Dec. 10, 1813.

NIDPATH ENTAIL. (QUEENSBERRY.)

Judgment.

of this case till the same day. (*Vide Roxburghe case, post.*)

Judgment of the Court below *affirmed.*

Agent for the Appellant, CHALMER.
Agent for the Respondents, SPOTTISWOODE.

ENGLAND.

IN ERROR FROM THE COURT OF KING'S BENCH.

HAWKINS—*Plaintiff in error.*
REX—*Defendant in error.*

Dec. 15, 1813.

CORPORATION OFFICE.—ELECTION.

AT a meeting duly held for the election of an alderman for the borough of Saltash, Hawkins and Spicer were candidates. Two votes were given for each, when they were interrogated whether they had qualified by taking the sacrament within a year before the election, as required by 13 Car. 2, stat. 2, cap. 1, sect. 12. Hawkins admitted he had not. Spicer answered that he had. Public notice then given of Hawkins's disqualification, but poll proceeds; and, after the notice, 20 vote for Hawkins, 16 for Spicer. Mayor swears in Hawkins; two of the aldermen (as they might do by the constitution of the borough) swear in Spicer. Hawkins takes the sacrament within the time limited by the Annual Indemnity Act. Held by the Court below:—1st, That though notice of the disqualification of Hawkins was not given till after the commencement of the election, all the votes for him, after that notice, were thrown away. 2d, That Spicer having the greatest number of legal votes was duly elected, and, he having been sworn in, the office was *legally filled up* by him, so as to exclude the operation

of the Indemnity Act in favour of Hawkins; that act (47 Geo. 3. stat. 2, cap. 35, sect. 6, corresponding to 42 Geo. 3, cap. 23, sect. 5, in last edition of printed Statutes) not curing the want of qualification in cases of offices legally filled up at the time of its passing. 3d, That Spicer must be presumed to have been qualified according to his own declaration, there being no evidence to the contrary. The Court below appeared to have considered it of great weight that the majority (36 out of 40) remained unpolled at the time of the notice, though not prepared to say that it would have made any difference though the notice had not been given till a more advanced state of the poll, if the votes for Spicer had exceeded the number given for Hawkins before notice. This judgment affirmed in the House of Lords,—the Chancellor (*Eldon*) appearing to think that those who voted for a disqualified person without notice might, if they chose to demand that privilege, vote again for another person, but that nobody was bound to call on them to do so.

Filed T. T. 1807.

THIS was an information, in nature of a *quo warranto*, calling on the Defendant to show by what title he claimed to be an alderman of the borough of Saltash. The Defendant pleaded, stating the constitution of the borough; viz.—

"That a charter was granted 7th June, 1774, "whereby the persons therein named, the mayor, "aldermen, and free burgesses of the borough of "Saltash, and their successors, were declared to be "a body corporate.

"That there should be one of the aldermen who "should be the mayor, and six other free burgesses "of the inhabitants of the borough, besides the "mayor; viz. seven capital free burgesses inhabit- "ants, who should be the aldermen and council of "the borough.

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" That the alderman who should have executed " the office of mayor for the preceding year should " be a justice to preserve the peace within the bo- " rough until another mayor should be elected.

" That the mayor, justice of the peace, and the " rest of the aldermen, or the major part of them, " (of whom the mayor and justice were to be two,) " should, whenever it should seem convenient, elect " such persons to be free burgesses as should please " them, and administer an oath of fidelity.

" That when any of the aldermen should die, " or be amoved from their offices, it should be law- " ful for the mayor, justice of the peace, and the " rest of the aldermen and free burgesses, or the " major part of them, to elect one or more of the " free burgesses, inhabitants of the borough, in his " or their place, who should hold their office during " their lives, unless they should be amoved as " therein mentioned, he or they first taking their " oath before the mayor or justice of the peace, or " two or more of the aldermen; or, in default of " the mayor, justice, and aldermen, and not other- " wise, before four or more free burgesses, inhabit- " ants of the borough, well and truly to execute " their offices."

