy were substantially the same

(*a*) Manwood.

thing ;

thing; for that the words *of*, *in*, and *called*, were confounded in grants, and had all the same signification; as if a man, having a manor of Dale, leased his "manor *of* Dale," or his "manor *called* Dale," or his "manor *in* Dale," in each case the manor would pass (a). He further observed, that inasmuch as in every such lease, there was a perfect understanding of the parties on both sides, the interest should pass to the lessee, and it was unreasonable that the successors of those persons who made such leases should avoid them for a trifling circumstance against the express intendment of their predecessors, who had taken money of the lessee, and had done an act which they thought valid, and might and would have amended in their grant, if they had known that such mistake existed.—As, however, the chief baron was but one judge against two, the plaintiff who wished to rescind the lease, had judgment: a writ of error was brought in the exchequer chamber, but while it was depending, the matter was compounded for money (b).

LORD COKE alluding to this case, expresses his disapprobation of the judgment in these terms. "It is true that judgment was given in the Exchequer by Baron Clarke and Baron Gent, against the opinion of Sir Roger Manwood, Chief Baron, *totis viribus*; and after the writ of error brought, and the case argued at the bar, the said Thomas Fanshaw compounded with Pascal for his lease, and I was of counsel with the said Thomas Fanshaw: and I conceive that there is *little* difference betwixt "the

(a) This case of the manor of Dale, the judges who argued on the other side, observed, was not *always* law; it was law where it appeared that the vill, town, or place called Dale was coextensive with the manor; but it might happen that there were two manors within the place, and then either of them might be called the "manor *of* Dale, but neither of them could be called the manor *called* Dale." 1 Anderf. 218.

(b) Moore 236. 1 Anderf. 202, 219. 1 Leon. 153.

mayor and commonalty of the city *of* London," and "the mayor and commonalty of the city *called* London," unless it can be shewn that there are two distinct corporations which have these two distinct names (a).

JOHN ALCOCK brought an action of trespass against Henry Ayray, doctor of divinity, and others, and declared of a trespass in a house of the plaintiff, called the Parsonage House, and two closes of the plaintiff, one called the Parsonage Close, and another containing ten acres of glebe land, at Charleton super Otmore, in the county of Oxford: the defendants pleaded not guilty, on which a special verdict was found to this effect; that the places in which the trespass was committed were parcel of the glebe of the rectory of Charleton super Otmore, of which Henry Ayray, at the time of the trespass and of the verdict, was parson: that Edward the third, in the 14th year of his reign, had granted to one Robert de Eglesfield to found, in a certain house of his in Oxford, a collegiate hall of scholars, chaplains, and others, under the name of *Aula Scholar' Reginæ de Oxon'*, quæ per unum præpositum de dictis scholaribus——gubernabitur, and to give and assign that house with the appurtenances *præfatis præposito et scholaribus*, to have and to hold to them and their successors *præpositis et scholaribus aulæ illius* for their habitation for ever; it was further found that King James 1st had, under the great seal, exemplified this charter in the records of the chancery enrolled in the tower of London, and in the exemplification the clause of "sub nomine" was "sub nomine Aulæ Reginæ de Oxon," whereas in the charter it was "sub nomine Aulæ *Scholarium* Reginæ:" it was also found, that the said Robert de Eglesfield founded the college

(a) 10 Co. 126 a. in the case of the mayor and burgessees of Lynne.

according

according to his licence, and in his charter of foundation ordered that it should be for ever called *Aula Reginae*, and that in several parts he called the *Scholares*, by the term *socii*: it was further found, that on the 8th of July, 1509, 'one Hugh Hodgefon, then provost of the hall aforesaid, and the scholars of the same,' who, it seems, were seized of the advowson of the rectory in question, by their deed under their common seal, and by the names of Hugh "Præpositi Collegii Reginae in universitate Oxoniæ, et sociorum et Scholarium ejusdem Collegii," presented one Allen Scott to the church which was then void, who was admitted, instituted, and inducted; that the said Allen being parson of the said church, and having become provost of the said hall, in the 10th of Elizabeth by his deed demised the said rectory to William Shillingford for the term of 81 years, and that afterwards the "provost of the hall or college aforesaid, and the scholars of the same hall, by the names "Præpositi Sociorum et Scholarium Aulæ vel Collegii Reginae in universitate Oxoniæ," patrons of the rectory of the church of Carleton super Otmore, by their deed sealed with their common seal, confirmed the said demise; that the ordinary likewise confirmed it in the life time of Allen Scott; that Allen Scott died, after whose death the defendant, Dr. Ayray, was lawfully presented, admitted, instituted, and inducted, and that the plaintiff had the estate and interest of William Shillingford': then the trespass was found.

THOSE who supported the title of the defendant objected that as well the confirmation, as the presentation were utterly void, by reason of the misprision of the true name of the corporation; the first question therefore which was made was, what the true name of the corporation was; and they conceived it to be "Præpositus et Scholares

Aulæ Scholarium Reginæ de Oxon," which they collected from the words of the charter of licence, "a certain collegiate hall de Scholaribus——under the name of *aula Scholarum Reginæ de Oxon quæ per unum præpositum de dictis Scholaribus—gubernabitur*:" this being therefore the true name, there were five differences between it and the name used in the confirmation; three in addition, one in alteration, and one in omission; in addition there were, first, the word "*focii*," the confirmation being, "*Præpositus, Socii et Scholares*, where it should have been "*Præpositus et Scholares*;" secondly, the words "*vel Collegii*," and thirdly, the word "*universitate*." In alteration there was the word "*de*" instead of "*in*," for the true name of the corporation was "*de Oxon*," and the confirmation was "*in universitate Oxon*." In omission, the variance was that the confirmation had "*Aulæ Reginæ*" instead of "*Aulæ Scholarium Reginæ*." In the presentation several variances were observed; one alteration of "*Collegii*" for "*Aulæ*," and the other misprisions, in addition, alteration and omission.

AFTER argument at the bar, the judges resolved that the variance arising from the omission of the word "*Scholarium*" after the word "*Aulæ*" was the only one attended with any difficulty, and that that depended on what was the true name of the corporation, and what was the diversity between the present case and that of Merton College before mentioned (*a*), which was affirmed by all the judges to be good law.

YET notwithstanding the resemblance of the present case to that, in the omission of this word "*Scholarium*" before "*Reginæ*," they resolved that both the confirmation and presentation were good; for they were of opinion, on full consideration of the charter of Ed. III. and of the

(*a*) Vid. ante, page 243.

instrument

instrument of Robert de Eglesfield, that the true name of the corporation was "Præpositus et Scholares Aulæ Reginæ de Oxon;" it appeared by the charter itself that the word "Scholares" was necessary only once in the name of the corporation; in the clause of "sub nomine," the word was but once mentioned, and although in that clause, the words were "Aulæ Scholarium Reginæ," yet when the word "Præpositus" was introduced, the word "Scholares" ought in construction to precede the words "Aulæ Reginæ;" if it did not, this would be a sole corporation consisting of a provost only, for then the corporation would be "Præpositus Aulæ Scholarium Reginæ," whereas it was acknowledged on all hands that this was a corporation aggregate consisting of provost and scholars: immediately after the words "sub nomine Aulæ Scholarium Reginæ" the following were added "quæ per unum præpositum dictis Scholaribus—gubernabitur," so that it clearly appeared that the word "Scholares" ought to be but once mentioned in the name of the corporation. This construction was confirmed by the subsequent parts of the charter, by the instrument of foundation, and by the uniform practice of the corporation itself. By the charter, the founder was empowered to give the messuage with the appurtenances "Præfatis Præposito et Scholaribus," to have and to hold to them and their successors "Præpositis et Scholaribus aulæ illius," by which it appeared not only that the King joined the words "Præpositus and Scholares," but gave the precedence to the word "Scholares" before "aulæ illius," and no mention was made of it afterwards; by the instrument of foundation, it was ordained that the college should be always called "Aulæ Reginæ," and not "Aulæ Scholarium Reginæ." The corporation itself from the time of its incorporation had never accepted
any

any grant, nor made any grant, with the repetition of the word "Scholares;" it had always been mentioned but once, as appeared by a great number of precedents: It had never been called in vulgar appellation, "Queen's Scholars' College;" neither did any one know it by that name; every one knew it by the name of "Queen's College" (a).

FROM all the cases put together, we may collect this general rule, that a variance from the precise name of the corporation, which makes no difference in the meaning, however different it may render it in words and syllables, will not invalidate a grant made by another to the corporation, or by the corporation to another, whether the variance be by addition, omission, or alteration of a word: but from many of the cases, we may be justified in remarking that in many instances, that which in former times would have been considered as a variance in substance, would now be considered only as a variance in syllables and words.

It may appear to some into whose hands this work may fall, that I have given myself a great deal of unnecessary trouble to detail so many cases, on a subject, where common sense applied to each particular case, must naturally be a better guide than a voluminous collection of precedents: the best apology I can make is this, that in the books in which these cases are reported, those questions which to this class of readers may appear so trivial, make so conspicuous a figure by the length and learned lumber of the arguments both at the bar and on the bench, that I was afraid another class of readers would have thought I had not done justice to the subject, had I treated it in a manner more concise.

(a) Dr. Ayray's case. 11 Co. 18 b.—22 b.

To avoid grants or leases made by corporations, on account of a mistake in the corporate name, is certainly unjust, even though the variance be in what is called substance: it is impossible that the grantees or lessees should know the real name of foundation; but the corporation must be presumed to know it, and if they do not use it, they ought not to be permitted to take advantage of their own wrong. This injustice was felt and censured when the attempts made by corporations to set aside their leases and grants became frequent, and was in a great measure repressed in consequence of the cases of the mayor and burgesses of Lynne and Dr. Ayray (*a*). In the former of these Lord Coke expresses himself to this effect. "And it is well observed in Sir Moile Finch's case (*b*), that till this generation of late years, it was never read in any of our books, that any body politic or corporate endeavoured or attempted by any suit to avoid any of their leases, grants, conveyances, or other of their own deeds, nor any other grants, &c. made to them for the misnomer of their true name of incorporation. But after a window was opened to give them light to avoid their own grants for the misnomer of themselves, what suits and troubles (to avoid grants, &c. as well made to them as by them) have followed thereupon every one knows: but there, it was said, that for every curious or nice misnomer, God forbid that their leases or grants, &c. should be defeated; for there is a sound difference between writs and grants; if a writ be adjudged bad on account of a misnomer, the only consequence is that it abates, and the plaintiff may have a new writ of common right by the proper name (*c*); but he cannot of common

(*a*) V. Jenk. 233, 270, 271, a note to Plowd. 536.

(*b*) 6 Co. 65 a.

(*c*) Per Manwood, C. B. 1 Anderf. 207.

right

right have a new bond or a new lease or grant — I conceive it would be reasonable to drive him who would avoid a writing, demise, grant, &c. made *by* a corporation or *to* it, by reason of any verbal or literal misnomer, to shew that there are two corporations in the same city, borough, or town, one by the true name and another by such name as is contained in the deed, &c. and so leave the deed, &c. good, by or to one of them. But when in truth there is but one and the same corporation, leases, grants, &c. made *by* them or *to* them, ought not to be avoided by such nice and verbal variances, when in substance the true name of the corporation, either by matter expressed or necessarily implied in the words themselves, appears to the court" (a).

IN a lease, grant, or other deed made by a corporation aggregate, or any deed made to it, it is not necessary that the proper name of the head should be mentioned, because the proper name of such a body politic is the name of incorporation, and not the names of any of the individuals of whom it is composed (b).

IN an ejectment, the plaintiff counted on a lease made by the warden and college of All Souls in Oxford, and exception was taken that the name of baptism of the Warden was omitted, but it was adjudged that it was not necessary (c).

THIS point, however, seems anciently to have been understood otherwise, for we are told that it was said by Littleton in the reign of Edward the fourth, that "if dean and chapter make a lease without mentioning the proper name of the dean, the lease is void:" *quod fuit concessum per totam curiam* (d), and Broke says, "see a diversity be-

(a) 10 Co. 126 a.

(4) 3 Salk. 103.

(c) Carter v. Crumwel, Dyer 86 a. in margin.

(d) 18 Ed. 4. 8 Bro. Corpor. 59.

tween a grant made by them and to them." There is certainly, however, no diversity at this day.

THE naming or not naming the head may, however, sometimes make a difference in the obligation imposed on the corporation by the deed after the death of the head in whose time it was made. Thus it is held (*a*), that if a dean and chapter, or a prior and convent, without naming the head by his proper name, grant by the common seal, an annuity till the grantee be promoted to a benefice, by the *aforesaid* dean or prior; the successor of the dean or prior may make a tender of a benefice; but that if the dean or prior had been named by his proper name, the successor could not have made the tender, because the word *aforesaid*, in this latter case, would have referred to the particular dean or chapter who made the grant.

In the case of a sole corporation, however, the name of baptism must be used as well as the corporate name; and there is a difference between those corporations sole who have the fee simple in them and may have a writ of right, as a bishop or dean distinct from his chapter, and those who have not the fee simple, as a parson or vicar; in the case of the former the Christian name alone is sufficient; but in that of the latter both Christian and surname must be used (*b*).

As a corporation must take and grant by their corporate name, so by that name they must in general sue and be sued; and they may sue by their true name of foundation though they be better known by another name; thus the master and scholars of the hall of Valens Mary in Cambridge, brought a writ by that name, which was the name of their foundation, though they were better known by

(*a*) 14 H. 7. vid. Dyer 86, pl. 96, 97, 98.

(*b*) Vid. 2 Inst. 666.

the

the name of ——— Pembroke Hall, and the writ was held good (a).

As a corporation by prescription may have several names, they may sue by the one name or the other, alleging that they and their predecessors have from time immemorial been known, and been accustomed to plead by the one or by the other (b). It is said, that if a corporation be *known* by a name, it is sufficient to sue them by that name (c), but this seems to be confined to the case of a corporation by prescription, for it is said, on another occasion (d), that when a corporation is created by the King, and the commencement of it appears by record, it can have no other name by use, nor be named otherwise than as the King by his letters patents has appointed, and the court will not permit it to be sued by another name. Yet I see no reason, why, in the case of a corporation by charter, which has acquired by long usage a name of reputation different from its real name of foundation, may not be sued by that name of reputation as well as a man may be sued by a name of reputation different from his name of baptism, or why if the corporation plead a misnomer, the plaintiff may not reply that it is known by the one name as well as by the other.

A WRIT *officire facias* was brought against the provost and scholars of the blessed Mary and Saint Nicholas in Canterbury. The provost and scholars pleaded that the college aforesaid was of the foundation of H. 6, who by letters patent founded it by the name of the provost and scholars, &c.

(a) 44 Ed. 3, 35.

(b) Vid. 9 Ed. 4, 21. 13 H. 7, 14. 16 H. 7, 1, and 21 H. 6, 4, which last seems contra.

(c) 8 Aff. pl. 24. Bro. Corpor. 40.

(d) 1 Anderf. 213.

of

&c. of Canterbury, and this variance was held to be a misnomer, for this wise reason, that a man might be in such a place and not of it, as St. Martin's le Grand is *in* London but is not *of* London (*a*).

A CHAUNTRY priest was incorporated by the name of Provost of the *Chauntry* of C. a writ was brought against him by the name of Provost of the *House* of C. this was held a variance sufficient to abate the writ (*b*).

A WRIT brought against the priores of Newark of Dorchester was abated, on the ground that it should have been against the priores of Newark only (*c*).

IF to the real name of a corporation any thing be added by way of synonyme or explanation, that will not make a misnomer: as if a corporation consist of master and confreres, and they be sued by the name of Master and Confreres *sive socii*; the words *sive socii* are only surplusage (*d*).

AN action at the suit of a corporation aggregate to recover a thing due to them in their corporate right, must not be brought in the name of their head alone, but in their full corporate name, unless it appear that the act of parliament or charter by which they are constituted, enables them to sue in the name of their head. Therefore where the president of the college of physicians sued to recover a penalty for practising physic contrary to their charter, judgment was arrested on the ground that the action should have been brought in the name of the president and college (*e*).

(*a*) 15 Ed. 4, b. Bro. Corpor. 33.

(*b*) 38 Ed. 3, 14, 15. Br. Corpor. 21.

(*c*) 38 Ed. 3, 28. Bro. Corpor. 22 misnom. 25.

(*d*) 20 Ed. 4, 12. Br. 183, Corpor. 8.

(*e*) 2 Bulstr. 185.

YET though it appear that the head of a corporation is enabled to sue, in his own name, for any thing to which the corporation are intitled, this will not preclude *them* from suing by their name of incorporation; thus where debt was brought in the name of the President and College of Physicians to recover the penalty of 5*l.* per month, on the 14 H. 8, c. 15, for practising physic in London without a licence; on demurrer to the declaration, this objection, among others, was taken, that the action ought to have been brought in the name of the college only, or of the president only, the words of the patent being, “quod ipsi per nomina presidentis collegii *seu* communitatis facultatis medicinæ London,” should sue and be sued; to which it was answered, that they were incorporated by the name of President *and* College, and had, in consequence of that, a power to sue and be sued by that name, and that this power was not taken away by the additional affirmative power which was given them (*a*).

WE have seen that, when an act of parliament grants any thing to a corporation, the grant shall take effect, though the true corporate name be not used, provided the name actually used be a sufficient description of the corporation; but it is doubtful whether in suing to enforce its claim under that act, it can use the name therein mentioned. —The only case I find on this subject is the following:

THE university of Cambridge was incorporated by the name of *Chancellor, Masters, and Scholars*; the statute (*b*) which disables popish recusants convicted from presenting to benefices, vests such presentations in the *chancellor and scholars* of the two universities, distinguishing the counties within which each of them shall respectively present. —The university of Cambridge brought a *quare impedit* against the

(*a*) 2 Salk. 451.

(*b*) 3 J. 1, c. 5, f. 18, 19, 20.

archbishop,

archbishop of York, by the name of *Chancellor and Scholars*: the defendant pleaded in abatement, that the university was incorporated by the name of *Chancellor, Masters, and Scholars*, and that, therefore they had sued by a wrong name: the Court of Common Pleas gave judgment of “*respondeas ouster*,” on which the defendant brought a writ of error in the King’s Bench.

IN favour of the university it was argued, that a corporation may have one name by which they may take, and another by which they may sue (*a*); it did not therefore follow, that because the university was incorporated by one name, they could not sue by another; the act of parliament vesting this right in them by the name of *Chancellor and Scholars*, was an incorporation of them, as to this particular purpose: this could be done by letters patent; (*b*) much more might it be done by act of parliament; and if this were so, the very act of parliament was a falsification of the plea.—To this it was answered, that if the university had in fact one name by which they might take, and another by which they might sue, they ought to have shewn it; that the act of parliament operated only as a description of person, as a devise would do, and not as an incorporation to a specific purpose.

PARKER, C. J. observed that the declaration set forth the act of parliament as an authority to sue by that name, which put it on the defendant to shew some special matter to avoid it, as the acceptance of another charter, by another name, at a time subsequent to the act.—Powys, senior, said, that “*chancellor and scholars*” was such a name as comprehended the whole university, for that it included both head and members.—The other two justices, Eyre and Powys, junior, said that it did not follow that what

(*a*) 1 Rol. 513.

(*b*) 2 H. 7, 13. 4 Leon. 190.

was sufficient as a description to enable a person to take, was a name by which he might sue (a).

IN all legal proceedings, where a corporation is introduced, its true name must be used, whether it be a party to the proceedings or not.

IN an action on a contract for the transfer of a certain quantity of South Sea stock, the plaintiff declared, that in consideration that he had undertaken to transfer to the defendant 800l. "in capitali fundo gubernatoris et societatis mercatorum Magnæ Britanniae negociantium ad maria australia et alia loca Americæ et pro incitatione piscationis, anglice vocato *South Sea Stock*," the defendant promised to accept it, and pay 5600l.—On "non assumpsit" being pleaded, the cause was tried at Guildhall, and one of three objections taken to the declaration was this, that the name of the South Sea company was mistaken, for that there was no such word as *australia* for south, the proper Latin word being *australia*, without the *i*. On this, as well as on the other objections, a verdict was allowed to be taken for the plaintiff, with leave for the defendant to apply to the court for a new trial; and on an application for that purpose, *after great debate*, a new trial was granted, on the ground that the plaintiff had failed in proving his declaration; for the evidence being of a promise to accept South Sea stock, and the name of the corporation being set out with an insensible word, "*australia*" instead of "*australia*," the declaration did not describe that corporation, and consequently the agreement set forth, was to transfer a stock different from that which was proved by the evidence: and it was held, that if the word *australia* were rejected, as the counsel for the plaintiff would have had it, that would not help the plaintiff, for then the cor-

(a) 12 Mod. 207, 208.

puration

poration described would be, "the governor and company of merchants trading to the seas and other places in America," but would not be that corporation, part of whose stock, it was proved, was agreed to be transfered (a).

AN act of parliament gave power to the justices of the county of Surry, at their quarter sessions, on the application of "the mayor, aldermen, and commons of the city of London, in common council assembled," to issue a precept to the sheriff to summon a jury to inquire into the value of certain estates; an order was made by the justices at their quarter sessions, stating, that on the application of the "mayor, and commonalty, and citizens," they issued a precept—and stating all the subsequent proceedings; this order being removed by *certiorari* into the King's Bench, this objection, among others, was taken to it, that it stated the application to have been made by the *mayor, commonalty and citizens*, instead of being made by the *mayor, aldermen, and commons*, according to the directions of the act. The court held the objection to be well founded, for that the bodies described in these different terms were distinct, the one being a *select* body, the other the corporation at large, and that they could not go into the examination of any fact tending to reconcile such distinction, or to shew that in truth the former were the proper persons; and on this objection, among others, the order was quashed (b).

2. *What acts a Corporation aggregate must do by deed, and what it may do without deed.*

THIS question seems by the old books, to have been the subject of considerable controversy among the justices.

(a) 2 Ld. Raym. 1515. 2 Str. 787.

(b) Rex v. Croke. Cowp. 26—29.

Some go so far as to say, that without deed a corporation cannot do any act whatever. One (a) makes a distinction, which seems to be founded in good sense, between the case of a corporation aggregate, consisting of many persons, one capable and the others incapable, as abbot and convent, and corporations aggregate of many persons capable, as mayor and commonalty, or dean and chapter; the former he seems to intimate may do many acts without deed, because the abbot is the only person capable, and the oracle of the whole, the rest being incapable of any act, because they are dead in law: but corporations of the other kind being composed of persons all of whom are capable of action, there is no individual who can be considered as the oracle of the whole, and therefore they can speak only by their deed executed in due form.—Some of the justices go so far as to say, not only that no servant of a corporation can be appointed without deed, but that without it no command is valid to do any particular act; others with more reason say, that admitting that no servant can be appointed without deed, yet when he is once appointed, he may do every thing incident to the nature of his service, not only without commandment by deed, but without any commandment at all (b).

AND it has long been considered as an established point, that to offices of ordinary service, such as that of cook and butler, a corporation may appoint without deed (c). It seems likewise to have been generally admitted, that a bailiff might be appointed to take a distress, without deed; it is even said, "that it is not necessary that he should be made bailiff before he distrain; that it is sufficient if the corporation agree to it afterwards, for that his being bailiff

(a) Oxenbridge. (b) Vid. 4 H. 7, 6, 13, 17. 7 H. 7, 9.

(c) Vid. the authorities just cited, and Plowd. 91.

is not traversable, and that a member of the corporation may distrain in right of the corporation, and justify as bailiff: thus, where a chauntry was incorporated of three chaplains, and one of them took a distress *damage feasant*, and on replevin avowed as bailiff; this was held good, and all these points resolved (a). Again it is said, "a man may justify as bailiff to dean and chapter, and the like, without shewing the deed constituting him bailiff" (b). And in more modern times it has been laid down as a rule, that "a corporation aggregate may appoint a bailiff to distrain without deed or warrant, *because the distress neither vests an interest in them, nor divests one out of them*" (c).

IN the time of Edward the fourth (d), it was said by Littleton to have been the opinion of all the judges in the Common Pleas and King's Bench, that an assignment of auditors by a commonalty was good without deed.

IN the time of Elizabeth, it was agreed by all the judges of the King's Bench, that if a sheriff make a warrant of arrest to a corporation which has return of writs, they may make a bailiff to execute it without writing (e).

THE Bank of England, or any similar corporation, may, without deed, empower their servant to make promissory notes or bills of exchange in their name (f), and this is the usual practice with the Bank.

BUT it is a general rule, that where a corporation aggregate appoint a person to do any act in which their real property is concerned, or by which their rights are to be asserted, the appointment must be by deed. Thus an appointment of an attorney to make or to take livery of

(a) 26 H. 8, 8 b. Bro. 182 b.

(b) 12 H. 7, 25, 26. Bro. Corpor. 51.

(c) 3 Salk. 191. 3 Lev. 107. (d) 12 Ed. 4, 10 a.

(e) E. 41 El. Moore, 512.

(f) Vid. Rex v. John Bigg. 3 P. Williams, 419.

Merchant Taylors : and that the same *master and wardens* should make statutes and ordinances. It was held that by this name, *the Master and Wardens*, should be understood, not the five individual persons who were the master and four wardens, but the whole company in their politic capacity (a).

WHERE any alteration is made in the name of a corporation, whether by the addition of another component part or otherwise, they retain the property, franchises, rights and privileges, which belonged to them before the alteration, and are equally liable to all claims to which they were subject before (b).

THUS the people of York prescribed as mayor, bailiffs, and citizens, to take and seize as forfeited, all goods *foreign bought and foreign sold*, till the time of Richard the second, when they were incorporated by the name of Mayor, Sheriffs, and Citizens, after which they claimed the same privilege as mayor, sheriffs, and citizens, and the claim was allowed (c).

So, if liberties be given by the King's charter to the bailiffs of a town, and afterwards they are incorporated by the name of Sheriffs, and the privilege conferred upon them that they shall implead and be impleaded by that name, they shall retain under the name of Sheriffs, all their franchises, which they had as bailiffs (d).

So, where a corporation under the name of a *Commonalty*, have certain possessions, and grant several covenants and annuities, and afterwards by the King's grant they have bailiffs added to them, and their name altered to that of Bailiffs and Commonalty, they are not discharged from

(a) Moore, 582. (b) 2 H. 6, 9. 21 Ed. 4, 56 et seq. 4 Co. 87.

(c) Dyer, 279, cited Moore, 582.

(d) 14 H. 6, 12, cited Moore, 581. Jenk. 99.

- annuities,

annuities, covenants, &c. to which they were liable before, nor is their previous property affected by it (a).

HOWEVER frequently the name may have been changed, the law, with respect to their ancient property, franchises and duties still continues the same (b).

So,

(a) 2 H. 6, 9. 21 Ed. 4, 56. 4 Co. 87.

(b) From time immemorial to the 14th of Richard the 2d, there existed in the city of London an association of men, who, by the name of Taylors and Armorers, *Linearum Armiturarum*, were accustomed to make ordinances for the government of the men of that mystery, and for the maintenance and relief of their poor, and to enforce these ordinances by the imposition of penalties.—Ed. 3, in the first year of his reign, granted by charter that they should hold a guild once a year, *as they had been accustomed*, make ordinances, and correct the defaults of servants under the inspection of the mayor or his deputy. Richard the second, in the 14th year of his reign, confirmed the charter of Ed. 3, and granted to them and their successors, that they might use the good customs relating to the guild, which they had used, but which were not expressed in the patent of Ed. 3. That they might elect from among themselves a master and four wardens, for the better government of the company for ever; and that the master, wardens, and brothers of the company, might assemble and make ordinances, as they had been of old accustomed.—Henry 4th, in the 4th year of his reign, confirmed the last mentioned charter, and incorporated them by the name of Master and Wardens of the Company of Taylors and Armorers, *Linearum Armiturarum*, of St. John the Baptist, in the city of London: these several charters, and all the privileges and franchises granted in them, were confirmed by act of parliament in the 1st year of Ed. 4, to the *then* master and wardens of the company of taylors and armorers, *linearum armiturarum*, of St. John the Baptist, and their successors.—Henry the 7th, in the 18th year of his reign, changed the name to “the Master and Wardens of Merchant Taylors of the Company of St. John the Baptist, in London, and granted that they should purchase and implead, &c. by the name of Master and Warden of the Merchant Taylors.→ It was held, that under this latter name, they should enjoy all the rights, privileges, &c. which they had obtained by prescription, or by means of
of

So, all grants made to the *inhabitants* and *good men* or *citizens* of such a place, shall be enjoyed by the *corporation* of the same place, if they be afterwards incorporated by the name of mayor and commonalty, or by any other name (*a*).

Corporation
incorporated
by the name of
mayor and commonalty
or by any other name
IT is a general rule that a corporation cannot *take*, but by their corporate name. The chapel of St. Stephen was incorporated by the name of dean, canons, and vicars, and then a *grant* of land was made to them by the name of presbyters or chaplains of St. Stephen and their successors, and the grant was adjudged void (*b*).

BUT a grant made to *Richard* Abbot of D. where his name was John, was held good, because it would have been good by his corporate name of Abbot without the word Richard (*c*).

of any of the former charters. Vid. Moore 576. In Haddock's case, Raym. 439. 1 Vent. 355, all the court held "that a *new* charter does not merge or extinguish any of the ancient privileges; but that the corporation may use them as before; that if it should be otherwise, it would be very mischievous to most of the corporations in *England*, who have taken new charters, but were ancient corporations before." And in the case of the *mayor, aldermen, and burgeses* of Scarborough v. Butler, in 3 Lev. 238, which was an action brought by the corporation by this their *new* name, for a debt which had originally become due to the *old* corporation by the name of bailiff, &c. judgment was given for the plaintiffs, and at the end of the case it is said that "no doubt was made of the debt due to the first corporation *remaining due* to the new, *after* the *name* changed by the letters patent." The form of all the pleadings, where, *after* the change of the name, a corporation claims something to which it was intitled *before*, shews that the alteration of the name makes no change in their rights, &c. vid. Mellor v. Spateman. 1 Saund. 339.

(*a*) 21 Ed. 4, 55, cited Moore 581.

(*b*) 21 Ed. 4, 55, 56. Bro. Corp. 65.

(*c*) 27 Ed. 3, 85. Bro. Corpor. 80.

So,

So, a bond given to Dr. Craven (master) and the fellows and scholars of Suffex and Sidney College, *to be paid* to the master, fellows and scholars, is a bond to master, &c. in their corporate capacity, and not to the master whose name is mentioned in the beginning of the bond, in his natural capacity (*a*).

IF, by a charter granted to the inhabitants of a place, it be granted that they shall be incorporated by the name of mayor, citizens and commonalty, and there be a subsequent clause in the same charter to this effect; "we grant to the citizens aforesaid that they shall not be impaneled on any jury out of the city;" this shall be effectual to confer the privilege of exemption on each particular citizen. The arguments against it all proceed on the principle that this latter grant being "to the citizens aforesaid," and not to the "mayor, citizens and commonalty," it is not a grant by the corporate name, and is therefore void: the best answer seems to be, that the words "we grant" are equivalent to "we will;" and that instead of being a grant by a wrong name, it is nothing more than the expression of the King's will, that the members of the corporation before constituted, should enjoy a particular privilege (*b*).

THE corporate name of the abbot of York was "Abbot of the Monastery of the blessed Mary of York;" a bond was made to him by the name of "Abbot of the Monastery of the blessed Mary *without the walls of the city* of York:" the abbey was in fact without the walls, but was within the city, and *therefore*, it is said, the bond was held good (*c*); I do not, however, see the force of that reason, and I conceive that if the abbey had *not* been within the city, that would have made no difference, though if it had been *within the walls*, it might.

(*a*) The master, fellows, and scholars of Suffex and Sidney College v. Davenport. 1 Wilson 184.

(*b*) 21 Ed. 4, 55, 56. Bro. Corp. 65.

(*c*) 10 Co. 125 b.

KING HENRY 8th granted to the mayor, burgesſes, and inhabitants of Lynne, that they ſhould have the name of “ Mayor and Burgeſſes of his borough of Lynne Regis,” and be called by the *ſame name and by no other*; a bond was made to them by the name of “ Mayor and Burgeſſes of Lynne Regis:” it was contended, that the omiſſion of the words “ the King’s borough” before the words “ of Lynne Regis,” made a material variance from the name of the corporation, for that theſe words were *parcel* of the name; and that this objection was ſtronger here, than it might have been in a common caſe, becauſe the King, after having given them their name, had not only ſaid in poſitive terms that they ſhould be *called* by that name, but had added negative words “ and by no other.” After ſeveral arguments at the bar, the court gave judgment that the bond was good; for that the words “ by the *ſame* name and by no other” might be underſtood in two different ſenſes; they might mean “ the ſame in words and ſyllables,” and “ the ſame in ſenſe;” that in grants and conveyances, it was ſufficient if the name of a corporation was the ſame in ſenſe, though it was not the ſame in words and ſyllables, and that the preſent variance was in words and ſyllables only, and not in ſenſe, and therefore not material (a).

THE miſnomer of a corporation in a grant by act of parliament or by deviſe ſhall not in general avoid the grant, for theſe are to be taken according to the intention of the grantors; and therefore when the deſcription of a corporation in an act of parliament or in a will is ſuch, that the corporation really intended is apparent, and it is impoſſible that it ſhould be applied to any other corporation, the act of parliament and the will ſhall take effect, though the right name of the corporation be not preciſely

(a) Caſe of the mayor and burgeſſes of Lynne. 10 Co. 122—126.
followed

followed (a): and therefore where one devised certain tenements in London for life, with remainder *ecclesiæ Sancti Andreæ de Holb'*, it was adjudged that "this devise was good to the corporation of the parson of the church of St. Andrew in Holborn, and his successors, for that such description in a will, was sufficient for that purpose" (b). So, if a devise be made to the university of Oxford, or to the city of London, or to Trinity College in Cambridge, it would be good, and the true name of incorporation implied; for by these descriptions it is apparent that the devisor meant that the incorporate body, in each case respectively, should take (c). So, where the parliament gave a benefice to the chancellor and scholars of Oxford, and their successors, this description was held sufficient to express the meaning of the makers of the act, that the corporation of the university of Oxford, which has a chancellor and scholars, should take it, and that no other corporation could (d).

IT is a general rule that a corporation shall grant only by its proper name of incorporation, though every minute variation in the name is not material to avoid its grant; but what variation shall be material or immaterial for that purpose, it is difficult to say, with any precision: many of the cases on that subject (and they are very numerous) seem to have been decided on principles very remote from those of good sense—some of the most remarkable here follow:

AN almshouse was incorporated by the name of the "Almshouse of John Isbury, founded at Lambourne," and the poor of the same almshouse were empowered by that

(a) 10 Co. 57 b. in the Chancellor of Oxford's case.

(b) 21 R. 2, Devise 27, cited 10 Co. ubi sup.

(c) Id. ibid. vid. ante, page 101, 102.

(d) 10 Co. 57 b. ubi supra.

name

name to purchase, demise, &c. and by the deed of foundation, after the death of the founder, the "warden of the college of the blessed Mary of Winchester in Oxford," and his successors, were appointed visitors: an indenture was made between "Thomas White, the warden of New College in the university of Oxford, visitor of the almshouse of John Isbury at Lamborne in the county of Berks, and the *poor men* of the same almshouse on the one part, and the lessee on the other. The name of the visitor in the lease, differing from the name in the deed of foundation, was held a misnomer; the joinder of the warden in the lease was also held fatal, because he appeared by that to be the head of the corporation, and there was no such corporation founded by John Isbury; the words "*poor men*" too were held to make a material variance, because under the general word "poor" might also be included poor women (a).

THE corporation of the college of Eaton was erected by H. 6, by the name of *Præpositi et socii Collegii Regalis Collegii, beatæ Mariæ de Eaton juxta Windfor*. In the time of Edward the sixth, Sir Thomas Smith, knight, being provost, a lease was made by the name of "*Præpositi et socii Collegii Regalis de Eaton*," omitting "*Collegium beatæ Mariæ*," and by the opinion of all the justices this lease was held void (b).

KING Henry VIII. incorporated the scholars of Trinity College, Cambridge, by the name of "master, fellows, and scholars of the college of the holy and undivided Trinity in *the town and university of Cambridge*;" in the time of Edward 6th they made a lease by the name of master and fellows of Trinity College in Cambridge: by those who wished to impeach the validity of this lease, it was argued

(a) Moore 285, 287.

(b) Dyer 150, pl. 84.

that

that there being two places, the town and the university, mentioned in the name of incorporation, one of them could no more be left out in a lease than the other; that if the lease had been made by the name of the master——of the college——in the *town* of Cambridge, this would have been an express exclusion of the university, and for that reason the lease without question would have been void; the case, it was said, was the same here where the exclusion was implied: that if a stranger demanded possessions of them in a *præcipe quod reddat*, he must sue them certainly and precisely; much more, therefore, when they parted with their possessions by their own act, must they be supposed acquainted with their own name (*a*).——In support of the lease it was said, that though every corporation must be limited to some place certain, that could not support the objection here, for that in fact a place was mentioned; and as to two places being mentioned in the name of incorporation, that was not an objection well founded, for as a *material* body could not be in more than one place at one and the same time, so neither could a body corporate, which always continues its resemblance to the body natural: but admitting that a body corporate might be founded as of two places, yet it was insisted that was not the case here, for that an university was not *local* but *personal*; in confirmation of which assertion were cited an instance of a writ addressed to the chancellor and university of Oxford by H. 3, to remove the university to another place, when he intended to hold a parliament there, and was afraid there would not be room for the parliament and the students together, and of another writ directed in the same manner, desiring them to return: a record was also

(*a*) The fair inference from this seems to be, that if they do not use their right name, the lessee ought not to suffer for their neglect or fraud.

cited

cited to the same point of the 49 Ed. 3, which recited that there had been contention between the scholars of Cambridge, and the townsmen there, and that the former had gone to Northampton, and petitioned the King for permission to erect an university there; that the King had sent his writ to the mayor of Northampton, commanding him not to suffer the scholars to remain there, and declaring that he would not there erect an university.—These, it was contended, proved that an university was not properly a place, and that therefore the omission of it could not prejudice the lease.

Two of the justices (*a*) argued that the lease was good; the chief with the two others that it was bad (*b*); the case however was adjourned, that the parties might have an opportunity of settling it without the judgment of the court: this, however, not taking place, Williams the next term brought into court, a decree of the Court of Wards, in a case respecting this very college, in which it appeared, that they claimed certain land by virtue of a devise made to them by the name of “Master, Fellows, and Scholars of Trinity College in Cambridge;” in this decree the point immediately applicable to this case was, whether, as the name by which the corporation was incorporated, was that of “Master, Scholars, and Fellows of the holy and undivided Trinity in the University and Town of Cambridge,” this devise was good by the other name, and the judges had declared that it was (*c*).—Williams offering this record in support of his opinion, said, that he conceived there was no difference between a grant and a devise, nor between an estate or conveyance made

(*a*) Croke and Williams.

(*b*) Flemming, C. J. and Fenner and Yelverton, J.

(*c*) Vid. ante, page 102.

to them, and a conveyance made *by* them.—The judges who supported the other side of the question, said there was great difference between a devise and a grant, for that in a will, it was sufficient that the name was so described that the intent of the testator might be known; and as to there being no difference between a conveyance made *by* them and one made *to* them, they agreed thus far, that where they were parties to the conveyance, and must necessarily be constant of it, there the comparison would hold (*a*)

THE dean and chapter of Carlisle were incorporated (*b*) by the name of the “Dean and Chapter of the Cathedral Church of the holy and undivided Trinity of Carlisle,” and they made a lease by the name of “Dean of the Cathedral Church of the holy Trinity *in* Carlisle, and the whole Chapter of the Church aforesaid:” four objections were made to this lease; 1. That the word “undivided” was omitted. 2. That *in* Carlisle was used instead of *of* Carlisle, which was the true name. 3. That the word whole was added; and 4. That the regular order of the words was not observed. But it was resolved that the lease was good, notwithstanding these variances, because they were only in *words and syllables*, and not in the *substance* of the name (*c*).

THE dean and chapter of Worcester were incorporated by the name of the “Dean and Chapter of the Cathedral Church of Christ and the Blessed Virgin Mary of Worcester:” they made a lease by the name of the “Dean of the Cathedral Church of Christ and of our blessed Lady

(*a*) Brownl. and Goldf. pl. 2, 243—247. Vid. the case of the corporation of Minister Dei pauperis domus de Donington et pauperes, &c. 2 Anderf. 116.

(*b*) 33 H. 8.

(*c*) 10 Co. 124. b. Moore, 233. 1 Anderf. 203, 206, 208. 1 Leon. 159. 2 Bulstr. 303. Dyer, 278, pl. 1.

R

the

the Virgin of Worcester, and the Chapter thereof:" and notwithstanding the alteration, and transposition, this was held to be no material variance (*a*).

THE dean and canons of Windfor were incorporated (*b*) by the name of "the Dean and Canons of the King's free Chapel of St. George *the Martyr* within *his* Castle of Windfor:" in the time of King Philip and Queen Mary, they made a lease of lands by the name of "the Dean and Canons of the King and Queen's free Chapel of St. George within *the* Castle of Windfor:" here three variances were observed. 1. That instead of "the *King's* free chapel" were used "the *King and Queen's* free chapel." 2. That the word "martyr" was omitted; and 3. That instead of *the* was used *his* castle. The two latter variances were held to be immaterial, because, they were variances in *words and syllables* only, and not in *substance*; for that "St. George" included the "martyr," as the "Trinity" implied and included the word "undivided," and that "within *his* castle of Windfor" and "within *the* castle" were in fact the same, for they both meant "within the *King's* castle:" but the first was held to be a variance in *substance*, for that though at the time of making the lease the chapel was, in truth, the King and Queen's free chapel, "yet the corporation ought to be such as was given by the founder, and that should not be altered by the alteration of the name of the founder or of the owner of the castle; as if a college had been incorporated in the time of Edward 6th, by the name of Master and Fellows of *King's* College, they could not in the reign of Queen Elizabeth have made a lease by the name of Master and Fellows of *Queen's* College" (*c*).

(*a*) 2 Bulstr. 302.

(*b*) By act of parliament in the 22 Ed. 4.

(*c*) 10 Co. 124. b.

