our said lord the King, (he the said F. S. then being in the same house and in the peace of God and our said lord the King;) and so being then and there assembled and gathered together, they the said G. S. L. D. and E. H. did then and there unlawfully, riotously and routously make, and cause and procure to be made, a large fire in the street and highway aforesaid: and in the same fire then and there unlawfully, riotously and routously, did burn, and cause to be burnt, him the said Felix Sarrant in effigy: and they the said G. S. L. D. and E. H. then and there unlawfully, riotously, and routously did remain and continue in the street and highway aforesaid, near the fire aforesaid, for a long time (to wit, for the space of two hours and upwards,) hollowing, shouting, firing guns, squibs, and fireworks, and misbehaving themselves; and other wrongs to the said F. S. then and there unlawfully, riotously, and routously, did, &c. &c.

Mr. Morton had (on Saturday the 30th of May last) moved in arrest of judgment: for, that only two of the defendants had been convicted; the *rest having been acquitted. Whereas three persons, at the least, are necessary to constitute a riot: and as this is an indictment for a riot, and only two are found guilty, there can be no judgment given against them.

[1264] And to prove "that if several persons be indicted for a riot, and two only found guilty, and the others all acquitted, judgment shall be arrested, because a riot cannot be committed by two persons only;" he cited Popham, 202, *Harrison* v. *Errington*, (the second error assigned;) also *Rex* v. *Sudbury, Heapes, and Others*, 1 Ld. Raym. 484. 2 Salk. 593, and 12 Mod. 262, all S. C. in point. And if another offence be added in the same count, it does not vary the case: so is *Rex* v. *Colson, et Al'*, 3 Mod. 72.

Mr. Norton and Mr. Stow now shewed cause, on behalf of Sarrant (a quack doctor) the prosecutor, why judgment against the defendants should not be arrested.

It has been objected "that it being an indictment for a riot, and no other count laid, three persons at least ought to have been found guilty; or else, it can be no riot."

But where the indictment is "that the defendants cum multis alijs committed a riot," there two only may be found guilty, and judgment shall be against them. 1 Sir J. S. 196, *Rex* v. *Kinnersley and Moore*. And so Holt held in the case of *Rex* v. *Sudbury, et Al'*.—These two, with others, (six in all,) are here charged: and two of the others are dead, without having been either convicted or acquitted.

Mr. Morton, contra, for the defendant. In the case cited from Sir J. S. 196, (*Rex* v. *Sudbury, Heapes, et Al'*;) it is supposed "that the defendants together with other persons unknown, were guilty." But in the present case it does not appear that any others were guilty, besides these two; for here is no finding as to the two dead persons.

Lord Mansfield—Six were indicted: two of them are acquitted; two are dead, untried. The jury have found these two to be guilty of a riot; consequently it must have been together with those two who have never been tried; as it could not otherwise have been a riot.

Per Cur. Rule discharged.

The end of Michaelmas term, 1761, 2 G. 3.

[1265] HILARY TERM, 2 GEO. 3, B. R. 1762.

1934. A. C. 395

REX *versus* BARKER, ET AL'. Saturday, 23d Jan. 1762. [S. C. 1 Bl. 300, 352.]

Mandamus lies to trustees to admit a dissenting teacher.

On Wednesday 10th of June 1761, Mr. Norton moved for a mandamus to be directed to the surviving trustees under a deed of release made by one Charles Vinson to John Enty a dissenting minister at Plymouth, and other trustees, settling a then new-built meeting-house, garden, &c. upon the said trustees in trust (amongst other things) "to suffer the meeting-house to be for the public worship of God by such congregation of Protestant Dissenters commonly called Presbyterians, as should sit under and attend the ministry of the said Mr. John Enty or such other Presbyterian minister or ministers as should in his and their room successively, in all times then

* The fact was, that two died, two were acquitted, and two convicted.

coming, be, by the members in fellowship of the said or such like congregation or congregations, regularly and fairly chosen and appointed to be the minister, preacher or pastor, to preach in the said meeting;" requiring them to admit Christopher Mends to the use of the pulpit thereof, as pastor, minister, or preacher there; he the said Christopher Mends being duly elected thereto.

He produced an affidavit of the facts, and of Mr. Mend's election: and of demand and refusal of the use of the meeting-house; and he cited the * case of *Rex* v. *Bloore*, P. and Tr. 1760, which was a mandamus to restore William Langly to the office of curate of a chapel; and the rule was made absolute upon this principle, that where *there is a temporal right*, this "Court will assist by mandamus."

Lord Mansfield took this opportunity of declaring, that the Court had thought of that case of the curate of the chapel of Calton, since the determination of it, as well as before; and they were **[1266]** thoroughly satisfied with the grounds and principles upon which that mandamus was granted.