The plea then stated the acceptance of the charter; and, " that on the 6th November, 1806, Richard " Thomas, one of the aldermen, died; and that on " the 18th December, 1806, the mayor, justice of " the peace, and the four other aldermen, and divers " of the free burgesses, assembled at the Guildhall " to elect one of the free burgesses, inhabitants, to

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" be an alderman, in the place of the said Richard " Thomas; and that the mayor, justice of the " peace, aldermen, and free burgesses, so assembled, " elected the Plaintiff in error, then being a free " burgess and inhabitant, to be an alderman, in the " room of the said Richard Thomas; and that on " the same day and year, at the borough aforesaid, " he took his oath before the then mayor, well and " truly to execute his office of alderman, and was " then and there duly sworn into the office of " alderman."

The replication, admitting the fact of the due assembling, took three issues:—

" 1st, That the mayor, justice of the peace, al- " dermen, and free burgesses, being so assembled as " aforesaid, did not then and there, viz. on the 18th " of Dec. 1806, at the borough aforesaid, elect the " said Plaintiff in error to be an alderman, in the " room of the said Richard Thomas, in manner " and form as the Plaintiff in error hath in his plea " alleged; and,

" 2d, That the Plaintiff in error did not in due " form take his oath before the then mayor, well " and truly to execute his office of alderman in " manner and form, &c.; and,

" 3d, That the said Plaintiff in error was not " duly sworn into the said office of alderman, in " manner and form," &c.

On issues joined, a special verdict was found, stating, " that, on the 18th of December, 1806, " the place of one of the aldermen of the borough " being vacant, the mayor, justice of the peace,

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" and the rest of the aldermen and 34 of the free " burgesses, assembled in the guildhall of the bo- " rough, *on due notice*, in obedience to a writ of " *mandamus* commanding them to proceed to elect " and swear in an alderman, &c.; that the Plaintiff " in error and Peter Spicer were proposed as candi- " dates for the vacant office of alderman; that, " after two persons had voted for Plaintiff, and two " for Spicer, the agent of Spicer asked Spicer, Whe- " ther he had received the sacrament within a year? " to which he answered, he had, (but no other evi- " dence was given of it;) that the said agent then " asked the Plaintiff whether he had so done; to " which he answered, he had not; and thereupon " the agent gave notice that the Plaintiff was on " that account ineligible, and the votes for him " would be thrown away, and read the twelfth " section of 13 Car. 2, stat. 2, cap. 1; that 20 " persons afterwards voted for the Plaintiff, who " were all present when the above notice was given, " except two or three, and 16 voted for Spicer; " that the Plaintiff was then sworn in by the mayor; " that Stephen Drew, one of the aldermen, declared " Spicer was duly elected, and he was tendered to " the mayor to be sworn, but the mayor refused to " swear him; whereupon Spicer was sworn in by " two of the aldermen: that the Plaintiff had not " taken the sacrament within a year before the " election, but took the same on the 4th of October, " 1807; but whether the Defendant was duly " elected an alderman, or duly took his oath before " the mayor, or was duly sworn into the office,

"the jurors prayed the advice of the Court," &c. &c.

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CORPORATION OFFICE.—ELECTION. Judgment for crown, and writ of error.

On this verdict judgment was given for the crown, in T. T. 1808; whereupon Hawkins brought his writ of error.

47 Geo. 3, cap. 35, sect 6:—"Provided always that "this act, or "any thing "herein contained, shall "not extend, "or be construed to extend, to restore any "person or "persons to "any office or "employment, &c. "avoided by "judgment of "any of His "Majesty's "Courts of "Record, or "already actually filled "up or enjoyed by any "other person: but "that such "office, &c. "so avoided "or legally "filled up "and enjoyed "shall be and "remain in "and to the "person who "is or are "now, or "shall be at "the passing

