1911: 2 KB: 460

DISSENTERS.

SIR THOMAS HARRISON,—*Plaintiff*; ALLEN EVANS,—*Defendant* (in Error)

[4th February 1767].

[(1) The statutes, such as the Corporation Act (13 Car. II. st. 2, c. 1) and the Test Act (25 Car. II. c. 2), imposing disabilities on dissenters have been repealed.]

[A freeman of the city of London is elected one of the sheriffs, but refusing to take the office, on account of his being a Dissenter, and as such not having received the sacrament according to the rites of the church of England, within a year before his election, an action is brought against him for the penalty incurred by such refusal, and a judgment recovered. The action being brought in the Sheriff's Court, a writ of error was brought in the Court of Hustings, where the judgment was affirmed. But the defendant having obtained a special commission of errors, the Judge's delegates reversed both the judgments; and on a writ of error in parliament, this judgment of reversal was affirmed.]

In February 1754, the plantiff in error levied a plaint in the Sheriff's Court of the city of London, against the defendant, in a plea of debt for £600. And by his declaration stated, that the city of London is, and hath been from time whereof the memory of man is not to the contrary, an ancient city and county of itself, and the county of Middlesex an ancient county. That the citizens of the said city, for all the time aforesaid, have been a body corporate and politic, and at the time of making the act and ordinance aftermentioned, were and are incorporated, by the name of the mayor and commonalty and citizens of the city of London. That the sheriffalty of the said city of London, and the sheriffalty of the said county of Middlesex, for all the **[466]** time aforesaid, have been and are ancient offices. That within the said city of London there now are, and from time whereof the memory of man is not to the contrary there hath been, and have been used and accustomed to be, and still of right ought to be, two sheriffs of the said city of London annually elected, chosen, and appointed, which said two sheriffs of the said city of London jointly are and constitute, and long before the making the act or ordinance aftermentioned, namely for the space of three hundred years and more before the making thereof, were and constituted, and still of right ought to be and constitute, one sheriff of the said county of Middlesex; and the said sheriffs of the said city of London for the time being, during all the time last aforesaid, and hitherto of right have exercised, and still of right ought to exercise, as well the said office of sheriffs of the said city of London, as the said office of sheriff of the said county of Middlesex.

The declaration further stated an act of common council of the said city of London, made the 7th of April, 21 Geo. II. appointing the particular mode and form of the annual election of the said sheriffs, and the time of assuming and holding the said office; by which act, *inter alia*, a power is vested in the lord mayor for the time being, of nominating annually, in the manner therein mentioned, one or more fit and able persons, not exceeding the number of nine, who should be put in nomination to the liverymen of London at every election, until they should have been elected, or discharged from such nomination as thereby directed; with a provision that any person so nominated, should, upon paying £400 and twenty marks in the manner and for the uses in the act mentioned, be for ever exempted and discharged from such nomination, unless he should afterwards take upon himself the office of an alderman of the said city. And it is by the said act of common council further provided, that every person who should be elected to the said offices of sheriffalty upon the general election day, or at any other time, between the said general election day, and the 14th day of September in the same year, when there should be no actual vacancy in the said offices, should personally appear before the court of lord mayor and aldermen, in the inner chamber of the Guildhall of the city of London, at the first court there to be holden next after notice of his election, unless such reasonable

excuse should then and there be offered on his behalf, as the said court should allow; and in case of such excuse allowed, then at such other subsequent court or courts as the said courts should appoint; and should then and there become bound to the chamberlain of the said city for the time being, his executors and administrators, by his bond or obligation, in the penal sum of £1000, with condition thereunder written or thereupon indorsed, that if he should personally appear on the vigil of Saint Michael the Archangel then next following, between the hours of twelve of the clock at noon, and three of the clock in the **[467]** afternoon, in the public assembly of the said Guildhall, in the place where the court of hustings was usually holden, and then and there in the presence of the lord mayor of the said city for the time being, and two aldermen of the said city for the time being, or in case of the absence of the said lord mayor, then in the presence of four of the aldermen of the said city for the time being, take the oath of office there usually taken by the sheriffs of the said city and county of Middlesex, then the said bond or obligation should be void; upon pain that every person so elected, who should not appear and become bound as aforesaid, should, if an alderman of the said city, or a commoner previously nominated by the lord mayor of the said city as aforesaid, forfeit and pay to the uses in the said act of common council mentioned, the sum of £600, or if he should not be then an alderman of the said city, or a commoner so previously nominated by the lord mayor of the said city, the sum of £400, and that all penalties and sums of money to be forfeited by virtue of the said act, should be recovered by action of debt in one of the courts of record of the King's majesty, his heirs and successors, within the said city.