Where there is a right to execute an office, perform a service, or exercise a franchise; (more especially, if it be in a matter of public concern, or attended with profit;) and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy; this Court ought to assist by a mandamus; upon reasons of justice, as the writ expresses—Nos A. B. debitam et festinam justitiam in hac parte fieri volentes, ut est justum;" and upon *reasons of public policy, to preserve peace*, order, and good government.

The interposing this writ where there is no other specific remedy, is greatly for *the benefit of the subject* and the advancement of justice. The speedy decision of the question, in that case which has been mentioned, by an immediate trial in a feigned issue shews it.

This case is not indeed quite the same as that was; but still it is reasonable to grant a rule to shew cause.

On Monday, 23d November 1761, Mr. Thurlow and Mr. Dunning shewed cause against the mandamus.

They controverted, by affidavit, the election of Mends; and endeavoured to support the election of Mr. Hanmer, whom the trustees had put into possession.

The majority of the congregation seemed to be on the side of Mends: the trustees espoused Hanmer, and *meant to maintain him with a high hand.*

There was no colour for the election of Hanmer: and that of Mends was liable to objections.

This contest had raised great animosity, spirit, and obstinacy; especially in those who were for Hanmer; and as they thought their strength lay in throwing obstacles in the way of any (more especially a speedy) redress, as Hanmer was upholden and maintained in possession by the trustees; their counsel, with great earnestness and ability, argued against making the rule absolute for a mandamus; and contended that it could not be "to admit," where another was in possession.

A mandamus "to admit" goes no further (they said) than to give a legal possession where otherwise the **[1267]** party would be without remedy. *And to prove the distinction* between a mandamus to admit and a mandamus to restore to a former possession—they cited the case of *Rex* v. *Dean and Chapter of Dublin*, 1 Sir J. S. p. 538, per Pratt. "A mandamus *to admit is only to give a legal*, not an actual possession; though in a mandamus to restore, the Court will go further."

But here, another person (Mr. Hanmer) is in possession: and Mr. Mends never has been so. Here is no legal right: and this Court can not take notice of trusts, so as to give relief, upon an equitable title only. Nor is this gentleman the cestuy qui trust: at most, his title is only equitable.

Lord Mansfield—A mandamus is a prerogative writ; to the aid of which the subject is intitled, upon a proper case previously shewn, to the satisfaction of the Court. The original nature of the writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced, to prevent disorder from a failure of justice, and defect of police. Therefore *it ought to be used upon all*

* Vide ante, p. 1043 to 1046. [And qu. if there ought not to have been an affidavit that the prosecutor was qualified, and the meeting house registered according to the Toleration Act 1 W. & M. c. 18. See also 1 Durn. 398, 399. 2 Durn. 180, 259. 3 Durn. 577, 649.]

occasions where the law has established no specific remedy, and where in justice and good government there ought to be one.

Within the last century, it has been liberally interposed for the benefit of the subject and advancement of justice.

The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. If there be a right, and no other specific remedy, this should not be denied.

Writs of mandamus have been granted, to admit lecturers, clerks, sextons, and scavengers, &c. to restore an alderman to precedency, an attorney to practice in an Inferior Court, &c.

Since the Act of Toleration, it ought to be extended to protect an endowed pastor of Protestant Dissenters; from analogy and the reason of the thing.

The right itself being recent, there can be no direct ancient precedent: but every case of a lecturer, preacher, schoolmaster, curate, chaplain, is in point.

The deed is the foundation or endowment of the pastorship. The form of the instrument is necessarily by way of trust: for, the meeting-house, and the land upon **[1268]** which it stands, could not be limited to Enty and his successors. Many lectureships and other offices are endowed by trust-deeds. The right to the function is the substance, and draws after it every thing else as appurtenant thereto. The power of the trustees is merely in the nature of an authority to admit. The use of the meeting-house and pulpit, in this case, follows, by necessary consequence, the right to the function of minister, preacher, or pastor; as much as the insignia do the office of a mayor: or the custody of the books, that of a town-clerk.

Mr. Just. Wilmot—It has been granted in the case of scavengers. It is a prerogative writ, and shall be granted to ampliate justice, and to preserve a right; where there is no specific, legal remedy; where no assize will lie.

Mr. Just. Foster—Here is a legal right. Their ministers are tolerated and allowed: their right is established, therefore is a legal right, and as much as any other legal right.

The Court proposed an issue to try "whether Mr. Hanmer * was or was not duly elected;" as the cheapest and best way to put it in.

It was then adjourned to the first day of this present Hilary term, in order that the parties might give an answer, "whether they would agree to this issue;" or "whether they would agree to proceed to a new election:" and the parties themselves to be consulted, and make their election.

But afterwards, (on Tuesday 24th November 1761,) Lord Mansfield proposed and made an alteration in the rule to be drawn up in this case: which alteration he judged to be necessary, as Mr. Hanmer himself was no party to this litigation about the mandamus.