Abbott (for Plaintiff in error.) The prosecutor relied on the objections to the Plaintiff in error's title, arising on 13 Car. 2, stat. 2, cap. 1, sect. 12; but the Plaintiff in error contended that this objection was removed by 47 Geo. 3, cap. 35, which received the royal assent on the 19th of February, 1807; he having taken the sacrament on the 4th of October, 1807, within the time limited by that act. But it was insisted that this case came within sect. 6 of 47 Geo. 3, cap. 35, because the office was at the time of passing the act *legally filled up and enjoyed* by Spicer. Mr. Hawkins was a good officer by the operation of the act of 47 Geo. 3, cap. 35, except under this proviso. But it was submitted that the Defendant in error was not entitled to say, under this proviso, that the office was avoided, or legally filled up as if the act had not been made, by Mr. Spicer. There were two modes of avoidance to which the act applied,—a judgment of the King's Bench, and amoval by the corporation. This was neither of these cases; and, Hawkins not having been removed, the office could not have been legally filled up by another person at the passing of the Indemnity Act.

One point therefore was, whether the proviso was applicable to the case of a person claiming by a contemporaneous election. By the charter of this

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CORPORATION OFFICE. —ELECTION. "of this act, "legally entitled to the "same, as if "this act had "never passed."

1st point. Whether s. 6, of 47 Geo. 3, stat. 2, cap. 35, (corresponding to sect. 5, of 42 Geo. 3, cap. 23, in the last edition of the printed statutes,) applied only to *filling up* after removal of disqualified person, or whether it extended to a filling up by a qualified person at a contemporaneous election?

2d point. Whether the votes given for a disqualified person, after notice of his disqualification, are thrown away, the notice having been given after the commencement of the election?

borough, the power of swearing in lay in two distinct authorities,—in the mayor, and in two aldermen. The mayor administered the oath to Hawkins,—the aldermen to Spicer. But the question was, Whether this proceeding as to Spicer satisfied the terms of this proviso? or, Whether, in order to deprive Hawkins of the benefit of the act, he must not have been removed by judgment of the Court of King's Bench, or by the Corporation? If he could not be deprived of it in any other way, then the judgment of the Court below was wrong. Hawkins himself was in office at the time of passing the act; and the first point then was, that the office could not have been legally filled up by another person.

Admitting that the proviso applied to a case of contemporaneous election and swearing in, still the question was, Whether Spicer was fully in office? for if he was not, their case was at an end. The majority voted for Hawkins, and Spicer was not elected, unless Hawkins's votes were entirely thrown away. There were not many cases where it had been decided that the votes of the majority were so absolutely thrown away as to give the election to the minority. That was a strong measure in any case: and it was submitted that it could not hold here, unless the notice of disqualification had been given before the commencement of the election. The electors ought to have notice and time to speak and deliberate before they were called upon to vote. Before 11 Geo. 1, cap. 4, this inconvenience existed, that the election of officers must take on the day fixed by the charter, and an election on any

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CORPORATION OFFICE. —ELECTION.

Notice, and opportunity to deliberate.

other day was bad. That act made it good if done the next day, or upon *mandamus*. But all who had a right to attend must have notice; and if not, what was done was void. In one case, (*Musgrave v. Nevinson*, 1 Str. 584,) all, except one, were present, and all concurred; but the election was void. That could have been on no other ground than that the absent voter had a right to deliberate and speak, as his vote, though he had been present, would have been of no effect.

Kinaston v. Mayor, 2 Str. 1051.

In another case, where the question was as to a removal, all were present except one; yet the Court held that the proceeding was bad. In another case, (*Rex v. May and Little*, 5 Bur. 2681,) which arose out of this same borough of Saltash, the meeting was not held in the usual place. All had notice of the meeting: all except two were present. Yet the proceeding was bad, as the meeting was not at the usual place, nor notice given in the usual way, by the ringing of a bell. These cases were cited to establish the principle, that on the election or removal of officers, all must have notice, that they might have time to deliberate and speak. In corporation elections, one might recommend one, another another, and all the members had a right to take a part in the discussion that might arise as to the merits of the different candidates; but all that right of deliberating, advising, and debating, might, in effect, be destroyed, if notice of disqualification was sufficient after the commencement of the election.

The persons who in this case voted for the incapacitated candidate, and who, undoubtedly, had not thrown away their votes at the time when they

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were taken, were, by these means as much deprived of the effect of their votes, as those who had notice and voted in defiance of it. It was by no means clear, that if any other candidate had been put up in lieu of Hawkins, they could have returned to the hall and polled again for such other candidate, the same election still continuing; and Hawkins being capable of receiving their votes when they polled for him, they had no reason to remain in the hall after their votes were taken.