The declaration then charged, that the defendant in error had been duly nominated on the 30th day of April 1751, by Francis Cockayne, Esq. then lord mayor, in pursuance of the power contained in the said act of common council for that purpose, as a fit and able person to be in nomination for the said offices of sheriffalty, and had not paid the £400 according to the provision of the said act of common council: that he was on the 23d day of July 1754, duly elected, according to the regulation of the said act of common council, to the said offices, and on the 24th of the same July had notice given him of his election: that on the 30th day of the same July, being the next court of the lord mayor and aldermen of the said city after the said election, the said Allen Evans appeared, and declared his refusal, and absolutely refused to take upon himself the said office of one of the sheriffs of the said city, and to be one of the persons to be and serve in the said office of sheriff of Middlesex; and no other reasonable excuse was offered by or on the behalf of the said Allen Evans, or allowed of by the said court; and the said Allen Evans also refused to give bond, or otherwise comply with the provisions of the act of common council above recited, whereby he had forfeited the said sum of £600, and an action had accrued to the plaintiff for the same, for which he had brought his suit.

To this declaration, the defendant pleaded an act of parliament, made at the second meeting in the parliament of King Charles II. begun at Westminster, the 6th of May 1661, and there continued until the 20th of December, and from that day adjourned to the 7th of January then next ensuing, intitled, an act for the well governing and regulating of corporations, by which it is (amongst other things) enacted, "That from and after the expiration of **[468]** a certain commission, in and by the "said act made and mentioned, no person or persons should for ever thereafter be "placed, elected, or chosen in or to any of the offices or places in the said act "mentioned, that should 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 that every person and persons so placed, elected, or chosen, "should likewise take the oaths therein-before mentioned, and subscribe the therein-"mentioned declaration, at the same time when the oaths for the due execution of "the said places and offices respectively should be administered; and in default "thereof, every such placing, election, and choice was and is, by the said act, enacted "and declared to be void." The defendant pleaded also an act of parliament of King William and Queen Mary, begun at Westminster the 1st day of February, in the 1st year of their reign, intitled, an act for exempting their Majesties Protestant subjects, differing from the church of England, from the penalties of certain laws; by which

it is enacted, "That neither the statute made in the three and twentieth year of "the reign of the late Queen Elizabeth, intitled, an act to retain the Queen's "Majesty's subjects in their due obedience; nor the statute made in the twenty-ninth "year of the said Queen Elizabeth, intitled, an act for the more speedy and due "execution of certain branches of the statute made in the three and twentieth year "of the said Queen's Majesty's reign, namely the aforesaid act; nor that branch or "clause of a statute, made in the first year of the reign of the said Queen Elizabeth, "intitled an act for the uniformity of common prayer and service in the church, "and administration of the sacraments, whereby all persons having no lawful or "reasonable excuse to be absent, were required to report to their parish churches "or chapels, or some usual place where the Common Prayer should be used, upon "pain of punishment by the censures of the church, and also upon pain that every "person so offending, should forfeit for every such offence twelve pence; nor the "statute made in the third year of the late King James I. intitled, an act for the "better discovering and repressing Popish recusants; nor that other statute made "in the same year, intitled, an act to prevent and avoid dangers which may grow "from Popish recusants; nor any other law or statute of the realm of England, "made against Papists or Popish recusants, (except the statute made in the 25th "year of King Charles II. intitled, an act for the more effectual preserving the "King's person and government, by disabling Papists from sitting in either house "of parliament,) should be construed to extend to any person or persons dissenting "from the church of England, that should take the oaths mentioned in a statute, made "in the then present parliament of the said King William and Queen Mary, intitled, "an act for removing and preventing all questions and disputes concerning the "assembling and sitting of that present parliament, and should make and sub- [469] "scribe the declaration mentioned in the statute made in the thirteenth year of King "Charles II. to prevent Papists from sitting in either house of parliament; which "oaths and declaration last above-mentioned, the justices of the peace, at the general "sessions of the peace to be held for the county or place where such person should "live, were by the same act, intitled, an act for exempting their Majesties Protestant "subjects dissenting from the church of England from the penalties of certain laws, "required to tender and administer to such persons as should offer themselves to take, "make, and subscribe the same, and thereof to keep a register." And it was further enacted by the said last-mentioned act, "That all and every person and persons that "should as aforesaid take the said last-mentioned oaths, and make and subscribe the "last-mentioned declaration, should not be liable to any pains, penalties, or forfeitures, "mentioned in an act made in the 35th year of the late Queen Elizabeth, intitled, "an act to retain the Queen's Majesty's subjects in their due obedience; nor in an act "made in the 22d year of King Charles II. intitled, an act to prevent and suppress "seditious conventicles; nor should any of the persons be prosecuted in any ecclesi- "astical court, for or by reason of their non-conforming to the church of England."