A COLLEGE in Oxford was incorporated by the name "*Gardiani et Scholarium domus five Collegii Scholarium de Merton in Universitate Oxoniæ*;" they made a lease by the name "*Custodis domus five Collegii de Merton in Oxonia et Scholarium ejusdem domus*:" four objections were taken on account of variance. 1. That the word *custos* was used instead of *gardianus*. 2. That the lease was by the name "domus five collegii de Merton," *scholarium* being omitted before *de Merton*. 3. That the lease was "in Oxonia" instead of "in universitate Oxoniæ." 4. That the order of the words was not observed, for that the word *scholares* was removed out of its place, and put at the end, instead of coming immediately after the guardian. The second variance was held to be a variance in substance, "for that the act of incorporation had baptized the college by the name of the College of *Scholars* of Merton, and they had made the lease by the name of the College of Merton himself, who in truth was the founder:" but the other three variances were held to be immaterial, "for that *gardianus* was the same as *custos*, and in *Oxford* and in *the university of Oxford*, meant the same thing, and the sense remained the same, notwithstanding the transposition of the word "*scholares*" (a).

KING Henry 8th incorporated the hospital of the Savoy by the name of "the Master and Chaplains of the Hospital of the *late* King Henry 7th of the Savoy:" they made a lease by the name of "William Ogle, Master of the Hospital of King Henry the 7th, *called* the Savoy, and the Chaplains of the same."

AFTER a long argument at the bar of the Exchequer, this case was argued by the barons, and two of them (b)

(a) 10 Co. 125 a. Moore, 266. 1 Anderf. 196: in this last book the case seems very incorrectly reported.

(b) Clark and Gent.

R 2

against

against the Chief Baron (*a*), were of opinion that the name by which the lease was granted, was materially variant from the name of incorporation, which opinion they supported on this argument, "that in substance many things are not as they are *called*, but one thing is the thing in truth, and another the thing in appellation; that therefore the lease being made by the master and chaplains of the hospital *called* the Savoy, it was not certain that it was the lease of the master and chaplains *of* the Savoy; for that one hospital might be *called* the Savoy, and another actually *be* the Savoy, and that therefore it was not to be intended that the hospital *of* the Savoy, and the hospital *called* the Savoy were the same corporation.

IN order the better to answer this argument, the Chief Baron made a distinction between a place generally which contained within itself several particular places, having each a distinct known name, and a particular place which comprehended no other place within it: thus, London comprehends several wards, several parishes, several streets of different names, in which place it would be absurd to call the particular by the name of the general, as to say the Black Friars *called* London, instead of the Black Friars *in* London; but the hospital *of* Christchurch, or the hospital *called* Christchurch in London is the same, because Christchurch is a particular name, which does not comprehend other places of other names in itself.—Again, the abbey of Bermondsey, and the abbey *called* Bermondsey is the same, and yet the abbey *of* Westminster, and the abbey *called* Westminster is not the same, because Westminster is the name of a place general, which contains several particulars.—He contended, therefore, that the hospital *of* the Savoy, and the hospital *called* the Savoy were substantially the same

(*a*) Manwood.

thing;

thing; for that the words *of*, *in*, and *called*, were confounded in grants, and had all the same signification; as if a man, having a manor of Dale, leased his "manor *of* Dale," or his "manor *called* Dale," or his "manor *in* Dale," in each case the manor would pass (*a*). He further observed, that inasmuch as in every such lease, there was a perfect understanding of the parties on both sides, the interest should pass to the lessee, and it was unreasonable that the successors of those persons who made such leases should avoid them for a trifling circumstance against the express intendment of their predecessors, who had taken money of the lessee, and had done an act which they thought valid, and might and would have amended in their grant, if they had known that such mistake existed.—As, however, the chief baron was but one judge against two, the plaintiff who wished to rescind the lease, had judgment: a writ of error was brought in the exchequer chamber, but while it was depending, the matter was compounded for money (*b*).

LORD COKE alluding to this case, expresses his disapprobation of the judgment in these terms. "It is true that judgment was given in the Exchequer by Baron Clarke and Baron Gent, against the opinion of Sir Roger Manwood, Chief Baron, *totis viribus*; and after the writ of error brought, and the case argued at the bar, the said Thomas Fanshaw compounded with Pascal for his lease, and I was of counsel with the said Thomas Fanshaw: and I conceive that there is *little* difference betwixt "the

(*a*) This case of the manor of Dale, the judges who argued on the other side, observed, was not *always* law; it was law where it appeared that the vill, town, or place called Dale was coextensive with the manor; but it might happen that there were two manors within the place, and then either of them might be called the "manor *of* Dale, but neither of them could be called the manor *called* Dale." 1 Anderf. 218.

(*b*) Moore 236. 1 Anderf. 202, 219. 1 Leon. 13

mayor and commonalty of the city *of* London," and "the mayor and commonalty of the city *called* London," unless it can be shewn that there are two distinct corporations which have these two distinct names (*a*).

JOHN ALCOCK brought an action of trespass against Henry Ayray, doctor of divinity, and others, and declared of a trespass in a house of the plaintiff, called the Parsonage House, and two closes of the plaintiff, one called the Parsonage Close, and another containing ten acres of glebe land, at Charleton super Otmore, in the county of Oxford: the defendants pleaded not guilty, on which a special verdict was found to this effect; that the places in which the trespass was committed were parcel of the glebe of the rectory of Charleton super Otmore, of which Henry Ayray, at the time of the trespass and of the verdict, was parson: that Edward the third, in the 14th year of his reign, had granted to one Robert de Eglesfield to found, in a certain house of his in Oxford, a collegiate hall of scholars, chaplains, and others, under the name of *Aula Scholar' Reginæ de Oxon'*, quæ per unum præpositum de dictis scholaribus——gubernabitur, and to give and assign that house with the appurtenances *præfatis præposito et scholaribus*, to have and to hold to them and their successors *præpositis et scholaribus aulæ illius* for their habitation for ever; it was further found that King James 1st had, under the great seal, exemplified this charter in the records of the chancery enrolled in the tower of London, and in the exemplification the clause of "sub nomine" was "sub nomine Aulæ Reginæ de Oxon," whereas in the charter it was "sub nomine Aulæ *Scholarium* Reginæ:" it was also found, that the said Robert de Eglesfield founded the college

(*a*) 10 Co. 126 a. in the case of the mayor and burgessees of Lynne.

according

according to his licence, and in his charter of foundation ordered that it should be for ever called *Aula Reginæ*, and that in several parts he called the *Scholares*, by the term *focii*: it was further found, that on the 8th of July, 1509, ‘one Hugh Hodgeſon, then provost of the hall aforesaid, and the scholars of the same,’ who, it seems, were seised of the advowson of the rectory in question, by their deed under their common seal, and by the names of Hugh “*Præpoſiti Collegii Reginæ in univerſitate Oxoniæ, et fociorum et Scholarium ejusdem Collegii*,” presented one Allen Scott to the church which was then void, who was admitted, instituted, and inducted; that the said Allen being parson of the said church, and having become provost of the said hall, in the 10th of Elizabeth by his deed demised the said rectory to William Shillingford for the term of 81 years, and that afterwards the “provost of the hall or college aforesaid, and the scholars of the same hall, by the names “*Præpoſiti Sociorum et Scholarium Aulæ vel Collegii Reginæ in univerſitate Oxoniæ*,” patrons of the rectory of the church of Carleton super Otmore, by their deed sealed with their common seal, confirmed the said demise; that the ordinary likewise confirmed it in the life time of Allen Scott; that Allen Scott died, after whose death the defendant, Dr. Ayray, was lawfully presented, admitted, instituted, and inducted, and that the plaintiff had the estate and interest of William Shillingford’: then the trespass was found.

THOSE who supported the title of the defendant objected that as well the confirmation, as the presentation were utterly void, by reason of the misprision of the true name of the corporation; the first question therefore which was made was, what the true name of the corporation was; and they conceived it to be “*Præpoſitus et Scholares*

R 4

Aulæ

Aulæ Scholarium Reginæ de Oxon," which they collected from the words of the charter of licence, "a certain collegiate hall de Scholaribus——under the name of *aula Scholarum Reginæ de Oxon quæ per unum præpositum de dictis Scholaribus—gubernabitur*:" this being therefore the true name, there were five differences between it and the name used in the confirmation; three in addition, one in alteration, and one in omission; in addition there were, first, the word "*focii*," the confirmation being, "*Præpositus, Socii et Scholares*, where it should have been "*Præpositus et Scholares*;" secondly, the words "*vel Collegii*," and thirdly, the word "*universitate*." In alteration there was the word "*de*" instead of "*in*," for the true name of the corporation was "*de Oxon*," and the confirmation was "*in universitate Oxon*." In omission, the variance was that the confirmation had "*Aulæ Reginæ*" instead of "*Aulæ Scholarium Reginæ*." In the presentation several variances were observed; one alteration of "*Collegii*" for "*Aulæ*," and the other misprisions, in addition, alteration and omission.

AFTER argument at the bar, the judges resolved that the variance arising from the omission of the word "*Scholarium*" after the word "*Aulæ*" was the only one attended with any difficulty, and that that depended on what was the true name of the corporation, and what was the diversity between the present case and that of Merton College before mentioned (*a*), which was affirmed by all the judges to be good law.

YET notwithstanding the resemblance of the present case to that, in the omission of this word "*Scholarium*" before "*Reginæ*," they resolved that both the confirmation and presentation were good; for they were of opinion, on full consideration of the charter of Ed. III. and of the

(*a*) Vid. ante, page 243.

instrument

instrument of Robert de Eglesfield, that the true name of the corporation was "Præpositus et Scholares Aulæ Reginæ de Oxon;" it appeared by the charter itself that the word "Scholares" was necessary only once in the name of the corporation; in the clause of "sub nomine," the word was but once mentioned, and although in that clause, the words were "Aulæ Scholarium Reginæ," yet when the word "Præpositus" was introduced, the word "Scholares" ought in construction to precede the words "Aulæ Reginæ;" if it did not, this would be a sole corporation consisting of a provost only, for then the corporation would be "Præpositus Aulæ Scholarium Reginæ," whereas it was acknowledged on all hands that this was a corporation aggregate consisting of provost and scholars: immediately after the words "sub nomine Aulæ Scholarium Reginæ" the following were added "quæ per unum præpositum de dictis Scholaribus—gubernabitur," so that it clearly appeared that the word "Scholares" ought to be but once mentioned in the name of the corporation. This construction was confirmed by the subsequent parts of the charter, by the instrument of foundation, and by the uniform practice of the corporation itself. By the charter, the founder was empowered to give the messuage with the appurtenances "Præfatis Præposito et Scholaribus," to have and to hold to them and their successors "Præpositis et Scholaribus aulæ illius," by which it appeared not only that the King joined the words "Præpositus and Scholares," but gave the precedence to the word "Scholares" before "aulæ illius," and no mention was made of it afterwards; by the instrument of foundation, it was ordained that the college should be always called "Aulæ Reginæ," and not "Aulæ Scholarium Reginæ." The corporation itself from the time of its incorporation had never accepted
any

any grant, nor made any grant, with the repetition of the word "Scholares;" it had always been mentioned but once, as appeared by a great number of precedents: It had never been called in vulgar appellation, "Queen's Scholars' College;" neither did any one know it by that name; every one knew it by the name of "Queen's College" (a).

FROM all the cases put together, we may collect this general rule, that a variance from the precise name of the corporation, which makes no difference in the meaning, however different it may render it in words and syllables, will not invalidate a grant made by another to the corporation, or by the corporation to another, whether the variance be by addition, omission, or alteration of a word: but from many of the cases, we may be justified in remarking that in many instances, that which in former times would have been considered as a variance in substance, would now be considered only as a variance in syllables and words.

IT may appear to some into whose hands this work may fall, that I have given myself a great deal of unnecessary trouble to detail so many cases, on a subject, where common sense applied to each particular case, must naturally be a better guide than a voluminous collection of precedents: the best apology I can make is this, that in the books in which these cases are reported, those questions which to this class of readers may appear so trivial, make so conspicuous a figure by the length and learned lumber of the arguments both at the bar and on the bench, that I was afraid another class of readers would have thought I had not done justice to the subject, had I treated it in a manner more concise.

(a) Dr. Ayray's case. 11 Co. 18 b.—22 b.

To

To avoid grants or leases made by corporations, on account of a mistake in the corporate name, is certainly unjust, even though the variance be in what is called substance: it is impossible that the grantees or lessees should know the real name of foundation; but the corporation must be presumed to know it, and if they do not use it, they ought not to be permitted to take advantage of their own wrong. This injustice was felt and censured when the attempts made by corporations to set aside their leases and grants became frequent, and was in a great measure repressed in consequence of the cases of the mayor and burgesses of Lynne and Dr. Ayray (*a*). In the former of these Lord Coke expresses himself to this effect. "And it is well observed in Sir Moile Finch's case (*b*), that till this generation of late years, it was never read in any of our books, that any body politic or corporate endeavoured or attempted by any suit to avoid any of their leases, grants, conveyances, or other of their own deeds, nor any other grants, &c. made to them for the misnomer of their true name of incorporation. But after a window was opened to give them light to avoid their own grants for the misnomer of themselves, what suits and troubles (to avoid grants, &c. as well made to them as by them) have followed thereupon every one knows: but there, it was said, that for every curious or nice misnomer, God forbid that their leases or grants, &c. should be defeated; for there is a found difference between writs and grants; if a writ be adjudged bad on account of a misnomer, the only consequence is that it abates, and the plaintiff may have a new writ of common right by the proper name (*c*); but he cannot of common

(*a*) V. Jenk. 233, 270, 271, a note to Plowd. 536.

(*b*) 6 Co. 65 a.

(*c*) Per Manwood, C. B. 1 Anderf. 207.

right

right have a new bond or a new lease or grant — I conceive it would be reasonable to drive him who would avoid a writing, demise, grant, &c. made *by* a corporation or *to* it, by reason of any verbal or literal misnomer, to shew that there are two corporations in the same city, borough, or town, one by the true name and another by such name as is contained in the deed, &c. and so leave the deed, &c. good, by or to one of them. But when in truth there is but one and the same corporation, leases, grants, &c. made *by* them or *to* them, ought not to be avoided by such nice and verbal variances, when in substance the true name of the corporation, either by matter expressed or necessarily implied in the words themselves, appears to the court" (a).

In a lease, grant, or other deed made by a corporation aggregate, or any deed made to it, it is not necessary that the proper name of the head should be mentioned, because the proper name of such a body politic is the name of incorporation, and not the names of any of the individuals of whom it is composed (b).

In an ejectment, the plaintiff counted on a lease made by the warden and college of All Souls in Oxford, and exception was taken that the name of baptism of the Warden was omitted, but it was adjudged that it was not necessary (c).

THIS point, however, seems anciently to have been understood otherwise, for we are told that it was said by Littleton in the reign of Edward the fourth, that "if dean and chapter make a lease without mentioning the proper name of the dean, the lease is void:" *quod fuit concessum per totam curiam* (d), and Broke says, "see a diversity be-

(a) 10 Co. 126 a.

(b) 3 Salk. 103.

(c) Carter v. Crumwel, Dyer 86 a. in margin.

(d) 18 Ed. 4. 8 Bro. Corpor. 59.

tween a grant made by them and to them." There is certainly, however, no diversity at this day.

THE naming or not naming the head may, however, sometimes make a difference in the obligation imposed on the corporation by the deed after the death of the head in whose time it was made. Thus it is held (*a*), that if a dean and chapter, or a prior and convent, without naming the head by his proper name, grant by the common seal, an annuity till the grantee be promoted to a benefice, by the *aforesaid* dean or prior; the successor of the dean or prior may make a tender of a benefice; but that if the dean or prior had been named by his proper name, the successor could not have made the tender, because the word *aforesaid*, in this latter case, would have referred to the particular dean or chapter who made the grant.

In the case of a sole corporation, however, the name of baptism must be used as well as the corporate name; and there is a difference between those corporations sole who have the fee simple in them and may have a writ of right, as a bishop or dean distinct from his chapter, and those who have not the fee simple, as a parson or vicar; in the case of the former the Christian name alone is sufficient; but in that of the latter both Christian and surname must be used (*b*).

As a corporation must take and grant by their corporate name, so by that name they must in general sue and be sued; and they may sue by their true name of foundation though they be better known by another name; thus the master and scholars of the hall of Valens Mary in Cambridge, brought a writ by that name, which was the name of their foundation, though they were better known by

(*a*) 14 H. 7. vid. Dyer 86, pl. 96, 97, 98.

(*b*) Vid. 2 Inst. 666.

the

the name of ——— Pembroke Hall, and the writ was held good (a).

As a corporation by prescription may have several names, they may sue by the one name or the other, alleging that they and their predecessors have from time immemorial been known, and been accustomed to plead by the one or by the other (b). It is said, that if a corporation be *known* by a name, it is sufficient to sue them by that name (c), but this seems to be confined to the case of a corporation by prescription, for it is said, on another occasion (d), that when a corporation is created by the King, and the commencement of it appears by record, it can have no other name by use, nor be named otherwise than as the King by his letters patents has appointed, and the court will not permit it to be sued by another name. Yet I see no reason, why, in the case of a corporation by charter, which has acquired by long usage a name of reputation different from its real name of foundation, may not be sued by that name of reputation as well as a man may be sued by a name of reputation different from his name of baptism, or why if the corporation plead a misnomer, the plaintiff may not reply that it is known by the one name as well as by the other.

A WRIT of *scire facias* was brought against the provost and scholars of the blessed Mary and Saint Nicholas in Canterbury. The provost and scholars pleaded that the college aforesaid was of the foundation of H. 6, who by letters patent founded it by the name of the provost and scholars, &c.

(a) 44 Ed. 3, 35.

(b) Vid. 9 Ed. 4, 21. 13 H. 7, 14. 16 H. 7, 1, and 21 H. 6, 4, which last seems contra.

(c) 8 Aff. pl. 24. Bro. Corpor. 40.

(d) 1 Anderf. 213.

of

&c. of Canterbury, and this variance was held to be a misnomer, for this wise reason, that a man might be in such a place and not of it, as St. Martin's le Grand is *in* London but is not of London (*a*).

A CHAUNTRY priest was incorporated by the name of Provost of the *Chauntry* of C. a writ was brought against him by the name of Provost of the *House* of C. this was held a variance sufficient to abate the writ (*b*).

A WRIT brought against the prioress of Newark of Dorchester was abated, on the ground that it should have been against the prioress of Newark only (*c*).

IF to the real name of a corporation any thing be added by way of synonyme or explanation, that will not make a misnomer: as if a corporation consist of master and confreres, and they be sued by the name of Master and Confreres *five socii*; the words *five socii* are only surplusage (*d*).

AN action at the suit of a corporation aggregate to recover a thing due to them in their corporate right, must not be brought in the name of their head alone, but in their full corporate name, unless it appear that the act of parliament or charter by which they are constituted, enables them to sue in the name of their head. Therefore where the president of the college of physicians sued to recover a penalty for practising physic contrary to their charter, judgment was arrested on the ground that the action should have been brought in the name of the president and college (*e*).

(*a*) 15 Ed. 4, b. Bro. Corpor. 33.

(*b*) 38 Ed. 3, 14, 15. Br. Corpor. 21.

(*c*) 38 Ed. 3, 28. Bro. Corpor. 22 misnom. 25.

(*d*) 20 Ed. 4, 12. Br. 183, Corpor. 8.

(*e*) 2 Bulstr. 185.

YET though it appear that the head of a corporation is enabled to sue, in his own name, for any thing to which the corporation are intitled, this will not preclude *them* from suing by their name of incorporation; thus where debt was brought in the name of the President and College of Physicians to recover the penalty of 5l. per month, on the st. 14 H. 8, c. 15, for practising physic in London without a licence; on demurrer to the declaration, this objection, among others, was taken, that the action ought to have been brought in the name of the college only, or of the president only, the words of the patent being, “quod ipsi per nomina presidentis collegii seu communitatis facultatis medicinæ London,” should sue and be sued; to which it was answered, that they were incorporated by the name of President *and* College, and had, in consequence of that, a power to sue and be sued by that name, and that this power was not taken away by the additional affirmative power which was given them (a).

WE have seen that, when an act of parliament grants any thing to a corporation, the grant shall take effect, though the true corporate name be not used, provided the name actually used be a sufficient description of the corporation; but it is doubtful whether in suing to enforce its claim under that act, it can use the name therein mentioned.—The only case I find on this subject is the following:

THE university of Cambridge was incorporated by the name of *Chancellor, Masters, and Scholars*; the statute (b) which disables popish recusants convicted from presenting to benefices, vests such presentations in the *chancellor and scholars* of the two universities, distinguishing the counties within which each of them shall respectively present.—The university of Cambridge brought a *quare impedit* against the

(a) 2 Salk. 451.

(b) 3 J. 1, c. 5, f. 18, 19, 20.

archbishop,

archbishop of York, by the name of *Chancellor and Scholars*: the defendant pleaded in abatement, that the university was incorporated by the name of *Chancellor, Masters, and Scholars*, and that therefore they had sued by a wrong name: the Court of Common Pleas gave judgment of "respondeas ouster," on which the defendant brought a writ of error in the King's Bench.

IN favour of the university it was argued, that a corporation may have one name by which they may take, and another by which they may sue (*a*); it did not therefore follow, that because the university was incorporated by one name, they could not sue by another; the act of parliament vesting this right in them by the name of *Chancellor and Scholars*, was an incorporation of them, as to this particular purpose: this could be done by letters patent; (*b*) much more might it be done by act of parliament; and if this were so, the very act of parliament was a falsification of the plea.—To this it was answered, that if the university had in fact one name by which they might take, and another by which they might sue, they ought to have shewn it; that the act of parliament operated only as a description of person, as a devise would do, and not as an incorporation to a specific purpose.

PARKER, C. J. observed that the declaration set forth the act of parliament as an authority to sue by that name, which put it on the defendant to shew some special matter to avoid it, as the acceptance of another charter, by another name, at a time subsequent to the act.—Powys, senior, said, that "chancellor and scholars" was such a name as comprehended the whole university, for that it included both head and members.—The other two justices, Eyre and Powys, junior, said that it did not follow that what

(*a*) 1 Rol. 513.

(*b*) 2 H. 7, 13. 4 Leon. 190.

was sufficient as a description to enable a person to take, was a name by which he might sue (*a*).

IN all legal proceedings, where a corporation is introduced, its true name must be used, whether it be a party to the proceedings or not.

IN an action on a contract for the transfer of a certain quantity of South Sea stock, the plaintiff declared, that in consideration that he had undertaken to transfer to the defendant 800l. "in capitali fundo gubernatoris et societatis mercatorum Magnæ Britanniae negociantium ad maria australia et alia loca Americæ et pro incitatione piscationis, anglice vocato *South Sea Stock*," the defendant promised to accept it, and pay 5600l.—On "non assumpsit" being pleaded, the cause was tried at Guildhall, and one of three objections taken to the declaration was this, that the name of the South Sea company was mistaken, for that there was no such word as *australia* for south, the proper Latin word being *australia*, without the *i*. On this, as well as on the other objections, a verdict was allowed to be taken for the plaintiff, with leave for the defendant to apply to the court for a new trial; and on an application for that purpose, *after great debate*, a new trial was granted, on the ground that the plaintiff had failed in proving his declaration; for the evidence being of a promise to accept South Sea stock, and the name of the corporation being set out with an insensible word, "*australia*" instead of "*australia*," the declaration did not describe that corporation, and consequently the agreement set forth, was to transfer a stock different from that which was proved by the evidence: and it was held, that if the word *australia* were rejected, as the counsel for the plaintiff would have had it, that would not help the plaintiff, for then the cor-

(*a*) 12 Mod. 207, 208.

poration

poration described would be, "the governor and company of merchants trading to the seas and other places in America," but would not be that corporation, part of whose stock, it was proved, was agreed to be transferred (*a*).

AN act of parliament gave power to the justices of the county of Surry, at their quarter sessions, on the application of "the mayor, aldermen, and commons of the city of London, in common council assembled," to issue a precept to the sheriff to summon a jury to inquire into the value of certain estates; an order was made by the justices at their quarter sessions, stating, that on the application of the "mayor, and commonalty, and citizens," they issued a precept—and stating all the subsequent proceedings; this order being removed by *certiorari* into the King's Bench, this objection, among others, was taken to it, that it stated the application to have been made by the *mayor, commonalty and citizens*, instead of being made by the *mayor, aldermen, and commons*, according to the directions of the act. The court held the objection to be well founded, for that the bodies described in these different terms were distinct, the one being a *select* body, the other the corporation at large, and that they could not go into the examination of any fact tending to reconcile such distinction, or to shew that in truth the former were the proper persons; and on this objection, among others, the order was quashed (*b*).

2. *What acts a Corporation aggregate must do by deed, and what it may do without deed.*

THIS question seems by the old books, to have been the subject of considerable controversy among the justices.

(*a*) 2 Ld. Raym. 1515. 2 Str. 787.

(*b*) Rex v. Croke. Cowp. 26—29.

Some go so far as to say, that without deed a corporation cannot do any act whatever. One (a) makes a distinction, which seems to be founded in good sense, between the case of a corporation aggregate, consisting of many persons, one capable and the others incapable, as abbot and convent, and corporations aggregate of many persons capable, as mayor and commonalty, or dean and chapter; the former he seems to intimate may do many acts without deed, because the abbot is the only person capable, and the oracle of the whole, the rest being incapable of any act, because they are dead in law: but corporations of the other kind being composed of persons all of whom are capable of action, there is no individual who can be considered as the oracle of the whole, and therefore they can speak only by their deed executed in due form.—Some of the justices go so far as to say, not only that no servant of a corporation can be appointed without deed, but that without it no command is valid to do any particular act; others with more reason say, that admitting that no servant can be appointed without deed, yet when he is once appointed, he may do every thing incident to the nature of his service, not only without commandment by deed, but without any commandment at all (b).

AND it has long been considered as an established point, that to offices of ordinary service, such as that of cook and butler, a corporation may appoint without deed (c). It seems likewise to have been generally admitted, that a bailiff might be appointed to take a distress, without deed; it is even said, "that it is not necessary that he should be made bailiff before he distrain; that it is sufficient if the corporation agree to it afterwards, for that his being bailiff

(a) Oxenbridge.

(b) Vid. 4 H. 7, 6, 13, 17. 7 H. 7, 9.

(c) Vid. the authorities just cited, and Plowd. 91.

is not traversable, and that a member of the corporation may distrain in right of the corporation, and justify as bailiff: thus, where a chauntry was incorporated of three chaplains, and one of them took a distress *damage feasant*, and on replevin avowed as bailiff; this was held good, and all these points resolved (a). Again it is said, "a man may justify as bailiff to dean and chapter, and the like, without shewing the deed constituting him bailiff" (b). And in more modern times it has been laid down as a rule, that "a corporation aggregate may appoint a bailiff to distrain without deed or warrant, *because the distresses neither vests an interest in them, nor deveys one out of them*" (c).

IN the time of Edward the fourth (d), it was said by Littleton to have been the opinion of all the judges in the Common Pleas and King's Bench, that an assignment of auditors by a commonalty was good without deed.

IN the time of Elizabeth, it was agreed by all the judges of the King's Bench, that if a sheriff make a warrant of arrest to a corporation which has return of writs, they may make a bailiff to execute it without writing (e).

THE Bank of England, or any similar corporation, may, without deed, empower their servant to make promissory notes or bills of exchange in their name (f), and this is the usual practice with the Bank.

BUT it is a general rule, that where a corporation aggregate appoint a person to do any act in which their real property is concerned, or by which their rights are to be asserted, the appointment must be by deed. Thus an appointment of an attorney to make or to take livery of

(a) 26 H. 8, 8 b. Bro. 182 b.

(b) 12 H. 7, 25, 26. Bro. Corpor. 51.

(c) 3 Salk. 191. 3 Lev. 107. (d) 12 Ed. 4, 10 a.

(e) E. 41 El. Moore, 512.

(f) Vid. Rex v. John Bigg. 3. P. Williams, 419.

feisin, or the like, without deed, is void (a); so, an appointment to seize goods as forfeited to the use of the corporation.

IN trespass for taking away a ship and sails, the defendant justified under the Canary patent, by which the King granted to the company the sole trade to the Canary Islands, and further granted, that if any should, without their licence; trade thither, the ships and goods sent thither should be forfeited to the company; the plea then set forth, that the plaintiff, with his ship and sails, sailed to the Canary Islands, and traded there, without licence from the company, on which the defendant seized the ship and sails on behalf of the company as forfeited; on demurrer to this plea, two points were resolved. 1. That that the letters patent could not create a forfeiture; and, 2. That the company could not, without deed, empower any third person to seize goods as forfeited to their use; for that the seizing of goods to the use of a corporation is an extraordinary and not a common service (b).

NEITHER can a corporation aggregate, without deed, authorize their servant or agent to enter into land on their behalf, for a condition broken; though this does not seem to have been always free from doubt.—In one place (c), it is said, that a man cannot *justify* as servant to a corporation, without shewing a deed of retainer, and it is contrasted with the case of a man *avowing* as bailiff to a corporation, which may be done without deed. In another place (d), where it is reported to have been said by Little-

(a) 12 H. 7, 25, 26. Bro. Corpor. 51. Vid. Cro. Jac. 411.

(b) Horne v. Joy. 1 Ventr. 47. 1 Mod. 18. 2 Keb. 567, cited 3 P. Williams, 424.

(c) 10 Ed. 4. 7. Ed. 4, 14. Bro. Corpor. 54.

(d) 12 Ed. 4, 10 Bro. Corpor. 56.

ton,

ton, that it was the opinion of all the judges in the Common Pleas and King's Bench, that an assignment of auditors by a commonalty is good without deed, it is added, "and so of a justification by their commandment." In a third place (*a*), it is said to be the *better* opinion, that he who pleads the freehold of dean and chapter, and that he *entered* by their commandment, ought to shew a command in writing; and the same of a servant of mayor and commonalty."—In another place (*b*), a distinction is made between a corporation which has a head, as mayor and commonalty, and a corporation without a head; in the first case, it is said, that a man may justify *entering* into land by the commandment of the mayor without writing; in the latter, that a command to enter must be by writing.

ROLLE (*c*) lays it down as clear law, that "a corporation aggregate cannot command their bailiff to enter into land of their own leasing for years, for a condition broken, without deed; for such commandment," says he, "without deed, is void." Dyer (*d*), on this point, makes a *quære*, but his own opinion seems to be with Rolle.

WHERE a mayor and commonalty, or any other corporation aggregate are disseised, the entry to revest their estate must be made by one authorized by a deed under their common seal (*e*).

THEY can neither make any disposition of their property, nor do any act relating to it, nor receive a grant, without deed: thus they cannot, without deed, make a lease for years, nor grant a licence to take their trees (*f*);

(*a*) 18 Ed. 4, 8. Bro. Corpor. 59.

(*b*) 16 H. 7, 2. Bro. Corpor. 96.

(*c*) 1 Rolle, 514.

(*d*) Dyer, 102. pl. 83.

(*e*) Jenk. 131.

(*f*) 12 H. 7, 25, 26. Bro. Corpor. 51.

and if a disseisin be made to their use, they cannot agree but by writing under their common seal (a).

BUT, though they cannot make a lease without deed, yet before the statute of frauds, it might, without deed, have been granted over by the lessee (b).

IF a lease for years be made to a corporation, and they grant it over, it is said, "the grantee may intitle himself thereto without *shewing* the deed; because," it is said, "the lease of the thing in its *nature* might have *passed* without deed, though the persons who *took* it, could not *take* it without deed" (c). It is difficult to ascertain what is meant by this assertion, "that the grantee may intitle himself without *shewing* the deed," and no assistance can be derived from the reason assigned: in technical language, to *shew* a deed, is not merely to say in pleading that such an act was done by deed, but to allege that the party pleading it produces it in court (d): if it be meant here that the grantee is not bound, in this sense, to shew the *original* deed, by which the corporation took the lease, the assertion is true, because the corporation being in possession of the deed, or presumed to be so, it is not in his power to produce it; and then the reason assigned does not apply; if it be meant that he is not bound to *shew* the deed by which the lease was *assigned* to him, or even that he is not bound to *allege* that the assignment was by deed, that may also be true (e), because, if a deed was necessary, it must be *presumed* that it was granted over by deed, and needs not be averred; but then the reason assigned is still inapplicable: If it be meant, "that the lease may have been granted over with-

(a) Vid. 7 H. 7, 9. 13 H. 8, 3, (13). 14 H. 8, 2, 29. Bro. Corpor. 34. (b) Plowd. 150. (c) Cro. Jac. 110.

(d) Vid. Bellamy's case, 6 Co. 38. (e) Vid. post.

out

out deed," then both the assertion and the reason are false, because, though the lease, in its *nature*, might have passed between common persons without deed, yet the persons "who took it," were as incapable of *transferring* it without deed, as they were to *take* it.

IF the mayor and commonalty of London have an estate for the life of J. S. and the reversioner grant over his reversion, the attornment to the mayor and commonalty to the grantee must be by deed (*a*).

A CORPORATION aggregate cannot make an *express* surrender without deed in writing under their common seal; but they may by act in law surrender a term without writing, as by accepting a new lease for years (*b*).

THEY cannot, without deed, present a clerk to a living (*c*).

IN commissions of bankruptcy, corporations usually appoint their clerk or treasurer to prove debts due to them: but he must produce his appointment under seal to the commissioners (*d*).

IN general the person who appears on behalf of a corporation in a court of justice must be authorised to do so by warrant under the common seal. *(authorised to appear in court must be under seal.)*

AN affize of fresh force was brought in the court of the hustings of the city of London against a private person, and the corporation of mercers of London; the individual appeared in proper person, and the corporation by bailiff; his warrant being demanded, he had none to produce, on which the affize was prayed against the corporation, because by law they could not appear by bailiff, unless he had a warrant in writing, so that they had made default: In answer to this, it was said, that the same rules should

(*a*) 6 Co. 38 b. (*b*) 10 Co. 67 b.

(*c*) 13 H. 8, 12. Bro. Corpor. 83.

(*d*) Cooke's Bankrupt Laws, 2d ed. p. 175.

be observed in this affize as in affizes at common law; that the words of the writ of affize were, "put by sureties and safe pledges the aforefaid defendant, or his bailiff, if *he* cannot be found," and that therefore the writ warranted the appearance of the bailiff; to which it was replied, that though the writ was "put the defendant or his bailiff," this must be understood such a bailiff as the law allows; if the defendant was a natural person, then his bailiff without deed, but if a body corporate, then their bailiff by deed.— After the question had been agitated several days, the deputies of the sheriffs, who were judges in the cause, consulted Lord Montague, and Saunders, serjeant; and R. Brooke, serjeant, recorder of London, all of whom agreed that the bailiff could not appear without warrant in writing; on which the deputy sheriffs gave judgment accordingly, and the corporation afterwards appeared by attorney properly appointed (a).

A *quo warranto* having been brought against the mayor and citizens of Chester, there was a warrant of attorney under the seal of the *mayor* to appear; on the part of the crown it was desired, that it might be examined whether this was a good and regular appearance, it being alleged that it ought to have been under the *corporation* seal. In answer to this application, it was said, that there were *three* seals, one the sign manual of the mayor, the second a seal for exemplifications, &c. and the third a seal for leases and grants, and those things which bound the corporation in point of interest; that this last seal was in the custody of the mayor for the time being, so many of the aldermen, and the recorder, and that the other two were in the mayor's custody alone: it was contended further, that the course was to admit corporations to appear, though

(a) Plowd. 91.

there

there were no seal, and that there were forty precedents of it; and Coke's entries were cited, *title Quo Warranto*; and the case of the town of Denbigh, to shew that a corporation might use what seal they pleased.

THE Attorney General said, they could not appear or do any act, but under their *corporation* seal; that even some acts under that seal were not good, unless it were regularly and duly put; and that, therefore, if the mayor alone, or one or two aldermen, should put the corporation seal to a lease, it would not be valid.

IN one book (*a*) we are told, that the matter was referred to be examined, and in another (*b*), that it was *adjudged* that it was not a good appearance, unless the warrant of attorney were made under the corporation seal.

NOTWITHSTANDING this general rule, however, that a corporation must appoint their attorney by deed under the common seal, they may make an attorney in a court of record, without other writing than the record itself (*c*); and this is the case of the city of London, who make an attorney every year in the King's Bench, without either sealing or signing; and the reason is, that they are estopped by the record to say it is not their act (*d*). So, they may present their mayor in the Exchequer every year without deed, which is the case of the city of London at this day (*e*).

3. *Their Common Seal.*

A CORPORATION aggregate, being considered as an invisible body, cannot manifest its intentions by any personal

(*a*) 1 Skin. 154. (*b*) 2 Show. 366.

(*c*) 13 H. 8, 12. Bro. Corpor. 83.

(*d*) 1 Salk. 192. 3 Salk. 103. Comb. 41, 422.

(*e*) Vid. Madox Firma Burgi, c. 7, *passim*, particularly the last section.

act

act or oral discourse; and though the particular members may express their private consent to any act, by words, or by signing their names, this does not bind the corporation; the law, therefore, has established an artificial mode, by which the general assent of the corporation to any act which affects their property, may be expressed. This is by fixing the common seal (a), which, therefore, it is incident to every corporation to have, without any clause in the charter of incorporation expressly empowering them to use one; for when they are incorporated, they may make or use what seal they will (b).

IN what cases the common seal must be used, may be collected from what has been said with respect to their acting by deed; for in every case where they must act by deed, there they must use their common seal.

WHEN the common seal is affixed to a deed, that is sufficient in general without delivery (c), and it is said, that when the common seal appears to be affixed to a deed, it is not necessary that the party producing the deed, should prove by witness the fact of its having been regularly affixed, or that the major part of the corporation agreed; but that, if it be alleged to have been affixed by the hand of a stranger, that shall be proved by the party who alleges it (d).

4. *When a Corporation must act by Attorney.*

WHERE any personal act is necessary in the case of a corporation, that act must be done by attorney: thus, where they are to make a feoffment and grant livery and

(a) Dav. 44, 48. (b) 10 Co. 30 b. Sutton's Hospital.

(c) Vid. 1 Ventr. 257. 2 Dam. 757. 1 Lev. 46. 1 Sid. 8. Cart. 160. 1 Salk. 255. 3 Keb. 307; et vid. 2 Leon. 98, a dictum of Gawdy, J. to the contrary. (d) Vid. Skin. 2.

seisin,

feisin, that must be done by an attorney authorized by warrant under their common seal (a). So, if a deed of feoffment be made in their favour, they must make a warrant of attorney under their common seal, authorizing their attorney to go upon the land to receive livery and feisin (b). So, if they accept rent from the assignee of a lease made by them, that must be by warrant of attorney, in order to discharge the original lessee (c): unless the corporation have a particular officer, whose business it is to manage the revenues; as is the case of the city of London, whose chamberlain receives the rents of their estates; and then, it is conceived, the receipt of rent from a new tenant, with an entry of the change of tenant in the books of the office, will bind the corporation: so wherever delivery of a deed is thought necessary, that must be by attorney, who must have a letter of attorney for that purpose (d).

IF a grant of an acre of land be made to a corporation within a certain waste, without specifying where; the grant, if from a common person (e), is good, and the corporation may make their election; but this cannot be done merely by a warrant of attorney under their common seal, authorizing the attorney to enter and make election for them; but after they are resolved on the land, they should make a *special* warrant of attorney, reciting the grant to them, and declaring in what part of the waste, by proper terms of description, they wish to make their election, according to which direction the attorney is to enter (f).

(a) Vid. Plowden 149. (b) Vid. 13 H. 8, 3, (13). 14 H. 8, 2, 29. Bro. Corpor. 34. Cro. Jac. 411.

(c) Vid. 2 Saundl. 305. Carter 16, 17.

(d) 9 Ed. 4, 39 b. Bro. Corpor. 72.

(e) Not from the King. (f) 1 Leon. 30.

A DEAN and chapter made a lease for three lives, and a letter of attorney to deliver it on the land: Twiden thought the letter was void, the lease being a perfect lease by sealing, and the delivery afterwards insignificant; but Hale, C. Justice, observed, that since he had sat in the court, it had been ruled that the latter execution was good, and that the lease on being sealed was but an escrow, when the letter of attorney was delivered at the same time (a).

ON evidence at a trial in ejectment, the case was this: a dean and chapter having a right to certain land, but being out of possession, sealed a lease with a letter of attorney to deliver it upon the land, which was done accordingly; and this was held to be a valid transaction, on the ground that though the putting of the seal of a corporation aggregate to a deed, be equivalent to delivery; yet the letter of attorney to deliver it on the land, suspends the operation of it till actual delivery by the attorney (b).

IN early times a corporation, as well as a community not incorporated, might have deputed some of their members to appear on their behalf in a court of justice (c). In many instances some of the inhabitants of a town were summoned in the name of the whole, and these appeared and pleaded by *their* attorney; so that the attorney was not the attorney of the town or corporation, but the attorney of those who happened to be summoned or commissioned by the community (d).

*Corporation
can't appear
but by atty* BUT it has long been a settled maxim that a corporation cannot appear in court but by attorney; because if the members appear in proper person, the court cannot judge

(a) Vid. 3 Keb. 307.

(b) Anon. 1 Ventr. 257.

(c) Vid. Madox Firma Burgi. c. 7 particularly f. 21.

(d) Id. c. 7, per tot.

whether

whether they all appear or not (*a*) ; therefore, where a writ was sued against the company of Lombards in London, merchants of Florence, and two Lombards whose goods had been distrained, came to the bar in person, and prayed that their appearance might be recorded to save their issues; this request was refused, because it was to be intended that the writ was against a corporation, which, it was said, must appear by attorney ; and if they were not in fact members of the company, their remedy was against the sheriff (*b*).

THE attorney may, however, be one of the corporation, and it is no objection that such a one is in a manner a party, because he has an individual capacity distinct from the corporate capacity (*c*).

A CORPORATION which has appointed a general attorney in a court of record, may, by such attorney, claim liberties (*d*).

FROM the maxim that a corporation aggregate cannot appear but by attorney, it follows as a consequence that it cannot be effoined ; because an effoin is an excuse of the *personal appearance* of the party (*e*).

5. *What process must be used against a corporation.*

A SUIT against a corporation aggregate must be by original out of chancery: the plaintiff cannot proceed against them by bill, because they cannot declare against them as in custody of the marshal (*f*):

(*a*) 21 Ed. 4, 13. Bro. Corpor. 63.

(*b*) 19 H. 6, 80. Bro. Corpor. 28.

(*c*) 3 H. 6, 43. Bro. 182 b. (*d*) 4 H. 6, 6. Bro. Corpor. 36.

