

RIGHT OF QUEEN'S COUNSEL TO DEFEND PRISONERS.

Lords the great Parliamentary case of the *King v. Sir John Elliot, Denzill Hollis, and others*, (3 St. Tr. 294,) and his argument so pleased the Duke of York (afterwards James II.) that he induced the King to appoint him one of His Majesty's Counsel.

From early days a fee or retainer of £40 a year was attached to the office. Some writers say that Lord Bacon was the first to receive this fee; while others say that Sir Francis North received £40 as his fee in the case referred to, and that thenceforward it became the annual fee or retainer of a King's or Queen's Counsel. And after 6th Anne, c. 7, s. 24, (1708) the appointment was held to confer an "office of profit," which disqualified a member of the House of Commons from sitting in Parliament, without re-election. (a)

It seems to have been the rule as early as Sir Francis North's time, that a King's Counsel could not appear in any civil or criminal cause against the crown. In the civil case of *Smith v. Wheeler*, 1 Mod. 38, (1669) the reporter states:

"In this case Serjeant Maynard was about to argue that the residue of the term was not forfeited to the King.

Kelynge, C. J., Brother Maynard you would do well to be advised, whether, or no, you being of the King's Counsel, ought to argue against the King?

Maynard answered, that the King's Counsel would have but little to do, if they should

(a) In ordering a writ for a new election it was called "the office of one of His Majesty's Counsel learned in the law." The constituencies vacated by the appointment were: *Berealston* (1715), 18 Com. Jour. 334; *Higham Ferrers* (1726) 20 Com. Jour. 722; *Newport* (1730) 21 Com. Jour. 587; *Dorchester* (1735) 22 Com. Jour. 563; *Stamford* (1737) 23 Com. Jour. 22; *Dorchester* (1742) 24 Com. Jour. 333; *Cirencester* (1745) 25 Com. Jour. 35; *Bath* (1751) 26 Com. Jour. 299; *Knaresborough* (1765) 30 Com. Jour. 441; *Calne* (1815) 70 Com. Jour. 73; *Newport* (1816) 71 Com. Jour. 164; *Plympton Earle* (1824) 79 Com. Jour. 501.

be excluded in such cases; and that Serjeant Crew argued Haviland's case in which there was the like question.

Twisden, J. In *Stone and Newnan's case*, Cro. Car. 427, I know the King's Counsel did argue against estates coming to the Crown; but if my lord thinks it not proper, my brother Maynard may give his argument to some gentleman of the bar, to deliver for him." And thereupon Serjeant Maynard handed his brief to Mr. Jones, who argued the case the following Term.

The next authority in order of date is Sir William Blackstone. In the 3rd vol. of his Commentaries, p. 30, he says: "The King's Counsel answer, in some measure, to the advocates of the revenue, *Advocati fisci*, among the Romans. For they must not be employed in any cause against the Crown, without special license, in which restriction they agree with the advocates of the fisc."

Mr. Christian, in his edition of Blackstone, adds: "Hence none of the King's Counsel can publicly plead in Court for a prisoner, or a defendant in a criminal prosecution, without a license, which is never refused."

Coming down to later times, we find that in the case of *Regina v. Jones*, 9 C. & P. 404, Mr. Cresswell, Q. C., was instructed to argue the case for the prisoner on a point reserved for the consideration of the fifteen Judges. The reporter states:—"The case was to have been argued before the Judges in Easter Term, 1840; but it being stated by C. Cresswell, who was instructed to argue for the defendant, that he had not obtained a license from Her Majesty, under the royal sign manual, to argue against the Crown, and that he had only received a certificate from the Secretary of State's office, the Judges directed the case to stand over till Trinity Term, that Her Majesty's license might be obtained."

The reporter adds in a foot note that, "The Attorney and Solicitor-General, a Queen's Sergeant, or a Queen's Counsel, can not appear in a case against the Crown, (even