2. Because the time is uncertain when it is to come into force, and the time during which the special rate is to be levied is also uncertain, and at all events no part of the sum required is to be raised in the year 1855.

3. Because it provides that if the rate imposed by it shall in any year be insufficient, the deficiency shall be made up from the general funds of the town, which funds cannot legally be so appropriated.

4. Because the rate of 5¼d. in the pound, thereby required to be levied annually, will be insufficient for the first year of the ten to pay £125 and interest on the whole sum unpaid, as required to be paid by law in that year.

5. Because the sum £7127 10s. 5d. was not the amount of ratable property in the town of Whitby, ascertained by the assessment returns of 1854. and there were no such returns *for that year* for the town of Whitby; and the persons voting at the general meeting of qualified electors for considering the said by-law were taken from the assessment rolls of 1855, and not from the collector's roll for 1854.

The by-law was passed for raising £1250 by way of loan, for the purpose of purchasing the site of a market, and defraying the cost of erecting market buildings thereupon, in the town of Whitby.

It recited that it was advisable to purchase certain lands specified, for the purpose of erecting market buildings thereon, and that it was expedient to raise by loan a sum sufficient to pay for the land, and for erecting the buildings, being £1250; that the whole ratable property of the town of Whitby for 1854, was £7127 10s. 5d.; that the annual rate in the pound required as a special rate for the payment of the interest, and the creation of a sinking fund for the principal, of a loan of £1250, is 5¾d. in the pound.

And it then enacted, that it should be lawful for the Mayor of the town to raise by way of loan, at a rate of interest not to exceed six per cent per annum, upon debentures and the special rate theron imposed, a sum of money not exceeding in the whole £1250, to be applied to the purposes mentioned.

2. That the Mayor might issue debentures for £1250, in sums not less than £25 each, dated on the day on which they should issue, and payable at the several and respective periods 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 years; and that no greater sum than £125 of the principal, being one-tenth part of the said loan, should be made payable in any one year, and the interest half yearly on such parts of the principal as remained unpaid, said debentures to be made payable at the agency of the Bank of Montreal, in Whitby.

3. That for payment of the debentures and interest there should be assessed, &c., upon the assessed value of all the ratable property in the town, over and above all other rates and taxes, a special rate of 5¾d. in the pound annually from the year 1856 to 1865, both years inclusive; provided always, that if the rate in any one year should prove deficient for the purpose aforesaid, such deficiency should be made up from the general fund of the town.

Wilson, Q.C., showed cause, and objected that the rule *Nisi*, having been taken out too late for obliging the Municipality to answer it during last term, not being drawn up till the last day but one of the term, ought to have been made returnable on some certain day in this term, in order that the Municipality might know when they could be called upon to answer it. He cited *Mitchell v. Foster*, 12 A. & E. 472; *Smith v. Collier*, 3 Dowl. 100; *Arthur v. Marshall*, 13 M. & W. 465; *Sells* and *The Municipality of St. Thomas*, 3 C. P. 286.

M. C. Cameron supported the rule.

ROBINSON, C. J., delivered the judgment of the Court.

The statute 12 Vic., chap. 81, sec. 155, as amended by 14 & 15 Vic., ch. 109, sched. A. 21, directs that the rule shall be made "to show cause within not less than *eight days* after service."

We cannot tell certainly whether the legislature meant by this that the rule should be drawn up exactly in these terms, or should appoint some day for showing cause, which should not be less than eight days after service. The language of the clause is rather inaccurate in using the word "within"; what was meant was, not that the defendants should be called on to show cause *within* not less than eight days, but that not less than eight days must elapse.

This rule was drawn up to show cause eight days after service, not naming any day, but the Municipality must be supposed to know that cause could only be shown in term, and they appear to have been aware that they must shew cause in the next term, for they did appear and answer, though they objected.

We think the appearance is a waiver of any objection in respect to the return, for the rule has had its effect. In the cases cited by Mr. Wilson the party served with the rule had not appeared, and the rule had been made absolute in his absence, and the question was whether it was regular to make it absolute.

It would be to be regretted if we unnecessarily caused delay by giving way improperly to the objection; for generally speaking, when a by-law is such that we cannot refuse to quash it, it is desirable that it should be quashed as soon as possible.

It seems too clear to be doubted that this by-law is illegal, in not conforming to that condition of its validity which is expressly imposed by the 177th clause of 12 Vic., chap. 81: namely, that it shall contain authority for levying a rate sufficient in each year to pay the interest on the debt, and that portion of the principal which is to be paid off within such year. It is clear, and is admitted, that the 5¾d. in the pound on the sum stated in the by-law to be the value of ratable property within the Municipality would not produce such an amount as would cover the payment which under the by-law is appointed to be made within the year; but considerably less. It will be found, I think, to come short by about £30.

And the manner in which the by-law provides for making up any deficiency that may arise in the payment, even if it were clearly legal, would still not cure the objection, for the statute expressly requires that the rate imposed shall be in itself sufficient to cover it upon the basis of calculation assumed, and if not, it declares that the by-law shall be void.

Rule absolute.

ROSS ET AL *v.* BRYAN ET AL.

Ca. Sa.—Under what circumstances may be sued out after issue and before return of fi. fa.

[In Chambers, April 15, 1856.]

This was an application on behalf of one of the defendants to set aside his arrest under a *ca. sa.* made after issue and before the return of a *fi. fa.* goods.

Cause was shown.

Judgment reserved.

DRAPER, C. J., C. P.—On the 20th of February last Mr. Justice *Hagarty* issued a summons calling on the plaintiff to show cause why the *ca. sa.* in this cause and the arrest of the defendant *Benjamin Bryan* thereon should not be set aside on the ground that said *ca. sa.* was issued before the writ of *fi. fa.*, also issued in this cause was returned, and while the writ was still in force, and while property was under seizure thereof. On the first of March following the same Judge discharged that summons, without costs, for insufficiency in the affidavits filed. The order discharging the summons was drawn up in those