(*e*) Benl. 121, pl. 154. 1 Ld. Raym. 79. *Argent v. dean and chapter of St. Paul's*, cited 2 Term Rep. 16.

(*f*) 6 Mod. 183. Vid. 1 Brown Ch. Rep. 471.

THE

THE summons to appear must be served on the mayor or other chief officer of the corporation, and that is sufficient service: a decree having been obtained in chancery against the East India Company for the payment of a sum of money, the plaintiff served the writ of execution on the governor of the company only; to which an objection was taken, on the ground that the governor had no power over the company's cash, and could not pay the money decreed, and that, therefore, the service ought to have been on the committee; but the objection was over-ruled, because the committee might not meet, or if they did, might not admit the officer into the room to serve them, on which there could be no service (a). The same principle applies to the service of an original writ.

IF on service of the writ, the corporation do not appear according to the exigency of it, the process to compel appearance is not against the individual members, but by *distringas* against the corporate property; and an *attachment* will not lie against them in their corporate capacity (b). If they have neither lands nor goods there is no way to make them appear, either in a court of law or of equity, for it is a rule, that for a public concern the sheriff cannot distrain any individual member of the corporation (c). But in an extraordinary case, where the corporation has no property, and will not appear, and where consequently a court of equity can give no relief, the plaintiff may appeal to the House of Lords, who will make a specific order for relief.

(a) Prec. Chanc. 131. 1 Ch. Cases 206.

(b) 2 Keb. 1 Ray. 152. 1 H. Bl. Rep. C. B. 209.

(c) Thursfield v. Jones, Skin. 27. 1 Ventr. 351. Styles 367 contra, all cited Cowp. 85,

A BILL,

A BILL, filed in chancery against the Hamborough company, by the name of the Governor, Assistants, and Fellowship of Merchant Adventurers of England, and several particular members of the company by name in their natural capacity, charged that the company were incorporated, as appeared by letters patent, and had power to make bye laws, and to assess rates upon cloths, which was the article in which they dealt, and by the poll on every member, to defray the necessary charge of the company; that the company had imposed rates accordingly, and had raised 8000*l.* per annum towards the support of the common charge; that they had in consequence of that obtained great credit, and borrowed large sums of money by deed under their common seal, and that the plaintiff in particular had on that security, many years ago, lent them 2000*l.* The bill then set forth several advantages they had in trade by being members of this corporation, which others wanted: it then charged, that the company having no common stock, the plaintiff had no remedy at law for his debt; but charged that their usage had been to make rates and levy them on the members and their goods, to bear the charges of the company and pay their debts, and complained that they now refused to exercise that power, and particularly complained against several of the members by name who refused to meet and lay taxes, and that they pretended want of power by their charter to impose such taxes, whereas they had formerly exercised it, and had in consequence of it gained credit; on which circumstances the plaintiff prayed to be relieved. The company were served with process, but would not appear, as they had nothing by which they might be distrained; but the particular members who were served in their natural capacity appeared, and demurred, for that they were not in that

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capacity

capacity liable to the plaintiff's demands. On the 10th of May 1666, on argument the demurrer was allowed, and the bill dismissed, and that dismissal enrolled; on which a petition of appeal was preferred to the Lords in Parliament, admitting that in the ordinary course of proceedings in chancery, that court could not help the plaintiff; but alleging, that in cases of this nature, the House of Lords had given special directions to the chancery to relieve, which had been accordingly done, and producing two precedents against companies in London for that purpose: to this petition the defendants particularly named put in an answer, plea, and demurrer, and the company though several times summoned did not appear. After argument at the bar of the House of Lords, January 20th, 1670, this order was made——

THAT the dismissal for so much as concerned the company should be reversed, and that the Lord Chancellor, or the Lord Keeper of the Great Seal of England for the time being, should retain the bill: that the Court of Chancery should issue forth the usual process of that court, and if there should be cause, process of distringas against the corporation, provided that the process should be served one month before the return of it: and if upon return of the process the corporation should not file an appearance, or should appear and not answer, the bill should be taken *pro confesso*, and a decree should thereupon pass: but in case the corporation should appear and answer within the time prescribed them, the Court of Chancery should proceed to examine what the plaintiff's just debt was, and should decree that the company should pay so much money as the same should appear to amount to, with reasonable damages: and in case the corporation should not pay the sum decreed within ninety days after the service of the decree on their
governor,

governor, deputy governor, treasurer, clerk or secretary for the time being, then, it was further ordered that the Lord Chancellor or Lord Keeper for the time being, should order and decree that the governor or deputy, and the twenty-four assistants of the company, or so many of them as by the tenor of their charter constituted a *quorum*, for making levies on the trade or members of the company for the use of the company, should within such time as by the Lord Chancellor or Keeper should be thought fit, make such levy on every member of the company who was to be contributory to the public charge as should be sufficient to satisfy the sum to be decreed to the plaintiff, and should collect and levy it, and pay it over to the plaintiff as the court should direct; that the order for such levy should be put in writing and signed by the governor, deputy governor and assistants of the company for the time being; and if so many of them as by the constitution of the charter made a *quorum* should not make such assessment, and return such levy, the Lord Chancellor or Lord Keeper might issue process of contempt against them, as was usual against persons in their natural capacities: and if, by the time so to be limited by the Court of Chancery, the money so to be assessed should not be paid, then, and from thenceforth, every person of the company mentioned in the order of levy should be made liable to pay his *quota* or proportion assessed: and the Lord Chancellor or Lord Keeper was directed to decree that such process should issue against any such member so refusing or delaying to pay his *quota* or proportion, as is usual against persons charged by the decree of the court for any duty in their several capacities: and if the total so returned and filed with the register should not amount to so much as should be sufficient to satisfy the sum decreed, due respect being had to such person as should

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make

make it appear that he was overcharged or ought not to be charged at all, then the Lord Chancellor or Lord Keeper for the time being might, from time to time, order that a new levy should be made and returned into the register's office of the Court of Chancery, of such sum as should be sufficient by way of supplement for that purpose, to the payment of which, every individual should be bound in the manner before described.

ON the 6th of March the Lord Keeper, on a motion grounded on this order, ordered that the dismissal should stand reversed and the bill revived, and that such proceedings should be had as were prescribed by the order.

THE treasurer and secretary were accordingly served with a distringas against the company, and copies of the order of the Lords: the sheriff returned *nulla bona*; and no appearance was made. On the 5th of July the cause was ordered to be put into the paper to be heard, and notice to be given to the treasurer, secretary and clerk; nobody appearing for the defendants, the court decreed the bill to be taken *pro confesso*, and the defendants to pay the plaintiff's debt according to the order of the lords in parliament (a).

THE proceedings on the *distringas* in the courts of common law against a corporation are the same as in other cases (b): in equity it is used to compel an appearance, to compel an answer, and to compel performance of a decree: when it is to compel appearance or an answer, and the defendants stand out in contempt, there issues an *alias*, and

(a) 1 Cases in Ch. 204. This case is cited 2 Vern. 396, in these words: "Note, in the case between Dr. Salmon and the Hamborough company, the members in their private persons were made liable, the company having no goods."

(b) For which vid. Tidd's Practice 18,—22.

if they still stand out, a *pluries*; if on the return of the *pluries* they do not enter an appearance, or put in their answer, as the case may be, the next step is to apply for a sequestration (a). When a *distringas* issues against them in consequence of their disobedience to a decree, a sequestration may be had against them after the return of the first writ (b). And when the sequestration is once awarded, they cannot have it discharged on entering their appearance with the register on the *distringas*, and submitting to answer interrogatories; because that permission granted in the case of common persons is in favour of liberty, which a corporation cannot lose: but if they can shew any irregularity in the proceedings, that may be cause to discharge the order (c).

It has been before observed, that a corporation aggregate cannot be summoned into the ecclesiastical courts (d). It seems, however, that they may be made amenable to these courts; for it is said, that "the Court Christian cites the *members* of corporations by their proper names, with the addition of the names of their corporate capacity, though it proceeds against them in the latter character, for that that court has no other way of citing them than this; that it cannot cite the body politic, and that therefore it has no mode of proceeding against them but this: that this does not resemble a *distringas* at common law, by which the lands or goods of the body politic may be taken, and where, if they have neither lands nor goods, there is no way to make them appear; but that in the Court Christian they are cited by their proper names, though in their *politic*

(a) Vid. 1 Harrison's Chanc. Pract. by Williams, 265.

(b) Vid. Harvey v. the East India Company. 2 Vern. 395. Prec. Chanc. 129.

(c) Vid. the last cited authorities.

(d) Page 71.

capacity; and if they stand out they must lie by the heels in their *natural* capacity" (a).

6. *How a Corporation must plead and be impleaded.*

IF a person who is a sole corporation *sue* in his corporate capacity, he must sue in his corporate name. Therefore, if a prebendary bring a real action for land which he claims in right of his prebend, and do not name himself prebendary, this may be pleaded in abatement. So, if a præcentor in a cathedral church, claiming a prebend in right of his præcentorship, bring a *quare impedit* for it, and do not name himself præcentor. So, if a prior, being parson of a church, had sued for a matter appertaining to that church, and had not named himself parson. So, if a dean bring a *præcipe* or other action by reason of his being dean, he ought to be so named. So, if a parson sue for any thing in right of his parsonage, he ought to name himself parson (b).

BUT if a man had brought an assize of a chapel which he held of the collation of the King, he needed not to have named himself parson or chaplain; "because," it is said, "it did not appear that he was instituted" (c): but I apprehend a better reason might have been given; that he did not claim any thing by such a suit in right of a parsonage or chaplainship already vested in him, but asserted a right to be parson or chaplain.

So, it is said, a parson needs not name himself parson against his bailiff for the profits of his church; nor in trespass *de parco fracto* and assault, where he had taken a distress for services due to his church (d).

(a) Skin. 27, 28.

(b) Vid. Comyn's Dig. Abatement, E. 21. Theol. Dig. l. 3. c. 5.

(c) Vid. last authorities.

(d) Ibid. *ibid.*

So,

So, where the action is not brought to assert a right in their corporate capacity, these persons need not use their corporate name; in which respect they differ from a bishop, for the latter must in all cases sue by the name of bishop, whether he sue in his corporate or in his private capacity, because Bishop is a name of dignity, like that of Duke or Earl (*a*).

ARCHDEACON is said not to be a name of dignity, and therefore an archdeacon needs not name himself Archdeacon, except where he sues in his corporate capacity (*b*).

WHERE a person who is a sole corporation is *sued* for any thing in his corporate capacity, he must also be sued in his corporate name: as, if land be demanded against a parson which he holds in right of his church, he ought to be named parson; so, if a prior had been charged with an annuity, as parson of a church by title of prescription, he must have been sued in a writ of annuity, by the name of Prior and Parson (*c*); and if such an annuity had been issuing out of a parsonage, and the parsonage had been appropriated to the master and scholars of a college; in a writ of annuity sued against them, they must have been named by the name of their incorporation, and also by the name of parson; but in *scire facias* issuing out of a recovery in a writ of annuity had before the appropriation, it is said to be sufficient to name them by the name of their incorporation (*d*). So, a writ of assize brought against a warden of a chapel for a house, land, and rent, was abated, because the tenant (*e*) was not named Warden (*f*). But

(*a*) Com. Dig. Abat. E. 20.

(*b*) Theol. Dig. l. 3. c. 3. f. 17.

(*c*) Th. Dig. l. 6. c. 6 (7). f. 7. (*d*) Id. f. 6.

(*e*) Tenant in a real action is equivalent to defendant in a personal action. (*f*) Com. Dig. F. 20. Th. Dig. l. 6, c. 7 (8), f. 6.

where an assize was brought against a warden of a chapel for the chapel itself, it was held that it was not necessary to name him Warden, because the suit was brought to disaffirm his title (*a*).

BUT where a sole corporation, whose name is not a name of dignity, is sued for any thing that does not concern his corporate capacity, it is not necessary to name him by his corporate name. As, if trespass be brought against a parson, there is no need to name him parson; nor in debt, unless it be brought on a bond given by the name of Parson; and if a parson be bound by the name of Parson of the church of A. and he be removed and made parson of the church of B. and afterwards a writ be brought against him, it must name him Parson of B. late Parson of A. The same principle applies to the case of a bishop who is translated from one bishopric to another (*b*).

WHERE a *quare impedit* is brought against a defendant who claims an advowson in right of his prebend, it is said that it is not necessary to name him Prebendary (*c*), perhaps because the plaintiff is not bound to know whether the defendant resists his presentation in his corporate or in his private capacity.

IT is a general rule, that a sole corporation who has the fee simple in him, and may have a writ of right in his corporate capacity, as a bishop or dean (*d*), may be named in originals and other legal proceedings, whether he be plaintiff or defendant, by his christian name only, because his name of corporation is in lieu of a surname:

(*a*) 7 E. 3, 328. 10 H. 7, 18. Th. Dig. ubi sup. f. 7. Vid. the remark in page 278, v. finem.

(*b*) Th. Dig. l. 6, c. 6 (7), f. 4.

(*c*) Com. Dig. Abat. E. 20. Th. Dig. ubi sup. f. 8.

(*d*) Vid. Co. Lit. 241. b.

but

but it is otherwise of a prebendary or parson who have only the freehold, and cannot maintain a writ of right: they must be named both by christian and surname (*a*).

IN the case of a corporation aggregate, there was formerly some doubt made how far it was necessary to mention the name of the head (*b*); but it has long been settled that it is not necessary, because in their corporate capacity they have no name, but that by which they were incorporated, and that therefore it is not more necessary to mention the name of the head, than that of any other of the members (*c*).

IF an action of account be brought by a mayor and commonalty without the proper name of the mayor, and the assignment of auditors be alleged to be by the *aforesaid* Mayor and Commonalty; it is no plea to say, that such a one is then mayor, and was so at the time of the writ purchased, and that HE and the commonalty did not assign auditors; because if the predecessor of the present mayor, together with the commonalty, assigned the auditors, yet the successor and the commonalty shall have the action, and count generally that the *aforesaid* mayor and commonalty assigned, because the word *aforesaid* applies to the corporate body at large, not to the particular mayor in whose time the action is brought: so, if a mayor and commonalty had been disseised, and the mayor in whose time the disseisin was, had died, the successor and commonalty might have had an affize, and the writ should have been in general terms disseised *them* (*d*).

IT is, in fact, more safe to omit the name of the head, for if his name be mentioned, and he die pending the ac-

(*a*) Vid. 2 Inst. 666. (*b*) Vid. 14 H. 4, 11. 21 E. 4, 19. 9 H. 5, 9.

(*c*) 3 Salk. 103. 1 Leon. 307. (*d*) 12 E. 4, 9, 10, Bro. Corpor. 56.

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tion, it will abate (a); and where they are defendants, there is yet another disadvantage which the plaintiff may have to encounter, if both the christian and surname of the person who is supposed to be the head, be mentioned, because the person summoned by these names may plead that he is indeed the person summoned, but that he is not the person who fills the office in consequence of which he is sued.

A *scire facias* was brought against Lawrence Booth, warden of the college of C. in Cambridge, and the scholars of the said college, for the recovery of an annuity; the sheriff returned that he had warned Lawrence Booth, and the scholars; on which Lawrence Booth came and said, that he was the same person that was warned, but said that he was not warden, nor was at the time of the writ purchased, nor at any time after, and prayed judgment of the writ; and it was agreed that the scholars had no occasion to appear and plead, because the whole composed one corporate body, and if the head was not warned, the body was not warned.—And it was held clearly that if the issue was in favour of the defendant, the writ must abate, because it was brought against a wrong person; and the better opinion was, that if the issue was in favour of the plaintiff, yet he should not have judgment to recover his annuity, because the scholars who were a part of the corporation were not parties to the plea—for which reason, Brooke says, that, “in such a case, it is better to sue the warden and scholars, without the proper name of the warden, and then a return, that he had warned the warden and scholars, will be sufficient” (b).

(a) 21 E. 4, 19. (b) 34 H. 6, 14, 15, 49. Brooke, 182. b.

YET in ejectment brought to try the right to the mastership of a house, it may be convenient that the name of the head be used.—In an ejectment brought by Lord Brounker against Sir Robert Atkyns, for the mastership of the hospital of St. Catharine's, which was a corporation consisting of master, brethren, and sisters; Sir Robert moved that the declaration might be by the name of Lord Brounker, master, &c. because if it should be by the name of master generally, and the defendant should confess lease, entry, and ouster, he might be tricked, because confession of lease by the master, &c. would be a confession that the lessor was lawful master.—By consent, therefore, the declaration was made by the name of Lord Brounker, master, and the brethren and sisters (*a*).

If a corporation sue or be sued by a wrong name, advantage may be taken of the misnomer by pleading, but the plea must conclude to the writ and not to the action, because misnomer is a plea in abatement, and not in bar (*b*).

So, if the name of the head be added and mistaken, this may be pleaded in abatement (*c*).

If trespass had been brought by the abbot of G. and the defendant had pleaded that the name of foundation was "Abbot of the church of Saint Mary of G." this, it is said, 'would not have been sufficient without adding' "and not abbot of G. only" (*d*).

So, where a writ was brought against the mayor and commonalty of Exeter, and they pleaded that they were incorporated by the name of Mayor, Bailiffs, and Commonalty; it was held to be no plea, without adding that they had been from time immemorial impleaded by that

(*a*) Skin. 2. (*b*) Vid. 26 H. 8, 1 b. Bro. 182 b.

(*c*) Bro. Corpor. 6, cited Com. Dig. Pleader 2 B. 2.

(*d*) 4 E. 4. 7 Bro. Corpor. 92.

name,

name, and not by the name of mayor and commonalty without the bailiffs (*a*).

WHERE a corporation sues by a particular name, as "Master and Brotherhood of the nine orders of Angels in Brandford;" a plea, that there is no such corporation in Brandford is a plea in bar, and not in abatement, because it denies all right of action, and, therefore, before the statute "for the amendment of the law" (*b*), could not have been joined with another plea in bar: but a plea that the brotherhood was incorporated by the name of Master and Brothers of the Brotherhood of all Saints, and of the nine orders of Angels, without this, that they were incorporated by the name of — of the nine orders only, is a plea in abatement, because it does not deny the right of action, but is merely a plea of misnomer (*c*).

IF a man sue as the head of a corporation, the defendant may plead that there is no such corporation as that in whose right the plaintiff pretends to sue; to which the plaintiff may reply, setting forth the manner in which the corporation was constituted, whether it has existed by prescription, or been created by patent (*d*).

IF a plaintiff sue as the head of a corporation, the defendant may plead that he is not the head, but that such another is (*e*), on which the plaintiff may take issue.

WHERE mayor and commonalty, or other corporation aggregate, are sued by a wrong name, they may make an attorney by special warrant, by their true corporate name, who may plead the misnomer (*f*); but this, it seems, must

(*a*) 26 H. 6. Brief. 101. Th. Dig. l. 6, c. 12, (13) f. 12.

(*b*) 4 Ann. c. 16, f. 4.

(*c*) 22 E. 4, 34. Bro. Corp. 67.

(*d*) 44 Aff. pl. 9. Bro. Corpor. 44.

(*e*) 43 E. 3, 29 b.

(*f*) 21 Ed. 4, 13 b. Bro. Corpor. 63.

be

be by special application to the court (a) ; and Lord Chief J. Treby said, that there was no *necessity* for a corporation to plead misnomer by attorney, "for that if judgment were given against them by a wrong name, it would be void" (b) : it is true, indeed, that in most of the cases where the question of misnomer of a corporation has been agitated, it has arisen on a special verdict ; but I apprehend, that where a corporation have taken no advantage of a variance from their name, either by plea or at the trial, they cannot arrest the judgment, or reverse it on that account.

If, however, there be a variance in the name of the corporation apparent in the entry of the judgment, that *may* be error: a judgment in the common pleas was thus, "that the mayor, commonalty, and citizens of London, should recover the debt for which they sued, and 6l. costs to the same *mayor and commonalty* adjudged," and it was held that this was error, there being no such corporation as the mayor and commonalty, without citizens ; but it appearing on the docket roll that it was well entered, it was awarded by the common pleas to be amended (c).

WHERE a corporation, whether sole or aggregate, plead misnomer, it must be before imparlance, and by a corporation sole, it is said, without attorney (d). Thus, where a writ was brought against the prior of the church of Saint Peter of B. and he made his attorney by that name, and the warrant of attorney was so put in, and an imparlance was entered by that name, and he afterwards pleaded in abatement ; "that the said priory was an ancient house, founded before time of memory, in honour of Saint Peter and Saint Paul, and that the prior was impleaded and im-

(a) 1 Ld. Raym. 118. (b) Id. 119. (c) Cro. Car. 574.

(d) Vid. 1 Ld. Raym. 118, 119.

pleadable

pleadable by that name, from time immemorial, without this, that it was founded in honour of Saint Peter only;" but it was held that though this would have been a good plea, if pleaded in person and before imparlance, yet, pleaded as it was, it could not be admitted (*a*).

So, where a writ of annuity was brought against the dean and chaplains of the King's free chapel of St. Stephen's at Westminster, and they appeared by attorney, made defence and imparled, and at the day given, said, they were founded by the name of dean and chapter of the free chapel royal of Saint Mary and Saint Stephen the protomartyr, all the justices held they were estopped to plead this, by reason of the warrant of attorney and imparlance (*b*).

If a personal action be brought against a corporation, and they plead misnomer, the plaintiff may reply that they were known as well by the one name as by the other (*c*). But it is said that it is otherwise in a real action; because the corporation cannot hold the land but by their true name (*d*). So, it is said, such a replication is not good, where a writ is brought on a specialty, and the name in the writ varies from that in the specialty (*e*): but where a deed has been given by a corporation by a name differing from the true name, *if the variance be not materially different in substance*, the person in whose favour it is given is not without remedy.

In the reign of Edward the third (*f*), Isabel, queen of England, brought a writ of covenant against William,

(*a*) Vid. 35 H. 6, 5. Bro. Corpor. 8, misnomer 9.

(*b*) 15 H. 7, 14. Bro. Corpor. 71.

(*c*) Th. Dig. l. 6, c. 12. (13) f. 16. Com. Dig. Pleader 2. B. 2.

(*d*) Th. D. ib. f. 14. Com. Dig. ib. vide ante, page 229, in the notes.

(*e*) Vid. the authorities last cited.

(*f*) 26 E. 3, 66, 67, cited in D. Ayrey's case; 11 Co. 21 a.

prior

prior of Coventry, and declared that Hugh prior of Coventry, his predecessor, and his convent, had submitted themselves to the award of the queen and her council, respecting certain tenements in Coventry; the deed of covenant was by the name of Hugh prior *of our Lady* of Coventry; it was objected that in the writ and count the words "*our Lady*" were omitted, to which it was answered that the prior and also the church of Coventry were founded by the name of St. Michael, and that, therefore, the plaintiff could not have a writ according to the specialty, because the writ might be abated notwithstanding the deed might be good; upon which the objection was overruled.

WHERE a deed is made *to* a corporation, by a name varying from the true name, the plaintiffs may sue in their true name, and in their declaration aver, that the defendant made the deed to them by the name mentioned in the deed (a); or, if the plaintiffs in their declaration take no notice of the variance, and the defendant trust to the advantage he may have from it at the trial; then if a special verdict be found "that the defendant made and sealed the writing in question, and delivered it to the corporation (describing them by their true name) by the name mentioned in the deed," this will entitle the plaintiffs to judgment (b).

So, if a deed be made *by* a corporation, by a name differing from the true name, the plaintiff may sue them by their true name, and aver, that, "by the name mentioned in the deed," they made such deed to him: or if he take no notice of the variance in his declaration, he may have

(a) Vid. the case of the abbot of York, cited in the case of the mayor and burgeses of Lynn. 10 Co. 125 b.

(b) Mayor and burgeses of Lynn. *id.* *ibid.*

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the same advantage from a special verdict as the corporation may have when they are plaintiffs.—And, if ignorant of their true name, he sue them by the name mentioned in the deed, and they plead *misnomer*, I apprehend it would be a good replication to say that they were known as well by the one name as the other, and that by the name mentioned in the writ, they made the deed to him. If such a replication were not admitted, this inconvenience must follow, that the plaintiff, after being deceived and led to expences by the false description given of themselves by the defendants, must have recourse to a new writ.

I HAVE said, “*if the variance be not materially different in substance,*” and have been induced to use this cautious mode of expression, from the manner in which Lord Coke expresses himself on the same subject, whose words are these, “in pleading, or in a special verdict, in *many* cases, if by express averment, or by the finding of the jury, it shall be made apparent to the court, that the true name of incorporation, and the name in the lease, grant, &c. are all one in *effect*, it will much enforce the matter, although in words there is *some seeming* difference” (a).

I FEEL no hesitation, however, to give it as my opinion, that in *all* cases, where, by express averment, or by the finding of the jury, it is made apparent that the corporation *sued* is the same that *made* the deed, whether the name in the deed be the same in *effect* or not with the name of incorporation, or whether the difference between them be *seeming* or *real*, judgment *ought* to be given in favour of the deed.

WHERE a corporation becomes liable to any duty, and then its name is changed, the *writ* brought against it should be in the new name.

(a) Id. *ibid.*

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THE abbot of Westbury brought a *scire facias* against the commonalty of the town of Shrewsbury, and counted on an agreement made by deed indented between one of the predecessors of the abbot and the said commonalty, that the commonalty should repair certain mills which belonged to the abbey whenever they should be out of repair; he shewed, that since this agreement, one of his predecessors, by name, had brought a writ of covenant against the commonalty, because the mills had not been sufficiently repaired; and recited the whole of the record and judgment, but alleged that the mills had not yet been repaired, and said, that for that reason he had brought his *scire facias*: the defendants pleaded in abatement of the writ, that on the day when it was purchased, and ever since, there were two bailiffs of the town of Shrewsbury, and that, therefore, the writ ought to have been brought against the *bailiffs and commonalty* (a). And by the better opinion it was held, that the writ ought to have been brought against them by their new name (b).

So, if they have a claim against any person, and then their name is changed, they must bring the *writ* by their *new* name.

BUT both in the case where they are plaintiffs, and where they are defendants, the declaration must state the claim to have accrued under the old name, and then shew how the name was changed (c).

IT was formerly usual, when a patent made to mayor, aldermen, and commonalty, was pleaded, to shew *who* was mayor at the time of the grant; but that practice has long been out of use; and it is held that where it is pleaded ge-

(a) 2 H. 6, 9. Bro. 182 b. cited Moore 581.

(b) Th. Dig. l. 6, c. 12, (13) f. 7, 8.

(c) Vid. 3 Lev. 237, 245.

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nerally, it shall be presumed, that there *was* a mayor at the time of the grant; and if in fact there was not, the opposite party must shew it (*a*).

A CORPORATION which has a head cannot sue or be sued without it, because, without it the corporation is incomplete (*b*).

WHERE the head of a corporation is changed annually, a writ brought by them, or against them, shall not abate by the *change* of the head where the name of the head is not mentioned: but where the head *dies*, pending the writ, there seems to have been formerly considerable doubt whether the writ should abate, both in the case where he is annually changed and where he is for life.

IN one place it is said generally (*c*), that if a dean die pending an action, the writ shall not abate; and it is compared to the case of mayor and commonalty; but it is said, it is otherwise of an abbot and convent, because, when the abbot dies, there remains no person capable, *by* whom or *against* whom the writ shall continue.

IN another place a distinction is taken between the case of a corporation whose head is annually chosen, and one whose head continues for life: in the former, as in the case of mayor and commonalty, it is said, that a writ shall not abate by the removal or *death* of the head; but that in the latter, as in the case of dean and chapter, the death of the dean shall abate the writ; in another place, however, this distinction is taken, that if the dean be mentioned by his name of *baptism* and *die*, the writ shall abate, though another be afterwards appointed; but that if he be *not* named by his name of baptism, then, though he die *after*

(*a*) 13 Ed. 4, 8. Bro. Corpor. 58.

(*b*) 22 Aff. pl. 67. Bro. Corpor. 43.

(*c*) Per Bryan, C. J. 1 E. 5, 5. a.

the writ purchased, yet, if another be appointed *before* the day in court, the writ shall not abate (*a*).

HOLT, C. J. is reported to have said, "that if an action be brought by a mayor and commonalty, and the mayor die, the writ abates; because he is the head of the corporation, and by his death the corporation is suspended" (*b*). I can see no reason, however, why in any case, the death or removal of the head in any stage of the proceedings, should abate the writ, where the *proper name* of the head is not mentioned: the death of the head is not like the case of the death of a common person, plaintiff, or defendant; in the latter case there is no body remaining to sue or be sued; but a corporation, notwithstanding the death of its head, still exists, and has the power of rendering itself complete by appointing another person in the place of the deceased.

THERE is a difference between a sole and an aggregate corporation in the manner of pleading in a real action: as the former has two capacities, a natural and a corporate, he must always shew in what right he sues (*c*): but as the latter have only a corporate capacity, a suit in their corporate name can be only in that capacity; and therefore it is not necessary that a mayor and commonalty should allege seisin in right of the corporation (*d*), or a warden and scholars, seisin in right of their college (*e*).

IN an action brought by a corporation on a contract, covenant, obligation, or specialty, or in an action to recover real property, it is unnecessary to shew how they

(*a*) 21 E. 4, 15, 16. Bro. Corpor. 64. 18 E. 4, 8. Bro. Corpor. 73.

(*b*) 1 Salk. 398.

(*c*) Plow. 102, 103. Dyer 102. 2 Lev. 68.

(*d*) 1 Leon. 153.

(*e*) Cro. El. 232. 1 Anderf. 272.

were incorporated; for if the name be proper for a corporation, that argues that they *are* a corporation; but on the general issue pleaded by the defendant, it is said, the plaintiffs must *prove* that they are (a).

AND an action may be supported in England by a foreign corporation, in their corporate name and capacity; and in pleading it is not necessary that they should set forth the proper names of the persons who compose the corporation, or to shew how they were incorporated or privileged; though on trial, on the general issue, they must prove that by the law of the foreign country they were effectually created a corporation (b).

BUT in justifying a trespass committed in the assertion of a franchise or privilege of a corporation, it is frequently necessary to shew not only the existence of a corporation, but the manner in which it claims to be so, whether by prescription, by charter, or by act of parliament; and the justification must extend to the whole of the act, which is the subject of complaint: thus, if a defendant in an action of trespass, justify a seizure for toll in right of a corporation, he must shew the title of the corporation by prescription or grant; if by prescription he must shew that they are a *corporation* by prescription, for a corporation created within time of memory, cannot claim any thing by prescription, because prescription implies a right existing *beyond* time of memory: if he say, that he detained the goods seized till toll and *charges* were paid, and only shew a title to distrain, that will not be sufficient; he must prescribe to distrain, and detain the goods distrained *till the toll and charges are paid* (c).

(a) Hob. 211. 2 Ld. Raym. 1535.

(b) Dutch West India Company v. Henriques Van Moyse. 2 Ld. Raym. 1535.

(c) Pitts v. Gainee and Foresight. 1 Ld. Raym. 558. 1 Salk. 10.

IN pleading a corporation by prescription, it is sufficient to use such words as necessarily imply the existence of a corporation from time immemorial; thus, "a certain hospital of Saint Mary of Bristol of a master and convent from time, &c. has been incorporated by the name of Master and Convent of the hospital of Saint Mary of Bristol:" or "the Warden and Vicars of the college of vicars in the choir of Hereford, are and from time, &c. have been incorporated by the name of Warden and Vicars, of the college of vicars, in the choir of Hereford," or thus, "the Master of the hospital of Burton Saint Lazarus, says, that he and all his predecessors, masters of the hospital aforesaid, from time, &c. have been called and known, as well by the name of Masters of the hospital of Saint Lazarus of Burton, of the order of Saint Lazarus of Jerusalem, in England, as by the name of Masters of Burton Saint Lazarus of Jerusalem in England" (a): or, in more modern terms, "the city of Litchfield is, and from time, &c. has been an ancient city, and the citizens and freemen of the same city using and exercising the mystery or occupation, &c. within the same city of Litchfield, and the liberties thereof, from time, &c. have been and still are one body politic in deed, fact and name, by the name of, &c." (b).

THE pleading of a corporation by letters patent may be thus: "On the — day of — in the — year of the reign of — late King of England, the said Sovereign Lord — by his letters patent, sealed with his great seal of England, bearing date at Westminster, in the county of Middlesex, on the same day and year aforesaid, of his special favour, declared, ordained and granted for himself, his heirs and successors, that the city of Bristol, from thenceforth, should

(a) 10 Co. 29 b. 30 a.

(b) Lutw. 1321.

be and remain for ever a city incorporated, and a county of itself; and that the citizens and inhabitants of the said city and their successors from thenceforth, for ever, should be one body corporate and politic in deed, fact and name, by the name of Mayor, Burgesſes, and Commonalty of the city of Bristol aforeſaid" (*a*).

IN pleading either a corporation by preſcription or by charter, it is unneceſſary to mention any of the powers which are incident to them as a corporation, as the power of pleading and being impleaded, of granting and purchaſing; becauſe theſe are neceſſarily implied (*b*). They are, however, frequently added (*c*).

WHEN the name of a corporation by preſcription has been changed by charter, and a preſcription is to be laid in them for ſomething to which they were intitled before the change of the name, the manner of pleading it may be thus: "The borough of Derby, in the county of Derby, is an ancient borough, and the burgeſſes of the ſaid borough from time, &c. until the — day of — in the — year of the reign of the Lord Charles the firſt, late King of England, were one body corporate and politic, by the name of Bailiffs and Burgeſſes of the borough of Derby——and on the ſaid — day of — in the ſaid — year of the ſaid Lord Charles the firſt, late King of England; the ſame Lord the King Charles the firſt, by his letters patent, &c. conſtituted and created the bailiffs and burgeſſes of the borough aforeſaid, to be from thenceforth, for ever, a corporation, by the name of Mayor and Burgeſſes of the borough of Derby——and the ſame John further ſaith, that the bailiffs and burgeſſes of the borough aforeſaid, from time, &c. until the — day, &c. aforeſaid, and the mayor and burgeſſes

(*a*) Lutw. 1330.

(*b*) 10 Co. 29 b. 30 a.

(*c*) Vid. Lutw. 1321, 1330.

of the same borough on the aforesaid — day, &c. and continually afterwards, hitherto have had ———” (a).

OR thus: “the town of Wallingford is and from time, &c. has been an ancient borough, and the men and inhabitants of the same town, from time, &c. until the — day of — have been a body corporate and politic in deed, fact, and name, and by divers letters patent of divers Kings and Queens of the kingdom of England at different times confirmed, as well by the name of Burgessees of Wallingford, as by the name of Mayor, Burgessees, and Inhabitants of the town of Wallingford, and also by the name of Mayor, Burgessees, and Commonalty of the borough of Wallingford, and also by the name of Mayor, Aldermen, and Burgessees of the borough of Wallingford; and the men and inhabitants of the same borough from time to time, during all the time aforesaid, by the several names aforesaid, until the — day of — aforesaid, have had and have been used and accustomed to have a certain antient market within the borough aforesaid, held, &c. ——— and on the said — day of — in the — year aforesaid, the said late King Charles the second, by his letters patent, &c. of his special favour, &c. granted for himself and his successors, that the burgessees and inhabitants of the same borough from thenceforth, for ever after, should be in fact and in name one body corporate and politic by the name of Mayor, Aldermen, and Burgessees of the borough of Wallingford ——— and the same late King, by the same letters patent, for himself, his heirs and successors, granted and confirmed to the said mayor, aldermen and burgessees, and their successors, that from thenceforth, for ever, they should have and hold one market ——— in the same manner, &c. ———” (b).

(a) 1 Saund. 340.

(b) Lutw. 1498, 1499.

OR, in more modern terms, thus: "Whereas the city of London is, and from time, &c. has been an ancient city; and the citizens of the said city, during all the time aforesaid, have been a body corporate and politic in deed, fact, and name, by divers names of incorporation, and for divers, to wit, fifty years last past, have been a body politic and corporate, by the name of the mayor, commonalty, and citizens of the city of London:" (a)

IF a corporation, consisting of many persons capable, claim any thing by prescription, in their general corporate right, they must prescribe in them and their successors, and not in the successors of their head; thus, in the case of dean and chapter claiming an annuity, seisin must be alleged in such a one, dean, and the chapter, predecessors of the present dean and chapter, and not in the predecessors of the dean only; though the corporation being intire and perpetual, cannot in strict technical propriety have successors or predecessors. (b)

IF the head of a corporation, being sole seised of land in right of his headship, be sued in trespass for an entry into that land, he must not, in justifying his entry, barely state that such a one, his predecessor, was seised of the land as parcel of his sole estate, and died, after whose death, he entered and was seised in right of his headship: but he must shew the existence of the corporation, and the manner in which the head is appointed; then allege seisin in his predecessor, his death, and the manner in which he was himself appointed his successor, and his subsequent entry in his corporate capacity; for without all these circumstances he cannot make a complete title to enter. (c) But

(a) 1 H. Black. Rep. C. B. 210.

(b) 39 H. 6, 13, 14.

(c) 34 H. 6, 27. Bro. A&T. sur le Stat. pl. 9. Corp. et Capac. pl. 7.
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it is not necessary to state the number of which the corporation consists; for perhaps no number was limited by the charter of incorporation, or it may be a corporation by prescription without limitation of number (*a*).

HOWEVER necessary it may be that any particular act done by a corporation, should be by deed, yet in pleading that act, it does not seem necessary to state that it *was done* by deed, nor to state all the circumstances that were necessary to give it effect.—Thus, if a man had pleaded that abbot and convent made a lease for life, it would not have been necessary to shew any warrant of attorney under their common seal to make livery, though the lessee, without that, could not have had seisin (*b*).

So, where the bailiffs and commonalty of Ipswich intituled themselves by feoffment, without shewing a letter of attorney under their common seal to receive livery, and though, without such letter of attorney the feoffment could not be good, yet the pleading was ruled to be good, on the ground that such letter was necessarily implied (*c*).

So, where an entry for a forfeiture was pleaded to have been made by the dean and chapter of Norwich, and exception was taken that there was no allegation of a deed or warrant of attorney to enter under their common seal; yet the pleading was adjudged good, on the principle that it should be intended a sufficient entry, and that all necessary circumstances must be implied (*d*).

So, if to an action for rent brought by a corporation against their lessee, he plead an assignment by him to another, and that the corporation had accepted rent of the assignee, it is not necessary to state, that the acceptance

(*a*) 34 H. 6, 27. Bro. Act. sur le stat. pl. 9. Corp. et Capac. pl. 7.

(*b*) Throgmorton v. Tracy. Plow. 149. (*c*) Cro. Jac. 411.

(*d*) Edward and Webb v. Sorrel. Cro. Car. 169.

was

was by deed, for if a deed was necessary, the existence of it must be implied in the averment of acceptance, because, in such a case, without the deed there could be no acceptance at all (a).

So, where a jury, in a special verdict, found that a dean and chapter had received rent, Bridgeman, Chief J. said, that must be presumed to have been by deed, because they could not receive it otherwise; a case in the Exchequer, he said, had indeed been cited, in which judgment had been arrested, because in the declaration, which was on a lease by a corporation, there were not the words "by deed;" but he was not satisfied with that case; yet, whatever weight it might have, it did not influence the present, because that was a case of pleading, this was a special verdict (b).

LORD Coke, indeed, tells us, that in Bellamy's case (c) a good difference was taken and agreed, when a deed is requisite *ex institutione legis*, and when *ex provisione hominis*. That when a deed is requisite *ex provisione hominis*, there the provision of man shall not change the judgment of law in such a case; as if a man make a lease for years of land to A. on condition that he shall not assign it over but by deed only, and not by parol; in this case, *ex provisione hominis*, the assignment, ought to be by deed, but because, *ex institutione legis*, a deed is not necessary to the assignee, he may plead the assignment without shewing the deed: but when it is necessary *ex institutione legis*, there it ought to be shewn in court; *although it concern a collateral thing, and transfer or convey nothing*. As, if the mayor and commonalty of London have an estate for the life of J. S. if, in that case, the mayor and commonalty attorn

(a) 2 Saund. 305.

(b) Carter, 16, 17.

(c) 6 Co. 38 a. b.

to the grantee of the reversion, the law requires that it should be by deed; for notwithstanding the grantee doth not claim *in* by them who attorn, and that an attornment is but a consent; yet in pleading, the deed of attornment ought to be shewn, for the deed is requisite *ex institutione legis* in such case."

WITH all due deference, however, to the authority of so great a lawyer, this distinction seems to be merely fanciful, and founded on no good reason; it was not the point adjudged, but was introduced collaterally in argument, and is certainly inconsistent with the authority of the cases before mentioned, which are confessed to be good law.

THE statute of limitations is pleadable against a corporation as well as against a common person.—The South Sea company brought a bill against one Wymondfell on a contract made by him with Mr. Surnam, the deputy cashier of the company, in the year 1720, respecting 20,000*l.* South Sea stock; suggesting several frauds, and shewing that by the statute (*a*), against the South Sea directors, all the estate, goods, and effects of the said Surnam were vested in the company for the benefit of the proprietors. The defendant pleaded the statute of limitations, and that if any such contract was made by the defendant with Surnam, it was made above six years before the filing of the bill, and denied the matters of fraud.

It was insisted, that the plaintiffs claiming by the act of parliament, *that* was matter of record, and the demand in question to be taken as a debt on record, and consequently not barrable by the statute of limitations: but the Lord Chancellor held this to be clearly otherwise; for that the South Sea company could not be in a better case than Sur-

(*a*) 7 G. 1, c. 27.

nam was, against whom as the defendant might have pleaded the statute, so might he also do against the company, who stood in Surnam's place; and he compared it to the case of an assignee under a commission of bankruptcy, against whom, though he claims under the statutes concerning bankrupts, and also by virtue of the assignment which is under the great seal, the statute of limitations might be pleaded, as well as against the bankrupt himself (a).

So, a corporation may have the *benefit* of the statute of limitations as well as a private person, as their witnesses may die, or their vouchers may be lost (b).

IN equity, corporations aggregate answer under their common seal, and if they refuse to answer, process issues against them as before mentioned (c): but if the majority of the members be ready to put in their answer, and the head who has the *custody* of the common seal refuse to affix it, the Court of Equity will stay the process against the corporation, till an application can be made to the Court of King's Bench for a mandamus to compel him, which that court will grant: this was first done about thirteen years ago in the case of Doctor Windham, warden of Wadham College; a bill was filed against the warden, fellows, and scholars of that college, to compel the execution of a lease according to an agreement, alleged to have been made by them; the subwarden, dean, and principal officers were ready to put in their answer, insisting that the agreement was not made by a majority of the college as it ought to have been; the warden disapproved of this answer, and therefore refused to affix the college seal to it: the Chancellor observing that the corporation

(a) South Sea Company v. Wymondsell. 3 P. W. 143.