He therefore directed it to be drawn up to the following effect, (and indeed gave the very words;) viz.

It is ordered, that the first day of next term be given to Pentecost Barker, Richard Dunning, Philip Cockey, and Elias Lang, to shew cause why a writ of mandamus should not issue, directed to them, requiring them to admit Christopher Mends to the use of the pulpit in a certain meeting-house appointed for the religious worship of Protestant Dissenters commonly called Presbyterians, in Plymouth in the county of Devon, as pastor, minister, or preacher there. And it is further ordered, that they **[1269]** the said Pentecost Barker, Richard Dunning, Philip Cockey, and Elias Lang, do at the same time acquaint this Court "whether they insist upon the validity of the election of John Hanmer;" and if not, "whether they are willing to proceed to a new election of a minister, pastor, or preacher there;" the prosecutor of this rule having declared his consent "to wave his claim, in order to a new election." And it is further ordered, that notice of this rule be given to the said John Hanmer; to the intent that he may be heard, as he shall be advised; and that he may acquaint this Court "whether he insists upon the validity of his election," and "whether he is willing to have it tried in a feigned issue."

Mr. Thurlow and Mr. Dunning now give an answer, by direction of their clients, "that Pentecost Barker, Richard Dunning, Philip Cockey, and Elias Lang, do insist

* N.B. This Mr. Hanmer was in possession, and claimed to be duly elected to the same ministry or pastorship.

upon the validity of the election of John Hanmer; and that they are not willing to proceed to a new election, &c. and that the said John Hanmer does insist upon the validity of his election, and is not willing to have it tried in a feigned issue."

After which Mr. Thurlow and Mr Dunning were heard again, in general; and argued strenuously against granting a mandamus. They knew, the election of Hanmer could not be supported upon a trial. The election of Mends seemed liable to objection as irregular. But, if the matter was proper for a mandamus, they were aware that in case neither was elected, the Court would issue a mandamus "to proceed to an election:" in which case, the majority of the congregation were inclined to Mends. The trustees therefore obstinately persisted in opposing a mandamus and refusing a trial.

Lord Mansfield—Every reason concurs here, for granting a mandamus. We have considered the matter fully: and we are all clearly for granting it. I have made a collection of cases on this subject, since the last argument: but I have it not here, at present.

Here is a function, with emoluments; and no specific legal remedy. The right depends upon election: which interests all the voters. The question is of a nature to inflame men's passions. The refusal to try the election in a feigned issue, or proceed to a new election, proves a determined purpose of violence. Should the Court deny this remedy, the congregation may be tempted to resist violence by force: a dispute "who shall preach Christian charity," may raise implacable feuds and animosities; **[1270]** in breach of the public peace, to the reproach of Government, and the scandal of religion. To deny this writ, would be putting Protestant Dissenters and their religious worship, out of the protection of the law. This case is intitled to that protection; and can not have it in any other mode, than by granting this writ.

The defendants have refused either to go to a new election, or to try it in a feigned issue.

We were, all of opinion, when a trial was proposed to them, that a mandamus ought to issue, in case of a refusal. Their answer ought to be put into the rule, as prefatory to it: and I do this, with a view that their refusal may be authentically given in evidence to the jury, upon a trial.

Many cases have gone as far as this, or farther.

Mr. Justice Denison, Mr. Justice Foster, and Mr. Justice Wilmot, all declared themselves of the same opinion.

The Court ordered a mandamus to issue.

V. post, pa. 1379, 1380, 28th April 1763.

REX *versus* HEYDON, AND FOUR OTHERS. Monday, 25th Jan. 1762. [1 Black. 351, 356, 404.] A joint information against several on distinct rules, will not be granted.

*Sir Fletcher Norton shewed cause on behalf of the prosecutor, why the proceedings upon this joint information should not be stayed, with costs to be paid by the prosecutor; for that five separate rules "for one or more informations against each defendant" are consolidated into this one joint information, without any rule for such a joint information against all of them.

Mr. Serjeant Nares, contra, insisted that by the practice, this can not be done; nor does the present rule justify it.

Mr. Athorpe (secondary) being asked, concurred with Mr. Serjeant Nares, "that there was no authority by any rule, or by the practice, for filing this one joint information against all the defendants."

Sir Fletcher Norton replied, that if the offence be joint, **[1271]** there may be a joint information.

Lord Mansfield—But the question is, whether it can be done upon these several and distinct rules, which were taken upon the motion of several different gentlemen, who only applied for one or more informations against each defendant, but without any general motion for a joint information against them all.

Sir Fletcher Norton—It must be allowed, I agree, that one man's guilt is not the guilt of another: but this case is a joint act of bribery, upon which we can convict

* Mr. Norton was this day knighted, and made Solicitor General.