If the law did not require the notice to be given before the commencement of the election, at what period of the election might it be given so as to invalidate it? Might it be done just at the period when the voters for the other candidate made a small majority over the votes given for the candidate objected to? If it might, it seemed that this doctrine might be misused, and much fraud practised, which it would be impossible to detect. Supposing the whole number of voters to be 30, of which one party had 12, and the other 18. If the person for whom the 18 were, engaged should be incapacitated, and the notice must be given before the election, the 18 would have an opportunity of exercising their franchise, and might choose some other candidate; but if notice might be given during the election, the 12 might wait till 10 of their opponents had polled, and then, by giving notice, secure the election to their own candidate, who had originally a minority; the eight would be thrown away, and the 10 who were good, as polling before notice, would be outnumbered by the 12.

If it was enough to give notice of the disqualifica-

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tion after two votes had been given, it might be so after any number: and even though those who polled without notice were to be called upon to vote again, it would be very inconvenient; for it would be necessary to ascertain who had polled *with*, and who had polled *without* notice; and it must be often difficult, and sometimes impossible, in the tumult of an election, to know when notice was given, or who had notice and who not. But if the rule should be that the notice must be given before the commencement of the election, all that inconvenience would be avoided. In the case of *Rex v. Coe*, (Heywood, County Elections, 538,) after nine had voted for the opponent of Coe, he was declared disqualified. The rest of his votes polled for another, but there were not enough; and Coe, who would otherwise have been out-voted, was, though he had only a minority, declared elected. Rule absolute against Coe. In *Rex v. Bridge*, 1 Maul. Sel. 76, (case of election for mayor of Colchester,) *Sparling* had 91 votes and Bridge 11, when notice was given that Sparling was disqualified. The poll proceeded, and the numbers were 123 for Sparling, 22 for Bridge. The Court was clearly of opinion that the 91 votes given before notice were not thrown away. That case showed, that if notice were given at such a period that a sufficient number did not remain to turn the majority, the party who had only a minority could not have the election. (*Lord Eldon* (Chancellor.) You must make out not only that Spicer is not elected, but that you are.) If Spicer was not elected, Hawkins was; as the defect was cured by the Indemnity

Rex v. Coe, 27 Geo. 3, H. T.

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Act, 47 Geo. 3, cap. 35, provided the office was not legally filled up by another. There was a case which would remove that difficulty, *Rex v. Parry and Phillips*, 14 East. 549. That was a case of an election of six common-council-men for Haverford West. After two votes for Defendants, notice was given, that they were disqualified. The poll went on, and they had a majority on the whole, though considerably more than two votes were given for each of the candidates in the minority. The Defendants were sworn in, and afterwards qualified within the time allowed by the Indemnity Act. Held that the Indemnity Act cured the defect, the office not having been avoided by judgment of Court, and not legally filled up by any other person: so that Hawkins was clearly well elected, if Spicer was not.

In considering the point of time at which notice must be given, not merely the interests of the candidates, but the rights of the voters must be taken into account. If only two persons were candidates, one might say of these two, "I vote for Spicer." But if he had had notice sooner, *non constat* but there might have been some other candidate for whom he would have voted in preference. (*Lord Eldon* (Chancellor.) That point was argued in Burke's case, before a committee of the House of Commons.) There was a difference between an election for a Member of Parliament and an election for a corporation officer. The election for a corporation officer might be adjourned. (*Lord Eldon.* Was there any finding in the special verdict that another meeting had been proposed?) No;—and

1 Doug. Rep. 241.

they (for Plaintiff in error) relied upon that. No such thing was done here.