(b) Wych v. East India Company. 3 P. W. 310.

(c) Vid. ante, p. 271 et seq.

at large were not in fault, but had obeyed the process of the court as far as they could, directed an application to be made to the Court of King's Bench for a mandamus to compel the warden to affix the seal; on the application being made, Lord Mansfield said, that though he believed this was the first instance of such an application, yet it was not new in principle: he observed that the warden seemed to have misconceived the consequence of his affixing the seal to the answer of the fellows, and to think that it would make his corporate answer inconsistent with his private separate answer, for that he was of opinion the plaintiff's suit was just, and that the agreement ought to be executed: but his lordship said, his putting the college seal to the answer of the corporation, did not contradict his private separate answer, and that therefore the mandamus ought to issue (a).

As a corporation answer under their common seal, and not upon oath, they will of course discover nothing to their own prejudice: when, therefore, a plaintiff apprehends he cannot have the full effect of his suit by making the corporation alone defendants to his bill, he usually joins the clerk or treasurer, or some of the principal members of the corporation in their natural capacity. This practice seems to have been introduced in consequence of an anonymous case late in the reign of Charles the second; where a bill having been filed against a corporate company to obtain the discovery of writings, and they refusing to answer satisfactorily, it was expressly ordered, that the clerk, and such principal members as the plaintiff should think fit, should answer on oath, and that a master should settle the oath (b).

(a) Cowp. 377.

(b) Anonymous, 34 and 35 Car. 1682. 1 Vern. 117.

FROM

FROM this time, it is probable, that the practice of joining some individual with the corporation, as a defendant in his individual capacity, became common; and in the case of Wych and Meal (*a*), the propriety of it was recognised by Lord Talbot.

THIS was a bill brought by the plaintiff against the East India company, and one of the officers of the company, in order to discover some entries and orders in their books.—The officer demurred, shewing for cause, that it was not so much as pretended by the bill that he had any interest in the matter in question; that his answer, if it were to be put in, could not be read against the company, as the answer of one defendant could not be made use of against the other; that the plaintiff, if he pleased, might examine the defendant as a witness; that on the same principle on which *he* was made defendant here, the plaintiff might make the servant of any private person a defendant; and that it was plain the plaintiff could have no decree against the defendant, the officer of the company.

THE Lord Chancellor observed, this was a thing of consequence, which he did not remember to have been judicially determined; but so far was plain, that the plaintiff was intitled to a discovery of the matters charged in the bill; the case where a private person was defendant, was different from that where a company were defendants; the latter could answer no otherwise than under their common seal; and though they answered ever so falsely, there was no remedy against them for perjury: it had been an usual thing for a plaintiff, in order to have a discovery, to make the secretary, book-keeper, or any other officers of the company, defendants, who had not demurred, but answered; whereas, if this demurrer should be allowed,

(*a*) 1734. 3 P. W. 311.

the officers of companies were never likely to answer again; and though the plaintiff were intitled to a discovery, he would never be able to obtain one; and consequently there would be a failure of justice.—Beside this, although the answer of the defendant, the officer, could not be read against the company, yet it might be of use to direct the plaintiff how to draw and pen his interrogatories, towards obtaining a better discovery; and since no instance was produced, where such a demurrer had been allowed, and it might be very mischievous and injurious to the subjects, by allowing it, to deprive them of that discovery, to which, in common justice, they were intitled; and as on the other hand no inconvenience could ensue from obliging such officers of a company to answer; therefore he over-ruled the demurrer.

WHEN a person has reason to suspect he has sustained an injury by persons acting under the authority of a corporation, but cannot ascertain how far they are concerned, he may file a bill against them and their secretary, or other officer, for a discovery, before he bring an action at law, suggesting that he *intends* to bring one, but cannot do it without the discovery prayed: because, as the suit against a corporation is by original, the discovery may be necessary before he can sue out his writ (*a*).

IF a discovery of any of the matters called for, would be prejudicial to the corporation, and be not necessary to the plaintiff's case, the officer needs not discover those parts (*b*).

WHERE an action is brought by or against the mayor and commonalty of a city, the issue must be tried by a

(*a*) Vid. *Moodamay v. Morton*. 1 Brown. Ch. Cas. 471.

(*b*) Id. *ibid*: cites the case of *Walpole and Ellison v. White*.

jury

jury of men who are strangers to the corporation, because the members of the corporation are interested in the event (a).

A Member of a corporation must take a disinterested oath. ON the same principle of being interested in the event, it seems, that a custom in a corporation, on which they found a claim, cannot be proved by a member of the corporation (b); but one who *has* been a member of the corporation, and disfranchised, may be a witness to prove such a custom; though, it is said, a man cannot surrender his franchise by consent, in order to be *enabled* to be a witness (c).

IN an action of assumpsit, brought by the mayor and commonalty of London, for 5l. due to them for several tons of wine, brought from beyond the seas to the port of London, at 4d. per ton, which was the duty of water-bailage; at a trial at bar, several freemen of London were offered as witnesses for the plaintiffs; the counsel for the defendant objected to them as being parties, and interested in the event, the commonalty of London comprehending all the freemen: it was answered that their interest ought not to be considered, it being so trivial and remote; that a small legatee had been sworn to prove a will; that in an indictment against the county for not repairing a bridge, one of the county might be a witness; and this, Dolben, J. said he had known in the case of Peterborough bridge; it was likewise observed, that in an action against the hundred on the statute of Winton, the plaintiff is a witness from the necessity of the case: to this it was replied, that the present was not a case of necessity, for that the plaintiffs, though perhaps with difficulty, might have other witnesses beside freemen; and that the case of the statute of Winton

(a) 10 Aff. pl. 13. Bro. Corp. 4. Trial, 67.

(b) 3 Keb. 12.

(c) 3 Keb. 295.

did

did not apply, for that there, a *hundredor* could not be a witness.—Scroggs, C. J. Dolben and Raymond, J. were of opinion, that the freemen ought to be admitted as witnesses, and Jones, J. that they ought not; on which a bill of exceptions was tendered by the counsel for the defendant, which the court proffered to seal, and to allow three or four days to draw it up; the plaintiff's counsel, however, produced *other* witnesses, which left the case of the freemen undecided (a).

ON a subsequent occasion, the Lord Keeper, Sir Francis North, alluding to this case of the water-bailage, said, "he thought it very hard, that no freeman of the city of London could be admitted as a witness, in a case that did not concern him sixpence; but that *there*, indeed, the *fee* was in question." This was in the case of the corporation of Sutton Coldfield against Wilson, in which the question was, whether a bond in the penalty of 400l. was intended for the benefit of the corporation or of the defendant; and the witnesses for the plaintiffs being all members of the corporation, it was insisted that their depositions could not be read, because they swore for their own benefit, and the exception was allowed; and the Lord Keeper said, that a corporation ought to have a town clerk, or under clerks, who were not freemen, that they might be competent witnesses when occasion required.

*James North
not to be a
freeman*

At length, however, it appearing that the defendant had cross-examined some of the plaintiff's witnesses, not only to questions, barely whether they were of the corporation or not, but to other questions which affected the merits of the cause; the Lord Keeper declared *that* made them good witnesses, though they were members of the

(a) The case of the city of London, concerning the water-bailage.
1 Vent. 351.

corporation, and, on their evidence, the latter had a decree in their favour (a).

*Subjects of
corporations
as a stranger
refused*

IT appears to be a general rule, that in actions where a corporation and a stranger are concerned, the latter shall not be assisted by the court to obtain inspection of the books of the former; but that, if he conceive he can derive any advantage from them, he must give the corporation notice to produce them on the trial.

THE first case we meet with on this subject, was an action of covenant against the defendant, as security for one Thompson, late warehouse-keeper to the charitable corporation, in which the issue was, whether Thompson actually did receive certain goods with which he was charged: an application was made on behalf of the defendant for liberty to inspect the corporation books, on the principle that they were *public* books: the court doubted whether they were of that description, and therefore made no rule; but told the defendant's counsel that he might give the corporation notice to produce them at the trial (b).

THE next case, indeed, directly contradicts the rule: it was an action brought by the Brewers' Company, on a bye law, against the defendant for exercising the trade of a brewer without being a member of the company: on behalf of the defendant, application was made to the court for a rule to inspect the books of the company and take copies, which was granted, on the ground that strangers had an interest in bye laws which affected them (c).

LITTLE regard, however, is due to this case, because the principle on which it is founded was impeached in a *subsequent* case, which seems to have been more maturely

(a) Sutton Coldfield v. Wilson. 1 Vern. 254.

(b) Tr. 8 G. 2. Charitable Corporation v. Woodcraft, B. R. H. 130.

(c) East. 19 G. 2. Brewers' Company v. Benson. Barnes, 236.
considered.

considered.—This was an action of trespass for taking the plaintiff's goods: the defendant, as servant to the corporation of Shrewsbury, justified the taking, as a distress for toll through the streets of Shrewsbury, which the plaintiff refused to pay: before the plaintiff replied, an application was made, on his behalf, for a rule to have liberty to inspect the public books and records of the corporation: in answer to this, it was urged, that the plaintiff, being a *stranger* to the corporation, had no right to inspect their books; that issue not being joined, it was not known what would be the point to be tried; that the plaintiff had not applied to the corporation and been *refused* the liberty of inspecting the books; and that therefore the motion was premature; and that it was the first of the kind, for it was a motion to furnish the plaintiff with matter for his reply to the defendant's plea. In support of the application, it was said, that there had been cases where *strangers* had had rules for liberty to inspect the books of the adverse party, and the case of the Brewers' Company was particularly mentioned as an authority in point.—The Chief Justice (*a*) expressed himself thus—"Do you lay it down in general, that a *stranger* has a right to inspect the books of a corporation? How has a stranger to a corporation more right to inspect *their* books, than the books of a private person? While Lord Camden sat here, there was the like motion in the like action of trespass, where the defendant justified, under the corporation of Ipswich, for distraining for a toll for repairing the quay there, and the motion was refused, the plaintiff being a *stranger* to the corporation; and I am sure, in many cases like the present, the motion has been refused; however, I shall give no absolute opinion on the present motion; because issue is not yet joined, nor

(*a*) De Grey.

X 2

has

has, the plaintiff applied to be *permitted* to inspect the books of the corporation and been refused, and *that* is a sufficient reason for not granting the rule at present" (a).

SECTION III.

By what acts a Corporation shall be bound.

MUCH of what naturally falls under this and the following section, having an intimate connection with the subjects of the preceding parts of this chapter, has already been unavoidably discussed at full length: in order, therefore, to avoid repetition, it is intended to introduce here, only those points which have either been not considered at all, or which have been but slightly touched upon before.

WHERE a collective body of men have a right to act in a matter which concerns the common interest, it seems to be the first suggestion of reason, that an act done by a simple majority should be binding on the whole: this is the principle of the rule adopted by the common law of England, with respect to aggregate corporations: thus, in general, the majority of dean and chapter shall bind the whole corporation of dean and chapter: So, the majority of mayor and commonalty shall bind the whole corporation (b): but this rule is to be understood as confined to a majority of those, who, by the constitution of the corporation, have a voice in the corporate deliberations; for it frequently happens, that the power of action does not ex-

(a) Tr. 13 G. 3. *Hodges v. Atkis.* 3 Wils. 398.

(b) 14 H. 8, 2, 29. *Bro. Corpor.* 34.

tend to the corporation at large, but is confined to a select body; and then the act of the majority of that select body, binds not only the whole of the select body, but the whole corporation.

IN different corporations too, the manner in which the majority shall be reckoned, varies according to the provisions of the constitution; sometimes the act that is to bind the corporation, must be sanctioned by the assent of an absolute majority of the whole body empowered to act; sometimes, it is sufficient if a majority of the whole body be assembled, and the majority of *those assembled* agree to the act; and sometimes a majority of those assembled, whether those assembled be a majority of the whole or not, may bind the whole corporate body.

IN all these several cases, the act of the major part, which is to bind the rest, must be done at one and the same time, and at a regular meeting held for that purpose. Thus, where a chapter consisted of eleven, and the majority of the whole eleven was necessary; a confirmation of a lease of the possessions of the bishopric, by three at one time and three at another, was held to be void, because the members ought to have been assembled in full chapter (*a*).

NOTWITHSTANDING this rule of the common law with respect to the majority, many founders of ecclesiastical and eleemosynary corporations, in order the better to prevent the alienation of the possessions of these bodies, had frequently rendered necessary the assent of a part greater than the absolute majority of the whole, and sometimes the assent of every individual.—King Henry the eighth, finding these private regulations a great obstruction to his

(*a*) Capitulariter congregati, as it is expressed in Sir J. Davis, Rep. 48. a. b.

projected scheme of obtaining a surrender of the lands of ecclesiastical corporations (*a*), procured an act of parliament, to reduce *all* corporations to the rule of the common law.

By this act (*b*), after reciting "that, by the common law, all assents, elections, grants, and leases, had, made, and granted by the dean, warden, provost, master, president, or other governor of any cathedral church, hospital, college, or other corporation, by whatever name incorporated or founded, with the assent and consent of the greater part of their chapter, fellows, or brethren of such corporation, *having voices of assent* thereto, were as good and effectual in the law to the grantees and lessees, as if the residue, or the whole number of such chapter, fellows, and brethren of such corporation, *having voices of assent*, had thereto consented and agreed; yet, several founders of such deaneries, hospitals, colleges, and corporations within the realm, had, on the foundation and establishment of the same deaneries, hospitals, colleges, and other corporations, established and made, among other their peculiar acts, local statutes and ordinances, that if any one of such corporation, *having power or authority to assent or dissent*, should deny any such grant or grants, that then no such lease, election, or grant should be had, granted, or leased; and for the performance of the same, every person *having power of assent to the same*, had been and was daily thereto sworn, and so the residue might not proceed to the perfection of such elections, grants, and leases, according to the course of the common law of the realm, without incurring the danger of perjury;" it is enacted, "that every peculiar act, order, rule, and statute, theretofore made, or thereafter to be made by any founder or founders of any

(*a*) Vid. 1 Bl. Com. 478.

(*b*) 33 H. 8, c. 27.

hospital,

hospital, college, deanry, or other corporation, at or upon the foundation of any such hospital, college, deanry, or corporation, whereby the grant, lease, gift, or election of the governor or ruler of such hospital, college, deanry, or other corporation, with the assent of the greater part of such of the same hospital, college, deanry, or corporation, as had or should have *voice of assent* to the same, at the time of such grant, lease, gift, or election thereafter to be made, should be in any wise hindered or let by any one or more, being the less number of such corporation, contrary to the order and course of the common law, should be from thenceforth clearly void, and of no effect—and that from thenceforth no person of any such hospital, college, deanry, or other corporation, should be compelled to take any oath for the observation of any such order, statute, or rule, upon the pain of every person so giving such oath, to forfeit for every time so offending, five pounds, one half to the King and the other to the informer.”

By the words of the preamble to this statute, it does not appear to have been the intention of the legislature, that it should extend to any negative or necessary voice, given by the founder to the head of any corporation; and, in fact, in many cases which have occurred since the statute, in which the question has been, whether by the words of a charter, a negative has been conferred on the head of the corporation, no doubt has been entertained of the legality of such negative, if actually conferred (*a*).

It appears likewise, from the wording both of the preamble and of the enacting clause, that the statute was not intended to prevent a select body from binding the whole corporation, nor to affect the sense in which the word

(*a*) Vid. 1 Bl. Com. 478. Cowp. 379.

"majority" should be construed, according to the different constitutions of different corporations.

If a mayor *de facto*, together with such other members of the corporation as are empowered to bind the whole by their act, put the common seal to an obligation, this shall bind the corporation, though he be not *de jure* mayor; for being in fact appointed to the office, and permitted to act in it by the corporation, who might have removed him, all judicial and ministerial acts done by him are valid (a).

INFANCY in the mayor, bailiff, or other head of a corporation, shall not avoid the deeds or grants of the corporation, because he acts in his corporate, and not in his natural capacity (b). So, it would seem, that non-sane memory, outlawry, or excommunication of the head ought not to avoid the acts of the corporation (c).

Acts done by the members in the absence of the head, void

BUT an act done by the members of a corporation in the absence of the head, shall not bind them; thus in the vacancy of the mayoralty, an obligation given by the commonalty is not binding: and on this principle, if a bond be extorted from a mayor and commonalty, by the imprisonment of the mayor, they may plead that imprisonment in avoidance of the bond, because, during the imprisonment of the mayor, the corporation may be considered as without a head (d).

IF a contract be made with the head of a corporation, for something which is to be applied to the benefit of the corporation, and which is afterwards actually so applied,

(a) Lutw. 519, cites 9 H. 6, 32, pl. 3. Br. non est fact. 3. 2 H. 6, 32. Br. tit. Abbe. 19 Mo. 112.

(b) 5 Co. pl. 2, 27.

(c) 21 Ed. 4, 7, 12, 27, 67. Bro. Corpor. 63.

(d) Vid. the authorities last cited, and Cowp. 222, 224, 225, where this case is alluded to,

this

this shall bind the corporation; but the plaintiff, in his declaration on that contract, must shew that the corporation had the benefit: thus, if an abbot had given an obligation without the common seal, for money to be applied to the use of his convent; this would have bound the successor: but it must have been shewn in the declaration, that the money was actually applied to the use of the convent (*a*).

So, where R. abbot of Chester, granted to John Brewin, Esq. by his deed, without the consent of the convent, a yearly rent of 40s. out of his monastery, for his council to the same R. abbot, and the convent of the same place, given, and in future to be given (*b*); and after the death of abbot R. Brewin brought a writ of annuity against the successor, and averred that he had given to the said R. late abbot, and to the convent, his council at W. in the business of the house, and to the profit of the house: Prifot and the whole court held, that the action would not have been maintainable against the successor without such averment as this: for that the action was not maintainable against the successor, on any contract or grant made by the abbot only without the convent, unless the effect or consideration came to the profit of the house; but that such *general* averment was good, because it would be too long to shew all the causes specially (*c*).

So, if the head of a corporation, by the intervention of *Minors* a servant, buy certain things for the use of the corporation, *for the use of the corporation* which are actually applied to their use, they are bound by this contract, and an action may be maintained against them, after the change of the head, in whose time the pur-

(*a*) Long, 5to. Ed. 4, 73, 3.

(*b*) Pro consil' suo eid' R. abbati et conventui ejusdem loci impenso et in posterum impendendo.

(*c*) 39 H. 6, 21, 22, cited in Ughtred's case, 7 Co. 10. b.

chafe was made (*a*). So, if one who is the regular servant of the corporation, make a purchase and apply it to the use of the corporation, it would seem that the corporation are bound (*b*): but in both these cases, the plaintiff must aver that the things purchased came to the *use* of the corporation.

BUT an act of the head of a corporation, by which any claim of the corporation is discharged, does not bind the corporation: thus an acquittance by the mayor alone of any sum due to the mayor and commonalty does not bind them (*c*): "not in strictness of law," says Jenkins (*d*), "but because an hundred precedents were shewn of the allowance of such an acquittance, it was allowed by all the judges of England."

IF a prior, with the consent of his convent, had made a lease for years, rendering rent, and had without the convent, by deed expressly released the rent and died, the successor should have recovered the arrears: but if the prior had *ousted* the lessee and died, this, being a discharge in law, would have discharged the rent accrued during the continuance of the ouster, against the successor (*e*).

Acts of the
Servant. IT seems that the acts of the regular servants of a corporation, done in their official character, shall in general bind the corporation.

THUS where the mayor and commonalty of a town, by deed covenanted with the mayor and commonalty of another, that the burgesses of the latter should be quit of toll and other duties within the former, and the burgesses of the latter were afterwards distrained by the officers of the former, this was held to be a breach of covenant, which

(*a*) Vid. Long 5to. E. 4, 70, 71.

(*b*) Vid. id. ibid.

(*c*) 2 R. 3. 7 Bro. Corpor. 87.

(*d*) Jenk. 162.

(*e*) 34 H. 6, 21. 10 Co. 67, b.

would

would support an action of covenant against the corporation (*a*).

THE dean cannot appoint a proxy for him to do any corporate act which is to affect the *possessions* of the deanry or of the chapter, as to put the seal to a lease (*b*).

IF an abbot and all his monks, by their proper names, and not by the name of their incorporation, had made an obligation under the common seal, this should not have bound their successors: and the law is the same with respect to a mayor and commonalty (*c*).

IF an abbot had given an obligation in these words, "Know all men—that I, abbot of E. am bound—— in witness whereof I have hereto affixed the seal of my convent," without mentioning his successors, this would not have bound the latter, because it did not appear to be with the consent of the convent: but words in this form, "Know that I, with the consent of my convent, have demised"—would have bound the successors, because the convent were persons dead in law.—But such a deed by a dean, alleged to be executed *by the assent* of the chapter is not good, if it relates to the joint possessions, because the chapter are an integral part of the corporation, and are seised with the dean, and implead and are impleaded with him.—The law is the same with respect to a mayor and commonalty (*d*).

AN abbot of England was bound by a deed made under the common seal of the abbot and convent, though it bore date *out* of their monastery (*e*).

(*a*) 48 E. 3, 17, 18. Bro. Corpor. 14, 74. Vid. ante, page 191. Vid. the case of Moodamay v. the East India Company. 1 Brown. Ch. Rep. 469. (*b*) Sir J. Davis, 47, a. b.

(*c*) 15 E. 4, 1. Bro. Corpor. 31.

(*d*) 14 H. 6, 16. Bro. Corp. 39. Faitef. 47. Vid. ante, p. 114, 115.

(*e*) Jenk. 10, cites 9 E. 4, 40. 14 H. 6, 16. 10 H. 6, 44. 27 Aff. pl. 43.

IN

IN the case of an abbot alien, who had a monastery beyond sea, being sued in debt on a deed obligatory, under the common seal of the abbot and convent, and bearing date in England, there was this distinction: if the abbot had a cell in England the deed was held good: but if the abbot had no cell in England, a deed by them bearing date in England was considered as void, because it was not to be supposed that the abbot and monks all left their monastery beyond sea, and came into England, or that their *common seal* was in England-(*a*).

WHERE an agreement, with relation to a dean and chapter estate, is executed by the dean for himself and chapter, though signed by him only it shall bind the chapter (*b*).

AND, if a body corporate, composed of a definite number of members, make an agreement with a person to grant him a lease, and the money be paid, though some of the members were wanting at the time of the agreement, probably a court of equity would carry it into execution (*c*).

ALL corporations aggregate, were, at common law, bound by a fine, levied with proclamations, according to the statute (*d*); for though the words seem to bar only natural persons and their heirs, because they do not save any right but to men and their heirs, and no mention is made of any corporation, or of successors, yet it was the intention of the makers of the act, that it should be extended to such corporations, and to their successors, as have of themselves an absolute estate, and authority to dispose of their possessions, as mayor and commonalty, dean and chapter, colleges, and the like (*e*). But since

(*a*) Jenk. 10. Vid. ante, page 33.

(*b*) Dict. pr. Ld. Hardwicke. 2 Atk. 45.

(*c*) Dict. pr. Ld. Hardwicke. 3 Atk. 478.

(*d*) 4 H. 7, c. 24.

(*e*) Plow. 375, 537, 538.

the

the statute of 13 El. c. 10, it has been adjudged, that colleges are not barred by fine and non-claim; because it would have been of no effect to have prohibited them to bar the right of their colleges by conveyances made by the master and fellows themselves, and to have left them power by their permission or sufferance, and non-claim, to bar it (a). Deans and chapters being within the statute of Elizabeth, the law with respect to them, on this point, must be the same as with respect to colleges.

BUT at common law, and much more since the restraining statutes, though a bishop, dean, parson, vicar, or prebendary do not make their entry or claim, nor bring their action to avoid a fine, within five years, but are remiss and negligent for that time, yet their successors shall not be bound for ever, because they have no absolute estate in their possessions (b).

SECTION IV.

To what Burthens Corporations are subject.

CORPORATIONS are subject to the same burthens, in the character of *owners* or *occupiers* of houses or lands, to which individuals are subject in the same character.

THUS, Lord Coke commenting on the word *inhabitants*, in the statute (c) made in the time of Henry the eighth for the repair of bridges, says that every corporation and body politic, residing in any county, riding, city, or town corporate, or having lands or tenements in any shire, riding,

(a) Magdalen College case, 11 Co. 78. b. Vid. ante, page 122, &c.

(b) Plow. 375, 538. 10 Co. 69 b. 71 a. Vid. ante, p. 108, 109, 122, &c.

(c) 22 H. 8, c. 5.

city,

city, or town corporate, *quæ propriis manibus et sumptibus possident et habent*, are inhabitants within the purview of the statute (*a*).

So, if any general duty be imposed by parliament in respect to houses and lands; corporations are liable in respect to *their* houses or lands in the same manner as a private person: thus, where a duty was imposed on hearths (*b*), and officers with a constable empowered to distrain, if the party refused to pay the duty by the space of an hour; and by a special verdict in an action of trespass, brought by the Ironmonger's Company, it was found that the company were seised in fee of five messuages, in which were thirty-five hearths; that the company had never finished the messuages, but that from the time of building they had stood unoccupied: that the defendants, being lawfully authorised, had demanded the duty of the company, which they refused to pay, on which the defendants took the distress and kept it till the company paid the duty: the general question made was, whether the *owner* of a new house, uninhabited from the time of the building, ought to pay this duty? But no question was made, whether as a corporation they were liable to the tax; it was taken for granted, that if *any* owner would have been liable, *they* were so too (*c*).

ON the same principle, there is no doubt but they are subject to the land tax. So, a corporation seised in fee of lands for their own profit, are, within the meaning of 43 El. c. 2. inhabitants or occupiers of such lands, and in respect of them, liable in their corporate capacity to be rated to the poor (*d*).

(*a*) 2 Inst. 703.

(*b*) Vid. 16 Car. 2, c. 3.

(*c*) Ironmonger's Company v. Naylor. 2 Mod. 185. T. Jones, 85. 1 Vent. 311. 3 Keb. 719, cited Cowp. 84.

(*d*) Rex v. Gardner. Cowp. 79.

So,

So, they are subject to similar charges imposed by the common law: thus, a corporation are rateable to the repairs of a church in respect of their corporate lands (*a*).

So, they may be bound exclusively to the repair of a highway, or of a bridge, or of a creek, by reason of the tenure of certain lands; so, they may be compelled to do so, by a *general* prescription that they have been *used* to do so from time immemorial, without an allegation that they used to do so, in respect of the tenure of certain lands, or for any other consideration, because a corporation aggregate, in judgment of law, never dying, if they were ever bound to such a duty, they must continue to be so; neither is it any plea that they have done it out of charity; for it shall be presumed they were bound to it for some good consideration (*b*).

(*a*) *Thursfield v. Jones*. Sir T. Jones, 187.

(*b*) *Vid.* 2 *Inst.* 700. 1 *Hawk.* Leach. 369, 443. *Cowp.* 87. *Mayor of Lynn v. Turner*.

CHAP. III.

OF CORPORATIONS CONSIDERED IN RESPECT TO THEIR
INTERNAL CONSTITUTION.

CORPORATIONS having been established at different periods, and with different views, the particular constitution of each depends on the provisions of the charter, by which it was erected, or on the prescriptive usage which time has imperceptibly introduced. The business of this chapter, therefore, will be, not to describe the precise constitution of every corporation in the kingdom, or that of any one in particular, but to consider, under distinct heads, those subjects which relate to the constitution of any corporation whatever.

SECTION I.

Of the different ranks of persons, members of Corporations.

IN corporations consisting of a small number of members without a head, there is usually no distinction of rank, but all are equal in rights, privileges, and authority (a). In small corporations, too, which have a head, such as dean and chapter, there is generally no other distinction of

(a) Vid. ante, page 37.

rank,

rank, but that between the head and the body at large, all the members of the latter being equal and co-ordinate.

IN corporations whose members are more numerous, *if numerous* and whose concerns are more complicated, there are usually *of necessity* some select bodies, which necessarily gives rise to a distinction and gradation of ranks. Thus, in corporate towns, the common freemen, forming the great mass of the corporation, may be said to compose one rank, the livery in the city of London another, and in the greater number of cities and towns, the common councilmen, and aldermen, or some equivalent descriptions, two others.—The common freemen have, in general, only the right of exercising their trade within the town, and enjoying the common privileges and franchises of the corporation, though sometimes the right of voting in elections: the livery are a select body, whose principal privilege is that of forming some of the electoral assemblies of the corporation: the common councilmen have a more immediate concern in the government, sometimes forming a constituent part of the legislative body, which is the case in London, and sometimes only a part of the general executive council: the aldermen are still more select, forming what may be called the privy council of the corporation, and in general also a part of the common council. *Common Councilmen*

A FREEMAN of a town differs from an inhabitant in this, that a freeman is a member of the corporation, and may or may not be an inhabitant of the town, and an inhabitant is so called from the circumstance of local residence, and may or may not be a member of the corporation.

THE terms citizen and burghers are generally synonymous with freeman; but sometimes "burghers" is the designation of a member of a select body, distinct from the

Y

common

THOUGH the term "common councilman," and other equivalent terms, in general mean a member of a distinct rank in a corporate town, yet the common councilmen do not often, if in any case, compose a separate assembly; but the assembly which is called the common council, beside the common councilmen properly so called, includes the mayor and aldermen, or others of an equivalent denomination.

*Powers and
duties of the
Mayor or
other head
officer*

THE powers and duties of the mayor, or other head officer of a corporation, depend in general on the provisions of the charters, or prescriptive usage of the corporation, or the express provisions of an act of parliament.—It is commonly one of his duties, as well as of his particular privileges, to preside at the corporate assemblies: but whether, in a corporation by charter, this be necessarily incident to his office, where no express provision is made for that purpose, has been made a question, though I do not find it any where solemnly determined.—In the course of argument, it has indeed been asserted, "that it is not essential or incident to the office of mayor by the common law, that the meetings of the body corporate should be in consequence of his summons, or that he should be present at such meetings; that if the charter expressly direct that all meetings shall be appointed by the summons of the mayor, and that he shall preside at them, then, indeed, there can be no doubt, that all meetings without these requisites are illegal, and all proceedings at them void: but that such requisites must be imposed by express words, or appear by necessary implication: that if, by a clause in a charter, it be provided, that, for the choice of an alderman on the death of any of the body, the mayor and the rest of the aldermen, or the major part of them, shall assemble, of this major part it is not necessary that the

mayor

mayor be one, and that his summons is not requisite to render their assembling valid; that it is, indeed, his *duty*, as head of the corporation, both to summon the rest of the body and to be present and preside at the meeting; but that if he refuse to summon them, or to attend, the others may proceed without him: that, if it be objected that they may not agree on the *time* of such meeting, it may be answered, that whoever can carry an election when they are met, shall also decide on the time of meeting, if there be any difference; and that this agrees with the rule of law in similar cases: that, in a commission of the peace to try felonies, and to hold a court of quarter sessions, those that constitute the court, and are to exercise the power, must issue the summons: that if twenty justices of the peace, not having one of the *quorum* among them, should issue a summons for a general quarter sessions, it would be void, because twenty justices of the peace, among whom there is not one of the *quorum*, cannot hold such a sessions; but that if one of them be of the *quorum*, the summons will be good" (a). With respect to the supposed case of the clause, "that the mayor and the rest of the aldermen, or the major part of them, shall assemble," and the comparison between it and the *quorum* clause, in the commission of the peace, it may be observed, that they do not affect the question under consideration; because, by the natural and obvious meaning of the words of the supposed clause, the mayor is not necessarily one of "the major part of the mayor and aldermen," and therefore, it is an express provision, "that so many aldermen as are equal in number to 'the major part of mayor and aldermen,' may hold the meeting without the mayor."

(a) Dict. per Sir Rob. Atkins, 3 Mod. 14, in Rex v. Sir Rob. Atkins, and others.

THERE is one case, in which the judgment seems to imply, that where no provision is made by the charter, this power is *not* necessarily incident to the office of mayor. "If a corporation," it is said, "be created of a mayor and eight aldermen, with a clause in the charter, that if any of the aldermen die or be removed, the mayor and residue of the aldermen, within eight days after the death or removal, may elect another in his place; and in such a case the mayor, at the time of the death of an alderman, be absent till *after* the eight days, and the aldermen, *within* the eight days, come to the deputy, and request him to assemble them, for the purpose of electing another within the eight days, and he refuse, and, on this, the greater number of the aldermen assemble themselves, without the mayor and his deputy, and elect an alderman, THIS IS A VOID ELECTION, for the mayor ought to be present, *by the express words of the charter (a)*. From this it seems, that if the mayor's presence had not been expressly required, the meeting might have been held without his summons, and the election made without his presence.

*Deputy
Mayor
recognized*

IN another case, it is said, "that the bailiffs, being the head of a corporation, nothing can be done without their presence; and that this is so, *though no special provision be made for it by the charter*."—This, however, was only said incidentally, for in the case before the court, their presence was expressly required (*b*).

IN another case, the chief Justice (*c*) is reported to have said, that whenever any business is to be done by a particular part only of a corporation, the presence of the mayor

(a) Hicks v. borough of Launceston, 1 Rol. Abr. 514, cited 3 Mod. 15.

(b) 2 Lord Raym. 1237. Serjeant Whitaker's case in Regina v. Ballivos, Burgeses, et Communitatem villæ de Gippo.

(c) Lord Hardwicke.

is

is not requisite at the assembly: but that wherever the business is to be done by the whole corporation, the presence of the mayor is absolutely necessary (a).

IN the case of a corporation by prescription, this question can hardly ever arise, because there must necessarily be some usage, one way or the other, to shew what is the power and duty of the mayor in this respect in every such particular corporation, independently of any general principle.

IN every other respect, however, it may be safely asserted, *Mayor &c. is* that the mayor, as well as the aldermen and other select *usually provided* bodies, have no other powers, authorities, or privileges, *by the Charter* than those which they possess by charter, prescription, or act of parliament.

IF the King, by his charter, incorporate a town by the name of Mayor and twelve Aldermen, they will not have any power as conservators or justices of the peace, without an express clause for that purpose: they can neither fine nor imprison, and if they assume such authority, it will be an usurpation (b); and it is for this reason that charters usually add these powers by express words, and make the mayor or aldermen justices of peace or of gaol delivery; but they act in these capacities, not because they are mayor or aldermen, but because by the charter they are expressly annexed to their respective offices; and the union of distinct powers in one person, does not confound his several and distinct capacities (c).

ON the death of the mayor, or during the vacation of the *Death of the* office, the corporation can do no corporate act, but that of *Mayor* choosing a new mayor (d).

(a) Rex v. Duffin et al'. 2 Barnard, 370.

(b) 3 Mod. 12. 2 Ld. Raym. 1030.

(c) Vid. ff. 27 H. 8, c. 24, f. 6.

(d) 21 Ed. 4, 58 a.

IN the universities, every matriculated student (*a*) is a member of the general corporation, intitled to enjoy its privileges and immunities, and subject to its government; bearing nearly the same relation to the corporate body, that a common freeman does to the corporation of a town: in Oxford, the masters regents (*b*) form another rank, and, together with the chancellor or vice chancellor, compose the congregation; which is a kind of administrative or executive council, and also an electoral assembly: the masters non-regents form another rank, and, together with those who compose the congregation, form the convocation, which is a legislative assembly, as well as administrative and electoral (*c*).

IN the university of Cambridge there are also the two distinct ranks of regents and non-regents; but there are not, as in Oxford, two distinct assemblies, possessing distinct powers for different purposes: there is only one assembly, composed

(*a*) By student, here, is not meant merely a scholar on the foundation of any college, but every one who is a student in the common acceptation of the word, whether he be on the foundation or not.

(*b*) Of the masters regents there are two classes, *magistri necessario regentes*, and *magistri regentes ad placitum*; the first are all masters of arts and doctors in the three learned professions, for the first two years after their admission to these degrees respectively, who have not received a dispensation for the second year of their regency: the second are those who have at any time been *necessario regentes*, and have ceased to be so: with respect to the congregation, the distinction between the two classes is this; that the first are bound to be present under a penalty, the second attend at their pleasure, or when specially required.

(*c*) The non-regents, in the house of convocation, are the same persons who, in the house of congregation, are regentes *ad placitum*: they are bound to attend the former under a penalty, as well as the *necessario regentes*.

Beside

composed of regents and non-regents, who meet at the same time, and in the same place, under the name of congregation or senate: but these two classes form two distinct branches of the same assembly, under the names of the House of Regents and the House of Non-Regents, and a majority in each must concur in every act (*a*).

IN the corporate companies of towns, there are generally two ranks, the common freemen of the company, and some select body who form the governing part: there is likewise an intermediate rank, as the livery in several of the companies of London: the common freemen have an inchoate right to have the freedom of the city at large; and from them the livery are nominated: the livery are the representatives of the company in matters concerning the city; they elect the members of parliament and compose the common halls; from them, too, the court of assistants is taken.

IN the colleges of the universities there are, in general, beside the head of the college, two classes, the scholars and the fellows, each class having some rights and privileges

Beside the convocation and congregation, there is another assembly, which is held every week, composed of the vice-chancellor or his deputy, the proctors and the heads of houses, and whose business is to deliberate on the protection of the privileges and liberties of the university, and to inquire into the observation of its statutes.—I consider it, therefore, rather as a statutable committee, than a distinct rank.

(*a*) In Cambridge, the regents are all those who have not been masters of arts five years; the non-regents, all those who have been masters upwards of five years.—There is likewise another select body called the *caput*, who must approve of every proposition, there called a *grace*, before it can be brought before the senate.—The members do not form a distinct rank, but are rather a standing committee, formed out of the two other ranks of regents and non-regents.—Their functions are similar to those of the lords of articles in the ancient Scotch parliament.

distinct

distinct from the other; and where there are either only scholars or only fellows, or where the terms "scholars" and "fellows" are synonymous, which is sometimes the case, there is generally a distinction between junior and senior fellows, or junior and senior scholars.—Independent members, usually called fellow commoners, are mere boarders, and have no corporate rights (a).

SECTION II.

Of the qualifications requisite for members or officers of Corporations.

THE qualifications requisite for members or officers of corporations, depend in general on the constitution, usage, or bye laws of each particular corporation: to intitle a man to be admitted to the freedom of a corporate town, the qualifications most commonly required are, that the person claiming to be admitted, should either be the son of a freeman, or have served an apprenticeship to a freeman; in some cases, to have married a freeman's daughter (b) is a sufficient title: and in many the freedom may be obtained by purchase. In the case of a title by apprenticeship, it is in many places expressly required, that the master of the apprentice should have been resident within the town during the time of the apprenticeship, and the reason of the thing seems to require this residence, without any express provision; as the privilege granted to the apprentice is in respect of the benefit which the town may receive

(a) Cowp. 319.

(b) This I understand is the case at Bristol.
from

from his service (a). It frequently happens too, that where the party claims by apprenticeship, birth, or marriage, some conditions are superadded by particular bye laws, without which, if they be reasonable, he cannot compel his admission.

A QUAKER, who has served an apprenticeship of seven years, is intitled to be admitted to the freedom of a corporation as well as any other person, and his solemn affirmation, by virtue of 7 and 8 W. 3, c. 34, is equivalent to taking the usual oaths; and that clause of the statute which provides that no Quaker, by virtue of that act, shall have any office or place of profit in the government, does not extend to the freedom of the corporation (b).

THE question whether an infant can be admitted to the mere freedom of a corporation, where there is no express provision on the subject, does not seem to have been ever agitated; but, as it has been questioned, whether he can be appointed to a corporate office, and as the freedom of the corporation is generally a precedent qualification to such appointment, it seems that he *may* be a freeman.

WE have seen (c), that where an infant is *actually* mayor, or other chief officer of the corporation, this shall not avoid the acts of the corporation with respect to strangers; because these acts are not the acts of the particular persons, but of the body corporate (d); but this does not affect the question with respect to the *members* of the corporation.

THE first case we meet with on this subject, is that of the King and White, in the 7th of George the second, which arose on a motion for an information against the defendant, in the nature of *quo warranto*, to shew by what

(a) Vid. *Rex v. Marshal*, 2 Term Rep. 2, 3.

(b) Carth. 448. 1 Ld. Raym. 337. 5 Mod. 402. *Rex v. Morris*.

(c) Ante, page 312. (d) Vid. *Cowp*. 225.

authority

authority he exercised the office of burghs of the borough of Calne: and the question was, whether, being an infant at the time of his election, though he was not sworn, and never acted before he came of age, he was capable of exercising the office? Several cases were mentioned of the capacity of infants to take the grant of an office, either in possession or reversion, and the case of a corporation being bound by a deed, notwithstanding the infancy of the mayor, was relied on as an authority, that an infant was eligible to that office, from whence it was argued, that he might be a burghs.—The court said, they thought, “if an infant was not fit to manage for himself, he was improper to be a mayor for the public:” but as it was a matter of law not settled, the rule was made absolute to have it solemnly determined (a); but what was the event does not appear.

THE only other case we find on this subject, is that of the King and Carter, in the 15th of George the third, which was an information, in the nature of *quo warranto*, against the defendant, to shew by what authority he claimed to exercise the office of burghs of the borough of Portsmouth (b).—The information alleged, and it was admitted in the plea, that this office and franchise of a burghs had been, and still was, a place, *office*, and *franchise*, of great *trust* and *pre-eminence* within the said borough, *touching the rule and government of the said borough, and the administration of public justice*. The plea then set forth, that within the said borough there had been, and then of right ought to be, an *indefinite* number of burghesses. That by a charter of Charles the first (c), the mayor, aldermen, and burghesses, were incorporated under the name of Mayor, Aldermen,

(a) Rex v. White, B. R. H. 8.

(b) Rex v. Carter. Cowp. 220.