The defendant then pleaded in substance as follows: That the office of sheriffs of London is an office to which the provision of the aforesaid act of King Charles II. commonly called the corporation act, extends; and that he is, and was at the time of the pretended election of him to the said office, a Protestant Dissenter, qualified agreeable to the terms of the act of King William and Queen Mary above recited; 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, or 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 said city of London had due notice, at and before the time of the said pretended election; and that by reason of the premises, and by force of the said act of parliament, intitled, an act for the well governing and regulating of corporations, the said liverymen were prohibited from electing him to the said office, and the said defendant 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 of him the said defendant was void.

The defendant also pleaded seven other pleas, which were the same as the first, and in the very words thereof, except in the averment relating to the office of sheriff, describing it in different words, as an office relating to the government of the city of London.

The plaintiff by his replication to the defendant's first plea, protesting that the two sheriffs of the said city of London for the time being, as being sheriffs of the said city, are not, nor were **[470]** at any time whatsoever, persons bearing an office, place, trust, or employment relating to or concerning the government of the said city of London; said, that by a certain act of parliament made in the 5th year of the reign of King George I. intitled, an act for quieting and establishing corporations, it was enacted, "That all and every the member and members of any corporation within this kingdom, "and all and every person or persons then in actual possession of any office, that were "required, by the therein recited act of the 13th of King Charles II. intitled, an act "for the well governing and regulating of corporations, in the plea of the said defendant "above-mentioned, to take the sacrament of the Lord's supper, according to the rites of "the church of England, within one year next before his election or choice into such "office, should be and were thereby confirmed in their several and respective offices "and places, notwithstanding their omission to take the sacrament of the Lord's supper "as aforesaid; and should be indemnified, freed, and discharged of and from all "incapacities, disabilities, forfeitures, and penalties, arising from such omission; and "that none of their acts, nor the acts not then avoided of any who had been members "of any corporation, or in actual possession of such offices, should be questioned or "avoided for or by reason of such omission; but that all such acts should be, and were "thereby declared and enacted to be as good and effectual, as if all and every such "person and persons had taken the sacrament of the Lord's supper in manner as "aforesaid; nor should any person or persons, who should be thereafter placed, "elected, or chosen, in or to any the offices aforesaid, be removed by the corporation, "or otherwise prosecuted for or by reason of such omission; nor should any incapacity, "disability, forfeiture, or penalty, be incurred for or by reason of the same, unless such "person should be removed, or such prosecution be commenced, within six months after "such person's being placed or elected into his respective office as aforesaid."

The plaintiff filed the same replication to all the other pleas. To which the defendant demurred generally. And the plaintiff having joined in demurrer, judgment was, on the 21st of April 1757, given in the Sheriff's Court, over-ruling the defendant's plea, and that the plaintiff should recover against the defendant his debt aforesaid, and also £174 10s. 7d. for his damages and costs.