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The decisions in which effect was given to the minority of votes were, *Rex v. Withers*, *Regina v. Boscawen*, and *Taylor v. Mayor of Bath*, all cited in *Rex v. Munday*, Cowp. 537. These were relied on by the Defendant in error. The disqualifications in these cases were of a different description, and nothing appeared in them in regard to what time the disqualification was notified. It might have been before the election. There was no authority distinctly in point to this case of the *King v. Hawkins*, of notice given after the commencement of the poll; and if the rule were to be established, that notice after the commencement was sufficient, it would violate the first principle of corporation law, which required that all should have an opportunity of deliberating and speaking. If the notice must be given before the commencement of the poll, this and other inconveniences would be obviated.

3 Luders, 324. Ford's Notes.

Another point in the case arose from the nature of the disqualification itself. In two cases, the election by the minority was held sufficient; but there the disqualification was very different from that in the present case. It was one thing to say that votes were thrown away where there was an absolute disqualification, and another to say so, where the disqualification was not absolute. It was not meant here to rely on the Annual Indemnity Act, but on the Permanent Act, 5 Geo. 1, cap. 6, sect. 3. It was admitted that there were *dicta* against them,

3d point. Nature of the disqualification.

5 Geo. 1. cap. 6, sect. 3. "Shall be re-

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CORPORATION OFFICE. —ELECTION. " moved by " the corporation, or " otherwise " prosecuted " for, or by reason of such " omission. " Nor shall " any incapacity, forfeiture, or " penalty, 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 " his respective office as " aforesaid."

but there was no case in which the decision did not turn upon an absolute disqualification. The 13th Car. 2, stat. 2, cap. 1, did absolutely disqualify, till 5 Geo. 1, cap. 6, which did more than was generally supposed. It removed the disqualification, not merely in case no proceedings were commenced within six months, but also " unless such person be " so removed," &c.

Now it was not denied but that, by the effect of that statute, Mr. Hawkins would have been a good officer, if no proceedings for his removal had been commenced within six months from the time of election. But it would be said that here the information was filed within six months. True;—but the point contended for was, that the votes were a nullity only where the disqualification was absolute; in which case Mr. Hawkins could not by possibility have been a good officer. Here he would have been a good officer, unless the prosecution had been commenced within six months. Suppose a single candidate were elected, with notice of the disqualification, and died within six months, without any proceedings commenced for his removal;—the effect under 5 Geo. 1, cap. 6, would be, that all his acts would be good; and, he being dead, no proceedings could be commenced against him. It would be carrying the law farther than had as yet been done, to say that the votes given to one under such circumstances should be a mere nullity. It was admitted that there were opinions of Judges to the contrary, but there were no cases where the point had been determined.

Harrison v. Evans, Cowp. 393.

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1st, Then, a filling up by a contemporaneous election was not a filling up within the meaning of the sixth section of the Indemnity Act; and Hawkins having the benefit of it, his election was good. If their Lordships should be against him on that point, then,

2d, The notice of disqualification, to be of any avail, ought to be given before the commencement of the election.

3d, The act 13 Car. 2, was governed by 5 Geo. 1, cap. 6; or at least the point was so doubtful that voters ought not to be punished by declaring their votes null.

A. Buller (for Plaintiff.) The notice was not given in time to render Spicer's election good, the majority of votes being in favour of Hawkins; and if Spicer's election was not good, the Indemnity Act put Hawkins in the same situation as if he had been originally qualified. It appeared from the cases, that the Court of King's Bench had always been anxious that the voters should have time to deliberate. In one case, that Court had said, that all ought to be present to debate as well as to vote. In *Taylor v. Mayor of Bath*, and *Regina v. Boscawen*, it was clear that the notice must have been given previous to the election. In *Oldknow v. Wainwright*, the majority refused to vote at all, and were considered as consenting to what was done by the minority. In *Rex v. Withers*, five voted, and six refused to vote, and were held as having consented to what the others did. This then was the first case in which notice after some

