preceding officer, to have delivered over the books and insignia of the corporation, to a man at that time liable to removal or prosecution for not having taken the sacrament within the year next before his election.

But the Court (notwithstanding all this plausible reasoning) over-ruled the objection, and gave judgment for the plaintiff.

Lord Mansfield said that since the statute of 5 G. 1, c. 6, * the election of a person who had not taken the sacrament within a year next preceding it, is not void, but only voidable in case of a removal or prosecution within the time thereby limited: and consequently, as here was no such removal or prosecution within that limited time, the plaintiff's election stood confirmed and became absolute. He therefore thought this a clear case; and that there was no real force in the objection. He did not think it like to the case of *Tufton* v. *Nevinson* that had been cited from Ld. Raymond's Reports: because that arose from the officer's bringing a mandamus to swear him into his office, being then out of possession; whereas this plaintiff is in possession of the office, and only brings his mandamus for the insignia and other things belonging to it.

Per Cur. Judgment for the plaintiff.

[1017] OLDKNOW *versus* WAINWRIGHT, or REX *versus* FOXCROFT. Tuesday, 10th June, 1760. [S. C. 1 Black. 229.] A majority dissent from an election, but vote for nobody else; the election by the minority is good.

Tr. 31 G. 2, Rot'lo. 159.

This case of *Oldknow* v. *Wainwright* was a feigned action, under a rule by consent, to try a right of election to the office of town-clerk of Nottingham: which rule was made in the other cause of *Rex* v. *Foxcroft*, against whom an information had been prayed by Seagrave his competitor.

The consent-rule was to the effect following—"*Rex* v. *Foxcroft*, &c." The first part of the consent is, "that the matters in difference between the parties shall be tried in a feigned action:" then the rule goes on, "that Oldknow should be plaintiff, and Wainwright defendant;" and particularly specifies and settles the several issues that were to be tried. Then comes a clause of consent "that the Judge who should try the cause should be at liberty to indorse any special matter that might arise at the trial, upon the postea." Then it concludes thus—"And by the like consent, it is lastly ordered that the costs shall abide the event of the issue."

There were four issues to be tried: 1st. "Whether the mayor alone had a right to appoint the town-clerk." And it was found "that he had not." 2d issue—Supposing he had, then "whether J. Foxcroft was duly appointed by him." On this issue, a verdict was given "against the mayor's appointment." 3d issue—"Whether the mayor, aldermen and common council have the said right of election." This was found in the affirmative. (So that these three issues were all found for the defendant.) 4th issue—Supposing the mayor, aldermen and common council have the right, then "whether Thomas Seagrave was duly elected by them." As to this 4th issue, there was a special verdict to the following effect. It sets out the constitution of the borough, and that the voices were all equal votes. Then it sets out the vacancy of the office of town-clerk, and a regular summons to elect another. That the whole number of electors was twenty-five: and that out of that number, twenty-one assembled on the 26th of May, pursuant to the said summons. That the mayor put Thomas Seagrave in nomination; and that no other person was put in nomination. That nine of the twenty-one voted [1018] for him: but twelve of them did not vote at all, but eleven of them protested against any election at that time; because the office was already full (as they alledged) of Foxcroft, whose right was then under litigation in this Court. That there was a written protest against any election at all, either of Seagrave, or any other person, by four aldermen and six common-councilmen; because a suit was then depending in the Court of King's Bench concerning the right of Foxcroft. These ten signed the written protest: another (Hollins) did not sign, nor vote; but declared "that he suspended doing any thing."

However, at the same Court or assembly, the mayor declared the said Thomas

* Vide s. 3. [And Doug. 384.]

Seagrave duly elected and he took the oaths of office, and other requisite oaths, in due manner and form.

Mr. Caldecote, on behalf of the plaintiff, argued (on Tuesday 6th of May last) that Seagrave was not duly elected. For twenty-five had a right of voting; all had equal voices; and of twenty-one that met, eleven protested against any election at that time: therefore, these eleven were all negative voices, and against Seagrave, and only nine were for him.

Besides, this was no corporate act.

All the twenty-five were summoned, and twenty-one appeared; the voice of the majority of those who were present, was the voice of the whole twenty-five; and Mr. Seagrave had not a majority of them.

Therefore the issue is found for the plaintiff: and we pray that the postea may be delivered to him.

Mr. Serj. Hewitt, contra, for the defendant.

The substantial matter in question was, "whether the right of appointing the town clerk was in the mayor: or in the mayor, aldermen and common-council." The mayor, aldermen and common-council-men make twenty-five, who are the corporate body.

Here was a regular summons of the whole body; and a corporate meeting of twenty-one of them, for the business of this election: and they entered upon the election: therefore they could not desert it unfinished.