(c) 3 Car. 1.

and

and Burgeſſes of the borough of Portſmouth: that the charter nominated the firſt mayor, and twelve perſons, to be aldermen, and then granted “that it ſhould and might be lawful for the mayor and aldermen, &c. or the major part of them, from time to time, and at all times then after for ever, when and as often as it ſhould appear to them to be *fit and neceſſary*, to name ſo many and ſuch perſons to be burgeſſes as *they ſhould pleaſe*, and to the burgeſſes ſo choſen, to adminiſter an oath for their faithfully executing the office of burgeſſes. The plea further ſtated, that this charter was accepted by the then mayor and burgeſſes of the borough, and that the defendant, on the 18th of May, 1751, was *eleſted* by the *major* part of the mayor and aldermen; and that *before* he took upon himſelf to exerciſe the place, office, and franchise of ſuch burgeſſes, he was duly, and according to the uſage of the ſaid borough, ſworn into the ſaid office.

THE replication ſet forth other parts of the charter, and then ſtated, that the defendant, at the time of his *ſuppoſed* election to be a burgeſſes, was of the age of five years and ten months, and no more.—The rejoinder ſtated, that at the time the defendant was *ſworn* into the place, office, and franchise of one of the burgeſſes, &c. he was of the full age of twenty-one years: and to this the plaintiff demurred.

AMONG other arguments againſt the right of the defendant, it was obſerved, that the inconvenience and miſchief of admitting infants of ſuch an age, would be fatal to almoſt all the corporations of the kingdom; that every borough would become a monopoly, and the inſtant an alderman’s ſon had breath he would be a burgeſſes, and no others would be admitted; that if one infant might be a burgeſſes, others might; ſo that all, or the greater part of

*Case of
Infants*

the burgesses, might be infants in their cradles, by which means one integral part of the body would be at least suspended, if not totally lost : that the King's charter would be perverted, and the power, which he had delegated to many, would be confined to the hands of a few : that many corporations would be wholly dissolved ; for that no function, in which the concurrence of burgesses was necessary, could be exercised till some of this body of childhood had attained the age of twenty-one years : that in the case of this borough, neither mayor nor justices, during the infancy of the burgesses, could be elected : that the inconvenience of suspending the powers of corporations had been so fully seen by the counsel for the defendant, that on shewing cause against the information, it was thought necessary by some to contend, that there was no reason why the burgesses should not be admitted and act during their infancy : but to this it was contended, it was a sufficient answer ; " that they had neither discretion to act, nor capacity to take oaths, both which are required by law."

To this it was answered in favour of the defendant, that an infant was *eligible* to the office of burgess, though he could not act till of full age. That the crown might, in the original grant, have nominated an infant to be mayor or burgess ; and if so, those to whom the right of the crown was delegated had the same power. But, on the supposition that an oath was necessary, it was contended, that an infant who is chosen a burgess, is not obliged to be instantly sworn into the office ; and that it is sufficient if he be of age at the time he takes upon himself to act ; in many corporations, it was said, persons were burgesses by birth (a) ; that titles by servitude or marriage of a burgess's

(a) This cannot be in the sense in which "burgess" is taken at Portsmouth, where it evidently means a member of the select body in which the government of the place is vested.

daughter

daughter were not unfrequent before the age of twenty-one; and that in some it was customary to swear them in at the age of twenty, which was the case at Newcastle: that no principle of law was more clear, than that an *inchoate* right to be a burges, *might* vest in an infant, and where such right did vest, a mandamus would lie to swear him in at the legal age of twenty-one, or such other time as custom might have established: that no authority had been cited to the contrary; that all the objections which had been made, were founded upon matter subsequent to the act of their being elected; but that these were not sufficient to bar the right of an infant, who had by law a capacity to take any thing which does not affect the commonwealth. In this case it was apparent on the record, that there could be no necessity for his acting as soon as he was elected; for the number of burgeses was by the charter made indefinite; and if the number of infants should be too great, a sufficient number of persons, qualified to hold the necessary offices of the corporation, might at any time be added; that consequently no inconvenience could arise from infants being elected, and as there was no law against it, the defendant was well intitled.

THE court observed, that this was a corporation which derived its constitution from the charter of the King, and that their whole power arose from it: it followed, therefore, that they were bound to act according to the powers and directions which it contained: that there certainly were such *inchoate* rights as had been mentioned, to be completed when the parties came of age, and the question was, whether the King had by this charter given the corporation a power to *grant* inchoate rights to infants; it did not depend on the capacity or incapacity of infants to take; if the King had not given that power, there was an
end

end of the defendant's title. The words of the present charter were, "that they might, as often as it should appear to them to be *fit* and *necessary*, elect so many and *such* persons to be burgesses as they should please, and to such persons so chosen, should *administer an oath* faithfully to execute the office;" this supposed the mayor and aldermen, &c. to exercise their *judgment* in electing persons to be burgesses; it was meant that their power should be exercised when it was *fit* and *necessary* for the present purposes of the corporation, and that the persons chosen should be such as were capable of taking upon themselves the immediate execution of the office; that the *election* and *swearing* were clearly intended to be at one and the same time, and that till sworn the persons chosen were not *complete* burgesses; but this was not an *election*, but a contingent *nomination*, which, perhaps, might never have taken effect; because the party might not have lived; other persons than those who elected him, might, at such a distance as sixteen years, have to swear him in; disputes might arise about the identity of his person, and many other inconveniences might ensue. —On these grounds judgment was given against the defendant.

FROM the principles on which this case was decided, it may fairly be concluded, that where neither the provisions of the charter, nor the usage of the corporation, *expressly* authorise the election of an infant into a corporate office, he is not capable of being elected; for, in this case, there was no *negative* provision on the subject.

THAT residence within a corporate town is not necessarily a previous qualification for the freedom of the corporation, and that the freedom, when once obtained, is not forfeited by non-residence, every day's experience proves: but by the constitution of the corporation, whether by prescription,

An infant is incapable of being elected a burgess.

prescription, or the *express* words of the charter, residence may be requisite as a previous qualification (*a*): and, where that is the case, the Court of King's Bench will grant leave to file an information, in the nature of *quo warranto*, against the governing part of the corporation, for admitting persons non-resident. This was done in the case of the mayor and aldermen of Hertford, after several motions and debates at the bar; and in one book (*b*), Holt is reported to have said on that occasion, "that if the defendants were found guilty, they should be fined;" from which we might be led to suppose, either, that he thought they *could* have no power to admit such persons to the freedom of the town; or that in this particular case it was manifestly contrary to the constitution. But, in another book (*c*), we are told, "that the motion was pretended to be on the behalf of the freemen, on whose rights the exercise of this power was alleged to be an incroachment, and that an information was granted, because it was a question of right, and there was no other way to try it, nor to redress the parties concerned:" from which it would seem that it was doubtful, whether in this *particular* case, the governing part of the corporation actually possessed this power; and this is confirmed by what was done in a subsequent stage of the case, and the reason given for what was then done: the process which had issued was quashed, on the ground that the prosecutor had not given security for costs, which was thought necessary, because the information might be vexatious (*d*).

In a case long subsequent to this (*e*), an application was made for leave to file an information, in the nature of *quo*

(*a*) Vid. 1 Barnardiston, K. B. 138.

(*b*) 1 Ld. Raym. 426. (*c*) 1 Salk. 374.

(*d*) 1 Salk. 376. Carth. 503. This case was in the 10 W. 3.

(*e*) 2 G. 2. Anon. 1 Barnard, 137, 138.

warranto, against several persons for acting as freemen of the city of Gloucester, not having been resident there at the time of their election: the point on which this question turned was, whether the acting part of the corporation could make honorary freemen. In support of the application, it was contended, that no corporation could do this, unless they had a prescription, or a clause in their charter to support them in it. It was true, indeed, that this had been sometimes done in compliment to noblemen and others of the first distinction; but that was only by connivance, and could not warrant what had been done in the present case, in which one hundred and nineteen strangers had been admitted to the freedom of the city at once: in this corporation, too, the freemen enjoyed very important privileges, and among the rest, that of being toll-free throughout the kingdom; that by the same authority by which they had made these one hundred and nineteen freemen, they might make every person in the kingdom free, and thus take from the King a considerable part of his revenue; if they claimed this authority by prescription, the charter of Charles the second, which they had accepted, had clearly taken it from them, by incorporating them by the name of *cives residentes et inhabitantes*. But the court were of opinion, that every corporation might make free of it what persons they would; that this was a power incident to corporations of common right, unless there was a prescription, or *express* words in the charter to the contrary; and that in this particular case the charter did not take away this power, for that all charters of incorporation were in the same form.

Residence, or a WHERE a man is already a member of a corporation,
member of the residence is not a precedent qualification to his being chosen
corporation to a corporate office, unless expressly required by the constitution

stitution of the borough (a); but though residence be not required at the time of the election, an absent person must not be chosen collusively for any sinister purpose, and if he be, the election will be absolutely void. The corporation of Cambridge, on the charter day for the election of a mayor, elected a person who was an officer in the army just gone to North America, and without the least probability of his returning till long after the year would be expired: The electors were sufficiently apprized of the fact, at the time of the election, and soon afterwards had express notice given them of it, but refused to proceed to a new election; and it appeared they had elected this absentee for the purpose that the preceding mayor might hold over, which it was pretended he might do by ancient usage, and by virtue of a charter of Charles the second. The court of King's Bench held that this was merely a colour to avoid any election at all: that the electors had chosen this person because they knew it was impossible for him to execute the office, and that the election was absolutely void (a).

By the provisions of a charter, residence may be required as a previous qualification for some offices and not for others. By a charter granted by Charles the first to the city of Exeter, it was provided, that for the future the COMMON COUNCIL should be elected *de discretioribus civibus et inhabitantibus civitatis prædictæ*; and further, if any freeman of the city should refuse to execute any of the offices within the city, he should be grievously punished. A person being a freeman, but not an inhabitant, was elected to the office of common councilman: an application being

(a) Cowp. 539.

(b) Rex v. mayor, bailiffs, and burgeses of Cambridge, 4 Bur. 2008.

made for leave to file an information against him in the nature of quo warranto, the question was, whether he was qualified to be chosen.—In favour of the defendant it was contended, that he was within the general rule, “that where the inhabitants of a town are incorporated, and no provision made, out of whom the officers of the corporation shall be elected, they may be elected out of the freemen at large, as well as out of the inhabitants.” Some difficulty, it was confessed, arose from the words of the charter, which seemed to make inhabitancy a necessary qualification for a common councilman: but as to this, it was contended, that the words might be construed as a direction, pointing out what would, in general, be most proper, rather than as a restriction, rendering previous inhabitancy absolutely necessary; and the subsequent clause of the charter, by which “all the freemen, inhabitants or not inhabitants; were to be punished in case they refused to execute the offices within the corporation,” justified this construction. The court observed, that the charter had provided expressly, in many other instances, that elections should be out of the freemen at large, as well as those inhabiting within the city; that the subsequent clause might be construed, *reddendo singula singulis*, that the freemen at large should be punished for refusing those offices of which they were capable, and that the freemen inhabitants should be punished for refusing to execute those for which they alone were qualified: the words *civibus et inhabitantibus*, therefore, they thought, required the concurrence of both qualifications in one person (a).

WHEN inhabitancy is required as a previous qualification, a question may sometimes be raised, as to what circumstances shall constitute a sufficient inhabitancy for that

(a) Rex v. Heath. 1 Barnard, 416.

purpose.

purpose.—A rule was granted against one Pool, calling on him to shew cause why an information should not go against him for exercising the office of capital burgefs in the town of New Radnor, not having been an inhabitant at the time of his election? In shewing cause against this rule, it was urged, that the clause in the charter, relating to this subject, only declared, that no capital burgefs should exercise his office any longer than he was an inhabitant within the borough, which was not an exprefs declaration that the candidate should be an inhabitant at the time of his election: that the present defendant had, in fact, come with his family, and inhabited in the town, *before* the application was made for the present rule; and that the court would now determine this point in his favour, without putting him to the expence of a special verdict: in support of which suggestion the case of the town of Pomfret was mentioned, which was said to be a case of more difficulty than the present. There the charter required, that no person should be mayor who was not an inhabitant at the time of the election. *A person came and lodged at an inn for a month*, and the court determined *that* to be a sufficient inhabitancy to qualify him for such election, and refused the information. This seems, however, not to have been an accurate statement of that case; for in another place of the same book (a) it is cited in these terms; “The Chief Justice said, that in the case of Sir William Lowther the court refused granting the information against him for exercising an office in the borough of Pomfret, though it appeared that he took a house in the borough to qualify himself only the day before the election.”—In the case of the town of New Radnor, the court made the rule absolute, because they thought this a matter proper to be

(a) 2 Barnard, 439.

determined in a more solemn way than by motion.—I apprehend, however, that in this case, the difficulty was not about the *fact* of previous inhabitancy, because it does not seem to have been pretended by the defendant, but whether the terms of the charter actually required it (*a*).

ON an issue in an information, in the nature of *quo warranto*, whether the defendant was an inhabitant at the time of his election to the office of capital burghs of the borough of Orford; It was proved that he was born in the town, that he served an apprenticeship with his father, and lived a journeyman with him ever since: in opposition to this evidence, it was contended, that to make him an inhabitant he ought to have been an housekeeper; and the judge declared his opinion to be, that to make him an inhabitant within the intent of the charter, he ought not only to have been an housekeeper, but to have paid scot and lot, and to have been rated and paid taxes to the poor (*b*).

IN another case arising in the same borough of Orford, where it appeared that the defendant chiefly resided in a neighbouring village, but that he occupied a house within the borough, of which part was let out in lodgings, and the rest was in his own hands; that he was rated for this house and was churchwarden that year: this was held a sufficient inhabitancy (*c*).

AFTER the restoration of Charles the second, some apprehensions were entertained, that questions might arise concerning the validity of elections of magistrates, and other officers and members in corporations, which might have been irregularly made during the time of the civil war: in order, therefore, to secure the peace of corpora-

(*a*) *Rex v. Pool.* 2 Barnard, 93, 94.

(*b*) *Id.* 408. *Rex v. Mallet and others.*

(*c*) *Rex v. Scolden and others.* 2 Barnard, 439.

tions,

tions, and, if possible, to perpetuate the succession in the hands of persons well affected to his Majesty and the established government, a statute (a) was made, empowering his Majesty to appoint commissioners to enquire into the state of all the corporations of the kingdom: by this act, every person who on the 24th of December, 1661, should happen to be mayor, alderman, recorder, bailiff, town clerk, common councilman, and other persons then bearing any office of magistracy, or place of trust, or other employment relating to the *government* of cities, corporations, and boroughs, the Cinque Ports and their members, and other port towns, were required, at any time before the 25th of March, 1663, at the desire of the commissioners, or of any three of them, to take the oaths of supremacy and allegiance, together with another oath prescribed in the act (b), and at the same time to subscribe a declaration against the solemn league and covenant (c); and the office and place of every such mayor or other officer who should refuse to take the said oaths, and subscribe the said declaration within the time prefixed, were declared to be to all intents and purposes void, as if the person refusing were

(a) 13 Car. 2, st. 2. c. 1, of which see the preamble. This is what is commonly called the Corporation Act. The act which is usually coupled with it, under the name of the Test Act, is 25 Car. 2. c. 2. *Corporation Act. Test Act.*

(b) I, A. B. do declare and believe, that it is not lawful, upon any pretence whatsoever, to take arms against the King: and that I do abhor the traitorous position of taking arms by his authority against his person, or against those that are commissioned by him: so help me God.

(c) I, A. B. do declare, that I hold that there lies no obligation upon me or any other person, from the oath commonly called the Solemn League and Covenant; and that the same was in itself an unlawful oath, and imposed upon the subjects of this realm, against the known laws and liberties of the kingdom.

actually dead.—The commissioners, or any three of them, during the time of their commission, which was appointed to expire on the 25th of March, 1663, were authorised to tender the oaths and declaration to persons coming within the description of the act—and they, or five of them, had full power, by warrant under their hands and seals, to displace such persons as they, or the major part of them then present, should deem it expedient for the public safety to have removed, although such persons should have taken and subscribed, or should be willing to take and subscribe, the said oaths and declaration.—The commissioners, or any five or more of them, were further vested with power to restore such persons as might have been illegally removed, and to put into the offices or places which should, in consequence of the powers of the commissioners having been put in execution, have become void, such persons members, or who had been members of the respective cities, &c. as they should think fit; who, on taking the oaths and subscribing the declaration, should hold and enjoy the said places and offices, as if they had been duly elected according to the charters and former usages of the respective cities and other places.

AFTER the expiration of the commission, the three oaths and declaration were directed to be tendered to the several persons before described, by those persons respectively, who, by the charter or usages of the respective cities or other places, ought to administer the oath for duly executing the respective offices—and in default of such persons, by two justices of the peace, within the said cities or other places, for the time being, if there should be any such, or otherwise by two justices of the peace, for the time being, of the respective counties within which the said cities or other places were.

SOON

Soon after this act, a burghs of Nottingham, being removed for not having taken the oath, and subscribed the declaration, applied for a *mandamus* to be restored, on the ground that a "burghs" not being mentioned, was not within the meaning of the act, being no way *interested* in the government: but it appearing in the return, that the burghs were part of the common council, and *had a voice in the election of parliament men*, a peremptory *mandamus* was refused (*a*).

BUT the oath prescribed by this act having been for a long time omitted to be taken, and the declaration to be subscribed, and considerable doubts having been entertained, in consequence of that omission, whether there remained any obligation on officers of corporations to subscribe this declaration (*b*), the statute of 5 G. c. 6. confirms the several persons in their places and offices, notwithstanding such omission, and entirely repeals so much of the act of Charles as relates to the oath and declaration there recited.—So that, at present, any magistrate or officer in a corporation, is obliged only to take the oaths of supremacy, allegiance, and abjuration (*c*),
beside

(*a*) 1 Kcb. 777. (*b*) Vid. *Rex v. mayor of Taunton*. 1 Str. 120.

(*c*) In none of the acts; 12 and 13 W. 3, c. 2. 13 and 14 W. 3, c. 6. 1 Ann. st. 1, c. 2. 1 G. 1, st. 2, c. 13, which prescribe the oath of abjuration, is there any express mention of officers in corporations; but they seem to be included in the general description of the latter, s. 22, which provides "that all persons whatsoever, who by virtue of any law now in being, are or would be obliged, if this act was not had or made, to receive the sacrament according to the usage of the church of England, and to make and subscribe the declaration against transubstantiation, or either of them, on any occasion whatsoever, shall continue obliged, in all such cases, to receive the said sacrament, and make and subscribe the said declaration, together with the oaths appointed by this act (which are
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beside the customary oaths relative to his place or office (a).

By the same statute of Charles the second, it is enacted, that after the expiration of the commission, "no person shall be placed, elected, or chosen to any office before described, who shall not have, within one year next before such election or choice, taken the sacrament of the Lord's Supper, according to the rites of the church of England—and in default thereof, every such placing, election, and choice is declared to be void."

By the statute before mentioned of 5 G. c. 6. persons who, before that statute, ought to have taken the sacrament within the year before their election, but had omitted so to do, are indemnified and discharged from all incapacities, disabilities, forfeitures, and penalties, arising from such omission; and all their acts, and the acts not then avoided of any who had been members of any corporation, are declared to be as good and effectual, as if all and every such person and persons had taken the sacrament in due manner.—And it is enacted that "no person or persons who shall be thereafter placed, elected, or chosen, in or to any the offices aforesaid, shall be removed by the corporation, or otherwise prosecuted for or by reason of such omission; and that no incapacity, disability, forfeiture, or penalty, shall be incurred by reason of the same: UNLESS such person be so removed, or such prosecution be commenced, within SIX MONTHS after such person's being placed or elected into

the oaths of allegiance, supremacy, and abjuration), in such manner, and under such penalties in case of neglect, as is required by any former law. In point of fact, the oath of abjuration is taken by the officers of the city of London, and, I believe, by those of other corporate cities and towns.

(a) Vid. 1 W. and M. ft. 1, c. 8, s. 14. 1 W. and M. ft. 2, c. 2, s. 3.
his

his respective office; and unless, in case of a prosecution, the same be carried on without wilful delay.

By a statute (*a*) made in the first year of William and Mary, it is enacted, that certain penal statutes (*b*) enjoining uniformity in the service of the church and the administration of the sacraments, and inflicting penalties for offences of certain descriptions, with respect to dissenting from the church, shall not be construed to extend to any person or persons dissenting from the church of England, who shall take the oaths mentioned in the statute 1 W. and Mary, c. 1. (*c*), and who shall make and subscribe the declaration mentioned in the statute 30 Car. 2, st. 2, c. 1. (*d*), which oaths and declaration the justices of the peace, at the general quarter sessions of the peace, to be held for the county or place where such person shall live, are by this act required to tender and administer to such persons as shall offer themselves to take, make, and subscribe the same, and to keep a register of such swearing and subscription.

In consequence of this statute, a question was long agitated, whether the statute of Charles the second operated as an absolute prohibition to elect protestant dissenters to offices in corporations, or whether, though they could not claim the *right* of being elected, yet, if *actually elected*, they could refuse to serve the office.

In the next year after this act, we find a case in which it was decided, that a dissenter actually elected to an office might refuse to serve.—It was an action of debt brought by the mayor and *probi homines* of Guildford against one Clarke, to recover the penalty of 20*l.* which he had for-

(*a*) 1 W. and M. c. 18, s. 2.

(*b*) 23 El. c. 1. 29 El. c. 6. 1 El. c. 2, s. 14. 3 Jac. 1, c. 4 & 5.

(*c*) These are the oaths of allegiance and supremacy.

(*d*) The declaration against transubstantiation.

feited

feited in consequence of a bye law, for not taking upon himself the office of bailiff, to which he had been elected. He pleaded the statute of Charles the second, and further said, that he was, and at the time of the election was, a protestant subject of the King and Queen, and a dissenter from the church of England, and that he had not received the sacrament within a year before the election, by reason whereof he was not capable of being elected to the said office, and that the election, by reason of the said act, was void.—To this plea the plaintiffs demurred; and in support of the demurrer, the case of Sir John Read was cited, who had several years before been made sheriff of Hertfordshire, though he was then under sentence of excommunication, and consequently could not receive the sacrament; and therefore, after he had held the office for three months, he had deserted it, and did not attend the assizes, for which he was fined 500*l*, and after argument in the Exchequer, where it was contended, that the act of 25 Car. 2, commonly known by the name of the Test Act, avoided the office on account of his not having taken the sacrament, which he was disabled to do by reason of his excommunication; yet he was adjudged in the court of Exchequer to pay the fine of 500*l*.

THE court, however, in the present case held, that the matter pleaded by the defendant was a good bar; for, as the statute 13 Car. 2, had enacted, that *none should be chosen who had not received the sacrament within one year before his election*, and as there could be no refusal before the election, it was plain that the defendant had not incurred the penalty of the bye law. And they said that this case differed from that of Sir John Read; because he was once actually in the office, and therefore bound to do every thing necessary for his proceeding in it: but that in this case, to make a
default

default in the defendant, there must have been an election antecedent, and the election of such a one as the defendant was absolutely prohibited by the statute.

FOUR years after this occurred the case of *Larwood*, which was an information brought against him for not serving the office of sheriff in the city of Norwich, to which he had been elected.—He pleaded the statute of Charles, and that he was a protestant dissenter from the church of England, and had not received the sacrament within the year preceding the election, as that act provides, by which he was incapacitated to execute the office, and that therefore the election was void, and that, after the election, and before the first of August, the time for entering on the office being the 29th of September, he gave notice to the mayor, &c. of this disability, &c. The Attorney General replied, that the defendant *ought* to have received the sacrament yearly, and that he ought not to take advantage of his own wrong or default. The defendant, in his rejoinder, pleaded the act of William and Mary before mentioned, which gives liberty of conscience to all protestant dissenters, and shewed that he took the oaths mentioned in 1 W. and M. c. 1, and subscribed the declaration at the general quarter sessions, thus bringing himself within the compass of the toleration act.—To this the Attorney General demurred, and the defendant joined in demurrer.

THE court concurred in opinion, that the rejoinder was a departure, because it did not strengthen the bar, and said that the matter of it ought to have been pleaded at first, which he had an opportunity of doing.

THEY were also of opinion, for reasons which seem by no means satisfactory (*a*), that the toleration act was a private

(*a*) 1. Because, time out of mind, there was a discipline established in the church of England, which all persons were obliged to observe, by
the

vate statute, and that therefore the court could not take notice of it, unless it were specially pleaded.

WITH respect to the plea, one judge (*a*) argued in favour of the defendant, that it was good; for that the design of the statute of Charles was to *exclude* men who were not of the church of England, from all offices which concern the government, and that therefore the defendant being a dissenter was altogether disabled: that it was unreasonable to punish a man for not doing that which the law disables him to do: and in support of his argument, he cited the case of Clarke before mentioned, as an authority directly in his favour; which it certainly is, for it is in effect the same case as the present.

THE two other judges (*b*) held that the plea was bad, because, they said, that the design of the statute of Charles was not to *exempt* any person from executing an office to which he was bound before; but to *compel* him to qualify himself for the execution of it; and that it was intended to *discourage* dissenters, and not to favour them: but that to allow this plea would be to construe the act much to their advantage; for that these offices were not profitable, but chargeable and full of trouble.—They further said, that the King had a natural interest in every subject, and might compel him to serve him in any function, of which he should judge him capable, and no body could be exempt from the office of sheriff, but by act of parliament or letters

the common law, before the reformation; and since that time by the statutes of Edward 6, and 1 Eliz. so that the law took no notice of dissenters before this act; and, *therefore*, it was a private act.

2. Because it does not extend to *all* dissenters from the church, but only to those who go to the sessions, and there take the oaths, and subscribe the declaration. 1 Ld. Raym. 30.

(*a*) Sir Samuel Eyre.

(*b*) Holt, C. J. and Sir Giles Eyre.
patent.

patent.—Lastly they said, that no man should take advantage of his own disability, as no man can plead that he is a fool, or *non compos*. If a man, indeed, were disabled by a judgment to bear an office, he should be excused, *quia judicium redditur in invitum*; yet where he might remove the sentence, as in the case of excommunication, he should not take advantage of it: and in this case, the defendant not having qualified himself as he ought to have done, he should not take advantage of his own disability (a).

“BUT one judge, and the Lord Keeper, as it was said at the bar, being of a contrary opinion; viz. that the defendant was sufficiently punished by the corporation act, in being disabled to hold any office or employment of profit, and that to punish him by an information, would be a double punishment for one offence, which the law would not allow; therefore, there being a *capias* against the defendant *pro fine*, and he now appearing in court, he was fined five marks and no more” (b).

THIS point, however, was finally determined in the case of Harrison and Evans, in favour of the exemption.—Harrison, as chamberlain of London, levied a plaint in the sheriff's court of the city, against Evans, in a plea of debt for 600*l.* for not serving the office of sheriff, having been duly nominated, elected, and publicly called upon to give his consent to take upon him the office, pursuant to the charter of King John, the acts of common council, &c. The defendant pleaded first the corporation act; then the toleration act (c); and then to this effect: that the office of sheriffs of London, is an office to which the provisions

(a) *Rex et Regina v. Larwood*. 1 *Ld. Raym.* 29. 4 *Mod.* 269. *Comb.* 315. (b) 4 *Mod.* 274.

(c) 13 *Car.* 2, ft. 2, c. 1, s. 12, and 1 *W. and M. c.* 18, s. 2, as given before in page 346.

of the corporation act extends; that he was, and at the time of the pretended election of him to the said office, was a protestant dissenter, qualified agreeably to the terms of the toleration act, and that he had *not*, within one year next before the said pretended election, taken the sacrament of the Lord's Supper, according to the rites of the church of England, nor had ever, nor could he in conscience take the same, and that he was not bound by law to take the same, of which the liverymen of the city had due notice at and before the time of the election; that, by reason of the premises, the said liverymen were *prohibited* from *electing* him to the said office; and that he was *disabled*, and utterly *incapable* of being elected to be one of the sheriffs of the said city of London, and thereby the said *supposed election* was void. The plaintiff, in his replication; set forth that part of the statute 5 G. c. 6, which relates to the taking of the sacrament (*a*).—To this replication the defendant demurred; the plaintiff joined in demurrer, and on argument in the sheriff's court, judgment was given for the plaintiff. The defendant brought a writ of error, returnable in the court of hustings of *Common Pleas* in the city of London, assigned the general errors, and the plaintiff rejoined there was no error: the court of hustings affirmed the judgment: on which the defendant obtained a special commission of errors, directed to Sir John Willes, Chief Justice of the Common Pleas; Sir Thomas Parker, Chief Baron; Sir Michael Foster, Justice of the King's Bench; the Honourable Henry Bathurst, Justice of the Common Pleas, and Sir Eardly Wilmot, Justice of the King's Bench, or any two of them, to inspect the said judgment and the affirmance of it at Guildhall. After three solemn arguments, the judgment of the sheriff's

(*a*) Vid. ante, page 346.

court and of the court of hustings were reversed on the 5th of July, 1762, by the unanimous opinion of all the judges in the commission then surviving, Lord Chief Justice Willes being before that time dead (*a*).

THE following is the substance of the arguments on which the judges founded their opinion. The only point the legislature had in view, was to secure the power to persons who outwardly professed the religion of the state.—The punishment of non-conformists, by excluding them from power, was the consequence, not the object of the law. The unhappy situation in which the royal family and the nation had been before the restoration, had made the legislature willing to guard against a recurrence of the same circumstances; and therefore they thought it necessary to regulate the corporations in an arbitrary way, by removing some officers, and placing others in their room who were better affected, and also by providing officers for the future. The method they took was, to vest a power in commissioners to turn out whom they pleased, and place others in their offices. Of these they did not require any sacramental qualification; because, while the extraordinary power subsisted, there was another check or controul. But, when that commission expired, they did not then choose to rest upon oaths and declarations, but measured the fitness of men by their antecedent religious habits, and made the having received the sacrament, according to the rites of the church of England, the criterion by which that fitness was to be determined. They did not propose it as a test, to be given after the election, or at the time of it; because they thought the charms of power in possession might make sudden conversions, which might not always be sincere. The intention of the legislature was expressed in the strongest

(*a*) Cowp. 393, in the notes.

and clearest terms. The clause was evidently addressed to the electors, and not to the person to be elected. It was a prohibition most clearly upon the persons who had a right to elect. It was the voice of the legislature, commanding them not to elect persons of a certain description. If then the act was prohibitory upon the electors, the consequence would be, that if they, having due notice of the incapacity of the candidate, proceeded, notwithstanding, to the election of a person declared by the statute to be ineligible; the whole proceeding was a mere nullity, in contravention of the prohibition to the electors, wilful, open, and undisguised.—A right of action could not accrue to the corporation from such an improper proceeding, contrary to the statute, prohibited by the statute, and consequently null and void from the beginning.—Thus it stood with respect to the corporation.—As to the defendant, he was now called upon under a penalty to usurp an office upon the crown, which usurpation would subject him to a criminal prosecution and all its consequences.—A strange dilemma! To be obliged to usurp upon the crown, or forfeit the penalty of the bye law. Could the bye law purge the usurpation? It had been said, that all corporations had a right to the service of their members: under certain limitations they certainly had this right. But it was a right subject to the controul of the legislature; and in matters of election, they must submit to such regulations as the state should think fit to make.—It had been asked, whether persons who live in open contempt of all government in a state, could shelter themselves under this act? The same had been said in *Larwood's case*; and it had been thrown out, not very decently, in the present. In answer to this, it was sufficient to say, that the case of debauchees and infidels was not in the contemplation of the legislature at the time

time this act was made. It was not levelled at atheists or infidels, but against protestant dissenters.—The defendant did not endeavour to shelter himself under the idle excuse to which the objection put him, of being an atheist, debauchee, or an infidel: but the defendant, by pleading the toleration act, averred that he did not live in open disobedience to the ordinances of the church, although he entertained some scruples in regard to the mode of administration in the established church: he was real and sincere in his scruples, and lived in obedience to the ordinances of the church.—It had been said, that the construction now contended for was partial to dissenters, in excusing them from offices of burthen. It certainly was, and therefore it excluded them from all corporation offices which were attended with profit and honour.—It would be absurd to say, that the same law which excludes them from the one, as persons unworthy of a public trust, had still left them liable to the other, whatever might be the trust attending them. The trust attending the office of sheriff of London, was a high trust: if, therefore, protestant dissenters were excluded from offices attended with profit, merely as persons unworthy of a public trust, it would be absurd to say, that they should be obliged to serve the office of sheriff.—It had been said in Larwood's case, and it probably had weight, that no man can, by his own plea, disable himself, nor excuse one default by another. It was sufficient now to say, that Larwood's case, in this respect, was totally different from the present. He had not properly pleaded the toleration act, and therefore could take no advantage of it; the present defendant had pleaded it properly, and shewn himself not eligible; he had not pleaded it to excuse one offence by another, but to shew that he was guilty of no offence at all in not having received the sacrament, be-

cause since that act, it was not his *duty* to receive it.—In that very case it had been admitted, that if a man be disabled by judgment to bear an office, there he was excused, because *judicium redditur in invitum*. Why, then, should not an act of parliament excuse, which was the judgment of the whole legislature? The case of Sir John Read, which had been mentioned, was very different from this: he was capable of the office at the time when he was appointed to it; his receiving the sacrament was not a *precedent* qualification; it was sufficient if he received it within three months *after* his appointment (*a*): he alleged a disability which it was in his power, and which it was his duty, to remove (*b*).

THE plaintiff afterwards brought a writ of error returnable in parliament, and on February the 4th, 1767, counsel having been fully heard, the following question was put to the judges: "Whether, on the facts admitted by the pleadings in the cause, the defendant was at liberty, or should be allowed to object to the validity of his election, on account of his not having taken the sacrament, according to the rites of the church of England, within a year before, in bar of this action?" The judges differing in opinion, were heard *seriatim*: six of the judges present delivered their opinions, with their reasons, in the *affirmative*; and the remaining judge (*c*) delivered *his* opinion, with his reasons in the *negative*: on which it was ordered that the judgment given by the *commissioners delegates*, reversing the judgments given by the sheriff's court, and the court of hustings, should be affirmed (*d*).

(*a*) Vid. 25 Car. 2, c. 2, f. 2.

(*b*) Burn's Eccl. Law, tit. Dissenters.

(*c*) Mr. Baron Perrot.

(*d*) Cowp. 394, in the notes:

BEFORE the statute of 5 G. c. 6, the objection of not having received the sacrament within the year, might have been taken to the candidate at the time of the election; if he had been actually elected, it might have been taken to his admission: and if he had been actually admitted, his title might have been impeached on this ground, at any distance of time at which it might have been impeached for want of any other *precedent* qualification.

SINCE that statute, the effect of this objection is to be considered in three different points of view. 1. When made at the time of the election, or at *any* time before the person elected has obtained possession of the office. 2. When made *after* he has obtained possession, and *before* six months have elapsed since the election; and, 3. When made after he has obtained possession, and *after* six months have elapsed since the election (*a*).

IN the first case, the effect is the same as it would have been *before* the statute; the election, of a person so disqualified, being still considered, before he is actually admitted, as absolutely void. In the second, the objection can be carried into effect only by actual *removal*, or a *prosecution* seriously commenced within the time limited; for *after* admission, the statute *permits* the election to be avoided within the six months, *only* by one of these two modes.— In the third case, the objection has no effect at all; it comes too late: the statute operates as a protection to the possession, and as a bar to the remedy. If a man under this disability has been in possession six months, there is no remedy

(*a*) The words of the statute are, “after such persons being *placed* or elected.” I take the word *placed* to allude to some other mode of appointment than election, and not to distinguish between the election and admission, and therefore I conceive the six months are to be calculated from the time of election, and not the time of admission.

to turn him out: his title shall not afterwards be questioned on that ground (*a*).

THESE distinctions are supported both by the words of the statute, and by the cases which have been decided since it was made.

To a mandamus directed to William Nevinston, mayor of Appleby, commanding him to swear John Tufton into the office of an alderman of that borough: the defendant, among other things, returned that the plaintiff was *not elected* an alderman, as by the writ was supposed. Issue being joined on this fact, and it being objected at the trial, that the plaintiff had not taken the sacrament within a year before his supposed election, his counsel shewed that more than six months had elapsed since the election, and therefore contended that the statute in question was an answer to the objection; but the whole court, it being a trial at bar, were unanimously of opinion that this case was not within the statute, because the plaintiff had never been admitted, and therefore could not be removed, nor incur a forfeiture for exercising the office (*b*).

GIBBS CRAWFORD having been elected into the office of town clerk of the corporation of Harwich, and having obtained *possession* of the office, applied to Griffith Powell, the late town clerk, to deliver up to him the common seal, books, papers, and records of the corporation, and on his refusal sued a mandamus commanding him to deliver them up: to this mandamus the defendant returned that the plaintiff was not *duly elected*: on which the plaintiff brought an action for a false return.—The declaration shewed that the plaintiff Crawford was duly elected town clerk on the

(*a*) Pr. Ld. Mansfield. Cowp. 539.

(*b*) John Tufton, Esq. v. William Nevinston, mayor of Appleby.
2 Ld. Raym. 1354.

20th of March, 1758; in virtue of which election, it alleged, that the common seal, books, papers, and records belonged to him; but that the defendant refused to deliver them; on which the plaintiff had, on the 12th of April, prosecuted a writ of *mandamus*, returnable on Friday next after one month from Easter, 1758; which was accordingly returned on that day.—So that it appeared on the *face* of the declaration, that this *mandamus* was actually returned *within six months* after the plaintiff's election to the office.

AT the trial it was contended, on behalf of the defendant, that the plaintiff ought to *prove* his having taken the sacrament, according to the rites of the church of England, within a year next before his election. And a verdict was taken for the plaintiff, subject to the opinion of the court on this objection. In support of the objection it was contended, that “by the statute of George the first, it was open to the defendant in this case, because the *return* had been made *within* the six months; for that, although such incapacity might be taken away by this statute, in a case where *six months had elapsed* since the election, without any *removal* by the corporation, or prosecution commenced and carried on without delay; and consequently a return that the party was *not elected*, founded only on this incapacity and disability, but not made till *after* the expiration of the six months, would indeed be a false return, and the plaintiff would have no need to prove his having taken the sacrament within the year: yet in the present case, where the return was made *within* the six months, it was not a false, but a true return, if the fact were, “that he really had not received the sacrament within a year next before his election: for, as the incapacity created by the statute of Charles, stood, in this case, unremoved by that of George the first,

the plaintiff *remained* still liable to a *removal* by the corporation, or to a prosecution to be commenced within six months." The foundation of all this reasoning, however, must have been, that this objection taken within six months, by *any* party and in *any* manner, was as effectual as if enforced by removal or prosecution, which is directly contrary to the words of the statute, which are "that no incapacity, disability, forfeiture, or penalty shall be incurred by reason of having omitted to take the sacrament; *unless* such person be so *removed*, or such *prosecution* be *commenced* within six months," &c. which clearly excludes every other manner of *enforcing* the objection, but *removal* or *prosecution*——and Lord Mansfield said, that as there was here no such removal or prosecution within the time limited, the plaintiff's election consequently stood *confirmed* and became *absolute*. He therefore thought this a clear case, and that there was no force in the objection; he did not think it like the case of Tufton and Nevison, because that arose on the officers bringing a mandamus to swear him into his office, being then *out of possession*; whereas this plaintiff was *in possession* of the office, and only brought his mandamus for the insignia, and other things belonging to it (a).

ON a mandamus to swear one Marten into the office of mayor of Winchelsea, it appeared by a special verdict, that the mayor must be chosen out of the jurats; that the plaintiff, on the first of May, 1739, was chosen a jurat, and sworn in and continued to act as a jurat till the 7th of April, 1740, when he was chosen mayor: and that he had received the sacrament within a year before his election to

(a) Crawford v. Powell. 2 Bur. 1013. 1 Bl. Rep. 229. In this last book there is only a short note of the case, which is evidently very inaccurate.

be mayor, but *not* within a year before he was chosen a jurat: the question was, whether the statute of George the first could operate, so as to give him the benefit of the non-prosecution in six months, with regard to the previous qualification? And the court held that it did, for that otherwise he would be under some degree of disability or incapacity, when the statute says expressly that none shall be incurred (a).

IN all cases in which the objection of not having received the sacrament within the year, may be taken against a person elected to a corporate office, I apprehend the *proof* of having received it must lie upon him; both because it would be hard to put the opposite party to the proof of the *negative*, and because the party claiming under an election must shew that he was qualified to be elected.

IN the case of Tufton, before mentioned, it was contended on the behalf of the defendant, that the *proof* of this previous qualification lay upon the plaintiff: to which it was answered, first, that at the *time* of the election this objection was not made to Mr. Tufton; and this the counsel proved by witnesses; from whence they contended, that he could not expect this objection would be made at the trial, and therefore could not come prepared to meet it: and in the next place, they said, that if the defendant intended to insist on proof of this matter, he ought to have given *notice* of his intention before the trial, that the plaintiff might have an opportunity of coming prepared to prove it, if he could. But the court were unanimous in opinion, that it was incumbent on the plaintiff to prove his having received the sacrament within the year, notwithstanding the objection had not been taken at the time of the election, and that no notice had been given to the plaintiff that

(a) Marten v. Jenkin. 2 Str. 1145.

he

he would be called upon to prove it; and they mentioned some other cases in which the same point had been so determined, particularly one concerning a member of the corporation of Buckingham; only that in the latter, a difference was taken between the case of a member of a corporation who had been long in possession of his office, and where the prosecution was recent; that in the first case, notice ought to be given that this would be insisted on at the trial, and that in the other, such notice was not necessary (a).

THE determination in the case of Crawford and Powell does not contradict this position; for though the objection made by the *counsel* was, that the plaintiff had not *proved* his having taken the sacrament; yet the decision of the *court* went upon the principle, that even had it been proved that he had *not* taken it, the objection could not have been admitted.

BUT where a question is raised about a person's title to a corporate office after the six months have elapsed, it is not incumbent on him to shew that there was no prosecution commenced within the six months; because six months' possession gives a presumptive title: thus in the case of Marten, the verdict being silent as to any prosecution, a doubt was raised, whether it was sufficient for the court to give judgment upon; and whether it should not have been found negatively that there had been no prosecution; and the court held it sufficient, for that the plaintiff had nothing more to do than to find his election, and its confirmation by six months' possession; that what was to avoid it should come from the other side; and that as it was not found that there had been a prosecution, which it lay upon the defendant to shew; they could not be warranted in saying

(a) 2 Ld. Raym. 1354, 1355. Vid. 1 Str. 585.

that

that the plaintiff's election was done away; and therefore they gave judgment for the plaintiff (*a*).

BESIDE the oaths to government, which are to be taken in consequence of the corporation act, there are oaths particularly applicable to the offices of corporations, which relate solely to the faithful discharge of the duty incumbent on the officers, or the preservation of the rights and privileges of the corporate body (*b*): and the taking of these oaths, it is said, may be enforced by the courts impowered to administer them, by imprisonment till the party submit (*c*).