In Hilary term 1758, the defendant brought his writ of error, returnable in the Court of Hustings in the city of London; and having removed the record, the defendant assigned the general errors, and the plaintiff rejoined, that there was no error; and after several arguments, the Court of Hustings affirmed the judgment, and adjudged the plaintiff £95 3s. for his damages and costs.

The defendant conceiving himself to be aggrieved by this affirmance of the judgment, obtained a special commission of **[471]** errors, directed to Sir John Willes, Knt. then Chief Justice of the Bench; Sir Thomas Parker, Knt. Chief Baron of the Exchequer; Sir Michael Foster, Knt. the Honourable Henry Bathurst, Esq. and Sir Eardly Wilmot, Knt. Justices, or any two of them, to inspect the said judgment, and affirmance thereof, at the Guildhall of the city of London, and if there should be any error therein, to correct the same; and having brought the record before the said Justices, the defendant assigned the general errors, and the plaintiff rejoined that there was no error therein.

After three solemn arguments, the said several judgments of the Sheriff's Court, and the Court of Hustings, were on the 5th of July 1762, reversed by the unanimous opinion of all the said Judges then surviving; namely, the Lord Chief Baron Parker, Mr. Justice Foster, Mr. Justice Bathurst, and Mr. Justice Wilmot, the Lord Chief Justice Willes being before that time dead.

In the several arguments of this cause, an objection was taken to the form of the declaration, because it had not set forth the charter of King John, to shew the court what right the city had to elect their sheriffs; but this objection was over-ruled in the Sheriff's Court, and in the Court of Hustings; and no opinion was given thereon by the Judges, in delivering their judgment at Guildhall, which they gave upon the merits only.

But to reverse this judgment so given, a writ of error was brought in parliament; and on the plaintiff's behalf it was argued (C. Yorke, F. Norton), that the city of London, and every corporation, has a right to the service of all their members, in

corporation offices, or to a pecuniary, or some other compensation in lieu thereof; which in the present case has been provided for, by a succession of acts of common council, giving an exemption to any person nominated to the office, on payment of a reasonable fine: and it would be a great hardship, that the private scruples of any of the members, should throw the whole burthen of the corporation offices upon the rest of them; especially, when every member upon his admission assents to this bye-law, amongst others, as the terms of his being entitled to many lucrative advantages, which he acquires by his admission into the freedom of the city of London; and at the very time of such admission must know, though the corporation cannot, his inward scruples against qualifying himself for these offices. That it was not the intent of the corporation or toleration acts, to abridge this right of the city of London, and other corporations, over their own members, in support of their franchises; or to deprive them of the remedies provided by their bye-laws, for enforcing their said rights, by pecuniary fines and penalties stipulated amongst themselves, which are not properly to be considered as punishments, but in the nature of damages to the corporation, in satisfaction for the loss of their member's service; and so the law considers all penalties for the inforcement of private rights, even when given by **[472]** act of parliament. That the construction of the corporation act contended for by the defendant, that it is absolutely prohibitory upon the electors, not to elect any person who shall not have received the sacrament according to the rites of the church of England, within one year before the election; and that such election shall in all respects, and to all purposes, be absolutely void; was contrary to former resolutions of courts of law, and particularly in the case of the King *v.* Larwood (1 Lord Raym. 29), and might be attended with dangerous consequences, as it might open the door to others, as well as the conscientious and scrupulous Dissenters, to evade the service of all burthensome offices, either by a wilful and avowed neglect of the sacramental qualification, or in the case of Dissenters, by introducing a more constant and strict non-conformity than they have generally professed; in order to lay a foundation for proving, whenever it may become necessary, the reality and conscientiousness of those scruples, which the defendant alledged in his pleas, as the ground of not having it in his power to qualify himself for this office. That these and all other inconveniences might be removed, and the full purpose of the corporation act answered, by the distinction established in the case of the King *v.* Larwood, and the King *v.* Read, and never since over-ruled; that no one shall excuse himself from the obligation of serving these offices, even in a course of criminal proceeding, much less on a private bye-law of a corporation, by his own default, or voluntary omission; and that in these cases, his election, notwithstanding his want of qualification, shall not be considered as void, so as to excuse him, but as voidable only against him, in respect of any advantages he might claim under it. And the statute 5 Geo. I. set forth in the plaintiff's replication, which confirms the election of such as have been in possession six months, shews, that the legislature have considered these elections as voidable only, and not as absolutely void. That though, since the toleration act, it might not be illegal in a Dissenter, duly qualified, not to have communicated with the church of England, yet it was apprehended, it could not appear in this cause, that it was not a voluntary omission in the defendant not to have done so; and it was conceived, that a voluntary omission can never be an excuse from a prior obligation. A Protestant Dissenter, as such, does not profess an absolute non-communion with the church of England; for the most conscientious of them have at times occasionally conformed, not for lucrative employments only, but in devotion and charity. And as to the defendant's allegation in his pleas, that he never had communicated, nor could in conscience communicate with the church of England; this was a matter not capable of proof, or of being put in issue to a jury, nor possible to be known, but to God and his own conscience. And therefore the alledging it, and that the corporation had notice of it at the time of the election, was totally immaterial upon these pleadings, and not admitted as a fact upon this record; because, by **[473]** the rule of law, nothing is admitted as a fact upon a demurrer, but such a fact as is well pleaded, and upon which the other party may take an issue; which in this case the plaintiff could not have done.