At this meeting, the mayor nominated Mr. Seagrave; which no one then opposed: a vote was taken: and nine [1019] voted for Mr. Seagrave. After which, ten, or (as it is said) eleven protested against any election at all, at that time. But mere silence is not a negative, either expressed, or implied; and as no other person was proposed, and nine voted for him, and none against him, he was well elected.

The protesters then thought the office was full already, of Foxcroft: but it now is found "that Foxcroft was not duly elected." They thought that the office being full (as they apprehended) of Foxcroft, precluded them from electing another person. But if Foxcroft's nomination and appointment were bad, they were at liberty to elect another person. The case of *Aberystwith*, in 2 Strange, 1157, and also that of *Tintagel* there cited, shew that the protesters proceeded upon a mistake, in fancying they could not elect another, whilst a former claimed upon a controverted title.

Though the presence of a majority of the whole number be necessary, yet the concurrence and consent of a majority of the whole number is not necessary. A majority of the number present is sufficient. This appears from the case of *Sir Robert Salisbury Cotton* v. *Davies*, 1 Strange, 53.

If these protesters had gone away, and left the assembly, it had made no difference, after the business was not begun. In such case, the rest had a right to proceed. M. 4 G. 2, *Rex* v. *Norris*, B. R. 1 Barnardiston, 385, 386.

It does not appear that these protesters would not have voted for Mr. Seagrave, if they had voted at all. And, at this very assembly, he was declared by the mayor to be duly elected: and was accordingly sworn in, in the presence of the protesters.

This is clearly a corporate act.

Mr. Caldecott, in reply.

Though there was a question, "in whom the right of appointment or election lay:" yet this right of the person elected was also in question.

Mr. Foxcroft had a prior nomination or election by the mayor: and the protesters thought, that whilst his right was sub lite, they ought not to go on at all to the election of another person. Eleven of them formally protested against it: which certainly is voting against Seagrave's election.

[1020] The case of *Aberystwith*, in 2 Strange, 1157, is certainly true—"that where there is a void election, the Court will grant a mandamus to go to an election." But that is nothing to this case.

In this case of *Rex* v. *Norris*, the presence of the mayor was necessary.

Lord Mansfield saw no doubt in this case. Here was an assembly duly summoned; one candidate was named: no other was named; the poll was taken; they had no right to stop, in the middle of the election; the mayor did not put any question for adjournment; nor was there any.

But Mr. Caldecott prayed another argument; because Mr. Serj. Poole was retained to argue it on the same side with him, for the plaintiff.

Whereupon, the Court gave leave that it should be argued again; and ordered an Ulterius concilium.

On Tuesday 10th June 1760, this cause stood in the paper for further argument. But

Mr. Serj. Poole, for the plaintiff, said he but very lately received his instructions; and therefore prayed further time.

But the Court refused to grant it: because it was his own client's fault, not to have instructed him sooner; as the further argument was indulged to the plaintiff, at his own desire, in the last term. However, they offered and even desired to hear what Mr. Serj. Poole might now have to say: for that they were quite open to conviction.

But the serjeant not urging any thing further—

Lord Mansfield confirmed his former opinion.

He said, the protesting electors had no way to stop the election, when once entered upon, but by voting for some other person than Seagrave, or at least against him; whereas here they had only protested against any election at that time.

Mr. Just. Wilmot—There was a case of *Rex* v. *Withers*, [1021] Pasch. 8 G. 2, B. R. where out of eleven voters, five voted, and six *1 refused: and the Court there held "that the six virtually consented."

In the case of *Regina* v. *Boscawen*, P. 13 Anne, B. R. (in Truro,) where ten voted for Roberts; and ten for Boscawen, a non-inhabitant; the votes given for a non-inhabitant, where inhabitancy was necessary, were holden to be thrown away. So, in the case of *Taylor* v. *Mayor of Bath*,*2 temp. Ld. Ch. J. Lee, B. R.

Lord Mansfield—Whenever electors are present, and do not vote at all, (as they have done here,) "they virtually acquiesce in the election made by those who do."

Therefore, per Cur. judgment for the defendant, (on *3 this 4th issue, upon the special verdict).

*3 Note—The three other issues had been found for the defendant as is above mentioned.

Afterwards, on Wednesday 25th of June, this case then bearing the latter name, viz. *Rex* v. *Foxcroft*;—Mr. Caldecott, on behalf of the defendant therein, shewed cause why the said defendant Foxcroft should not pay to the prosecutor in this cause, his costs as well in this cause of *Rex* v. *Foxcroft*, as in the information in the nature of a quo warranto against Robert Seagrave; and likewise the costs in the mandamus moved for against Cornelius Huthwaite, Esq. late Mayor of Nottingham.

He urged that no other costs were payable but those that arose upon the civil action, viz. the feigned issue which had been tried by consent of the parties, in order to determine the right; and which feigned issue had been found in favour of Seagrave, and against Foxcroft.