BUT where the charter is silent with respect to an oath of office, it is doubtful whether any such oath can be administered at all, and whether, under a general power to make byelaws, a corporation can make a byelaw imposing an oath. If such an oath be prescribed, but the charter is silent as to the person who is to administer it, no particular person, it seems, is appointed by the law to do it, but a *dedimus* must be sued out of Chancery for that purpose; and this is said to have been the case of *Devizes* (*d*).

ALL the oaths ought to be administered at the time of the party's being admitted to the exercise of the office, and till they are administered, his title to hold the office is not complete.—By the express provision of the corporation act, the oaths to government are to be taken at the same time with the oath of office, in default of which the election is declared to be void.—And by the statute 11 G. 1, c. 4, s. 4, the mayor, bailiff or bailiffs, or other chief officer or officers, who shall be elected in pursuance of the directions of that act, shall take the oath or oaths by law re-

(*a*) *Marten v. Jenkin*. 2 Str. 1145.

(*b*) *Vid. March*, 179, 189. (*c*) *Id. ibid.*

(*d*) *Vid. 1 Str. 537, 539. 1 Barnard, 80. Rex v. Wake.*

quired,

quired, at the time of his admission, before the officer presiding at the election.

If a corporator do not procure himself to be sworn into his office within a reasonable time after his election, it is a *waiver* of the election.

AN information, in the nature of *quo warranto*, being filed against one Jordan, for usurping the office of a capital burges in the borough of Westbury; he pleaded, that it was the custom for the mayor and the capital burgeses, or the majority of them, on a vacancy taking place among the capital burgeses, to assemble and elect an inhabitant into the *said office which was vacant*, and that the person so elected might be sworn and admitted at *that or any future assembly*: that there being two vacancies among the capital burgeses, he was, on the 18th of October, 1709, at an assembly then holden, elected into *one of the said two offices so being vacant*: then he said, that on the 16th of September, 1734, at an assembly then holden, he took the oath of office of a capital burges, and was then duly sworn and admitted to the office of *one of the capital burgeses, being at that time vacant*. The King's coroner replied, and admitted the election as set forth in the plea, but averred that the defendant was not sworn till 1734, though he had notice of his election; that subsequent vacancies happened, and that the office into which the defendant was elected, was filled up in the year 1714: then he made three traverses, one of which, and that on which the judgment of the court was given, was that the office of capital burges, to *which the defendant was elected*, was not vacant at the time he took the oath, *as the defendant had alleged*. To this the defendant demurred, and after argument at the bar, Lord Hardwicke delivered the opinion of the court to this effect: that there were two matters for the consideration of

of the court; the manner of pleading, and the merits of the question: as to the first, the traverse was strange; for all that was said in the plea was, that there was a vacancy, the traverse to which was, that the *said* office into which the defendant *was elected*, was not vacant at the time of the swearing, *as the defendant had alleged*; whereas the defendant had not alleged it: on the supposition, therefore, that the defendant's plea were good on this point, he said, he should not think the plaintiff's traverse good, because it was a denial of a thing not alleged; for though a matter *implied* in the plea might be traversed, yet it must be *necessarily* implied, which was not the case here.—The question, therefore, was reduced to the merits which depended on the defendant's plea; and in order to give judgment, the court must not resort to any part of the plea which was brought to issue by the country, for there might be a good title found for the defendant, if his title depended on the custom set out by him, which was a custom, on a vacancy of a capital burghs, to elect one into the office *so* vacant, who was at the same or any future assembly to be sworn into the *said* office; which meant, into the office into which he had been elected: but how had the defendant brought himself within that custom? By saying that he was elected into an office *then* vacant, and afterwards sworn to be a capital burghs, the office of a capital burghs being then vacant; which was not all within the custom, because he had not said that he was sworn into the *said* office. Every capital burghs filled a *distinct* office; for though, in common language, every one was said to hold the *same* office, that only meant the same *kind* of office; it was impossible, therefore, to maintain *this* part of the defendant's plea; and as to that part which was put in issue, it seemed strange that a man might lie by for twenty-three

ty-three or twenty-four years after his election, and then come to be admitted.—He thought this was a waiver of the defendant's right to the office: if he had refused to accept it, and then another had been elected in his room, this must have been a waiver, and certainly a non acceptance for so many years must be considered as sufficient evidence of a refusal (*a*).

It seems that the person elected to an office must, at his peril, take the oaths, and that it is no excuse that they were not tendered to him.

A *MANDAMUS* was directed to the mayor and commonalty of the city of Oxford, commanding them to admit one Slatford to the office of town clerk: they returned that he had not taken the oaths according to the statute of 13 Car. 2.—To this return it was objected, that it was not said that they had tendered the oaths, which, it was contended, was a duty incumbent on the corporation to do to all their officers; for that all oaths must be tendered by some person who had lawful authority to tender them; and for ought that appeared, the plaintiff might have desired to take the oaths, and the defendants refused to administer them: but to this it was answered, that the party was bound at his peril to take these oaths; and that it might as well be said, that it must appear on a return on the test act, that the parson tendered the sacrament. To this the court assented, and the Chief Justice observed, that the words of the statute were positive, "that at the time of taking the oaths of his office, he shall take the other oaths;" and he mentioned the case of the King and Thacker (*b*), as a decisive authority on the subject: this was a *mandamus* directed to the mayor of Norwich, commanding him to re-

(*a*) *Rex v. Jordan*. B. R. H. 255.

(*b*) *Sir Thomas Jones*, case 121.

store an alderman ; to which it was returned, that the plaintiff being elected to the office, took the oaths in the acts of 1 W. and M. and of Car. 2, and *pronounced* the declaration, but did not subscribe it: the counsel excepted to this return, because it did not appear that he was *required* to make the subscription, or that the declaration was *tendered* to him to be subscribed: but the court held that the *tender* was not necessary; that the officer was bound to subscribe the declaration at his peril, and that the office was void for non-subscription by the very words of the act.

THE Chief Justice further observed, that the design of this act was to secure the government in general, and that of the corporations in particular, and that therefore the officer must at his peril take the oaths; and that otherwise the corporation, by agreement among themselves, might dispense with the act, which might prejudice the government (*a*).

ONE Hart being elected into the office of capital burges of the borough of Malmesbury, in the year 1714, took all the oaths which were tendered to him at the time of his admission, which he believed were all that he was required to take at that time; among these were not included the oaths of abjuration and supremacy, which, however, he took a short time after, at the quarter sessions held in Wiltshire. Eight years afterwards, Hart having voted at the election of members to serve in parliament, for a candidate in the opposite interest to a great person (*b*), who had offered Hart's wife one thousand guineas the night before the election if she would persuade her husband to vote for the other candidate; the town clerk, as it was suggested, at the instigation of this great person, made an affidavit of

(*a*) Rex v. Slatford. 5 Mod. 316. Comb. 419.

(*b*) These are the words of the report.

Hart's

Hart's not having taken the oaths of abjuration and supremacy at the time of the election, on which affidavit an application was made for leave to file an information against him, in the nature of *quo warranto*.—The facts before stated being laid before the court, in answer to the application; the court said, that "if he did not take the oaths at the time of his election (*a*) to be a capital burges, he was not qualified for the office, and that the length of time which he had filled it, would not obstruct the filing of an information against him: but that after so long a time, they would require clear proof of his *wilful refusal or voluntary neglect to take the oaths*; and that they would certainly not grant it on the oath of the town clerk himself, whose fault it was that they were not taken, and whose duty it was to have discovered the omission long before the present application (*b*).

THE corporation and test acts do not extend to common freemen, because they do not exercise any office relating to the government of the town (*c*).—By statute 7 and 8 of W. 3, c. 34, it is enacted, that for the ease of Quakers, they shall, in all cases where by law an oath is required to be taken, be permitted to make a solemn declaration in the words prescribed by the act; but by a subsequent clause it is provided, that no Quaker or reputed Quaker shall, by virtue of this act, be enabled to bear any office or place of profit in the government.—One Abraham Morrice, a Quaker, who had served, an apprenticeship in the city of Lincoln, obtained a *mandamus* to be ad-

(*a*) The word used is "election," but I apprehend "admission" would be more proper, as in some cases the admission is at some time subsequent to the election.

(*b*) *Rex v. the mayor and burgesses of Malmesbury*, 8 Mod. 55.

(*c*) 2 Str. 828, borough of Christchurch.

mitted

mitted to his freedom: the defendants returned that they could not admit him, because to be a freeman of the city of Lincoln, was to have a place of profit in the government; each freeman being entitled to a vote in the election of two citizens to serve in parliament for the city, and to have pasture for three horses in the common; and that Morrice had refused to take the oaths in the common form, though he offered to take his solemn affirmation. The principal question in this case was, whether this was such a place of profit as fell within the proviso of the statute, and it was determined that it was not: the Chief Justice observed, that Morrice had a precedent right to have his freedom; and that the Quakers were usually admitted in London on their solemn affirmation: and accordingly the party in the present case was admitted (*a*).

A PERSON who is already in possession of one office, is not, for that reason, disqualified to be elected to another, whether the two offices be incompatible or not: if they be not incompatible, they may of course be held together; if they be incompatible, the election or appointment to the second, and acceptance by the party elected or appointed, vacates the first.—The rule is general, applying both to offices at common law, and to offices in corporations. Thus, if a judge of the Common Pleas be appointed a judge of the King's Bench, this vacates the office of judge of the Common Pleas, because it is part of the business of the one to correct the errors of the other: so, if the King's remembrancer in the Exchequer be appointed a baron in the same court, the first office is void, because a man cannot be a judge and a minister in the same court (*b*).

(*a*) *Rex v. mayor of Lincoln*, 5 Mod. 402. 12 Mod. 190.

(*b*) *Pop. 28, 29.*

So, if a town clerk be elected mayor, in a corporation where the mayor holds a court of record, and the town clerk is a minister of the court, if he accept the office of mayor, the place of town clerk is *ipso facto* void (a).

AND there is no distinction between the case where an *inferior* officer is appointed or elected to a *superior* office, and that where a *superior* officer is appointed or elected to an *inferior* office. Thus, if a judge of the King's Bench accept of an appointment to the place of judge of the Common Pleas, which has sometimes been the case, this vacates the place of judge of the King's Bench.—The greater number of the cases that have occurred on this subject, have, indeed, been of *inferior* officers appointed or elected to *superior* offices; but in the decisions no distinction has been made between the two classes.

SIR William Trelawney (b), having been steward of the borough of West Loe, was elected into the office of capital burghs, which was alleged to be an *inferior* office to that of steward; an application was made for an information against him, in the nature of quo warranto, for acting as a capital burghs, on the ground that the office of steward being *superior* to that of capital burghs, he was *ineligible* to the latter: in answer to the application, it was contended, that the offices were not incompatible; but, that if they were, it would be the *first* office that would be vacated by the acceptance of the *second*; and Lord Mansfield said, "it seemed to him very strong, that if the two offices were incompatible, the *acceptance* of the latter would imply a

(a) 1 Sid. 305. 2 Keb. 92.

(b) Rex v. Sir William Trelawney, steward and capital burghs of West Loe. 3 Bur. 1615.

surrender

surrender of the former," though it was not now necessary to determine it, because it did not appear that the two offices were incompatible, all the evidence that could be traced, shewing a consistent usage for an hundred years back, "that the steward, if a capital burges before, had remained a capital burges, after he became steward."

IN the case of Milward and Thatcher, this point was indisputably settled. In that case the following facts were found by special verdict: that the borough of Hastings was a borough by prescription; of which the town clerk had immemorially been elected by the mayor, jurats, and freemen, on the third Sunday after Easter in every year: that in pursuance of such immemorial usage, the defendant was, on the third Sunday after Easter, in the year 1782, elected clerk by the mayor and jurats, who are magistrates exercising judicial authority within the borough, and the freemen, pursuant to the custom; that the defendant was annually elected and sworn into the office every year, from the year 1782, till Sunday the 29th of April; on which day the plaintiff was elected town clerk by the mayor, jurats, and freemen, and sworn into the office, agreeably to the usage. That the plaintiff at the time of his election was, and still continued to be a jurat. That he had never *acted* as a jurat since his election to the office of town clerk; but had ever since acted as town clerk, though without the *consent* of the defendant: that there were within the borough twelve jurats, who sat as judges in a court of record, immemorially holden within the borough; and also held pleas of the crown. That the mayor and *two* jurats might hold such court of sessions, but that all the jurats had a right to attend as judges without being summoned: and that there had been many instances within the borough, of jurats

B b 2

being

being elected to the office of town clerk, and serving in that office.

Two questions were made on this special verdict : first, whether the offices of jurat and town clerk were incompatible ; and secondly, if they were, whether the plaintiff being, at the time of his election, in possession of a *superior* office, was *eligible* to an *inferior* one. On the part of the defendant it was admitted, that a person in possession of an *inferior* office might be elected to a superior one incompatible with the inferior, and that the acceptance of the former vacated the latter ; but it was contended, that the converse of the proposition was not true ; that a man already in possession of a superior office, was absolutely *ineligible* to an *inferior*, and that the election to the latter was void.

THE Court said, that whether the offices in question were compatible or not, the plaintiff must in this case have judgment ; the issue had been directed to try whether he had been duly elected to the office of town clerk : if the offices were compatible, his being a jurat before was no objection to his election ; and if they were incompatible, the election to the latter office was good, because the acceptance of the second vacated the first. With regard to the distinction, which had been attempted to be made, between being elected from an inferior to a superior office, and from a superior to an inferior office, there was neither reason nor authority to support it. The case of the King and Trelawney, as far as it went, was an authority against the distinction : as to any option which the party might be said to have, there could not be a stronger instance of an option than the plaintiff's conduct ; he had accepted the office and acted in it. There was no doubt that his *intention* was to keep both offices : but if he was mistaken

taken in the law, and chose to accept the last office; he must abide by the consequences, because it was his own act (a).

WHETHER one office in a corporation be incompatible with another, depends entirely on the constitution of the corporation in which the question arises, whether it be a corporation by prescription or by charter; as if the King by his charter were to say there should be a mayor, twenty-four jurats, and a town clerk, the corporation, by their own act, could not reduce the number by consolidating two of these offices (b), because the corporate body would then consist of twenty-six *distinct* members: in the case of Sir William Trelawney, the office of steward was held not to be incompatible with that of capital burghers, because there was nothing in the constitution of the borough which rendered it so, and it was consistent with the usage of a century, that the offices might be united in the same person.—And, in the same case, Lord Mansfield said, that if “he should be chosen mayor, it might *then* be a question, whether his acceptance of *that* office did not vacate his office of steward:” from which it is evident that he did not think that the offices of mayor and steward were naturally and necessarily incompatible, but that they might or might not be so according to the constitution of the borough.

IN the case of Pike, chamberlain of Portsmouth, the question whether that office was compatible with that of alderman, depended on another, “whether by the constitution of the borough, the aldermen were necessarily auditors of the chamberlain’s accounts:” if they were, the offices were incompatible; otherwise not. The charter was silent

(a) *Milward v. Thatcher*, 2 Term Rep. 87, 88.

(b) *Dist. pr. Buller, Justice*, 2 Term Rep. 88.

on the subject; but though, *before* the charter, the auditors had been sometimes chosen from among the burgesses at large, the *usage*, *since* the charter, had been to appoint them from among the aldermen: if that *usage*, therefore, was binding, the offices were incompatible (*a*).

IN the case of Milward and Thatcher, the court were inclined to think, that the two offices of jurat and town clerk were incompatible, because the one was a ministerial and the other a judicial office: and though it had been said that the plaintiff was not bound to fit in his judicial capacity, because there was a sufficient number of jurats to constitute a court without him: yet there might be cases in which it would be absolutely necessary for him to fit in that character, as in case of the sickness of the other members; and if there were one possible case in which he might be called upon to act, that was an answer to the argument (*b*).

A RULE was obtained against William Pateman, calling upon him to shew cause why an information should not be filed against him, in the nature of a quo warranto, to shew by what authority he claimed to be an alderman of Bedford. The foundation of the rule was an affidavit, which, among other things, stated that there was a ministerial officer in the borough, called the town clerk, attendant on the corporate courts and meetings, which corporate courts and meetings were subject to the controul and direction of the aldermen. It then stated, that the deponent *believed* that the accounts of the town clerk were adjusted and allowed by the aldermen; and that by the ancient usage and custom of the borough, the office of town clerk was incompatible with that of alderman: that the defendant, who

(*a*) Doug. 398 (382), in the notes.

(*b*) Pr. Ashhurst, J. 2 Term Rep. 86.

had

had been a burgher, was duly elected mayor at Michaelmas, 1782, which office he served till Michaelmas, 1783, when he became an alderman: that in September, 1784, he was elected town clerk, which office he had since exercised together with that of alderman, contrary to the usage of the borough; and had from time to time acted as one of the aldermen who had allowed his accounts as town clerk. The defendant, in his affidavit in answer to this application, alleged that he had never officiated as town clerk, the whole duty of that office having been transacted by his deputy. He denied that the two offices were incompatible, and that the aldermen settled the town clerk's accounts, these being usually settled and adjusted by the chamberlain: he further said, that the corporation always appeared satisfied with his conduct as an alderman, as well as in the management of the town clerkship by deputy. He then stated two instances in the borough, the one of the offices of town clerk and common councilman having been enjoyed by the same person in 1721, the other of those of town clerk and alderman by a Mr. Hill, from 1750 to 1784.

LORD Kenyon said, he did not think the offices of alderman and town clerk were *necessarily* incompatible; because in some corporations aldermen were not judicial officers: that if an alderman were also a magistrate, and the town clerk acted ministerially under him, then indeed these two offices could not be held by the same person: here the question was, whether the town clerk's accounts were not allowed by the aldermen; if they were, he thought the two offices incompatible; and that this information ought to be granted for the purpose of trying that fact.—The rest of the court concurred (*a*).

(*a*) Ashhurst and Grose, J. Buller being absent. Rex v. Pateman, 2 Term Rep. 777.

SECTION III.

Of holding over by the annual Chief Officers of Corporations.

BY the provisions of some charters, the mayor or other chief officer is elected for a year and till another be chosen; in which case, if no successor be chosen at the end of the year, the mayor of the preceding year is said to hold over. But where a particular day is appointed for the election of a successor, which is generally the case, and a power of holding over is not expressly given; it does not exist by implication, as is evident from the following case.

AN information having been filed against the defendant Philips, for usurping the office of mayor of Bodmyn; in his plea he made a title under two charters of Queen Elizabeth, the first of which appointed the election of mayor to be held on Michaelmas day, in the manner therein particularly directed, and appointed that the mayor so chosen should take an oath to execute the office of mayor for the next year, and till another should be chosen; the second charter recited the former manner and time of election, and the continuance in the office after it; and that the corporation had petitioned the Queen to alter the time and manner of choosing the mayor: it then confirmed all their former rights and privileges, and appointed the election to be for the future, by the mayor, common council, and town clerk, on the 24th of September, for one whole year then next ensuing. The defendant averred, that as well before as since the second charter, the usage had been for the mayor to hold over till another was chosen; that he being elected mayor, served for a year, and that the town clerk

clerk being then dead, and no new one chosen, there could be no new election of a mayor: and by that warrant he claimed to hold the office of mayor till another should be chosen and sworn; and traversed the usurpation. The attorney for the crown prayed oyer of the last charter, which being set forth, there appeared a further clause, by which the Queen abolished all the former manner of *choosing*, *nominating*, and *appointing* the mayor; then he took issue, that *since* that charter there had been no such usage of holding over; which, on trial, was found for the King.

A MOTION was made, in arrest of judgment, on the ground that this was an immaterial issue, because the corporation not being by *prescription*, the title to the office must depend on the charter, and not upon any usage within time of memory; that this was worse than most cases of immaterial issues, which were often good, if found one way, though they were bad if found the other (*a*); but here the finding for the King could neither destroy the defendant's right, nor could a verdict for the defendant have established it; because it did not depend on any usage inconsistent with the charter, but must depend intirely on the charter itself: without much argument, the court was clearly of opinion that the issue was immaterial, or in other words, that the mere fact of usage, one way or the other, did not affect the title of the defendant.

ON behalf of the defendant, it was contended, and one of the judges (*b*) was of that opinion, that the title was good in law, under the two charters taken together; by the first, it was observed, that the mayor being elected by the inhabitants on Michaelmas day, was to hold for a year

(a) Solvit *ante diem* is good, if found for the defendant.

(b) Eyre.

and

and till another was chosen; that the second charter, which was made to alter the time and manner of the election, directed that he should be chosen by a select number, and on the 24th of September; but it did not meddle with the right of holding over: on the contrary, it confirmed expressly all their former rights and privileges, of which that of holding over was one; the clause of abolition was expressly confined to the authority, form, and manner of choosing, and did not extend to the right of holding over, and it would be hard to interpret affirmative words in the charter into an abolition of so great a privilege, which might often serve to prevent the extinction of the corporation.

ON the other side it was contended, that the whole question depended on the *second* charter, which, where it recited the former, took express notice of the clause for holding over, and abolished all the former method of election: when it did that, and appointed the election to be in another manner, it was not to be imagined, but that the right of holding over, which was only incidental, was intended to be abolished likewise; the right of election was transferred to other persons, and there could be no holding over under an election, when the foundation of that holding over was gone: besides, the *day* of election was altered, and there could be no holding over under the old charter, for that empowered the mayor to hold over from Michaelmas day; but it could not give him a right to hold over from the 24th of September.—Suppose the second charter had said, that the mayor should continue in office for three quarters of a year, would it be contended, that the reservation of their former privileges should intitle him to hold over for the other quarter under the old charter?

ter? Such was the reasoning adopted by the other three judges, on which the court gave judgment against the defendant (a).

FROM the whole tenor of the arguments on both sides, in this case, it is evident that it was not conceived that the privilege of holding over was implied where it was not expressly given by the charter.—And the preamble of the statute of 11 G. c. 4, manifestly shews that the legislature thought it was not implied; for it proceeds on the supposition, that for want of an election of a new mayor on the charter day, the corporation was dissolved, which could not have been the case, if the mayor of the preceding year had had a right of holding over. ✓

WHERE there was a clause of holding over, it had become a practice with the mayor and other head officers of corporations, to avoid holding an election on the charter day, by which means they continued in office for several years together: in order to put an end to this practice, the statute 9 Ann. c. 20, f. 8, after reciting the inconvenience which had arisen from head officers of corporations, to whom it belonged to preside at the election and make return of members to serve in parliament, being elected for two years successively, enacted “that no person or persons who had been, or should be in *such* annual office for one whole year, should be capable of being chosen into the same office for the year immediately ensuing, and that where any *such* annual officer or officers was or were to continue for a year, and *until some other person or persons* should be chosen and sworn into *such* office; if any *such* officer or officers should *voluntarily* and *unlawfully* obstruct and prevent the choosing of another person or persons to succeed into *such* office at the time appointed for making

(a) Rex v. Philips, mayor of Bodmyn, Str. 394.

another

another choice, he should forfeit 100*l.* for every such offence, to be recovered, with costs of suit, by such persons as should sue for the same in any of her Majesty's courts of Queen's Bench, courts of sessions of counties palatine, or courts of great sessions in Wales, by action of debt, bill, plaint, or information, wherein no *esso*in, protection, or wager of law should be allowed, nor any more than one imparlance; one moiety to her Majesty, and the other to him or them who should sue for the same."

AT common law, where by charter the election of the mayor was appointed to be on a particular day, and also gave a power of holding over, then if no election was made on the charter day, there could be no election on any subsequent day in the same year, except on the *death* or *removal* of the mayor in being, because an election on any other day was not according to the authority given by the charter; and this statute of Queen Anne does not seem to have made any alteration in the common law in this respect: it renders void the re-election of the same person, in the case "where his duty is to preside at the election, and make return of members to serve in parliament;" and it inflicts a penalty on every person holding over by means of his own *wilful* and *unlawful* act; but it makes no provision for the election of another officer, nor does it take away the right of holding over.—This is manifest, both from the words of the statute itself, and from the case of the mayor and burgesses of Tregony, which came before the court thirteen years after it (*a*). This was a *mandamus* directed to them, commanding them to choose a mayor, and swear him into office; to which they returned, that the borough of Tregony was incorporated by letters

(*a*) *Rex v. mayor and burgesses of Tregony*, 8 Mod. 111, Hil. 9 G. 1, 1723. 8 Mod. 127, East. 9 G. 1, 1724.

patent

patent of King James the first, by which it was provided, that the mayor and burgesſes ſhould for ever after proceed to elect a new mayor on the Thursday next after Michaelmas day in every year, and that the new mayor thus elected, ſhould be ſworn by the mayor in being before he went out of his office, and that every mayor ſo choſen ſhould continue in that office till another ſhould be duly elected in the manner *aforeſaid*: they further returned, that the day of election being paſt, they could not proceed to a new election except on the death or removal of the preſent mayor.—Though it was inſiſted that the day appointed was only directory, and that notwithstanding the day was paſt, they might proceed to an election at any other time, as the mayor might be ſick or abſent at the day appointed; yet the court held that they were confined to the day, and reſuſed to grant a peremptory mandamus.

By an obſervation which fell from the Chief Juſtice in the caſe of Alexander John, which occurred a few months after that of Tregony, there is ſome reaſon to ſuppoſe, that he thought the right of holding over was affected by this ſtatute of Anne; but the *circumſtances* of that caſe were ſuch as to leave this queſtion unaffected by the obſervation. Some differences had ariſen in the borough of Leſtwithiel, in the county of Cornwall, in conſequence of which the corporation had omitted for ſeveral years to elect any capital burgesſes, from the number of whom the mayor, by the conſtitution of the borough, was to be choſen; on which account, no new mayor having been elected, Alexander John had continued in that office, under a claufe of holding over, till the year 1724, when an application was made on the proſecution of one John John, for an information, in the nature of quo warranto, againſt him, on the ground that he had never been duly choſen a capital burgesſ,

gefs, and that confequently he could not have been duly choſen mayor.—In answer to the application, the defendant ſaid, that he was choſen a capital burgefs in the year 1697, and that as many of the inhabitants as were living at the time of the application, ſaw he was duly elected, except the proſecutor who now complained againſt him : and it was contended on behalf of the defendant, that as there had been ſo long an acquieſcence under that election, it ſhould not now be brought in queſtion ; for if it ſhould, it might as well be inquired whether the defendant was a freeman before he was a burgefs, and whether he was a burgefs before he was a capital burgefs, which would be attended with many inconveniences.

THE Chief Juſtice ſaid, “ the fact was plain, that the defendant had been mayor of this place for ſixteen years (a) together, which was a ſufficient cauſe for an information ;” but he is not reported to have ſaid any thing on the right of holding over, or how it was affected by the ſtatute of Queen Anne.—The rule was made abſolute, and a trial being had, and a verdict found for the plaintiff, a motion was made to ſet aſide the verdict, which the court took *time to conſider*, and agreed that, in the mean time, Juſtice Forteſcue ſhould conſult with Baron Price, who tried the cauſe, and report his opinion: Forteſcue afterwards informed the court, that the opinion of the Baron was, that the verdict was not againſt evidence, but that the proof was only by *one* witneſs, that the defendant was a capital burgefs duly elected, and that the evidence that he was not duly elected was given by John John alone ; that an objection had been taken at the trial to his evidence, but over-ruled, and that the Baron was ſatisfied with the verdict.

(a) He meant eighteen.

THE

THE ground of the application for a new trial was, that John John, who was the only witness against the defendant, having been served with a rule of the court to produce the corporation books at the trial, had not done it; and that if the verdict should stand, this inconveniency must follow, that all the acts of the corporation ever since the defendant had been mayor, must be avoided; because, if he was not lawful mayor, all the corporate acts done by him were void.

THE majority of the court, against the opinion of Justice Fortescue, refused a new trial, because the judge who tried the cause, was of opinion that the verdict was not against evidence; and observed that, as that was the case, the only reason which remained in favour of a new trial was, that from long continued possession, the defendant must be presumed to have been duly elected, and that an inconveniency would ensue from the avoidance of all corporate acts for so many years past: and as to this, they said, that if the question at the trial had been, whether the defendant had had a right to *vote* or not, or whether he had taken the oaths or received the sacrament within the time limited by the statute, his being mayor, in point of fact, and a long acquiescence under such a mayoralty, would be a strong evidence for him; but when the question only was, whether he was duly elected into the office, "that was a question concerning the right," and in such case the long possession of the mayoralty, or the many inconveniencies that would follow if he was not duly elected, ought not to be regarded (a).

FROM the whole of this case, no very satisfactory conclusion can be drawn; the ground of the application for the information was the ineligibility of the defendant to

(a) Rex v. Alexander John. 3 Mod. 132.

the

the office of mayor at the time of the election: the Chief Justice paying little attention to that, thinks the length of time he had held the office a sufficient reason for granting the information: the trial is had upon the question of eligibility; and that question, by the verdict, is given against the defendant; the ground of application for a new trial is, that length of possession ought to have prevented the evidence of ineligibility from having been received: the court think that long possession is not to be regarded as opposed to the direct evidence of ineligibility; but they do not use it as an argument *against* the defendant, and a principal reason in *support* of the verdict, which they ought to have done, if they had thought the right of holding over could not justify so long a possession.

REASONING from the nature of the thing, independently of authority, I should conclude, that a clause of holding over was inserted in the charter, merely to provide against any inconveniency that might arise from the accident of no election of a new mayor on the charter day, and to enable the corporation to elect at any time *after* that day, *without* the death or removal of the preceding mayor.—What effect the statute of 11 G. c. 4, has on this clause, will be more properly examined in another place.

SECTION IV.

Of the manner of enforcing the undertaking of an office within a Corporation.

THERE are several ways in which a member of a corporation may be compelled to take upon him any office or place to which he is appointed or elected, or at least, in
which

which he may be punished for his refusal.—The most usual of these is a penalty imposed by a bye law, which may be recovered by an action of debt.

THE case of *Taverner (a)*, which is usually cited (*b*) as the first authority on this subject, has, in fact, no relation to it; instead of being an action of debt to recover a penalty for refusing to undertake an office, it was an application by the party chosen a liveryman of the company of Vintners, in London, for a mandamus directed to the master, warden, and assistants of the company, to admit him: the mandamus was granted; the return admitted the plaintiff's election, and assigned as a reason for their refusing to admit him, that he had refused to pay the sum of 3*l.* 13*s.* 4*d.* which, by a bye law of the company, every man chosen into the livery was to pay on his admission.—The court held the return good, and said, that whether the sum was more or less, it could not make the bye law void, because it was to bind only the members of the corporation; and “that when a man became a member of a company, he impliedly consented to become bound by the laws of it.”

IN the case of the Stationers' Company against *Salisbury*, the real question was before the court, but was not decided, because an objection was taken on a collateral point. This was a bye law, “that the master, warden, and assistants should, from time to time, elect such members as they thought fit into the livery, and that if any person so elected should refuse to accept the office without a reasonable excuse, *to be approved by the court of assistants*, the person so elected and refusing should forfeit 4*ol.*” The validity of the bye law was questioned on account of the clause “to be approved by the court of assistants;” for, said Holt,

(*a*) Raym. 446.

(*b*) 5 Mod. 319. 1 Bur. 237, 238.

if the cause were reasonable, yet it might not be approved: so that it would seem, that if this clause concerning the approbation had been left out, the bye law would have been good (a).

IN the case of the city of London against Vanacker (b), the question was fully canvassed, and decided against the person refusing to accept the office: it was an habeas corpus directed to the mayor, aldermen, and sheriffs of the city of London, to remove the body of Vanacker with the cause: they returned that the city of London was an ancient city and a county of itself; that the citizens from time immemorial had been a body politic known by several names: that King John, by his letters patent, had granted to them the sheriffwick of the city of London and of the county of Middlesex, and that they should choose the sheriffs from among themselves — that they had a custom to make bye laws, and that if any of their laws or customs were defective, — or if any matter arose for which convenient remedy was requisite, then the common council should ordain convenient remedy, so that it were honest, profitable, and reasonable; that there was, and from time immemorial had been, a court of record held before the mayor and aldermen, in the inner chamber of Guildhall: that an act of common council had been made the 7 Car. 1, which, “after reciting several acts of common council before that time made concerning sheriffs, and that these were found inconvenient, because the penalty on those who refused to undertake the office was too mild, and therefore the city might be prejudiced for want of persons to execute it,” repealed all these laws, and enacted, that the election should be yearly on Midsummer day, and if there

(a) Stationers' Company v. Salisbury, Comb. 221, 222.

(b) 1 Ld. Raym. 496. 1 Salk. 142. Carth. 480. 5 Mod. 438.

were

were occasion for a new election, then on such day as the court of aldermen should appoint, and that he who should be elected, being a freeman of London, should serve, and should not be discharged, unless he came voluntarily before the court of aldermen, and swore that he was not worth 10,000*l.* and brought six compurgators with him, such as the lord mayor and court of aldermen should approve, who should swear, that they believed in their consciences that he swore what was true; and that if any freeman elected sheriff, and proclaimed in the hustings, should not come at the next court of aldermen, to be held in the inner chamber of the Guildhall, and there declare, that he would accept the office, and become bound in a bond of 1000*l.* to accept it at the vigil of Saint Michael next ensuing, not having reasonable excuse, to be allowed by the lord mayor and court of aldermen, nor being discharged—he should forfeit 400*l.*—which should be recovered in the court of the mayor: then they shewed the election of the defendant, and brought him within the terms of the bye law, by which he forfeited 400*l.* for which a plaint was levied.—Several objections were taken to this return, but all of them overruled: Holt delivered the opinion of the court at full length, and, as far as is necessary for the present purpose, expressed himself to this effect:—“That the very constitution of the charter of King John, which granted this franchise to the city, obliged the citizens to make bye laws concerning it; for the charter appointed that they should make such as they pleased, from among themselves, sheriffs; so that they were not to execute the office by themselves, nor by deputy, but were to *appoint* two persons, who, as soon as they were appointed, were absolute sheriffs, and immediately attendant on the King’s courts: that it would be vain to give them such a power of election, if they could not

*Freemen
bound by
the charter*

compel the persons elected to serve; that the acceptance of the charter bound the body politic to perform the terms on which it was granted; and as every citizen was capable of the benefit of the franchise, so also he ought to submit to the charge; that as those who *accepted* the charter were bound by it, so were all those who had been made freemen since: that since it was part of the constitution by which the franchise was granted, that the office should be executed by citizens elected from among themselves, an omission to elect would be a forfeiture of the franchise: that it was therefore necessary that they should have a coercive power to compel the persons elected to take the office upon them, and that therefore a bye law imposing a penalty for refusing was good, though there had been no custom set forth to justify it.—To the objection which had been made, that it was unreasonable to impose an oath upon the party, and not only so, but to oblige him to bring six compurgators with him, such as the lord mayor and aldermen should judge fit: he answered, that this was a favour to the defendant; for that it must be granted that, when elected, he was bound to serve: but here the bye law admitted an excuse, that he was not worth 10,000*l.* and admitted also the oath of the party himself, which was a greater favour, only it required the oath of six compurgators, which was not unlawful: nor was it unreasonable that the mayor and aldermen should have the power of refusing to admit them, in order that they might not be infamous persons and unworthy of credit.

IT is no objection to such a bye law that the penalty is imposed absolutely, without providing for the party's having a reasonable excuse; nor, if such provision be made, is it an objection that the excuse is to be allowed by the mayor and aldermen, or any other body of the corporation.—The objection made on account of the latter circumstance,

cumstance, in the case of the Stationers' Company, was not determined, and therefore nothing can be concluded from that case, as to the force of that objection. But the case of Vanacker is a direct authority against it.—It was there objected, that the mayor and aldermen were judges of the reasonableness of the excuse, and therefore judges in their own cause, since the words of the bye law were, “such reasonable excuse as the mayor and aldermen shall judge proper,” and not a reasonable excuse in general. To this it was answered, that if the mayor and aldermen *allowed* the excuse, the city would be bound for ever; and if they refused to admit a reasonable excuse, their refusal would not be final; it might be controverted in an action brought for the penalty (*a*). The defendant might either plead it, or give it in evidence on the general issue (*b*).

THAT it is no objection to the bye law that it makes no provision at all for a reasonable excuse, was expressly decided in the case of the Vintners' Company against Pafsey (*c*). This was an action of debt brought against the defendant, to recover a penalty imposed by a bye law of the company, in order to enforce another bye law, of which the part material to the present question was to this effect: “that once in every year, or oftener if occasion should require, the master, wardens, and assistants, or the major part of them, who should be then present at a court of assistants for the time being, to be holden for the said mystery, *should* and *might* elect into the livery of the said corporation or mystery, such and so many of the yeomandry of the said mystery as should seem most meet and convenient to them, and that every such person——so elected——should, at or before his admission into the said livery, pay to the

(*a*) 1 Ld. Raym. 500.

(*b*) 5 Mod. 442. Carth. 483.

(*c*) 1 Bur. 235.

master, wardens, and freemen and commonalty of the said mystery, to their use, the sum of 31l. 13s. 4d." The bye law on which the action was brought was to this effect: "that every person chosen in pursuance of the first law, who should not, on notice given him by the clerk or beadle, accept of the livery, or on acceptance should, before his admission, refuse to pay to the master, &c. the sum of 31l. 13s. 4d. should forfeit to the said master, &c. the sum of 25l."—After stating these bye laws, and averring them to be reasonable, the declaration alleged that at the time of making them, and ever since, all the freemen of the said mystery, before their admission to the livery, were known by the name of the Yeomandry, and that the defendant was a proper person to be elected into the livery: it then set forth his election and his refusal.—The defendant pleaded the general issue *nil debet*, and likewise another plea, which being given up without argument, it is unnecessary to state. On demurrer to this second plea the case came before the court; and the principal objection taken to the bye law was, that the penalty of 25l. was made payable absolutely and at all events; in support of which it was said, that the liverymen ought to be persons of substance, capable of being at the expence of serving or paying the fine; that the averment "that the defendant was a proper person," went only to the just *execution* of the bye law, but would not make the bye law itself good, if it were otherwise void. To this the same answer was given as in the case of Vanacker, "that if the defendant had a reasonable excuse, he might plead it or give it in evidence on *nil debet*; that it was *implied* that a reasonable excuse was to be admitted; and that the court could never *presume* that the persons chosen were not meet and convenient.

NEITHER

NEITHER is it an objection to the bye law, that it does not provide for notice to be given to the party of his election: this objection was made in the case of Vanacker, and it was added, that the party might be beyond the seas, and it would therefore be unreasonable to bind him to take notice at his peril of what was done in his absence: but to this the chief justice answered, that in judgment of law every citizen was intended to be inhabiting within the city, and ought to be present at all public courts and assemblies, and therefore privy to all public acts; and if he be absent, it is his own neglect, of which he shall not take advantage. In the present case, it had been objected, that the bye law concerned *all* the freemen, but that the election was made only by the liverymen, who were a small number compared with all the citizens: to this it was answered, first, that it did not appear by the return, that the election was made by the liverymen, and therefore it must be supposed to have been by all the citizens; but, secondly, admitting that it was by the liverymen; yet every citizen was bound to take notice of what was done by them, for the same reasons that all persons are bound to take notice of what is done by parliament; because, though the liverymen are not in fact delegated by the citizens, yet they are considered as their representatives in matters of election (*a*). The proclamation on the hustings, too, was sufficient notice, if notice was required, and agreeable to the reason of the common law; to some cases of which he compared it: to the case of a *præcipe* brought against a man, where summons on the land is sufficient; and to the case of outlawry, where proclamation in the county court is sufficient; because the tenant is supposed to be commorant on the land, and every man of the county to be attendant on the county

(*a*) 1 Ld. Raym. 501. 1 Salk. 142.

court.—If a man had occasion to be absent, he knew whether he was liable to be elected, and therefore ought to take care to be informed; otherwise, he said, it would be highly inconvenient, if it should be in the power of the citizens to withdraw themselves, so that no notice could be given, and the office consequently could not be executed.

IF the bye law require that the party elected shall appear at the *next* court to take upon him the office, it is not necessary that he should have formal notice of the *time* of holding the court; for, as a member of the corporation, he is *bound* to take notice of the time of holding their courts (*a*).

BUT the terms of the bye law must be confined to those, who, from the constitution of the corporation, or from the nature of the thing, are bound to undertake the office: on this principle, where a bye law of the city of Oxford was set forth in these terms, “that if any *person* should be duly elected to be chamberlain, and should refuse to undertake the office, he should forfeit 10*l*.” judgment was given for the defendant, on the ground that the bye law as set forth extended to persons who were not members of the corporation, though in a subsequent part of the declaration it was alleged, that “he, being then a citizen and freeman of the said city, was elected, and refused to take upon himself the office;” because this allegation applied only to the just *execution* of the bye law, but could not make the bye law itself good (*b*).

ON the same principle it would seem, that where by the constitution of a company in the city of London, a man may be a freeman of the company without being a freeman of the city at large, which is the case of several companies, a bye law, imposing a fine for refusing to accept

(*a*) *Vintners' Company v. Pasley*. 1 Bur. 239, 250.

(*b*) *Mayor of Oxford v. Wildgoose*, 3 Lev, 293, cited 1 Bur. 237.

of

of the livery of the company, must be confined to such freemen of the company as are freemen of the city; because the liverymen are not representatives of the freemen of the companies, but of the freemen of the city. At least the declaration on such a bye law must shew that the defendant is both a freeman of the company and of the city: in the case of the master and wardens of the society of Innholders in London against Gledhill (*a*), this objection was taken by Foister, J. to the declaration, that it did not allege that the defendant was a freeman of the city; because any person who keeps an inn within the distance of three miles from London, may, by the charter of this company, be a freeman of the latter, though he be not a freeman of the former.

IN the same case the declaration was held to be insufficient, because it did not aver that the company *had* a livery; because it is certain that some of the companies of London have no livery, and the court thought they could not *intend* that this was one of the companies which had.