As to the objection to the declaration, that it had not set forth the charter of King John, to shew what right the city of London has to the election of sheriffs; it was answered, that that charter is only a charter of confirmation, and that the city have this right prescriptively, and by custom, as part of their ancient constitution: that this

right of electing their sheriffs is taken notice of in public acts of parliament, particularly 11 Geo. I. for regulating elections in the city of London; and that however necessary this might have been thought, if the present action had been brought in the Courts of Westminster Hall, which cannot take notice of the customs and laws of the city, unless they are particularly pleaded; yet in the city courts, the laws and customs, and acts of common council of the city, are the laws which they must proceed by, and which the judges of those courts are sworn to observe, and consequently obliged to take notice of: and the general course of precedence in those courts, in declarations upon acts of common council, is, to set forth the act of common council only, without alledging what right the city has to make bye-laws concerning the subject matter of the act, or how it arises; and the court of appeal, or on writ of error, must always judge by the same rule with the court wherein the cause is first commenced.

On the other side it was said (W. de Grey, E. Willes), that though the defendant had been always desirous of having his cause determined upon the true and real merits of the question between him, as a Protestant Dissenter, and the city of London; a question in which the whole body of Protestant Dissenters in this kingdom was greatly concerned, and on the real merits of which it was conceived, that the judgment given in the defendant's favour was pronounced; yet it must be observed, that the plaintiff who brought his suit as chamberlain of the city of London, and for the benefit of the city, had not in his declaration shewn such a ground, as to warrant the bringing the suit. For the action was founded on a supposed right in the city of London, to elect sheriffs for the city and county of Middlesex, and on a supposed breach of a bye-law relative to such election: such a right of election was a franchise, which could be supported only by grant, or prescription, which supposes a grant; but it was not stated in the declaration, nor did it any where appear on this record, how or by what means the city of London derived to themselves, or indeed that they had vested in them, any such franchise or right of election, which the bye-law was made to regulate. This was conceived to be a defect in the pleadings, which must be fatal to the suit; and such as would of itself be sufficient to overthrow the former judgments, given in favour of the plaintiff by the Sheriff's Court, and the Court of Hustings. That the duty **[474]** of members of a corporation to serve corporate offices, and the right of the corporation to compel them so to do, were not in the general now disputed, any more than the right of members to enjoy such offices, when they were legally and duly elected thereto; but both these rights of electing and enjoying, as well as the duty of serving, must be subject to the controul of the legislature; by which they might be abridged or extinguished, qualified or restrained. Thus the legislature after the restoration, intending to provide for what was thought a proper succession of officers, to be entrusted for the future with power and influence in the government of corporations, and to restrain and regulate the election of magistrates into such offices, by excluding persons who by their general habits and religious principles were deemed unfit to be trusted, and by absolutely prohibiting and declaring void the election of any such persons; did by the act of 13th Charles II. which was professedly made, according to the title of it, for the well governing and regulating of corporations, for the reasons therein mentioned, provide, and enact, "That no person should be elected into any office or place, concerning "the government of such corporation, who should not, within twelve months next "before, have received the sacrament of the Lord's supper, according to the rites of the "church of England." And the defendant not having so received the sacrament within a year, was then under a legislative disability of being elected; and the corporation, by the same law, was absolutely prohibited from electing him, and the right of the one to elect, and both the right and duty of the other to enjoy and serve the office, was totally taken away. The pretended election in question was therefore a mere nullity, and a transgression of the law in the electors: and it was difficult to conceive, how the corporation could from their own transgression of the law, and breach of the statute, acquire a right of action, and entitle themselves to recover a penalty from an innocent person.