And for this, he relied upon the authority of the case of *The Borough of Walsall*,†1 (in the dispute between the borough and the foreign of that place,) Tr. 28 G. 2, B. R. as a resolution directly in point: where it was determined "that no costs were payable upon these feigned issues; but the costs in the civil suit only."*4

Mr. Norton, contra, on behalf of Mr. Seagrave the prosecutor, insisted upon costs of the whole; viz. the costs in this cause of *Rex* v. *Foxcroft*, the costs in the information against Seagrave, and the costs of the mandamus directed to Huthwaite, as well as the costs of the civil suit upon the feigned issue.

[1022] Lord Mansfield was of opinion that the Court were tied down by the †2 consent rule, to direct the costs of the whole to be paid by the defendant Foxcroft. It was made in the cause where an information was prayed against him, in the nature

*1 It was an election of a burgess of Westbury upon a single vacancy. Six voted for Withers singly; six others voted for two persons jointly, (though it was upon a single vacancy). The Court held clearly, "that the double votes were absolutely thrown away;" and refused to grant an information against Withers.

*2 M. 15 G. 2, 21st November 1741.—It was holden "that votes given for an unqualified person, under notice of his incapacity, are thrown away."

†1 *Rex* v. *Nichols & Al'* 12th June 1755.

*4 And so it was also determined in *Rex* v. *Griffiths*, M. 29 G. 2, B. R. and in *Thomas* v. *Powell*, P. 31 G. 2, B. R.

†2 V. the consent rule before p. 1017.

of a quo warranto, to shew by what authority he claimed to be town-clerk of Nottingham; to which office Seagrave also claimed a right. Foxcroft thereupon consents "that the matters in difference between the parties shall be tried in a feigned action:" and then he consents, in express terms, "that the costs shall abide the event of the issue:" which must mean the whole costs; or else it has no meaning at all; for the costs on the civil side (arising upon the feigned issue only) would of course abide its event, without needing any rule or any consent for that purpose; (that point having been fully settled long before the making of the present consent-rule). Consequently, this consent takes in the other costs, on the Crown-side.

The other three Judges were of the same opinion.

Rule made absolute.

TRAPAUD *versus* MERCER. 1760. Where there is an affirmative and a negative, the conclusion must be to the country. [Doug. 91.]

Hil. 32 G. 2, Rot'lo, 984.

This was a cause in the paper, upon a demurrer: and the whole question turned upon the pleadings. The replication concluded to the country: and the defendant insisted that it ought to have concluded with an averment.

The principle was agreed, by both Bar and Bench, "that where there was an affirmative and a negative, the conclusion ought to be to the country:" but the present demurrer was grounded upon a supposition "that as these pleadings stood, here was not an affirmative and a negative."

The pleadings were as follow—

It was an action of debt on bond. On oyer, it appeared to be conditioned thus—The condition first recited that one Robert Grier had been appointed by the plaintiff, who was Lieutenant-Colonel of the Second Battalion of the Buffs, and by Mr. Hughes, the Major, to be paymaster of the said battalion: and then went on, that if the said Grier should within thirty days after any demand in writing, render an account of all monies received by him, &c. and in case there should be any deficiency, &c. [1023] then if the defendant should make good any such deficiency, not exceeding 1000l. the obligation to be void. And the plaintiff assigned the breach, in Grier's not rendering an account within thirty days after a demand in writing.

The defendant (who stood thus bound as security for Grier) pleaded (by leave of the Court) two several pleas; viz. 1st. That no demand in writing was made, &c. 2dly. (Protesting that no demand, &c. was made). He for plea says that Grier did render an account within thirty days after any demand in writing, and paid the monies due, &c. and that no deficiency at all was made to appear.

To this second plea, (which second plea alone was now before the Court,) the plaintiff replied "that a large sum of money, that is to say, the sum of 2000l. was received by Grier, &c. and that, on such a day (particularizing it) a demand in writing was made, &c. and yet no account was rendered by Grier, within thirty days, &c." which replication concluded to the country.

To this replication, the defendant demurred: and

Mr. Yates, for the defendant, argued in support of the demurrer, that the replication ought to have concluded with an averment: for that this was not a proper affirmative and negative, but a matter newly alledged in the replication; which newly alledged matter the defendant ought to have an opportunity of answering. And as the plea is general, it was necessary for the plaintiff to assign a particular breach, in his replication.

Mr. Serj. Hewitt, for the plaintiff, urged that it was not new matter, but a proper negation of the matter pleaded, and made a sufficient affirmative and negative; and therefore the conclusion was as it ought to be. And

The Court were of this opinion.

Lord Mansfield—The material question between the parties is,—"Whether an account has been demanded in writing, such an account rendered within due time; and the money paid." The sum of the defence is "that no demand was made; but supposing that a demand was made, yet an account was rendered within due time after every such demand, and the money paid." The replication alledges "that an account was demanded in writing, on such a particular day; but that Robert Grier