WHERE a corporation have a power, by their charter, to fine any of their members for not undertaking an office to which he is elected, they may fine him for not qualifying himself to be elected.—The mayor and commonalty of Exeter brought an action of debt in the King's Bench to recover a fine of 60*l.* imposed by them on the defendant, for refusing to take the oaths and subscribe the declaration required by the statute 13 Car. 2, and declared that he was elected bayly of the corporation for a year, according to their charter, by which they had a power to fine for refusing to accept the offices, and that, by his refusal, the election became void; they then averred, that the bayly

(*a*) Say. 274, 5.

usually

usually expended in his office 60*l.* that for his refusal they had fined the defendant 60*l.* to recover which they had brought the action. The defendant pleaded *nil debet*, and, verdict and judgment being given against him in the King's Bench, brought a writ of error in the Exchequer Chamber, assigning for error, that the statute did not enable them to impose any fine, but only made the office void: but the court held, that the refusal to take the oaths was indirectly a refusal to undertake the office, and therefore within their power to fine given by the charter, and therefore affirmed the judgment (*a*).

IF a man be chosen to an office within a corporation, and he refuse to undertake the office, or to take the oaths necessary to qualify him for it, it is said, that a custom in a court of record of the corporation, as the court of aldermen in London, to imprison him till he take the oaths, is a good custom, because without such power, the corporation may at length be dissolved for want of a sufficient number of officers, or the government of it may not be able to subsist, as a fine may not have the proper effect, because the person chosen may choose to pay the fine rather than serve the office (*b*).

BUT a custom for a private company within a city to commit is not good.—Grafton, one of the company of Drapers, was brought up to the Court of King's Bench by *habeas corpus*, and the cause of his imprisonment alleged in the return was, that being chosen of the livery he had refused to serve. To which the court said "they might have fined him, and have brought an action of debt for the sum; but they could not imprison him." Keeling, C. J. however added, that the court of aldermen might imprison a man

(*a*) *Starr v. mayor and commonalty of Exeter.* 3 Lév. 116.

(*b*) *March. 189. Langham's case, cited 5 Mod. 158.*

who

who should refuse to accept the office of alderman, because they are a court of record, and they might otherwise want aldermen (a).

By what is here said by Keeling, and the case of Clerke, which happened some time after that of Grafton, it may be concluded, that the imprisonment of Grafton was supposed to be by the private authority of the court of assistants; and there seems to be a very important distinction between the power of such a court of a private company, established merely for the purposes of trade, and that of a superintendant court of a corporation for the purpose of general government.

THE case of Clerke came before the court on the return to a *habeas corpus* directed to the keeper of Newgate.—The return stated, after a proper introduction, that there were within the city several companies, guilds, and fraternities, of which the company of Vintners was one; that this company had a livery, to which some of the freemen of the company were always chosen, and being so chosen, and fit persons for the office, usually held the same, without some reasonable excuse to the contrary.—That there was a court of record held in the city before the lord mayor and aldermen twice in every week, where rules and orders were made in all things relative to the several companies, for the better government of the city, and that the companies were under the correction of that court.—That there was a custom in the city, that if any complaint should be made to the mayor and aldermen of the said court, by the master and wardens of any company, of a liveryman chosen and refusing to take the office, being admonished by that court to accept it, then the mayor and aldermen had used to commit the person so refusing to the custody of

(a) Grafton's case, 1 Mod. 10.

the sheriffs of London, or any other officer, there to be detained until he should consent, and *declare* that he would take upon himself the said office.—The return then stated, that before the issuing forth of the writ, Clerke, being a citizen of London and a freeman of the company of Vintners, was chosen of the livery, and required to take upon him the office, which he refused; on which complaint being made to the mayor and aldermen, by the master and wardens of the company, he was summoned to appear—which he did, and refused to take upon himself the office, and being admonished by the court, still refused, on which the court, by a warrant in writing, committed him to custody, there to remain till he should *consent and declare* that he would accept the said office; and that this was the cause of his taking and imprisonment.

MANY exceptions being taken, some to the form and others to the substance of the return, the court said, that a commitment till he should *declare* his consent to accept the office, was more than if he had been committed till he should *actually* consent: and that therefore, though the court of aldermen might commit him till he should *consent*, yet they had no power to imprison him till he should *declare* his consent.—With deference to this authority, however, this distinction seems to be altogether absurd: how is his consent to be known, if he do not declare it? If consent be taken merely as a submission of the mind, a commitment till he shall consent is nugatory: but in common acceptance, “to consent,” implies an intimation of some kind, that he is willing; and had the commitment been till he should consent, the declaration of his consent must have been implied.

THE court, however, further observed, that the court of aldermen were the proper judges of an excuse made by the

the defendant for not taking upon him the livery; and if they adjudged it insufficient, and appointed him to accept the office, and he refused; this was a contempt of their authority, for which they might commit him: and afterwards Holt in particular said, "that the court ought, as far as they could by law, to support the government of all societies and corporations, especially that of the city of London; and that, if the mayor and aldermen should not have power to punish offenders in a summary way, then farewell to the government of the city."

CLERKE was, however, discharged, on the ground that it did not appear by the return, that the keeper of Newgate was an officer belonging to the lord mayor and aldermen; and that they could not commit to any but their own officers; and therefore the commitment ought to have been to the custody of the sheriffs, who were known to be officers of the city (*a*).

IN many cases the Court of King's Bench will grant a criminal information against persons, for not taking upon them offices to which they have been legally elected (*b*): the case of Larwood is an instance of this, in which no objection was taken, that an information was not maintainable against a person for refusing generally, but the defendant, as a dissenter, insisted on his being exempted.—And before the final determination of that question, one Grosvenor, a dissenter, having been chosen one of the sheriffs of London, and refusing to take upon himself the office, an application was made for leave to file a criminal information against him; but on shewing cause, the court discharged the rule, it appearing there were acts of com-

(*a*) *Company of Vintners v. Clerke*. 5 Mod. 156, 319. *Rex v. Clerke*. Comyns, 24.

(*b*) *Dist. per Buller*, J. 5 Term Rep. 86.

mon council which provided other remedies, and it being yet unsettled how far the refusal in such a person as the defendant was a crime, they did not think they ought to interfere in this way. However, they declared that, if the point should be determined against the dissenters, and they should afterwards refuse, this might be a foundation to ask for an information (a).

It seems, likewise, that an indictment may be maintained against a man for refusing to undertake an office in a corporation: in the case of Vanacker, one objection made to the power of *fining* the party refusing, was, that he might be indicted, which, it was said, was a more proper remedy; and that he might be indicted, had been held in Norwood's case: to this the chief justice answered, that if the party *were* indicted, that would not save the forfeiture of the franchise, which would be incurred, if the city did not appoint to execute the office: but that an indictment would not lie in the present case, because the refusal was not at the time when the defendant ought to have entered on his office, but before; that if, indeed, the defendant had refused at the vigil of Saint Michael, he *might* have been indicted; but that for his refusal before, he could not, because he might have repented and entered on the office at the day (b).

. NOTWITHSTANDING this power of a corporation to compel their members to undertake the offices, yet, where two offices are incompatible, and a man is already in possession of one of the two, they cannot, against his consent, elect him to the other: therefore, where one Baston, who, being town clerk of B. was elected alderman, in order that he might be deprived of his office of town clerk, as these

(a) *Rex v. Grosvenor*, 2 Str. 1193.

(b) 1 *Ld. Raym.* 499. 5 *Mod.* 440, 441.

two offices were incompatible, applied for a writ of restitution to the latter, it was granted him (a).—And Coke is reported to have said, in the case of the chamberlain of London, “that whereas the custom of London was, that if any one were elected mayor, and he refused, he should pay 500*l.* for a fine; if they elected one who was not fit, *for the purpose of having the fine*, the election was void (b). Rolle, indeed, who reports this as a note, says it is a mistake: but whether he means that Coke is mistaken in stating the custom, or in his assertion that the election is void, when made for the purpose of having the fine, is uncertain; if he mean the latter, I apprehend that *he* is mistaken, and not Coke.

SECTION V.

Of the different assemblies in Corporations.

THERE are three different kinds of assemblies in corporations, all of which are frequently called courts—Legislative, electoral, and administrative: legislative, which possesses the power of making laws for the government of those who are within the jurisdiction of the respective corporations; such are the court of common council in London, the legislative courts of the different companies within that city; the comitia majora of the college of Physicians (c); the convocation in the university of Ox-

(a) Dyer, 332, pl. 28, in margin. Vid. 2 Term Rep. 88.

(b) 1 Rol. Rep. 109. Mes en hoc erratum est, says Rolle.

(c) Vid. 14 and 15 H. 8, c. 5. 4 Bur. 2187.

ford;

ford; the congregation or senate in that of Cambridge (*a*); the court of proprietors of Bank, East India, and South Sea Stocks.—Electoral, which possesses the privilege of elections; such are the livery in London for the election of members of parliament, and wardmotes for those of aldermen; the convocation and congregation in the university of Oxford, and the congregation in that of Cambridge; the comitia majora of the college of physicians, and the proprietors of the stock companies.—Administrative, who have the management of particular affairs; such are the court of aldermen in London; the comitia minora of the college of physicians; the convocation and congregation of the university of Oxford; the congregation in that of Cambridge; the courts of assistants in the city companies; the court of directors of the Bank and other stock companies.

So that the same body of men frequently possesses distinct powers.

SECTION VI.

Of the concurrence required in corporate acts.

WHERE no special provision is made by the constitution of a corporation, the whole are bound by the acts, not only of the major part (*b*), but of the major part of those who are present at a regular corporate meeting, whether the number present be a majority of the whole body or not (*c*). So, though a particular constitution require the

(*a*) Vid. ante, 328, 329.

(*b*) 10 Mod. 75. 12 Mod. 232, ubi major pars, ibi totum.

(*c*) Vid. ante, 309, and Cowp. 249, vers. finem.

presence

presence of a majority of the *whole* number, yet the *concurrency* and *consent* of a majority of the *whole* is not necessary; it is sufficient that a majority of the *number present* concur (a). So, where a number less than the majority of the whole, are by a particular constitution competent to do a corporate act, the act of a majority of that smaller number is equivalent to the act of the majority of the whole: thus, by the constitution of the city of London, forty are sufficient to form a court of common council, though the number of common councilmen greatly exceeds the double of that number, and a *majority* of the forty, if no more be present, bind the whole corporation. So, where it appeared that King Edward the sixth, by charter, incorporated twelve persons by name, to elect a chaplain for the church of Kirton, in Lincolnshire; and by a distinct clause, *three* of the twelve were to choose a chaplain to officiate in the church of Sandford, within the parish of Kirton, with the consent and approbation of the major part of the inhabitants of Sandford;—on a vacancy, two of the three chose a chaplain, with the consent of the major part of the inhabitants of Sandford; the third dissented: the question, whether this was a valid election, coming before Lord Chancellor Hardwicke, he is reported to have expressed himself thus. “It cannot be disputed, that wherever a certain number are incorporated, a major part of them may do any corporate act; so, if all be summoned, and *part* appear, a major part of those that appear may do a corporate act, though nothing be mentioned in the charter of the major part.”

“THIS is the common construction of charters, and I am of opinion, that the three are a corporation for the purpose for which they are appointed, and that the major part

(a) Vid. 2 Bur. 1019.

of them may do any corporate act; this was a corporate act, and the choice too was confirmed, and consequently it was not necessary that all the three should join" (a).

WHEN a clause, *expressly* empowering a major part to act, is inserted in a charter, the operation of it depends on the context, and on the position of the words.

WITH respect to the body at large, the cases on this point may be distributed into three classes. First, where the number of those out of whom the corporate assembly is to be formed is definite, and the clause is, "they or the major part of them," without the addition of the words "for the time being." Secondly, when the number is indefinite, and the clause is also without this addition; and, Thirdly, when, either in the case of a definite or indefinite number, the words "for the time being" are added.

THE charter of New Radnor required (b) that the capital burgesses should be chosen by the burgesses or the *major part* of them; thirty-one was the whole number of electors; nine only were present at the election of a capital burgess, but a majority of the nine concurred in the election: an application was made for a rule against the person elected, to shew cause why an information, in the nature of quo warranto, should not be filed against him, on the ground, that a majority of the thirty-one should have been present; and the rule was granted (c).

(a) Attorney Gen. v. Davy, 2 Atk. 212, where Lord Hardwicke is made to express himself further thus, "but if the act to be done by a select number of the twelve had been by a different charter, it would have been otherwise." The meaning of which I confess I do not understand.

(b) In stating the provisions of a charter, or the constitution of a corporation by prescription, I use the past tense, because, in some cases, an alteration may possibly have been made since the time of the report from which I take my information.

(c) Anon. 2 Barnard, 74.

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By a bye law of the borough of Carmarthen, made in the reign of Queen Elizabeth, the right of electing a mayor was vested in the major part of the common councilmen of the borough, the number of whom, when compleat, was twenty-four; this right had been exercised ever since that time by the major part of the common councilmen, till the year 1754, or 1755, when, on the day appointed for the election of a mayor, a mob took possession of the town hall; on the succeeding day another mob did the same, and on the latter day the *burgesses at large* elected a mayor, but the person who presided was not the proper person; so that, on the supposition that the right of election was in the *burgesses at large*, the present election was irregular: the common councilmen at this time were reduced to eleven: under these circumstances, an application was made to the court of King's Bench for a mandamus to be directed to the common councilmen, on the ground, that if the right of election should be determined to be in the major part of the common councilmen, and one of them should die before a mayor was elected, no election could take place. The chief justice (*a*) on this point observed, "that the circumstance of the common councilmen being reduced to the *lowest* number which could elect a mayor, was of great weight; for that if the right of election were in the major part of the common councilmen, and any one of the common councilmen should happen to die before there was an election of a mayor, no election could ever take place, and consequently the corporation must be dissolved" (*b*).

From this it appears, that the court thought that no election could be, but in an assembly consisting of a number equal

(*a*) Ryder.

(*b*) *Rex v. Newsham and others*, common councilmen of the borough of Carmarthen. Sayer, 211.

to a majority of the *whole* body, and that a majority of the *existing* members, less than that number, was not sufficient. That this was their opinion, is confirmed from what Mr. Justice Aston said on a subsequent occasion, in an answer to a question from Lord Mansfield; the former had had the conduct of this cause, and therefore knew exactly what points had been made in the argument, and the grounds on which the court proceeded in giving judgment, as well as the opinion of the court on every point canvassed in the cause, though not expressly decided (*a*). The question of Lord Mansfield was in these words; "is there any case, where the charter has directed the election to be by the majority of the body in which it has been held, that a less number than a majority of the whole corporate body can elect? For instance, suppose the corporate body consisted of twelve, and two were dead; is there any instance where the charter has said, the election shall be by a majority of the body; in which it has been held that six, who are a majority of the remaining ten, were sufficient to elect?"

To this Mr. Justice Aston immediately replied, "that in the case of *Rex v. Reese*, and *Rex v. Newsham*, common councilmen of Carmarthen, *it was clearly understood*, that if the major part of the corporation had been dead, it would have been, in fact, dissolved, or at least, those who survived could not have assembled for the purpose of an election" (*b*).

In the case of *Grimes*, capital burgesses of Yarmouth, in the Isle of Wight, one principal point was, whether John Leigh was mayor at the time when the former was elected: this depended on the question, whether the election of Leigh had been according to the directions of the charter; of which the clause relating to this subject was to this ef-

(*a*) Pr. Ld. Kenyon, 4 Term Rep. 823.

(*b*) In the case of the *King and Monday*, Cowp. 537, 538.

fect,

fect, "that the mayor, and eleven of the capital burgesſes *for the time being, or the greater part of them*, of whom the mayor was to be one, ſhould aſſemble in the Guildhall, and there continue, till they, or the greater part of them then there aſſembled, ſhould elect a mayor for the year following from among themſelves:" on the 21ſt of September, 1759, there were eleven chief burgesſes; and on that day, the then mayor and *three* of the chief burgesſes, of whom John Leigh was one, met in the Guildhall, and there, in the abſence of the other *ſeven*, elected Leigh into the office of mayor. The court held that this election was not according to the directions of the charter; of which they held the reaſonable conſtruction to be, "that the mayor, and the major part of the eleven ſubſiſting burgesſes, muſt meet; that after the major part of the ſubſiſting members were ſo aſſembled together, *then*, indeed, the major part *of thoſe who were ſo aſſembled* were to elect, and the majority among them involved the whole number, who were all bound by the determination of the majority of ſuch a meeting:" but here the mayor and a major part of the ſubſiſting burgesſes did *not* meet, there being *eleven* chief burgesſes ſubſiſting, and four only, including the mayor, having met (*a*).

ON this caſe it may be remarked, that by the poſition of the words "for the time being," we may be led to ſuppoſe, that the body of capital burgesſes might conſiſt of a greater number than eleven, although that number *only* actually exiſted at the time of this election: but the evident meaning of the charter was, that eleven was the ſmalleſt number of whom a majority ſhould be able to form an aſſembly for the election of the mayor. Had the claufe run thus, "that the mayor and eleven capital burgesſes, or

(a) Rex v. Grimes, 5 Bur. 2598.

the greater part of them for the time being," then another question might have arisen, if, by accident, the number had been reduced to eight or nine, whether, by virtue of the words "for the time being," coming after "the greater part of them," the majority of eight or nine, which would have been the majority of the *subsisting* body, could have formed an electoral assembly? Without the addition of the words "for the time being," they clearly could not.

IN the case of the King and Varlo, mayor of Portsmouth, the constitution of the borough, as far as respected the question of the validity of the defendant's election, was admitted on both sides to be:—That the corporation was a corporation by prescription, and also by a charter of Charles the first, and consisted of a mayor, twelve aldermen, and an *indefinite* number of burgesses; and that the mode of electing the mayor, as prescribed by the charter, was as follows: that the mayor, aldermen, and burgesses, *or the greater part of them*, should, from time to time, have a power of assembling themselves, *or the greater part of them*, at ——— and should there continue till they, *or the greater part of them* then there assembled, should choose one of the aldermen to be mayor.

THE election of the defendant was by a majority of the mayor, aldermen, and burgesses assembled; but the mayor, aldermen, and burgesses so assembled, did not constitute a majority of the whole corporation.

THE question was, whether, on the true construction of the words of the charter, a majority of the mayor, aldermen, and burgesses only, who were assembled, or whether the majority of the major part of the whole corporate body ought to concur in the election of a mayor?

THOSE who shewed cause in favour of the defendant stated, that there had been but five instances in the space
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of one hundred and seventy years, where a majority of the whole body were assembled at the election of a mayor, and observed, that if the objection now made should prevail, the consequence must be that the corporation must be dissolved; that this was the first time such an objection had ever been made in the case of an *indefinite* number of electors, and if good, might affect most of the corporations in the kingdom. The distinction was, that where the election was by the commonalty at large, those who were assembled had a right to elect, though they did not constitute a majority of the whole body; and that those who were absent, were virtually represented by those who were present: but that, where the number of electors was *definite*, as in the case of Grimes, there the majority of the whole body must first meet, and then the major part of those so assembled might elect.

ON the other side it was admitted, that where a power was given to any description of persons, as mayor, aldermen, and burgesses, *generally* to do an act, there it was competent to the major part of those who were present to do such act; but it was contended, that that was not the case here, and that the charter clearly meant, there should be no election of a mayor but by a majority of the major part of the constituent members, specified and impowered by the charter to act. The words were, "that the mayor, aldermen, and burgesses, *or the greater part of them*, should, from time to time, have power, on such a day, to assemble *themselves*, or *the greater part of them*." Who were to assemble themselves by this direction? At least the greater part of the whole body. And the subsequent direction was, that they should there continue, till they, or the greater part of them then there assembled, should choose

one of the aldermen to be mayor: there must therefore be a majority of the constituent body assembled.

LORD Mansfield said, that on the words of the charter alone he had no doubt; in this corporation there were an *indefinite* number of burgesses; and it was a corporation in which honorary burgesses might be made. It was in the nature of all corporations to do corporate acts; and where the power of doing them was not specially delegated to a particular number, the general mode was for the members to meet on the charter days, and the major part of those who are present to do the act. BUT WHERE THERE WAS A SELECT BODY, IT WAS A DIFFERENT THING, FOR THERE IT WAS A SPECIAL APPOINTMENT. ALL THE REASONING, THEREFORE, WAS DIFFERENT.

“BUT suppose,” continued his lordship, “the *words* of the charter are doubtful, the usage in this case is of great force; not that usage can overturn the clear words of a charter: but if they are doubtful, the usage under the charter will tend to explain the meaning of them; especially in a case like this, where, before the charter, the corporation consisted of an *indefinite* number of burgesses by prescription, and where the charter itself added no new members, but only incorporated the old ones. Since the charter, namely, for these last one hundred and seventy years, the major part of those *only* who were assembled, have concurred in electing the mayor; and there are but five instances during that period, in which the members so assembled have constituted a majority of the whole body. My only doubt at present is, whether it ought not to be put upon the record, if the parties are desirous to try the question, and to be at the expence; and therefore I think the rule ought to be made absolute in one case, and enlarged as to the rest.”

MR.

MR. Justice Aston said, that “in the case of an *indefinite* number of burgesses, as there were in this corporation, he could not conceive that the charter meant that a majority of that *indefinite* number should be present” (a).

THE case of the King and Monday came before the court on a special verdict, found in an information in the nature of quo warranto, which had been filed against the defendant; to shew by what authority he exercised the office of alderman of this same borough of Portsmouth. The special verdict set forth the directions of the charter for the election of a MAYOR, in the same terms in which they had been stated in the preceding case, except that the words “for the time being,” were inserted before the words “or the greater part of them” thus, “the mayor, aldermen, and burgesses *for the time being*, or greater part of them,” shall assemble, &c. The directions for the election of the aldermen were in these words; “if at any time it shall so happen, that any one or more of the aldermen of the said borough, *for the time being*, shall die or be removed, then, and so often, it shall be lawful for the mayor and the rest of the aldermen, *for the time being*, or the greater part of them, to elect or prefer one or more others of the burgesses to be an alderman or aldermen.—Before we go further, it must be observed, that the present case differs from that of Varlo, in this, that here the number of the body intitled to elect, is definite, and that there it was *indefinite*.

THE special verdict went on to state, that from the time of the granting and acceptance of the charter, whenever it had happened that any of the aldermen had died or been removed, the mayor and all the other aldermen (b), or the major part of them, had assembled, &c. it then stated, that on the 3d of May, 1775, there was only a mayor

(a) Rex v. Varlo, mayor of Portsmouth, Cowp. 248.

(b) Without the words “for the time being.”

and

and five aldermen; the seven remaining offices being vacant by death; that on that day the mayor, and four of the five subsisting aldermen, assembled for the purpose of electing seven burgesses to fill up the vacancies.—In the argument of this case at the bar, it was not denied that a majority of the *existing* body of mayor and aldermen might constitute the electoral assembly; but on the one side it was contended, that a majority of the *whole existing* body must concur in the election; on the other, that the concurrence of the majority of those who were assembled was sufficient: it was not even made a question, whether the number assembled must amount to a majority of the body when full: had that been the case, then the court must have decided on the operation of the words “for the time being,” and what their decision would have been it is not easy to say. It was here that Lord Mansfield put the question before stated, after the case of the borough of Carmarthen (*a*), to which Aston, after having answered in the terms there also stated, added, “but *here* the words seem to confine it to a majority of the members *for the time being*.”

LORD Mansfield then, so far as the present subject is concerned, expressed himself to this effect; “that one question was, whether the assembly was duly constituted, according to the directions of the charter, for the purpose of an election: as to that, it had been argued on both sides, that a majority of the mayor and aldermen *for the time being*, were sufficient to constitute the assembly; though they did not amount to a majority of the whole corporate body. “Therefore,” said his lordship, “I will not start a point not agitated at the bar, when the consequences might tend to a dissolution of the corporation. I will take it for granted, that a *majority* of the mayor and aldermen *for the*

(*a*) Vid. ante, p. 404.

time being, was sufficient to constitute the corporate assembly: and the fact found by the special verdict is, that a majority of those in being did meet. When the assembly are duly met, I take it to be clear law, that the corporate act may be done by the majority of those who have once regularly constituted the meeting.—What follows does not relate to the present subject (a).

THE operation of these words, “for the time being,” in the case of a body consisting of a *definite* number, has been lately very fully discussed in the case of the King and Bellringer, of which the circumstances were these (b): a charter of the 5th of Elizabeth incorporated the borough of Bodmin by its ancient name, and ordained that there should be twelve capital burgessees and counsellors of the borough, and twenty-four other capital burgessees of the number of *twenty-four*, which twenty-four, together with the twelve, should be the common council for the government of the borough, and for assisting the mayor for the time being; another charter of the 36th of Elizabeth, granted that the mayor and thirty-six capital burgessees, being the common council of the borough, together with the common clerk *for the time being*, or the major part of them—should yearly, on the 24th of September, choose one honest man of the number of the twelve capital burgessees, at that time in the borough inhabitant, who should be mayor for a year following—and that the mayor and common clerk *for the time being*, and the common council *for the time being*, or the major part of them, should elect all the officers and ministers of the borough—and in case of the death or amotion of the mayor *for the time being*, within

(a) Rex v. Monday, Cowp. 530, 538.

(b) The importance of this case will be a sufficient apology to the reader for giving it, with the arguments on both sides, at some length.
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the year, that it might be lawful for the said common clerk, and thirty-six capital burgesſes, being the common council of the ſaid borough, *or the major part of them for the time being*, to elect one of the aforeſaid twelve capital burgesſes to be mayor.—It then gave power to the mayor and common council *for the time being, or the major part of them*, to commit or fine ſuch as reſuſed to ſerve the offices. And if it ſhould happen that any of the aforeſaid capital burgesſes *for the time being*, or any other officer *for the time being*, or any burgeſs of that borough, in their functions, ſhould miſbehave, or commit any crime for which he ſhould be thought worthy, by the ſentence of the mayor and thirty-six capital burgesſes, *or the major part of them for the time being*, from his office to be removed, then and ſo often it ſhould be lawful for the aforeſaid mayor and thirty-six capital burgesſes, *or the major part of them*, ſuch perſon to remove. On the 25th of June, 1790, there were only fix capital burgesſes and counſellors, and only twelve capital burgesſes of the number of twenty-four then living and ſurviving; on the ſame day the defendant was elected one of the twenty-four, by a majority of the *then* capital burgesſes and counſellors, and of the *then* capital burgesſes of the number of twenty-four.—An information, in the nature of quo warranto, having been filed againſt the defendant, he ſet forth theſe circumſtances in his plea; the plaintiff replied, and the defendant demurred to the replication: but as the judgment of the court did not proceed on the replication, it is unneceſſary to ſtate it here.—The argument in favour of the plea was to this effect: that the words on which the queſtion more immediately depended were theſe, “that the mayor and the common clerk *for the time being*, and the common council *for the time being, or the major part of them*, ſhould elect all
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the officers and ministers;" that the words "for the time being," necessarily referred to the body as it existed at the time; and therefore the major part of them must mean the major part of the existing members: this, it was said, was the plain grammatical construction of the words; and to confirm it, as applied to the present case, it was only necessary to advert to that part of the charter which provides for the election of another mayor, on the death or removal of one within the year; there the election was ordained to be made by the common clerk and thirty-six capital burgesses, *or the major part for the time being*; no words could more strongly than these express a reference to the existing body: and that the majority to which the charter referred, must be taken to mean *the major part for the time being*, though not so directly expressed, was further evident from the clause relative to the removal of the officers and ministers for misbehaviour, which was, "if thought worthy by the sentence of the mayor and thirty-six capital burgesses, *or the major part of them for the time being*, to be removed; and yet it was expressed, that the actual removal, in consequence of this sentence, should be by the mayor and thirty-six capital burgesses, *or the major part of them*. If, then, "the major part of them" referred, in this charter, to the *original*, and not to the *existing* number, this gross absurdity would follow, that a less number might judge of the propriety of the removal than was necessary to do the ministerial act of removing: and those words were not so strong as the clause in question, where the words "for the time being," immediately preceded "or the major part of them." In order, therefore, to make sense of it, the construction contended for by the defendant ought to prevail: and as it could not be contended that words could be any longer considered as doubtful, whatever they might

might originally have been thought to be, after a precise legal meaning had been affixed to them by a court of law, it could no longer be argued that these words were doubtful, having been already interpreted by the court, in the case of Grimes, supported by other authorities. After stating the circumstances of that case, as they have been given above, the counsel remarked, that the court held the reasonable construction of the charter to be, "that the mayor, and a major part of the *subsisting* burgesses, should meet, to form the elective assembly;" but in that case, *six* would have been the major part of the *subsisting* body, whereas *seven* were necessary to make a majority of the whole number (*a*). Here Mr. Justice Buller remarked, that Aston had said, in that case, that though a majority of the *subsisting* body was sufficient to form the election when met, yet there still must remain a sufficient number of that *subsisting* body to form a majority of the *whole* body when the corporation was full.—To this it was answered, that whatever opinion Aston might have thrown out in that case, it did not appear that the rest of the court adopted it; and that in two subsequent cases, he seemed to have himself adopted a different opinion: in the case of Varlo, he had declared his opinion, that an election by the major part of those *assembled* was good, though it might not form a majority even of the *subsisting* body; and in his answer to the question of Lord Mansfield, in the case of Monday, which was that of a *definite* body, he distinguished it from the cases which he cited, by observing that the words in the case *then* before the court, "seemed to confine it to a majority of the members *for the time being*."

IN answer to this reasoning, it was contended on behalf of the plaintiff, that the construction of the charter would

(*a*) It does not appear by the report of the case of Grimes, what was the original full number.

be.

be uniform, consistent, and sensible, by referring the words "for the time being," on which the main stress was laid, to the different individuals of whom the corporation might be composed at any time subsequent to the granting of the charter: in many parts of it, those words could have no other signification; as where applied to the mayor, or common clerk; where they could only mean the mayor or common clerk, whoever he might happen to be at such a time. If this were so with respect to those officers, the same words ought to have the same construction, when applied to the other members of the corporation, namely, the body composed of twelve, and that of twenty-four. These were expressly directed to form the common council of thirty-six. Each of the persons there named, was first to take upon him one of these offices; and when the charter directed how they should be made in after times, it naturally, though perhaps superfluously, described those bodies with the addition of the words "for the time being;" meaning no more than in the other cases, that those who for the time being filled those thirty-six offices, which formed the common council, should elect. In several parts of the charter, as in that which related to the election of the mayor, where the words "for the time being, or the major part of them" occurred, it was with express reference to the common council, as consisting of thirty-six. And the major part, for the time being, of thirty-six, could have but one interpretation.—In the case of Grimes, this point was never agitated; it was enough to say, that at all events, the election, in that case, had not been made even by a majority of the *subsisting* body; and the expressions there used had a reference to that fact: in the case of Varlo, the court expressly took the distinction between corporate bodies consisting of a definite and an indefinite number: what

what was there said in the argument by the counsel relative to the case of Grimes, which was then recent, and in the recollection of the court and bar, was confirmatory of Mr. J. Buller's note of it. Arguing upon the distinction above-mentioned, he said, "but if the number of electors be *definite*, as in Grimes's case, there the majority of the *whole* body must first meet, and then the major part of those so assembled may elect." This statement was not denied by the court, and was therefore conclusive. As to what was supposed to have been said by Aston, J. with respect to the words "for the time being," distinguishing the case then before the court from the Carmarthen cases, to which he referred, there must be some mistake in that point, because, by the paper book in those cases, it appeared that the bye law relating to the election, directed that it should be by the mayor and common council *for the time being*, or the major part of them: but, at all events, what he was reported to have said, was no more than a loose suggestion, without expressing any opinion on the subject.

THE court having taken time to consider this case, Lord Kenyon afterwards delivered their opinion to this effect. On the fair construction of the charter we have no doubt. The Queen, when she thought fit to grant this charter, granted it to a body consisting in the whole of thirty-seven, a mayor, twelve capital burgesses and counsellors of the borough, and twenty-four other capital burgesses, somewhat subordinate, for the government of the borough.—The defendant's argument supposes, that any number of the corporators, however reduced that number may be, are competent to do the several acts for which the corporation was created; and that all acts done by a majority of the corporators, though reduced, are valid. Without viewing this charter with the eye of a lawyer, it cannot be

be supposed that the Queen ever intended that any small number of the corporation, however minute, would be sufficient for the purposes for which the charter was granted ; and that the survivors, by refusing to fill up the vacancies as they happened, might monopolize the whole government of the borough to themselves. A question lately arose in another corporation in this very county, where the number of corporators was reduced to two or three, who claimed the exclusive privilege of electing members of parliament for the borough. When the case came before us, we were staggered with the proposition, that those were still legal corporators : and, after argument, we decided that they had no title, and gave judgment of ouster against one of them : even without the assistance of any authority on this point, I could never have thought that the whole government of the borough could devolve on so minute a number as two or three ; and yet, if the defendant's argument were to prevail in this case, the consequence that it might so devolve would necessarily follow. *But the cases which were cited in the argument are all one way, that there must be a major part of the whole number constituted by the charter, in order to make the elections, and to do the several acts under it.* His lordship, after stating the words of Lord Mansfield, in the case of the King and Varlo, continued to express himself thus : " it appears to me, therefore, that it was his opinion, and that of the court, that where there is a definite body, there must exist at the time when the act is done a *major* part of that definite body ; it is not necessary, indeed, that they should all concur in the election or other act done ; but they must be present ; and the election of such meeting is, in point of law, an election by the whole."—He then stated the question put by Lord Mansfield in the case of the King and Monday, and

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the answer given to it by Mr. Justice Aston; and then continued thus: "the same doctrine was again entertained by this court in the case of the King and Grimes; and we do not find a single decision in opposition to all the cases, considering that this election should have been made by a select definite body. Therefore, on the words of the charter of Elizabeth, on the intention of the Queen in granting it, as it is to be collected from thence, and on these authorities, we are all of opinion, that the defendant's was not a legal election, because, at the time when it took place, there was not a major part of the select body then in existence" (a).

It is remarkable, that though the judgment of the court is professed to be given on the construction of the charter, as well as on the authority of the preceding cases, yet no mention is made of the particular *terms* of the charter, nor any particular observation made on their operation: reasons of convenience and policy, indeed, seem to have had greater weight than any consideration of the charter; and, accordingly, it is laid down as a general proposition of law, independently of any provisions in a charter, "that where there is a *definite* body, there must exist, at the time when the act is done, a *major* part of that definite body; that though, indeed, it be not necessary that they should all *concur*, yet they must be *present*." And this is laid down as the conclusion from what is recited from Lord Mansfield's opinion in the case of the King and Varlo; a conclusion which, in my apprehension, is not justified by the premises.—In the case of Varlo, the number was indefinite, and Lord Mansfield, after giving his opinion on that case, only distinguishes it from the case of a select body, by saying, "that then it is a different thing, for there it is a spe-

(a) Rex v. Bellringer. 4 Term Rep. 810.

cial appointment ;” and he adds, “ all the reasoning therefore is different.” Which means, as I take the words, nothing more than this, that the case of a select body, depends on the construction of the particular charter by which it is constituted, and that therefore, the reasoning on the case of an indefinite body does not apply to it.—The proposition, as it stands here, extends to the case of a select body where there is no clause of “ the major part.”—The question of Lord Mansfield, in the case of the King and Monday, is confined to the case where there *is* such a clause, and it was in the cases which furnished the answer of Mr. Justice Aston.—From a review of all the cases of a definite body, a distinction seems to have been acknowledged between the case where the power of acting is given to the definite body in general terms, without the addition of the clause of “ the major part,” and where that clause is added : the question of Lord Mansfield implies this distinction ; and his doubt of the power of a number less than the majority of the whole original body, is expressly confined to the case where that clause is inserted.—Till this case of the King and Bellringer, the great doubt has been on the operation of the words “ for the time being.”—In the case of the King and Grimes these words were inserted ; but as the election of Leigh was not made in an assembly composed of a majority even of the *existing* body, it was unnecessary to decide this question, because, by the express words of the charter, a majority of eleven of the *existing* body, at least, was absolutely required to form an electoral assembly—“ The mayor and ELEVEN of the capital burgesses *for the time being, or the major part of them.*” Whatever was the number of the capital burgesses originally, or whatever might at any time ^{be} the existing number, ELEVEN of these might meet and do corporate acts ; but

whether the major part of eleven, or only the major part of the *existing* number, being *greater* than eleven, could meet and act, depends on the reference of the words "the greater part of them," to the words "ELEVEN of the capital burgesſes for the time being," or to "the capital burgesſes for the time being."—If they refer to the firſt, then fix with the mayor might in all caſes have acted; if to the ſecond, then fix could act, only in the caſe where the *existing* number was reduced to *eleven*; but in no caſe do I conceive, that a majority of the compleat original number was neceſſary. It is, however, to be obſerved here, that this caſe of Grimes differs from moſt others; in general, the power is given to the *whole* ſelect body, or to the "major part of them," or to the "major part of them for the time being:" but here it is given to "a *part* of the whole for the time being, or the major part of them:" ſo that, whatever might be decided to be the operation of the words "the major part of them" ſimply, or with the addition of the words "for the time being," in a caſe ſo circumſtanced, it could have no influence on the generality of *other* caſes; unleſs the judgment were given on *general* principles, and not as *merely* applicable to this particular caſe.

THE number of the corporate body, in the caſe of the King and Varlo, being indefinite, no diſtinction between the major part of the *whole* body, and the major part of the *existing* body could have place, and therefore a claſe of "the major part," or of "the major part for the time being," could have no operation.

THE caſe of the King and Monday would have been an authority, with reſpect to the operation of the words "for the time being," had it been made a queſtion at the bar: but as it was not, we are left to conjecture what *might* have been the opinion of the court, from the expreſſions incidentally thrown out.—The inclination of Lord Mansfield's
opinion

opinion seems to have been, that they had no effect; but Aston, J. certainly thought that they justified a decision in the case before the court, different from those of Reese and Newtham, which he cited; for though these words did really occur in those cases, it is evident he did not *suppose* they did, at the time he cited them. If, however, the question on these words was, in fact, agitated and decided in those cases, the latter are an authority that the operation of the former is nothing, and therefore, on the ground of precedent, justify the decision in the case of the King and Bellringer. The question *may* have been agitated, but it was not necessary to decide it, because the *danger* of the corporation's being dissolved in case of the death of one of the common councilmen, was a sufficient reason for the court's granting the mandamus, without positively deciding that it *would* be dissolved. The case of the King and Bellringer is a *direct* authority, that these words have not, in *ordinary* cases, any operation; and, indeed, the correct manner of considering them, seems to be that adopted by the counsel for the prosecutor in that case, "that they are a natural, though, perhaps, a superfluous description of the persons who shall, at any time, fill the respective offices to which they refer;" but that they can seldom operate to give *expressly* a power of action to a less number than a majority of the whole.

THE words "or the major part of them," have been uniformly interpreted as imposing a *restraint* on the power of acting of the body at large, which, without them, would not have existed: so that they have been considered as importing the same thing as "*not less than* the major part of them;" which appears to be directly against the plain grammatical construction of the words.

AT common law, independently of any specific constitution, when the power of acting is intrusted to any number of persons, whether definite or indefinite, any number of the whole body, however minute, is sufficient to form a legal assembly, if all be properly summoned to attend; and it is presumed, that those who do not appear mean to abide by the acts, whatever they may be, of those who do: but in order to obviate the inconvenience which might ensue from resolutions taken in a very thin meeting, it is frequently provided by a particular regulation, that no meeting shall have the power of acting, at which some specific number, at the least, shall not be present. Thus, though the house of commons be composed of five hundred and fifty-eight, yet forty form a house, and any number less than forty would do so too, were there not a standing order, that no business shall be agitated unless that number be present. So, it is apprehended, any number less than forty might form a regular corporate meeting of the common council of the city of London, though the whole of that body amounts to about two hundred and fifty, were there not some bye law or particular regulation requiring the presence of forty at the least.

THAT, where a charter gives the power of doing corporate acts to a particular body, and makes no mention of the major part, any number, however minute, when *all* are regularly summoned, may form a corporate assembly, is not only implied from the words of Lord Hardwicke, in the case of the chaplain of Sandford, before mentioned, but seems to be admitted in all the cases where "the major part" is introduced, these words forming the great objection to the validity of acts done by a smaller number than a majority of the whole. To confer a power of acting
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on the whole body was, therefore, in effect, to enable any part of that body to act, if all were regularly summoned: but it might, though erroneously, be apprehended, that unless a power of acting were *expressly* conferred on the major part, the *whole* must necessarily assemble; it was, therefore, as an indulgence, and not to impose a restraint, but to obviate a *supposed* inconvenience, that the power of acting was conferred in the alternative, on the whole, *or the major part*. But if no such inconvenience could in effect exist, the words introduced to obviate it are nugatory, and ought of course to have been, in all cases, rejected as superfluous.

It has been said, "that it cannot be supposed to have been intended, that any small number of the corporation, however minute, would be sufficient for the purposes for which the charter was granted; and that the survivors, by refusing to fill up the vacancies as they happened, might monopolize the whole government of the borough to themselves" (a): we may go further, and say, that when the King granted a charter, giving the power of doing corporate acts to a *select* body, consisting of a *definite* number of persons, it must have been his *intention* that the number should always be kept full, and that as soon as a member died, or was removed, his place should be immediately supplied by a new election: this is implied in the very form of almost every charter; for immediately after the constitution of the *select* body, a provision generally follows in such terms as these, "and if it shall so happen, that at any time any one or more of the members should die or be removed, *then and so often*——the rest——shall assemble and choose another:" from which it is manifest, that the first corporate act, after a vacancy,

(a) Pr. Ld. Kenyon, in the case of *Rex v. Bellringer*, ante, p. 147.

ought to be to supply the place of the late member: and it would have been well, if the maxim, "that a corporation can do no corporate act in the vacancy of the head, but that of filling up the vacancy" (*a*), had been applied to the case of every member of a select *definite* body, so that they might always have been under the necessity of keeping the number compleat. But as this has *not* been the case, it does not appear quite correct, to admit that such a body may act, while the *existing* members form a bare majority of the original number, and yet to decide that the power of action is at an end, the moment that a bare majority no longer remains; *merely* from the inconvenience that arises from the whole power of the corporation falling into the hands of two or three individuals. Such consequences may be an argument of the pernicious tendency of such institutions, and may be a good reason for the interposition of the legislature; but cannot justify a judicial departure from the natural construction of the provisions of a charter.

WHATEVER weight these observations might have had if the subject had been new, we must now, however, be satisfied to state the law as it appears to be settled by the decided cases:

Result of the cases as to the necessity of the concurrence of a majority of the corporate body. FIRST. That in all cases, either of a definite or indefinite body, when a corporate assembly is once duly formed, the concurrence of the majority of those assembled is sufficient, whatever proportion that majority may bear to the whole corporate body.