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had voted was held to be sufficient. The principle upon which the election was in some cases given to the minority was, that the majority might prevent the office from ever being filled up at all, by constantly voting for a disqualified person; but there was no occasion to carry the matter beyond this. In *Rex v. Coe*, it was stated in a note by *Lens*, Serjeant, that two objections were made:—1st, That the other candidate had the majority. 2d, That the election was not conformable to the usages of the borough. From *Mr. Serjeant Heywood's* note, it would appear that the question had been decided on the second point; but from that of *Mr. Serjeant Lens*, as if it had not been decided merely on that point. In *Rex v. Bridge*, the Court had said that the mayor was not at liberty to say that the votes were thrown away, and it was always anxious that there should be no surprise upon the voters. The voters for Hawkins considered the objection as stated merely for the purpose of taking them in. True, they were bound to know the law, but still the notice ought to have been given in sufficient time to enable them to deliberate—to consider the objection, and bring forward another candidate, if they thought proper. This case therefore did not seem to have received that consideration which many of great legal ability thought it deserved. It might be said that notice of the disqualification given to the *person* before he voted was sufficient. In county elections, that rule might be convenient; but it was otherwise in the case of a corporation election. These persons ought to have been called

27 Geo. 3. H. T. (Heywood.)

Maul. Sel. 76.

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on to begin again. Hitherto the point had not been decided, and no injury could arise from beginning again. The voters did not intend to vote for a disqualified person; and it was only where it must be necessarily concluded that the voters did so intend, that the Court would say the votes were lost.

Pell, Serjeant, (for Defendant in error.) The cases cited on the other side did not bear at all on the question. The act 13 Car. 2, absolutely disqualified those who did not comply with its provisions. If an unqualified candidate should be elected in defiance of the act, the election was declared null and void altogether. What was this case? There were two candidates: two votes were given on each side. Notice was then given of the disqualification of one of the candidates. There were 36 votes still remaining, and yet the majority of these went on and gave him their votes; and now they complained that they were injured, after having voted for one who admitted that he was disqualified. The question then was, Whether, on such a mode of voting, Hawkins was or was not duly elected? The argument on the other side was twofold:—1st, That Spicer was not duly elected. 2d, That Hawkins was now a good officer, his original want of qualification being cured by the Annual Indemnity Act. It was admitted then that the case came within the act 13 Car. 2. It had been argued that those only were excepted from the benefit of the Indemnity Act who had been removed by judgment of the King's Bench, or by the corporation. No such

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clause however was to be found in the act. The excepting clause was very general; it extended to all those cases where the office was legally filled up, and the argument for the crown was, that Mr. Spicer was duly elected, and that therefore the office was legally filled up. They had been hard pressed on the other side when they represented the act 5 Geo. 1, cap. 6, as qualifying the operation of 13 Car. 2, as far as regarded absolute disqualification, when they admitted at the same time that their case did not come within the terms of that act. The argument then came to the point of notice: and it was said that notice must be given before the election began. No case to that effect was cited. There might perhaps be cases where that would be necessary. But the question was, Whether it was so or not in a case like the present? That the election should be good, after the admission of the candidate that he was disqualified, appeared a very extravagant proposition. The notice, it was said, must be given before the election began. Suppose, then, that none had voted for Hawkins, and one only for Spicer; would the notice then be too late? If not, then this showed that it was not necessary in all cases to give the notice before the commencement of the election. It was submitted that the subsequent votes were lost; and it did not clearly appear that this doctrine would be attended with any inconvenience. Hawkins was not elected, but Spicer was; and therefore Hawkins was not in a situation to claim the benefit of the Indemnity Act.

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Adam, jun. (for Defendant in error.) As the case stood, there were three points made:—1st, That there was no filling up to bring the case within the exception in the 47th of the King, as the filling up must be after removal by judgment of the King's Bench, or by the corporation. But no reason was assigned why that should be considered as the true interpretation of the act rather than that of the Court below. The words were, "legally filled up;" and if it could be shown that Spicer was elected, and the other not, then the office was legally filled up.