But it was objected by the plaintiff, that the disability arose from the defendant's own default; and that no person shall be allowed to plead his neglect of one duty, as an excuse for his not performing another.

This matter, independently of the toleration act, must now be considered in the same light, as at the time of passing the corporation act of Charles II. It was not the

defendant's duty to serve the office, if it was the intention of the legislature, as it clearly was, to exclude him as an improper person, and as such to render him incapable, by laying him under an absolute disability of being elected to it. His capacity of being elected was taken away and extinguished. The corporation were expressly prohibited from electing him; he could not therefore be under any obligation to serve, nor consequently liable to any penalty for refusing office. If by the ecclesiastical law, he ought to have taken the sacrament according to the rites of the church of England, by that law he might have been punished. If the **[475]** statute meant to punish him by an exclusion from all corporation offices, such punishment ought not to be aggravated by additional penalties. There is an essential difference between a previous capacity, and a subsequent qualification; the latter supposes a previous duty. The not having received the sacrament does not, nor did in the view of the legislature, fall under the idea of neglect of duty; but was considered as an evidence of a religious principle, which they thought ought not, in a political view, to have any influence in the government of corporations. Since the toleration act, it cannot in any sense be considered as a duty incumbent on a Protestant Dissenter, to receive the sacrament according to the rites and ceremonies of the church of England; his scruples are, in effect, declared innocent; and the exercise of his religion, according to his sentiments and persuasion, is under the protection of the law. The Dissenters therefore could not help regarding the steps taken by the city of London, to enforce against them the bye-law on which the present suit was founded, as an attempt to levy a tax of £600 payable to the chamber of London, upon every Protestant Dissenter free of the city and of sufficient wealth, who prefers his religious principles and his conscience, to the dignity or profit of a corporation office; and such a burthen was apprehended to be derogatory to the liberty given by the legislature in the toleration act.

Another objection was, that though the act declares the election void, yet it does not mean, and therefore does not expressly say, that the election shall be void to all intents and purposes; but that the act is to be so construed, as to make the election and office void, as to the person elected, but not as to the corporation electing, which are to be considered as punishing for a contumacy.

But there was no foundation for this distinction. The objection was obviated, by the answer to the former objection. The prohibition extends equally to the persons electing, and the persons to be elected; and the former, according to the spirit and true meaning of the act, are no more to be trusted in the exercise of their power and general right of electing, than the latter with the power and exercise of the office. The election or office therefore is not, from being once good and well filled, declared to become void to all intents and purposes, according to the usual language in such cases, as if the person was naturally dead; but the very placing, electing, etc. is declared in itself void. Such words would be improper where the election, from the disability of the electors, and the incapacity of the elected, is a nullity from the beginning; though they may be proper in the subsequent avoidance of an office once full.

It was further objected, or rather further urged in support of the second objection, that the act 5th Geo. I. mentioned in the replication, shews that the election of a person who has not received the sacrament according to the rites of the church of Eng- **[476]**-land, is not absolutely void, because by six months possession, the disability is purged.