SECONDLY. That where no mention is made of the major part, either in the case of a definite or indefinite body, any number duly assembled, however small, is sufficient to form a corporate assembly.

(*a*) Vid. ante, 327, v. finem.

THIRDLY,

THIRDLY. That where mention is made of the major part, in the case of a definite body, no corporate assembly can be composed of less than a majority of the number when complete; and consequently, that when the number is reduced *below* that majority, the power of acting is at an end.

FOURTHLY. That in the case of an indefinite number, the clause of the "major part" has no operation: and,

LASTLY. That the words "for the time being" have no operation in the case either of a definite or indefinite body.

WITH respect to the head of the corporation, there was this difference between a corporation aggregate of one person capable and many incapable, and a corporation aggregate of many persons capable, that in the former, as in the case of abbot and convent, there must have been the concurrence of the major part, and of the head besides, because the abbot only acted with the consent of the major part of the rest; but in the latter, as in the case of master and fellows, or mayor and commonalty, the head is but a member of the acting part, in the same manner as any other individual; and therefore, without a particular usage, or the express provision of a charter, he has no casting voice (*a*).

By the local statutes of Clare-Hall, in the university of Cambridge, it is provided, that the person "*in quem magister et major pars sociorum convenerit, pro socio habeatur.*" Mr. Jennings was chosen by eight of the fellows, and another was chosen by six, and the master of the hall, Dr. Blythe, who gave his vote with the six. Dr. Blythe refused to admit Mr. Jennings, on a supposition that his concurrence was necessary to the election; the matter coming

(*a*) Per Holt. 7 Mod. 12. 12 Mod. 232.

before

before the Court of King's Bench, on the application of Mr. Jennings, that court is reported to have said, they were of opinion that the master had only a *negative* vote in this case (*a*). What is meant by this it is difficult to conceive; if it be meant that the master may refuse his consent to the election of the majority, the word "only" is improperly introduced; if it be meant that the master can only give a casting vote in case of an equality, his vote cannot be called a *negative* one; if it be meant that he and the fellows shall be the electors, and that the majority of these electors shall carry the election, then the master has only a single vote, like any of the fellows, but not the power of refusing admission to the candidate chosen by the greater number, though he himself may be in the minority: if this be the meaning of the court, it is very awkwardly expressed, and seems, likewise, inconsistent with the natural import of the clause: by that the master is distinguished from the "greater part of the fellows," and the separate assent "of the major part of the fellows" and "of the master" seems to be required; so that if the master do not consent to the person chosen by the majority of the fellows, they must choose another whom he shall approve.

By a charter of incorporation, the mayor, recorder, and in his absence the deputy recorder, and capital burgesses, *vel major pars eorundem*, were empowered to choose capital burgesses; on this clause a question arose, whether acts done by the mayor and majority of the burgesses, without the presence of the recorder or his deputy, were good; and the court inclined to think they were good, and that the word "eorundem" referred not only to the capital burgesses, but to the mayor, recorder, and capital burgesses, as one

(*a*) *Rex v. Blythe*. 5 Mod. 404. Mr. Jennings's case of Clare Hall. 5 Mod. 421.

aggregate

aggregate body; and that if this were not so, the addition of such words in charters as these, "of whom the recorder shall be one," would be useless and unnecessary (*a*).

By the charters of the town of Denbigh, there are to be two bailiffs, two aldermen, and twenty-five capital burgeses; and the direction, how the capital burgeses are to be elected, is in these words: "and if it happen that any of the said capital burgeses die, or be removed, then it shall be lawful for the bailiffs, aldermen, and capital burgeses *for the time being*, or the major part of them, *quorum unum ballivorum, et unum aldermanorum, duos esse volumus*, to elect another;" on a vacancy, the bailiffs, aldermen, and capital burgeses met, and proceeded to an election; the *two* bailiffs and the major part of the capital burgeses gave their votes for Sir Robert Salisbury Cotton, and the two aldermen and the residue of the capital burgeses voted for another.—It was contended that this election was void, and that *one* bailiff and *one* alderman ought to have voted for the same person: but the court held, that the *presence only* of one bailiff and one alderman was necessary at every election, but that they had no negative voices; and they compared it to the case of the city of London, where the mayor and common council have power to do corporate acts, yet the act of the majority of the common council is good, though the mayor dissent (*b*). So, that, though the *presence* of a particular person be required at a corporate meeting, it does not follow that his *consent* is necessary to every *act* of that meeting.—So, though the *concurrence* of any particular persons be necessary, to render any act valid, that concurrence will be presumed, if it appear they were present when the act was done, and did not expressly dis-

(*a*) Queen v. Sutton, 10 Mod. 74.

(*b*) Sir Robert Salisbury Cotton v. Davis. 1 Str. 53.

sented.

sent. Thus, where it appeared that an officer was removable by bailiffs and burgesses, or the greater part of them, "of whom the bailiffs to be two," and it was said in the return to a mandamus, that he was removed by the bailiffs and burgesses, the bailiffs being then present, the court held, that if the actual consent had been required in this case, their consent should be intended, either as actually given, or as included in that of the major part: but they held that it was not required; for that, as in all corporate acts, the act of the majority is the act of the whole, so the bailiffs being the head of the corporation, nothing could be done without their *presence*, though it had not been expressly required, and its being so required did not render their concurrence necessary (a).

*Where a Cor-
porate Office
is held by more
than one person*

WHERE the head office of a corporation is filled by more than one person, as in the case of two bailiffs, and any corporate act is directed to be done by the two bailiffs and the other members of the corporation, or the *major part of them*; in such a case, though it be not necessary that the bailiffs or either of them should make part of the majority concurring in the act, yet the *presence of both* is absolutely necessary: because both fill but *one* office.

THE corporation of Malden, when full, consisted of two bailiffs, six aldermen, and eighteen capital burgesses: the clause which directed the election of aldermen was in these words, "that the bailiffs and capital burgesses, or the major part of them for the time being," should elect the aldermen.—One Smart was chosen alderman at a corporate meeting, where Jonas Malden and Charles Malden presided as bailiffs. Charles Malden had not been properly sworn into the office of bailiff, for which reason judgment of ouster was afterwards given against him in an

(a) 1 Ld. Raym. 1236, 1237. 2 Salk. 434, 435.

information

information in the nature of quo warranto: it was therefore made a question whether Smart's election was good, as in reality *one* bailiff only presided at the meeting. It was agreed, that if *two* bailiffs had presided, the assembly would have been good, and that an election by a *majority* of the *whole* body assembled would also have been good; but it was contended that the election in the present case was void, and the court was of that opinion, because the *two* bailiffs made but one officer. They considered the case in the same point of view, as if the head officer had been a mayor.

WHERE the provisions of a charter direct that the new mayor shall be sworn *before* his predecessor, the *presence* of the latter is not sufficient; there must also be his *assent*; at least nothing must appear from whence his *dis*sent is manifest. By the charter of New Romney, the new mayor was to be sworn before his predecessor. At the election there were two candidates, Ellis and Whitwick; Ellis had the majority, notwithstanding which the mayor ordered Whitwick to be sworn: the town clerk read the oath, and both Ellis and Whitwick laid their hands upon the book and kissed it. On a trial of the issue, whether Ellis was duly sworn, the judge ruled that he was not; for that there was no difference between being sworn *by* the mayor and *before* him, and that as it was to be his *act*, his *assent* must go along with it (*a*); and on a motion for a new trial, the court were of the same opinion.

*where the
mayor's consent
is necessary
to the validity
of a corporate
act.*

(a) Rex v. Ellis. 2 Str. 994.

SECTION

SECTION VII.

Of the regularity of corporate proceedings.

EVERY corporate act must be done in a corporate assembly, properly constituted and duly assembled. Of the proper constitution of a corporate assembly something has been said in the preceding section, and something further will be said in the present; but the first object of consideration is that it be duly assembled. This depends on the members having had such notice of the meeting, as the nature of the assembly itself, the time of its being held, and the nature of the business to be transacted, require.

WHEN a corporate act is to be done not on a charter day, and by a *select* number, all the members who, by the constitution of the corporation, compose the assembly, except those who have absolutely deserted the town, should have notice that such *particular* assembly is to be held for the purpose of doing some corporate act, though it be not in *general* necessary that the particular business should be specified. And where there are different assemblies in a corporation with distinct powers, and all the members of the smaller assembly are members of the more numerous; if the more numerous assembly be summoned to meet to exercise the powers lodged in them, those who are members of the smaller assembly cannot separate from the rest, and exercise their distinct powers: but there must be a summons for that purpose of the smaller assembly by itself.

THE corporation of the city of Carlisle consisted of a mayor, aldermen, bailiffs, and capital citizens, who together formed the common council, and had the power of
electing

electing capital citizens; the power of amotion was in the mayor and aldermen only, or the major part of them. The common council met for the purpose of transacting the business of that assembly; and the mayor and aldermen made an order for the amotion of one Poulter, a capital burges, for a cause which was allowed to be legal. The case coming before the court on the application of Poulter to be restored, the Chief Justice (a) observed, that the powers of the common council, and of the mayor and aldermen, were distinct; that the common council could do no acts, unless assembled in that capacity; neither could the mayor and aldermen, unless they met only in that character, on a regular summons for that purpose; and that as these two bodies had distinct authorities, they must be summoned in their distinct capacities; that here was no summons to meet as mayor and aldermen only, of which the consequence was, that the acts done by them in that distinct capacity were void. An alderman, when he received a summons to the common council, might consider with himself, that there were a great many members, and that probably his single voice might not be wanted, and therefore he might stay at home: but when he was summoned to meet with the mayor and aldermen only, he might say, there are but twelve of us in all, and therefore my voice and advice, to which others have a right, may have its weight: he might likewise reflect, that the powers lodged in the court of mayor and aldermen were of a higher nature than their other powers; and therefore, as his presence might, on both accounts, be necessary, he might make a point of being there. Was it reasonable, then, that the others should proceed to act as mayor and aldermen only, when they assembled as members of the

(a) Pratt.

common

common council? What confusion would this make in the city of London, if, when the whole body was assembled, they should suddenly draw off into different parties, and execute their distinct powers?

SOME difference arising on a collateral point, the matter was adjourned; but afterwards the Chief Justice delivered the opinion of the court, that the removal in this case was not regular, and that there ought to have been a summons for the mayor and aldermen to meet in their distinct capacity (a).

THE corporation of Appleby consisted of a mayor, twelve aldermen, and sixteen common councilmen, beside the freemen at large: the mayor was to be chosen by the common council out of the aldermen, and the common councilmen likewise by the common council out of the freemen: the members used to be summoned to meet for the election of a mayor, by order of the old mayor, not on any fixed day, but some time about Michaelmas: on the 26th of May, 1674, an order was made by the mayor, aldermen, and common councilmen, that they should for the future meet on the Monday before Michaelmas day, every year, to choose a mayor: on *other* days for filling up vacancies of aldermen or common councilmen, the mayor used to summon the body, and they never used to meet without such summons; when they met, he acquainted them with the vacancy, and with the occasion of the meeting: on the 23d of September, 1723, being the Monday before Michaelmas, the mayor, eleven aldermen, and fifteen common councilmen met in the Moothall: the mayor declared their meeting was to elect a mayor; on which some of the common council said, there was a vacancy of an alderman and common councilman, and they

(a) *Rex v. mayor of Carlisle.* 1 Str. 385.

would

would first proceed to fill up those vacancies: the mayor replied they were filled up; on which *nine* of the common council withdrew into the council chamber, the other six staying in the moothall with the mayor; the nine elected a common councilman, signed a paper purporting their election, brought it into the moothall, tendered it to the mayor, and desired him to swear the person they had chosen.—On a trial at bar, on the validity of this election, it was attempted to be proved, on behalf of the plaintiff, that it was usual to fill up vacancies on the Monday before Michaelmas, before the election of the mayor; but only one instance was given in evidence of such a thing having been done; and that was but two years before the election of the plaintiff; and it did not appear but that the mayor directed the going to that election, and that all the common councilmen then living were present and consenting. But all the witnesses agreed, they never knew, before this time, an instance of proceeding to fill up a vacancy, without the mayor's declaring the vacancy, and directing them to proceed to fill it up.

THE counsel for the defendant contended, that on this evidence the plaintiff's election was void; for that this being a corporation by prescription, the right and manner of election was to be governed by the usage; that for the election of aldermen and common councilmen at any other time but this Monday before Michaelmas, it was agreed there ought to be a preceding summons from the mayor for the corporation to meet; that it had been the same in the case of the election of a mayor, till the order in 1674; and that that order did not affect the present case; that the mayor's presence being necessary at the meeting, he ought to preside, though he had no vote; that as this was not a day appointed for choosing common councilmen, and no

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summons

summons had been issued for that purpose, part of the common council, though the *major* part, could not elect to bind the rest. The court were unanimously of opinion that the election was void, for the reasons thus suggested in behalf of the defendant; and that this case was almost the same with that of Poulter, immediately preceding (a); which it certainly was in the circumstance of the same body possessing distinct powers, and attempting to act in one capacity, when they were summoned to act in another.

IN one place (b) it is said, "that if *all* be present, though by accident, and without notice, their acts, * done by unanimous consent *, will be good; but that the acts of a *majority* present by accident will not be binding."

IN another (c) it is said, "that wherever notice is given for one particular business only, no other business can be transacted, *unless* the whole body be present, and every one consent:" which implies, that if all be present and consent, their acts will be good.

THIS proposition, "that if all be present by accident, or in consequence of a summons to attend on *one* particular business, the acts done by unanimous consent will be good," receives some countenance from what fell from the court in the case Sir Christopher Musgrave against the mayor of Appleby (d).

IN this case issue was joined on the question, whether the plaintiff was elected mayor, and a trial at bar was granted.—It was admitted that, by the constitution of the borough, the mayor was to be chosen out of the aldermen, and that the validity of the election depended on the ques-

(a) Machell v. Nevinston, mayor of Appleby. 2 Ld. Raym. 1355.

(b) Pr. Lord Parker, in Rex v. Strangeways, Hil. 1 G. 1, cited by Ld. Hardwicke. B. R. H. 151.

(c) 1 Barnard, 80.

(d) 2 Ld. Raym. 1358. 1 Str. 584.

tion,

tion, whether the plaintiff was an alderman? And on evidence the fact appeared to be thus.—The right of election was in the common councilmen alone, except in the case of their being equally divided, when the aldermen had a right to vote. The mayor had invited some of the common council to a tavern, to treat Sir Christopher Musgrave, who happened to be there; the number of the common councilmen then living was fifteen; all of them but one being met, a gentleman in company acquainted them, that one of the aldermen had resigned the day before, and produced his resignation signed and sealed, and then proposed that they should choose Sir Christopher to succeed him: he then asked every common councilman present, who all consented, except Dean, Barnes, Robinson, and Lamb, of whom the first opposed the election, and the three latter said, “it was not convenient at that time of night, nor in that manner;” on which the mayor proposed to adjourn to the moothall; to which Barnes replied, it was not necessary to give Sir Christopher that trouble, *if all were agreed*; to which Lamb and Robinson said nothing, and Dean, as he swore on the trial, was not afterwards asked whether he consented.—The mayor sent for the books, and Sir Christopher was entered and sworn into the office of alderman. None of the common councilmen present knew any thing of the vacancy till they were told it at the meeting; and Resbrook, who was not present, was told of it as he came along, and that Sir Christopher was sworn in: after he came, nobody asked him for his approbation. The common councilmen were not called over one by one by the proper officer, nor were they separate from the aldermen; both of which were usual on such elections.

ON this evidence the jury found a verdict for the plaintiff to the great dissatisfaction of the court, who considered the election as void: because, there having been no previous summons, the body was not corporately assembled; and where that was not the case, it was absolutely necessary that all who had a right to vote ought to be present and expressly assent: but this was an election obtained by surprise, and consequently void (a).

FROM the manner in which the court here expressed themselves, it may seem that they thought the election would have been good if all had been present and assented: it may, however, be remarked, that even in that case, the election would still have been liable to the objection of surprise; and that it does not appear to have been ever solemnly determined that such an election, or any other act done under similar circumstances, is good.—The whole that can be concluded from such expressions of the court is, that in the case of such accidental meetings, they would at least require the presence and unanimous assent of all who had a right to attend; but it does not follow, that, if these circumstances had concurred, they would have determined the act to be valid.

WHERE a summons is necessary, it is not sufficient that the usual and general orders be given to the summoning officer; the latter must actually do every thing he possibly can to summon all the members of the select body.

IN the case of Kynaston, an alderman of Shrewsbury, it was found by special verdict, that he was removed from the office at an assembly held to do the business of the corporation; but that Corbet, one of the aldermen, having

(a) Sir Christopher Musgrave v. mayor of Appleby. 2 Ld. Raym. 1358. 1 Str. 584.

then

then a house and family in the town, was not present at the assembly, nor was summoned to be there, though the mayor had given the usual and general orders that the aldermen should be summoned; that the summoning officer had not, in fact, summoned him, nor endeavoured to do it, having been informed, and believing him to be out of summons, and that he had accordingly returned him to be out of summons, as was usual in the case of persons who were absent.

LORD Hardwicke, after citing several of the cases before mentioned, observed, that it was a settled point, that "where corporate acts were to be done, not on a charter day, and by a select body, there must be a summons of every member, except such as had absolutely deserted the town" (a). He then said, that the next question was, whether, in the present case, there was a good excuse for not summoning Mr. Corbet; it was, that the mayor gave the usual and general order for summoning all the members; it was therefore contended, that he had done his duty, and that the subsequent default of the officer ought not to avoid the acts of the assembly. He did not, however, see how any distinction could be made between the default of the mayor and that of the officer: the rule was, that there must be an actual summons; and be the default where it might, if a person who had a right to give his vote was not summoned, the consequence was the same; and though the corporation was affected by the officer's neglect, yet the inconvenience arising from that, was not so great as the inconvenience on the other side would be; for the corporation themselves might do over again what might be faulty from the neglect of their officer; but if their acts, under these circumstances, were established to be good, the inconvenience was irretrievable, and a door

(a) Vid. ante, 430.

was opened to great collusion : as to the officer's information and belief that Mr. Corbet was out of summons, that neither was in itself an excuse, nor would it even have been admitted as evidence.

BUT it had been said, that the assembly were regular in what they did, because they ought to give credit to their officer's return, which was, that Mr. Corbet was out of summons : it was true, indeed, that courts of justice were bound to give credit to the returns made by their officers, and that their officers might be punished for a false return ; but the law could take no notice of the process and return of this assembly ; or if it could, this was only a return that he was out of summons, which the court could not understand, unless it were more certainly explained, as if it had been said that he was at London, or at some other place ; but even that would not have been sufficient, because the court could not proceed on what was said by the officer : the circumstances of the present case were strongly against the return : the jury had found that Corbet had a house and family in the town, which made an end of all excuses ; for to the purpose of summons, he was, by this circumstance, resident ; and in all cases where an excuse had been allowed, the party not summoned had ceased to be an inhabitant : but in this case, the inhabitancy required by the charter was, that he should reside by himself or family, which the jury had expressly found him to do (a).

Object of the It has been said, that though the assembly of a select
meeting to be number held *expressed* *in the summons* not on a charter day, be irregular, unless every member within reach of summons, be actually summoned, yet that in the summons it is not necessary to specify any particular act (b). However well founded this may be, as

(a) Rex v. mayor, aldermen, and assistants of the town of Shrewsbury. B. R. H. 147—152. (b) Per Eyre, J. 1 Str. 386.

applied

applied to the ordinary business of the corporation, it seems that, in the case of an amotion of a corporator, a general summons to every member is not sufficient; but that it is necessary to mention, that it is intended to consider the question of removing the particular person; perhaps even that will not be sufficient, but it may be necessary to state the cause of his intended amotion. This, however, does not appear to be fully settled, for in the cases where the amotion of members has been held irregular for want of proper summons, the determination has generally proceeded on the circumstance of there having been no summons at all.

IN the return to a mandamus, directed to the mayor, bailiffs, and common council of Liverpool, to restore one Clegg to the office of common councilman, from which he had been removed, it was stated, "that the common council consisted of forty-one persons, and no more; that the power of amotion was in the mayor, bailiffs, and common council, or the greater part of them, in common council assembled; that on the first of February, which was not alleged to be a charter day, the mayor, bailiffs, and twenty-six of the common council by name, in *due manner*, met and assembled in common council within the said town of Liverpool, in the council chamber of the said town, and then and there duly held a common council of the said town, concerning divers matters and businesses relating to the said town, and the good regulation and government thereof:" it then stated particularly all the proceedings relating to the amotion of Clegg, and the cause of that amotion.

ONE objection to this return was, "that, supposing this *select* body to have authority to remove, to which no objection had been made, and considering the case abstractedly from the particular *cause* of the present amotion, yet

it did not appear that the constituent members of the body who made the motion were summoned at all to this meeting: whereas, it not appearing to be a meeting directed by the charter, there ought to have been a *special*, or at least a *general* notice given to each individual member of it, that there was to be such a meeting."

As to this point, Lord Mansfield said, "it is certain that no summons of any of the members is alleged in the return: whereas, if a *select* number of a corporation have power to remove, and do remove at a meeting holden on a day not directed by charter, all that are within summons must be summoned——and it is not sufficient to allege that they were *duly*, or *in due manner*, met and assembled: it ought to be expressly alleged, that they were all summoned."

DENISON, J. said, "they should have shewn *which* were their *general* days of meeting fixed by the charter. Here was an motion by a meeting of a *select* number, who ought, every one of them, to have notice when they are to proceed on *particular* business, whereas it is not here pretended, by any direct allegation, that they had any notice at all."

• FOSTER, J. declared himself of the same opinion. "They ought," he said, "either to have set out an assembly on a charter day, or a *general* summons to the component members of the *select* body who moved." But he added, "I cannot go so far as to say that a *special* summons was necessary, setting forth the *particular* business on which they were to treat: but I think a *general* summons to *every* member was necessary."

WILMOT, J. expressed himself thus; "if the assembly be not holden on a *charter* day, or a *general* day of meeting, there must be a previous summons to *every* member,
either

either *general* or *special*: I rather think it ought to be *special*, that every member may come *prepared*, and have an opportunity to give his reasons to the rest" (a).

ALL the cases hitherto mentioned, have been of the meeting on a day not prescribed by the charter or constitution of the corporation, and of a *select* body: but the following case shews that a summons is equally necessary to constitute a regular meeting, at least for the purpose of removing a corporator, where that power is exercised by the *whole* corporation.

IN the return to a mandamus, directed to the mayor, aldermen, and burgesses of Doncaster, to restore one Wilford to the office of capital burgess of that corporation, it was, among other things, stated, "that at an assembly of the mayor, aldermen, and burgesses of the said borough, held in and for the said borough of Doncaster, in the guildhall of the same borough, on the 7th day of March, which was not alleged to be a charter day, they being so *duly* assembled for the good rule and government of the said borough," removed the prosecutor, setting forth the cause and the proceedings.

THE objection to this return was the same with that taken in the case immediately preceding, "that the assembly which made this motion did not appear to have been legally holden: it was an motion made by the *whole* body, not by a *select* part; on a *bye* day, not on a charter day, and on a *general* (b) summons to meet to transact the business of the corporation, not upon a *particular* notice to meet upon this *particular* affair," which it was contended ought to have been given to every member.—The case having been once argued, stood over for a further argument, and

(a) Rex v. mayor, &c. of Liverpool. 2 Bur. 723—735.

(b) No summons at *all* is stated.

when

when it was called for that purpose, the counsel for the corporation gave up the return, on the ground, that this was the same objection which had prevailed in the case of Liverpool (a).

If it be intended to do any -- as a consequence of a charter day other than the ordinary business of the day a summons is usually necessary.

THE objection to the regularity of the meeting, for want of a previous summons, in all the cases in which it is taken, points at a distinction between a meeting held on a charter day, and one held on a day not a charter day.— This, however, is open to some observation. It is presumed, there are very few instances of a *particular* day being appointed by charter or prescription for the transaction of the *general* business of the corporation: when a *particular* day is appointed, it is *generally* for the purpose of some *particular* business, as the choice of annual magistrates: it can hardly ever be for the choice of magistrates for life, or for the removal of members; because the contingency on which such acts may be necessary, cannot be foreseen. Where a *particular* day is appointed for the *general* business of the corporation, the distinction may have place; but where it is appointed only for a *particular* purpose, I apprehend the *same* summons and notice are necessary to justify their proceeding to any *other* business on *that* day, which would be necessary on any other: thus, if a day be appointed merely for the election of a mayor, I apprehend the meeting held on that day cannot proceed to the choice of other officers, or the removal of a corporator, without the same previous notice and summons which would have been necessary in the case of a meeting held on any *other* day: and even in the case of a *particular* day appointed for the *general* business of the corporation, I doubt much whether they would not be necessary to justify so serious a proceeding as an amotion.

(a) Rex v. mayor, &c. of Doncaster. 2 Bur. 738—745.

IN

IN all the cases it seems implied, that a summons is not necessary where a member is not resident within the town: in the case of Grimes it was expressly so determined (a). *Summons not necessary any to non-residents*

It is laid down (b) as a general rule, that where there is a *usual* method of notice, that cannot be dispensed with, though there be an actual summons of all the members, and that where that usual method is not observed, no act is good to which all, who have a right to notice, do not unanimously agree on being all actually summoned.

THIS was laid down in the case of the freemen of Saltash, which, as it appeared, was originally a borough by prescription, and afterwards obtained a charter. This charter prescribed no particular place for the election; but the usual place was the guildhall, and the *usual* notice was the ringing of a bell; which used to ring at eight o'clock, at nine o'clock, and then to toll from ten o'clock to the time of meeting. The election, in question, was not made at the guildhall, but at an inn within the town, on a bye day, and without the usual notice; for no bell was rung on the occasion. But all the electors who were intitled to notice, had *personal* notice of the meeting at the inn, and of the business intended to be transacted there: all the electors, but two, were present and *unanimous* in the election. The two absent electors did not live within reach of the summons, and, therefore, it was contended they had no right to notice, nor had any thing to do in this matter; and that this election was good; because, though the usual notice was not given by the ringing of the bell, yet it had been supplied by *other* and *better* notice, and all who were intitled to notice were present, and una-

(a) 5 Bur. 2601. Vid. ante, 404.

(b) Per Ld. Mansfield, with the assent of the court, 5 Bur. 2682, in Rex v. mayor et al. and Rex v. Little, freemen of Saltash.

nanimously

animously concurred.—But Lord Mansfield said, “that nothing was more certain, than that there could not exist a valid election made on a bye day by surprize. That notice must be given to every member who was within the limits of summons, and that *personal* summons must allow reasonable time to the person summoned: but this was where no other method of summons or notice, as by a bell or a horn, was established. Here, by the usage (*a*), the notice must be given by personal summons to those who were within the limits of the borough; but that was only *part* of the usual notice: there must also be a bell rung at eight and nine, and then tolled from ten to the time of meeting. This could not be dispensed with, unless every single member were present and consented to wave it. The want of it vacated the election.”

*In case of
summons the
party to be
summoned to
attend?*

WHERE it is intended to remove any of the members or officers of a corporation, it is, in general, absolutely necessary, not only that he should be summoned generally to attend; but he must have a particular summons to attend and answer the particular charge alleged against him; for it would be highly unjust, upon a general summons, to remove a man for particular offences, which he may have had no opportunity of preparing to answer (*b*).

BUT there may be particular circumstances, under which the summons may be dispensed with. Thus, says Holt, C. J. (*c*) “a man ought not to be disfranchised until he has been heard in his defence, on notice and preparation, and notice is only necessary for that purpose. Therefore, if a man be charged *in plenis comitiis*, and ordered to prepare

(*a*) This, however, does not appear by the report of the case.

(*b*) James Bagg's case, 11 Co. 99. a. Glyde's case. 4 Mod. 33, 37.

(*c*) Rex v. Chalke, 1 Ld. Raym. 225, 6. Same case by the name of mayor and burgeses of Wilton, 2 Salk. 42.

by

by such a time, this will be good, though there be no actual summons, because if the party he heard it is sufficient."

If a party be charged with a particular offence in one assembly, and ordered to prepare for his defence, he certainly cannot complain of want of notice; but it seems very doubtful whether his being charged and answering in the *same* assembly will cure the want of notice.—Holt, indeed, goes on to say, that "he remembered a case, where the return was, that the party disfranchised, being in common council, was examined touching such and such affairs, and not being able to give a sufficient answer, was disfranchised." And in the case of Serjeant Whitaker, recorder of Ipswich, he uses similar expressions. Among other misdemeanors imputed to the serjeant, one was, that he had not attended his duty as recorder at the sessions of the peace, and the notice to attend and shew cause why he should not be removed from his office, as far as it related to his non-attendance there, was in these words: "why you did not, by your attendance, assist Mr. Bailiffs, and other her Majesty's justices of the peace for this town, at the motehall, in Ipswich, on the 14th of January, 1702, and also on the 8th of April following, at which times and place there should have been the general quarter sessions of *oyer and terminer*, and gaol delivery, holden for this town, according to the several usual proclamations publicly made for that purpose, you knowing that, by the charters of this town, *no sessions of the peace* could be holden for this town, without the actual presence of the bailiffs and recorder thereof." It was alleged, that orders had been given that *this* notice should be delivered to the serjeant, "and that notice should be given him to answer to the said matters so as aforesaid objected to him, and to shew cause on the 8th of

of September next following to the bailiffs, burgesſes, and commonalty, why he ſhould not be diſcharged from his office of recorder, for the ſaid miſdeaneors in his ſaid office; that the ſeveral notices in writing were delivered to him on the 10th of Auguſt, 1704; that on the 8th of September the ſerjeant appeared before the bailiffs, burgesſes, and commonalty, at the motehall, and there the ſeveral charges being objected to him, he answered, that as to his non-attendance at the ſeſſions of the peace, he ought to have been ſent for when they were ready; and as to the other articles, declared that he was not bound to answer, and abſolutely reſuſed ſo to do:” on which they proceeded to remove him from his office.—To theſe proceedings it was objected, firſt, that there was no time appointed by the notice, when he ſhould appear to answer to the matters charged in the notice; to which it was answered and reſolved, that the ſerjeant appearing, and being charged and answering, ſupplied the want of notice both of the time and of the *offence*: and the Chief Juſtice ſaid, “that in juſtice, convenient notice ought to be given for the party to prepare for his defence, *but he might wave that, if he would.*” It was likewiſe obſerved, that it appeared in the preſent caſe, that notice of the *day* was given, and *that* in writing, it being ſaid, that the ſeveral notices in writing were given to him; though the Chief Juſtice ſaid, “the notice of the day might be well enough given by the officer by word of mouth.” In the ſecond place it was objected, that in the notice he was not charged for not holding a ſeſſion of the peace, but of *oyer* and *terminer*, and gaol delivery; and that if he was not charged with it, though he *did* answer it, his answer was impertinent, and would not help the want of notice: he had notice of one charge and answered to another: for that the words, “the aforeſaid

aforesaid several misdemeanors," must, or, at least, might be understood of those mentioned in the notice, and that was sufficient to vitiate the return, which being to justify turning a man out of his freehold, must be precisely certain, and could not be aided by intendment: to which the court agreed, and granted a peremptory mandamus to restore the serjeant to his office (*a*).

It is not easy to reconcile the event of the case with what is reported to have been said by the Chief Justice and the court, "that the serjeant appearing, and being charged and answering, supplied the want of notice, both of the time and of the *offence*," and "that he might *wave* the notice if he would."—The ground on which the peremptory mandamus was awarded, was, that *one* offence was specified in the notice, and that he was charged with another when he appeared: how is this to be reconciled with the proposition, "that appearing and answering supplied the want of notice of the offence?"

THAT a man may wave any thing which the law has intended for his benefit, is a general proposition which cannot be denied; and as previous notice of an offence charged against a party, is given him only that he may come prepared to defend himself, he may, no doubt, dispense with it. But if he be present accidentally at a meeting, and answer immediately, or be unable to give any answer, to a charge made against him, of which he had no previous notice, is it from thence to be concluded that he *waves* the *necessity* of such notice? I apprehend that nothing less could *cure* the want of notice, than an *express* declaration of the party, that he consented to answer without it.—This point, however, does not appear to be absolutely

(*a*) Serjeant Whitaker's case, 2 Ld. Raym. 1240. 2 Salk. 435.

settled.

settled.—In the case of Clegg (*a*) before mentioned, it was stated, that the mayor and bailiffs, &c. were duly assembled in common council——and there duly held a common council concerning divers matters——relating to the town——“and that the said Joseph Clegg was then and there *present* at that assembly: and that in the *same* assembly——an information and charge were exhibited against him;——that he *then* and *there* had *personal notice* of the said information and charge——and confessed that it was true——and that being asked what he had to say in his defence, why he should not be removed from the office of one of the common council of the said town, for the cause aforesaid——he did not *then*, or at any *other* time before his removal——*desire* any *further* time to be allowed him to make his defence——and did not——allege, or offer to that assembly, any cause whatsoever why he should not be removed——and that therefore the *said* assembly did *then* and *there* duly discharge and remove him——.”

IT was objected, that here was no previous summons to Clegg to come prepared to meet this particular charge; and that his being casually present in the general discharge of his duty to the corporation, would not *cure* the defect: on the other hand it was contended, that as he was present, heard the charge, admitted the facts, and desired no further time, this was sufficient.

LORD Mansfield and Mr. Justice Wilmot said nothing as to *this* objection, because the return was bad on other accounts.

MR. Justice Denison said, “he *thought* the party himself ought to have had previous notice; but that as there were many other objections, he would not meddle with *that*.”

(*a*) Rex v. mayor, &c. of Liverpool. 2 Bur. 723, 725, ante, p. 439.

MR.

MR. Justice Forster expressed himself to this effect: "as to this objection, I will not say much upon it. But a man ought not to be dispossessed of his freehold, without having a proper opportunity of making a *defence* to the charge on which he is removed from it. He could not be prepared, in the present case, to defend himself against *this particular* charge; he ought to have been apprised what it was to be. There might be an opportunity taken when there was a thin meeting, and when all his friends were absent, who would perhaps have been present, if he had any notice of *this*, or even of *any* charge against him.

IN the case of Wilsford (*a*), a similar statement was made, and nearly the same objection taken, and the same answer given; but as the matter was given up on *another* objection, the court do not seem to have said any thing as to this.

WHERE a person is removeable for non-residence, there is no necessity to summon him before he is removed, because he has abdicated the town and is out of the *reach* of summons (*b*). But if he be removeable for non-attendance at the corporate assemblies, he must have had *personal* notice to attend, and that his presence was necessary; the *usual* notice of the intended meeting will not be sufficient, unless that *usual* notice be *personal* (*c*).

WHAT acts a corporation must do by deed under its common seal, when considered in its relation to the public

(*a*) Rex v. mayor, &c. of Doncaster. 2 Bur. 738, ante, 441.

(*b*) Comb. 198, 270. 1 Show. 259, 260, 364, 365. Reg. v. Trumbody. 2 Ld. Raym. 1275, cited Doug. 152 (157), vid. Style. 151, 446. Palm. 451. 1 Sid. 14, 15. 2 Sid. 97. Fortesc. 205.

(*c*) Vid. Rex v. Richardson, 1 Bur. 517, 527, 540.

at large, has been shewn in the last chapter (a) : it is to be observed here, that nothing which is there said applies to any act relating to its internal constitution.

A MAN *may* be constituted a burgess, or appointed to an office, by deed under the common seal, and *then* he ought to be discharged in the same manner : but where the party is constituted or appointed by election, nothing more is required than an entry in the books of the corporation ; and he may be discharged by an order entered in the same manner (b).

So, where an office is granted by deed, the *resignation* or *surrender* ought also to be by deed ; but where an officer is appointed by election, the corporation may accept his resignation or surrender by parol before them : "if, indeed," says Holt, "a man speak at large, and say he will be no longer alderman, &c. that signifies nothing : but if he come in an open assembly of the corporation, and there resign his office, declaring that he will not continue in it any longer, and desire them to accept his resignation, and they accept it and elect another in his room, this is a good resignation" (c).

AND, in the case where a resignation ought to be by deed, it is sufficient, in legal proceedings, to say, that the party resigned, or that he resigned in due form, without shewing that it was by deed ; for if that be necessary, it is implied (d).

(a) Ante, p. 259—268.

(b) Per Holt, 1 Ld. Raym. 226, in *Rex v. Chalke*. S. C. Carth. 390. In 5 Mod. 257, called *Rex v. mayor, &c. of Wilton*.

(c) 1 Ld. Raym. 563. *Rex v. mayor, &c. of Rippon*. S. C. Salk. 423.

(d) Vid. 1 Sid. 14. 1 Ld. Raym. 564. 1 Lutw. 405.

WHEN

WHEN a corporate assembly is duly summoned, and the members met, the next requisite is, that the proper person preside; unless this be observed, there are *many* acts which will be void.

A DISTINCTION is made between a mere usurper, and an officer *de facto*: an usurper is a man who, without any colour of election, gets possession of the office, and acts in it; and the mere circumstance of being *sworn* into the office makes no difference: but to make an officer *de facto*, at least the *form* of an election is necessary, though, on legal objections, it may afterwards be overturned. Notwithstanding this distinction, however, in point of form, it is doubtful whether there be any in the effect.

SOME acts, it is admitted, may be good, if done by a mayor *de facto*, or under his authority; but it does not appear whether the *same* acts would be good if done by a mere usurper: some acts are certainly *void* if done by an usurper; and probably so if done by a mayor *de facto*.

THOSE acts which are good if done by a mayor *de facto*, or under his authority, are those which he may be *compelled* to do, in favour of a person who has a precedent right to have them done. All voluntary acts, *not necessary* to carry on the business of the corporation, seem to be void, whether done by an usurper or a mayor *de facto*, or under the authority of either: some *necessary* acts, too, are certainly void, in both cases (*a*).

IN the case of Kynaſton, before mentioned (*b*), it appeared, that by the charter it was ordained, that the senior alderman, who had not been mayor, should, in case of a

(*a*) Vid. Andr. 116, 117. B. R. H. 150, and ante, page 312. What is said here does not apply to acts in which *strangers* are interested.

(*b*) Vid. ante, page 436.

vacancy, be appointed to that office; that Kynaston, on the 25th of August, 1732, was the next senior alderman who had not been mayor, but that he did not then reside, nor had in person or with his family resided in the town for three years before; that Floyd was the *next* senior alderman to Kynaston, and was in fact elected mayor in that year, took the mayor's oath, was admitted to the office, exercised it for a year without interruption, and presided in the assembly which removed Kynaston. One question was, whether Floyd was lawfully chosen mayor, or whether he was only mayor *de facto*; and another, whether, if he was only mayor *de facto*, the amotion of Kynaston, by an assembly at which Floyd presided, was valid. Lord Hardwicke, in delivering the opinion of the court, said, that if the assembly had been properly summoned, they should then have been obliged to have considered these points, which were matters of very great consequence; the first to the town of Shrewsbury in particular, and the other to all the corporations in England; but that, as there was no difficulty on the question of the summons, it was unnecessary to enter into the consideration of them at that time.—So that the validity of an amotion by an assembly at which a mayor *de facto* presided, was left undetermined.

AN information, in the nature of quo warranto, being filed against one Lisle, to shew by what authority he acted as a burgess of Christchurch, it appeared by special verdict, that the mayor and burgesses, or the major part of them, had a power, at their will and pleasure, to choose as many burgesses as they should see occasion, at the nomination of the mayor; that one Goldwire, who never was elected mayor, procured himself to be sworn into the office by the steward of the court leet, and in fact exercised the office
for

for some time; that at an assembly summoned by Goldwire, and at which he presided, Lisle the defendant was nominated and chosen a burges; and that a quo warranto, in which there was afterwards judgment of ouster, was pending against Goldwire at the time when he held this assembly.—Two questions were made. First, Whether Goldwire was mayor *de facto*; and, Secondly, Supposing he was mayor *de facto*, whether this election of Lisle, at an assembly at which Goldwire presided, was good.—It was held by the whole court, except Lee, C. J. who gave no direct opinion on this point, that Goldwire was not a mayor *de facto*, but a mere usurper: that to constitute a mayor *de facto*, it was necessary that there should be some form or colour of election; but that without this, assuming the title and insignia of the office, and being sworn and acting as mayor, were not sufficient; and by this verdict it appeared that Goldwire never was elected at all.—The whole court agreed, that supposing Goldwire was a mayor *de facto*, yet the acts found to have been performed by him were not good, because they were not *necessary* for the *preservation* of the corporation: that in these cases, the proper distinction was between such acts as were necessary for the good of the body, which comprehended judicial and ministerial acts, and such as were arbitrary and voluntary: the election of the defendant was of the latter kind; for as the number of the burgeses was indefinite, it did not appear, nor was it stated, that the choice of a burges was necessary. It was also material that no person had a *previous* right to the office of burges; nor could the taking of the oath be regarded as a legal consideration; because this was

subsequent to the election, and the party might perhaps refuse to take it (a).

It is to be observed, that the court here dwell upon the circumstance of the election of the defendant, in this case, not being a *necessary* act: but it appears from subsequent cases, that the circumstance of the act being *necessary* is not alone sufficient to make it good.

In the King and Hebden (b), the defendant made a title to the office of bailiff of Scarborough, from an election under the bailiffship of Batty and Armstrong, and on issue joined whether these were bailiffs or not, a record of a judgment of ouster against them was read in evidence; and on a motion for a new trial, it was held, that it was properly admitted; and the same evidence was said to have been lately admitted in a trial at bar, in a case relating to the corporation of Orford.

In the case of the King and Grimes, a question having been made, whether the *special verdict* found on the information against John Leigh, for usurping the office of mayor, and the judgment given thereupon against him, were evidence in the present case against Grimes for usurping the office of capital burghs; and to what degree it ought to be allowed: the court held it to be admissible, but not conclusive, and, in fact, gave judgment against him, on the ground that Leigh, who had presided at his election, was not a rightful mayor (c).

In the first of these cases, if not in both, the election was an act *necessary* to the preservation of the corporation.

(a) *Rex v. Lisle*. 2 Str. 1090. Andr. 163.

(b) 2 Str. 1109. Andr. 388, in which latter book the case is most fully reported.

(c) 5 Bur. 2601.

WHERE

WHERE the mayor's presence is necessary at a corporate assembly, his departure before a business regularly begun be concluded, will not invalidate that particular business, but the assembly cannot proceed to any thing else (a). *aliter in the case of an election assembly vide 2nd Chan. & Delays Rep. 111.*

(a) 1 Barnard, 385.

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