2d, The general doctrine was clear, that after notice of disqualification, the votes for the disqualified person were thrown away. They (for Defendant in error) had no decision upon the point in a case where notice was given after the commencement of the election; but neither had they on the other side any decision to show that the general doctrine did not apply in a case of this kind. There was no necessity for stating particularly the cases where the general doctrine was clearly recognized. *Oldknow v. Wainwright*, *Harrison v. Evans*, *Rex v. Parry and Phillips*, *&c.*

The disqualification was established by the act Car. 2, cap. 13, whether known to the voters or not; with this difference, that if they had no notice of the disqualification, their votes were not thrown away. But the exception was to be construed strictly, and saved only the votes given before notice. Then this inconvenience had been stated,—that those who voted before would have no oppor-

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tunity of deliberating, and cases had been cited to show that the Court was anxious that this opportunity should be afforded. But suppose the disqualification only became during the election; according to this doctrine, that notice must be given before the commencement, no advantage could be taken of the information thus acquired. Suppose a still stronger case;—that the disqualification arose during the election by bribing a voter, that the candidate thus bribing was seated by this vote, and that he discharged the duties five or six years before he could be ousted: the inconvenience in this view of the effects of the rule which it was attempted on the other side to establish, rather preponderated the other way.

Then it was said, that in the tumult of an election, it was difficult to say when notice was given, or who had notice, or who not. But that lay in the mouth only of the party in the minority. There might have been another candidate, it was said; and why was there not here? There still remained 36 voters to poll after the notice,—more than sufficient to control the election. The two persons who polled for Hawkins before notice might have voted for another person if they chose; and here they were not injured, for they could not have controlled the 20 who voted for Hawkins after notice.

3d point. But another point was raised:—that the election was not void, but voidable. This point had been already decided. *Grose*, in *Rex v. Munday*, (Cowp. 537,) took this very objection with-

out effect, (*vide Harrison v. Evans*, and also *Crawford v. Powell*, 2 Bur. 2013—2016.) The prosecution here was commenced within six months; and the instant it was commenced, the election, if only voidable before, became void.

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Abbott (in reply.) The argument was, that the office was filled up before the passing of the 47th of the King. The way in which they said it was filled up was, that the minority elected Spicer, who was sworn in by two aldermen; and that he was then in the legal enjoyment of the office. This had led him to contend, that the office could only be filled up after amoval of the disqualified person. The reason was, that as the expression, "*so avoided*," referred to avoidance by judgment of record, the other, "*or* "*legally filled up*," appeared to refer to filling up after amoval by the corporation, or in some other way, of the disqualified person.

Then he had to consider, whether, from the facts, it appeared that Spicer was so elected as to fill up the office. That brought him to the question arising from the time at which the notice was given. (*Lord Eldon*. That was the only point. There was no doubt among them as to the effect of 5 Geo. 1, cap. 6, that it did not alter 13 Car. 2, stat. 2, cap. 1, sect. 12. He would however avail himself of such opportunities as he might have of consulting the Judges out of the House. There was a notion in some quarters that judicial business had not increased. It had so much increased, that they could not in this case have the attendance of the Judges.) Then

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he would confine himself to that. The question was put as to Hawkins having taken the sacrament: he replied in the negative. Information was then given to the assembly, that the votes for him would be thrown away. But no proposition was made that the election should begin again. If this had been done, and the voters for Hawkins had gone on notwithstanding, that would have raised a different question.

Then it was said, that only two on each side voted before notice, and that they neutralized each other. But then it might be 20 on each side, or any number; and then, if three remained, it followed that the election would be made by two out of the three. That was a state of facts which their Lordships would not be very ready to recognize. These elections had been compared to elections for Members of Parliament. But cases of the latter description did not necessarily apply; as such elections were not properly corporate acts, nor under the control of Courts of law. One mode of proceeding might be adapted to the one case, and another to the other. He had quoted some cases to show that the members ought to have an opportunity of deliberating. (*Lord Eldon*. Did the Court consider it the duty of the returning officer to begin again in these cases? He could easily conceive in theory all might be considered as present during the whole time. If those who had voted without notice did not claim to vote again, was there any rule that the returning officer should desire them to do so? If that was brought before the Court below, they

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thought nothing of it. The calling upon them to vote again, by the objecting party or presiding officer, might furnish better evidence, but neither the party nor officer was bound to do so.) Unless the election of Hawkins was a mere nullity, Spicer was not well elected. Unless it should be the rule that the notice must be given before the commencement of the election, many of the voters might go away after having voted, and never hear of the disqualification; and he might put that case. They might never know that any objection was started; and yet all they had done might be unavailing, and the voice of one might elect. Though the law might presume that all the voters were present during the whole time, that was contrary to the fact. In some cases, the places were not large enough to hold them all. He was not aware, however, of any instance in which electors, under such circumstances, voted twice. They were not called upon to do so here; and it would be attended with great inconvenience, even though it were to be done at their own request. All that inconvenience would be avoided, if it were laid down as the rule, that the notice of disqualification must be given before the commencement of the election.

