

The other was an affidavit of one Eligh, a constable, who swore that he did, on the 29th of July, 1865, serve Mr. Wood, the mayor, with a duplicate notice attached to his affidavit. The notice attached was signed by the relator as an elector, and addressed to G. C. Wood, Esquire, mayor, &c., as follows:

"Take notice, that John S. McDougall, formerly a councillor for the centre ward of the corporation of the town of Cornwall, has made an assignment under the Insolvent Act of 1864, whereby his seat in the council has become vacant; and take notice, that you are hereby required, under section 122 of chapter 54 of the Consolidated Statutes of Upper Canada, to issue a warrant for the holding of an election under the said section, to fill the vacancy; and that if you fail to do so, an application will be made to the Court of Queen's Bench for a writ of *mandamus* to compel you to do so, and that you will be compelled to pay the costs of such application.

"Dated the 18th of July, 1865."

In Michaelmas term last the *mandamus nisi*, with the return of Mr. Wood, the mayor, was filed, which was in substance as follows:

I cannot by warrant, &c., require the said returning officer, &c., to hold a new election to fill the place of John S. McDougall, whose office and seat as councillor is alleged to have become vacant, because the alleged vacancy is a disputed vacancy, the said McDougall having, since the alleged act of insolvency on the 1st of June, 1865, and since his alleged application for relief as an insolvent debtor, exercised the said office of councillor, by attending the meetings of the council, and no such vacancy having been declared to exist by the said council, or by court of competent authority. I further return that I have no authority as mayor to declare the seat of the said McDougall vacant, as I am not authorized by statute or otherwise to call evidence and to adjudicate as to the truth of the said alleged vacancy; and in the absence of any action on the part of the council declaring the seat vacant, I have no power; and I humbly submit that I should not be compelled by the order of this honorable court to require by my warrant as aforesaid the holding of a new election to fill the alleged vacancy until the fact of a vacancy is ascertained by proceedings in the nature of a *quo warranto*.

During the same term, on motion of Mr. Kerr, a rule was granted, calling on Mr. Wood, the mayor, to shew cause why his return to the writ should not be quashed, and a writ of *mandamus* absolute should not issue, upon several grounds—among others, that the vacancy was not a disputed one, by reason of McDougall's attending meetings of council or otherwise: that it was not necessary that the vacancy should be declared to exist by the council or any court, and that it was the duty of the mayor to have issued his warrant without waiting for the vacancy being ascertained by proceedings in the nature of a *quo warranto*.

C. S. Patterson and Robert A. Harrison shewed cause during that term, and took various exceptions to the writ, and contended, among other things, that the office was full, and that the proper remedy was by *quo warranto*.—They cited *The Queen v. Powell*, T. Q. B. 352; *The Queen v.*

*Mayor of New Windsor*, 7 Q. B. 908; *Mayor of London v. The Queen*, 13 Q. B. 41; *Frost v. The Mayor of Chester*, 5 E. & B. 531; *The Queen v. Phippen*, 7 A. & E. 966.

M. C. Cameron, Q. C., and Kerr, supported the rule citing, *Re v. Robbison*, 1 Str. 555; *The Borough of Bossiny*, 2 Str. 1003; *Case of Aberystwith*, 2 Str. 1257; *Re v. Mayor of Stafford*, 4 T. R. 690; *Re v. Mayor of York*, 5 T. R. 47; *Re v. St. Catharine's Dock Co.*, 4 B. & Ad. 383; *Re v. Parry*, 6 A. & E. 810; *The Queen v. Quayle*, 11 A. & E. 508; *Re v. Overseers of Canton*, 1 Barnardiston, 299; *Tapping on Mandamus*, 288, 348, 371.

MORRISON, J., delivered the judgment of the court.

The main question that arises in this case is whether this application for a *mandamus* is the proper remedy.

It appears that Mr. McDougall was elected a councillor for the centre ward of the town of Cornwall at the usual annual election, and that he accepted the office and exercised it up to the time of the application. It is alleged that in the month of May last McDougall called a meeting of his creditors under the Insolvent Act of 1864, and made an assignment of his estates for their benefit; and it is contended, under the 121st clause of our Municipal Corporations Act—which enacts that in case a member of council applies for relief as an insolvent debtor, or assigns his property for the benefit of creditors, his seat in the council shall thereby become vacant—that Mr. McDougall's seat became vacant, and that it was the duty of the defendant, under the 122nd clause, without any further act or proceeding, to issue his warrant to fill such vacancy, notwithstanding that McDougall was still filling and exercising the office. The fact that McDougall was duly elected to the office, and was never removed or resigned his office, and was *de facto* exercising the office of councillor, *prima facie* shews that the office is full; and whether McDougall applied for relief as an insolvent debtor, &c., are facts, the truth of which must be ascertained and brought under the notice of the head of the council in some way or other before he can issue his warrant.

The 52nd clause of the English Municipal Corporations Act, 5 & 6 Wm. IV., ch. 76, provides that if any person holding the office of councillor, &c., shall apply to take the benefit of an act for insolvent debtors, &c., such person shall thereupon become disqualified, and shall cease to hold the office of councillor, and the council shall thereupon declare the office to be void, and shall signify the same by notice in writing, &c., and the office shall thereupon become void. Under that clause it has been held that the office is not void until the vacancy is duly declared—*Regina v. Mayor, &c., of Leeds*, 7 A. & E. 963. Our statute is unfortunately silent as to the mode of declaring the vacancy.

In the same English act, sec. 54, which refers to bribery at elections, is in effect somewhat like our 121st clause. It enacts that any person committing the offence of bribery, and being lawfully convicted thereof, "shall be for ever disabled to hold, exercise, or enjoy any office or franchise to which he then shall, or at any time afterwards may, be entitled as a Burgess of such borough, as if such person was naturally dead;"