

No 51.

1760. July 24.

BYRON *against* CRAW.

THE LORDS refused to allow the oath of calumny to be put where the pursuer was out of the country, and it appeared to be demanded only with a view of delaying the cause. See APPENDIX.

*Fol. Dic. v. 4. p. 21.*

## DIVISION IV.

### Oaths to Government.

1792. June 6.

ROBERT BANKS, and Others, *against* HENRY JAFFRAY, and Others.

No 52.  
Consequences of omitting or refusing, in a proper manner, to take the oaths to Government, as an officer in a Royal Burgh.

JOHN HEWIT was chosen Deacon of the corporation of Tailors in the burgh of Stirling, in the month of September 1790; but he did not take his seat, or act in that capacity, till 27th September 1791, when the Magistrates, and other officers in the burgh, were elected for the ensuing year.

The usual oaths to Government being tendered to him, Hewit added this qualification, "That he took them, so far as was agreeable to the Word of " God."

The result of the election depending on this man's vote, a complaint was preferred, in virtue of 16th George II. for trying its validity.

Thereafter, on 24th December 1791, Hewit appeared in the Court of Session, and took and subscribed the oaths, without any reservation.

The Court unanimously found, "That the oaths had not been taken by Hewit on 27th September 1791, in the form required by law." After this, however, the question occurred, what should be the effect of the vote he had given; Henry Jaffray, and the other candidates favoured by him, insisting that the circumstances occurring at that period could not affect them. In support of this proposition, they

*Pleaded,* The Scots statutes of 1661, c. 11. and 1685, c. 17. though they impose certain penalties on persons refusing or delaying to take the requisite oaths to Government, do not render void what is done by them in their official capacity. And the act 1693, c. 6. declaring that such persons shall be *ipso facto*

deprived of their offices, is alike silent on that point. These statutes, however, having become inapplicable by the union of the two kingdoms, are no longer in force.

By act 6th Anne, c. 14. new oaths were required, and the persons who do not comply are declared incapable to hold the offices, in respect of which the oaths were imposed, and the offices are declared to be null and void. But the idea of an immediate forfeiture, without some judicial discussion, as it is inconsistent with the general practice, is here inadmissible, the party being permitted to take the oaths at any time within three months "after his admittance into the office." Thus, at least, the validity of the acts performed by him during that time must be liable to no exception; Kames's Principles of Equity, book 1. part 1. sect. 2.; 20th February 1787, Campbell against Macdowal, No 82. p. 8671.

A subsequent clause in the same statute imposes penalties on those who, after refusing or neglecting to take the oaths, continue to execute their offices; which clearly imports, that even a refusal to take the oaths did not *ipso facto* render the nomination ineffectual. And this is also confirmed by comparing the enactment in question with those respecting bribery and corruption, committed by persons holding offices in burghs, where the inefficacy of the votes, and other acts performed by the offenders, is declared in express words.—See act 13th of 14th William III. also 22d George III. c. 41. § 45.

The statutes, too, passed at the end of each year, for indemnifying those who have omitted to take the necessary oaths, contain only the limitation, that "they shall not restore or entitle any person or persons to any office, employment, benefice, matter, or thing whatsoever, actually avoided by judgment of any of his Majesty's Courts of record."

Farther; The statute of indemnity, passed in the year 1791, must put an end to the present argument. For if it shall be held, that it is not necessary to take the oaths, until the party enters on the exercise of his office, the proceedings on 24th December 1791 must be considered as fully sufficient to remove every objection. If, on the other hand, the obligation to take the oaths commenced as soon as the party was elected, he was thereby enabled, by taking the oaths on or before 25th December 1791, to prevent any forfeiture to which he had become liable, in consequence of his former neglect.

*Answered,* The purpose of requiring certain oaths from persons in offices of public trust, is not surely to make room for pecuniary penalties, but to exclude those who are unwilling to give such assurances of their attachment to the established Government. The taking of the oaths, therefore, ought to be considered as a condition annexed to the several offices, in respect of which they are required. And, on a survey of the different enactments, it will appear, that this was in the view of the Legislatuæ, and effectually provided for.

The acts 1661, c. 11. and 1693, c. 6. require the persons therein mentioned to take the oaths, "at their entry and admission to their several offices, and

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“ before the exercising thereof.” And it is declared, “ That if any person shall own or exercise their offices, without taking the oaths, they shall be deprived *ipso facto* of their said offices, trusts, and employments.” The act 1702, c. 1. on the same subject, refers to that in 1693, and thus it seems quite clear, that, before the Union, no person could validly exercise any public office without previously taking the oaths to Government.

Nor were those enactments done away by the subsequent statutes, which were only meant to adapt the oaths to the circumstances of the times, without altering their nature or effects. The words, indeed, are somewhat different; but they evidently mean the same thing; the offices held by persons neglecting or omitting to take the oaths, being by the statute itself “ adjudged to be void and null.” And to this sanction are added the penalties of the English statutes, 13th and 14th William III. which, besides a penalty of L. 500, excludes the offenders from suing in the Courts of law; act 6th Anne, c. 14.

By act 1st George I. c. 13. it is in like manner declared, that those who neglect or refuse to take the oaths, “ shall be *ipso facto* incapable and disabled in all cases, and to all intents and purposes, to enjoy the same offices, or advantages thence arising;” and every office, &c. is “ *ipso facto* adjudged void.”

The acts of indemnity, instead of weakening, tend very much to confirm this argument. Those acts, proceeding on the narrative, that “ some persons, from ignorance of law, absence, or some unavoidable accident,” have been prevented from taking the oaths to Government, extend only to those who have omitted, and not to such as have wilfully refused to take them. They also contain an express ratification of the acts and deeds of those who are entitled to the statutory benefit, which denotes, that, in every case, such deeds were invalid. And, as to the act 31st George III. although it were to be so construed as to protect a wilful refusal to take the oaths, it is quite inapplicable to the present case, the delinquency in September 1791 being after the passing of the law, which was only meant as a remission of penalties already incurred, and not to afford impunity to future offenders.

The Court, by one interlocutor, found, that the elections which had been carried by Hewit's vote were ineffectual and void;

But, after advising a reclaiming petition, with answers, the Lords altered that interlocutor, being chiefly moved with this consideration, that, as the enactments after the Union authorised the party, at any time within three months after his admission into his office, to take the requisite oaths, his actings, in the mean time, were to be considered as legal, and authoritative in every respect.

With regard to the effect of the acts of indemnity, there was a great diversity of opinion, many of the Judges thinking, that, where the party had wilful-

ly refused, as in this case, to take the oaths in a proper manner, he was not entitled to the benefit of these enactments.

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“ THE LORDS repelled the objection to the vote of John Hewit, and dismissed the complaint,” &c.

A reclaiming petition was preferred, and refused without answers.

Act. *Solicitor-General, Maconochie, Abercromby.*

Alt. *Lord Advocate, et alii.*

Clerk, *Mennis.*

C.

*Fol. Dic. v. 4. p. 21. Fac. Col. No 215. p. 451.*

*See APPENDIX.*