Judicial observations.

Lord Eldon (Chancellor.) Though before final judgment he should avail himself of the opportunities which he might have of consulting the Judges to rectify his opinion in case he should be wrong; yet, as he was unwilling to postpone the decision, in case his opinion should be confirmed,

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he should now state what occurred to him on the question.

He would confine himself to what appeared in the special verdict; but *Mr. Abbott* was right in urging every point which he thought necessary to do justice to his case, and he seldom, it might be said never, submitted any point that was not worthy of attention.

The special verdict stated here, that the electors assembled on due notice.

The special verdict stated, that "the mayor, "justice of the peace, and the rest of the aldermen "of the said borough, and divers, to wit, 34 of the "free burgesses of the said borough, did assemble "and meet, &c. *on due notice*." Taking it, then, that the electors ought to have an opportunity to deliberate and speak, it must be after they were met. When deliberating separately as individuals, they were not then deliberating as a corporation. There was a fixed time and place for meeting and deliberating in their corporate capacity.

However, they met here *on due notice*. There were two candidates,—Hawkins and Spicer. It might happen that an objection might be kept back fraudulently. In this particular case, there was no appearance of fraud. There were a considerable number of free burgesses present,—40, suppose:—two voted for each candidate; and it must be supposed that the knowledge of the disqualification then appeared. Their Lordships would attend to that, as a question had been made, Whether the notice must not be given before the election commenced?

No appearance here of the objection having been fraudulently kept back.

It did not appear that any of them voted either

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for Hawkins or Spicer, that would not, at any rate, have voted for them; but he agreed that the objection might be taken by both parties, as in Burke's case. They might say, 'We did vote for E. B. 'and the other candidate; but if we had known all 'the circumstances, we would have voted for neither 'of them.'

1 Doug. 241.

No objection of this kind was then taken. The election proceeded, and the great majority voted for Hawkins; and the election of Hawkins was an absolute nullity by the act 13 Car. 2, lib. 1. If there had been no other candidate, it was a nullity, independent of the Indemnity Act: and if there was another candidate, it might then have been to be considered whether the Indemnity Act could take effect. But there was no such question here, if Spicer was duly elected.

All that could be demanded by voters, having polled for a disqualified person before notice of his disqualification, would be, to be placed in the same situation as if they had had notice before the commencement of the election.

If the majority were unpolled at the time of the notice given, the utmost that those who had polled without notice could say would be, 'Place us in 'the same situation in which we would have been 'if notice had been given at the beginning of the 'election;' and that was only matter for consideration, if they could not proceed on the theory, that all continued present till the election was over. The notice was given, and why did the election continue under these circumstances? and why did not those, who were surprised perhaps, require to vote again? Unless it was the duty of others to call on them to do so, they ought to have done it; and if they did not, they sanctioned all that was done; and their complaint came too late when they

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When a voter polls for a disqualified person before notice of the disqualification, it rests with himself to require to be permitted to vote again for another person; and it is not the duty of the presiding officer to call on him to do so.

might have required to vote again, and have made the election effectual by voting, or ineffectual, if their votes had been refused.

But no other man would have been chosen here. The majority knowingly voted for this dead man, and that was to be attended to. If he were to go farther, he should take the ground that the majority was unpolled at the time of the notice; and if he were to go farther, he should say, it was his opinion, that when a voter had polled without notice, it rested on him to require to be permitted to vote again. If he should alter his opinion, he would state that circumstance afterwards.

Judgment.

Judgment of Court below affirmed.

Agents for Plaintiff in error, SMITH, HOSKINS, and WILSON.
Agent for Defendant in error, ———.