of *Rex* v. *Payn* was decided in 1837, before the Imp. 6–7 Vict. c. 67 introduced the system by which a prosecutor demurs in such cases.

The passage in Blackstone, referred to by Proudfoot, J., is apparently contained in the last edition by Stephens, vol. 3, p. 617, but nothing is said there as to whether the Court will even now ever quash a return on motion, when insufficient in point of law. In Corner's practice, ed. 1844, p. 230, "it is apprehended that the power of the Court to quash a return of the description referred to," (*i. e.*, where it is clearly bad, or so evasive and frivolous as to amount to a contempt) "is not taken away by Imp. 6–7 Vict. c. 67." No cases are cited, however, to support this, nor is there anything to support it in Selwyn's N. P. ed. 1869, p. 1040 sq., where the procedure is discussed. Moreover neither does there appear to be in Fisher's Digest or elsewhere any English case since Imp. 6–7 Vict. c. 67, —nor in Robinson & Joseph's Digest any Canadian case since our 28 Vict. c. 18, in which a return to a mandamus nisi has been quashed on motion as deficient on the face of it,—and as above shewn it never could have been so quashed *as deficient in point of fact.*

Prima facie it would appear unlikely that after Imp. 6–7 Vict. c. 67 (28 Vict. c. 18 C.) the Courts would still quash on motion a return as insufficient on the face of it, for two reasons (i.) because 6–7 Vict. c. 67 specially recites that it was intended to remedy defects in the former procedure, and to enable the prosecutor to demur in such cases ; and (ii.) because its language is peremptory, and says that in such cases the prosecutor *shall* demur.

It thus appears that there are three courses now eligible if a return is unsatisfactory :—

(i.) If the return is good upon the face of it, but false in fact, the prosecutor can—

(a) Bring an action on the case against the defendant for his false return ; (as to which see Selwyn's N. P. ed. 1869, p. 1041 ;)

(b) Proceed under 9 Anne c. 20, sect. 2, as extended by R. S. O. c. 52, sect. 11, and plead to or traverse all or any of the material facts contained within the said return, etc.; (as to which see *ib.* p. 1043, and *Reg.* v. *St. Luke's Chelsea*, 5 L. T. N. S. 744.)

(ii.) If the return is defective upon the face of it he can demur under R. S. O. c. 52, sect. 15.

Thus in *Re Perth*, 39 U. C. R. 53,—a similar application for a mandamus to the one in the recent Napanee case—a mandamus nisi was granted in order "that the legal question involved might be formally raised by demurrer or plea," per Harrison, C. J.

What form the pleadings will take now in such cases still remains to be considered. R. S. O. c. 52, sect. 10, dealing with application for writs of mandamus on motion says that the preceding provisions of that Act, so far as they are applicable, shall apply to the pleadings and proceedings upon a prerogative writ of mandamus issued by either of the Superior Courts of Law, which could, before the enactments giving a right to proceed by action for a writ, grant such writs.

Sect. 6 of the Act says: "the pleadings and other proceedings in any action in which a writ of mandamus is claimed shall be the same in all respects, as nearly as may be, and costs shall be recoverable by either party, as in any ordinary action for the recovery of damages."

But the pleadings in any ordinary action for the recovery of damages have been changed by the Judicature Act. (O. 15, r. 1), and there appears no specific provision as to these proceedings on the return to a mandamus nisi. It is true O. 58, r. 1, provides that nothing in these rules shall be construed as intended to affect the practice or procedure in Criminal proceedings on the Crown or revenue side of the Q. B. or C. P. Division. But it is a question whether the proceedings we are considering can be held any longer in this Province to be proceedings on the crown side of the Q. B. or C. P. Division. It has been held by Proudfoot, J., followed by the