This statute is a statute of limitation, founded on political convenience. It gives a title to the office where there was none before, by discharging the disability, unless the person shall have been removed within six months; but does not hinder or vary the operation of the corporation act in any case, except where the title, founded on the limitation thereby introduced, has attached and taken effect; and the operation and effect of this act is, by a retrospect, to give an original right to the office *ab initio*, which right is absolutely and wholly derived from this act.

But a fourth objection was taken, that the corporation act was intended to punish and not to favour Dissenters; and that if it is so construed as to exempt them from burthensome offices, it will enure to their benefit, and put them on a better footing than the members of the established church, contrary to the design of the legislature.

To this it was said to be evident, that the corporation act was not designed to favour Dissenters; but the disfavour thereby intended, was to exclude them from power, and not to punish them for their non-conformity, for which there were other laws. It is a

mistake, which confounds the end of the statute with the consequences of it, to argue upon the corporation act, as a mere vindictive law, made to punish an offence. The end and purpose of it was to be a protection to the constitution, by disabling all who did not profess the established religion, from being elected or placed in offices of government, as persons whom the legislature deemed not fit to be trusted with power; and appropriating such offices, and the powers annexed to them, to the members of the established church. The act cannot, consistently with the rules of sound construction, be so interpreted, as to expose Dissenters to another punishment, superadded to the loss of power. It makes no difference between burthensome and lucrative offices; for such a distinction would have been inconsistent with the principles, and destructive of the end of the act; which manifestly was to shut the door against Dissenters, as to power. If the consequence of that is to free them from offices which are burthensome, it gives the members of the established church an equivalent; namely, the privilege and exclusive capacity of enjoying those, which are accompanied with honour and profit.

It was still however objected by some, that if the defendant was allowed to shelter himself under the corporation act, the atheist, the infidel, and the profligate, and every one who desires to avoid a burthensome office, might do so likewise; and the corporation would have no means to compel a performance of corporate duties.

But to this objection it might be sufficient to say, that it was not applicable to the present case; for the defendant by plead-**[477]**-ing the toleration act, and by having qualified himself within the terms of it, had drawn a line between the scrupulous Dissenters, and persons of the odious stamp and character mentioned in the objection. The reality of the Dissenters scruples is supposed by the toleration act, and was admitted by the pleadings in the present cause.

It was then further argued upon the general merits of the case, that the defendant would have been liable to punishment for an usurpation, if he had taken upon him the office, in consequence of such a mere pretence, or colour of an election, as in the present case; an election, which the corporation was by the act prohibited from making, and under which the defendant was, by the same act, rendered incapable of accepting the office; and it would be contrary to reason, that any person should incur a penalty for not doing that, which it would have been criminal in him to have done. That the penalty imposed by the bye-law upon which this action was brought, could not be incurred by any but those who were duly elected by the livery to the office of sheriff, in consequence of a proper and legal nomination by the lord mayor; such previous nomination being essential to the subsequent election. The bye-law itself enacts and ordains, "that it shall be lawful for the lord mayor to nominate fit and able persons to "be put in nomination to the livery," which is in effect a prohibition to nominate any person, not of that quality and description. But the defendant not having been qualified as the corporation act requires, was not a fit and able person, and could not be nominated as such by the lord mayor; on the contrary, he was under an absolute disability by act of parliament, of being either nominated or elected; and therefore, the pretended nomination of the lord mayor, and all the subsequent proceedings, and the election pursuant thereto, were mere nullities, and could not have any legal effect; any more than the nomination and election of a person rendered incapable by the judgment of a court of law could have had.

After hearing counsel on this writ of error, the Judges were directed to deliver their opinions upon the following question, viz. "Whether upon the facts admitted by the "pleadings in this cause, the defendant is 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?" And the Judges having taken a week's time to consider, and differing in their opinions, delivered them *seriatim*, with their reasons; Mr. Justice Hewitt, Mr. Justice Aston, Mr. Justice Gould, Mr. Baron Adams, Mr. Baron Smythe, and Mr. Justice Clive, were of opinion in the affirmative, and Mr. Baron Perrot in the negative: whereupon it was ORDERED and ADJUDGED, that the judgment given by the commissioners delegates should be affirmed; and the record remitted. (Jour. vol. 31. p. 458. 470. 475.)