Notice of appeal was given, and among the grounds stated were the following:—that the justice was ousted of jurisdiction, as the title to land or possession thereof was brought in question: that the defendant Meyers had the right of possession, and the alleged assault consisted in only using sufficient force to put John Wonnacott out, he being a trespasser.

The Court of Quarter Sessions opened on the 14th of June, 1864. The appellant's counsel produced the notice of his appeal, and evidence of its service was given. The respondent's counsel then, alleging the absence of the respondent and his witnesses, asked to have the appeal stand until the following day, which was granted. On the next morning he objected to the jurisdiction of the court to hear the appeal, contending that the conviction was founded upon the summary jurisdiction given by sec. 37 of ch. 91, Consol. Stat. C., and that the appeal was given by the 117th sec. of ch. 99 of the same statutes: that the right to appeal was conditional, first, on the giving the notice, and, secondly, upon the appellant remaining in custody until such sessions, or entering into a recognizance conditioned to appear personally and try the appeal, and abide the judgment of the court thereon, and to pay such costs as should be awarded.

The court held that the objection should have been taken on the preceding day, and was waived by the application to postpone the hearing, and informed the respondent that he must proceed or they would quash the conviction. He then went into his case, and the appellant's counsel objected that the justice was not authorised to hear and determine the case, as a question arose as to the title of land, citing sec. 46 of chapter 91, already referred to. The court thereupon ordered that the conviction be quashed with costs.

Diamond and *Bull* shewed cause, and after raising some preliminary objections, it was agreed between the counsel that the rule should be argued as in the case of *Meyers, appellant*, and *John Wonnacott, respondent*. They cited *Regina* v. *Burnaby*, 2 Ld. Raym. 900; *Rex* v. *Justices of Yorkshire*, 3 M. & S. 493; *Scarlett* v. *Corporation of York*, 13 U. C. C. P. 161; *In re Winsor* v. *Dunford*, 12 Jur. 629; *Jones* v. *James*, 14 L. T. Rep. 424.

Robert A. Harrison, contra, cited *Jones* v. *Owen*, 18 L. J. Q. B. 8; *Kimpton* v. *Willey*, 19 L. J. C. P. 269; *In re Earl of Harrington* v. *Ramsay*, 22 L. J. Ex. 326; Paley on Convictions, 3rd. ed., p. 59.

DRAPER, C. J., delivered the judgment of the court.

We have no doubt this conviction must be treated as having been made under the 37th section of ch. 91. The information charged the appellant with having committed an assault on the respondent by catching hold of him by the collar of his coat and throwing him down, and prayed that the justice do proceed summarily in the matter, in pursuance of the statute; and the appellant's counsel relies on the provisions of the 46th section of the same act.

It is, we think, equally clear that the appeal is under the 117th sec. of ch. 99 of the same Consol. Stats., and not under the 1st sec. of the Consol. Stat. U. C., ch 114, which applies to convictions, &c., in any matter cognizable by justices of the peace, "*not being a crime.*" See *Butt* v. *Conant*, 1 B. & B. 174.

The appeal then is given to any person who thinks himself aggrieved by a summary decision, who, 1st, gives a certain notice, and, 2nd, either remains in custody until the sessions, *or* enters into a recognizance with two sufficient sureties, before a justice of the peace, conditioned personally to appear at the sessions and try the appeal, and to abide the judgment of the court thereupon, and to pay such costs as shall be by the court awarded.

It is not asserted that the appellant was either in custody or that he entered into a recognizance, but for the appellant it is suggested that no proof was given on the part of the respondent that the appellant was not in custody, and that nothing appeared before the Court of Quarter Sessions to shew that he was not. The answer to this is so obvious, that if the suggestion had not been seriously put forward in an affidavit of his professional adviser, we would not have thought the objection worthy of notice. The right to appeal is given on certain conditions, the latter presenting the alternative of remaining in custody or of giving a recognizance. It is for the party claiming the right to appeal to bring himself within the class of persons so entitled by the statute, and the appellant has not done so.

Then it was urged that the objection had been waived by the respondent's counsel asking to delay the hearing of the appeal from the first to the second day of the sessions. If we could look upon the objection as based upon merely technical grounds, we should feel disposed, if possible, to deny effect to it. But we do not view it in that light. It strikes at the appellant's right to be heard. He had proved one step towards establishing his right of appeal, the other was to be proved. To ask a postponement until the following morning involved no admission on the part of the respondent of any matter which it was incumbent on the appellant to establish, nor do we see that it involved any waiver of such proof. It appears to be the established practice for the Quarter Sessions to hear appeals on the first day, but there is no law compelling them to do so, and many reasons might be presented to that court, which in a particular case would make the adherence to the practice a harsh and unjust proceeding. In letting the case stand over, no conditions were imposed; nothing was said beyond a consent to the application, which appears to have been made as soon as the notice of appeal was proved. We cannot say that we think the court, if applied to by the appellant, would or ought to have refused the delay to the respondent except on the terms that it should be admitted that the appellant had a right to be heard. We are of opinion this objection fails, and that the necessity to prove compliance with the condition rested on the appellant, and failing such proof that his appeal should not have been entertained.

We think, therefore, the rule for a prohibition to proceed further in the matter should be made absolute.

Rule absolute.

IN RE COLEMAN, CLERK OF THE PEACE FOR THE COUNTY OF HASTINGS.

Quarter Sessions.

The court having granted a prohibition against proceeding further with the appeal, refused a mandamus to the clerk of the peace to certify the non-payment of costs.

Semble, that the chairman of the Quarter Sessions cannot make any order of the court except during the sessions, either regular or adjourned.

(Q. B., T. T., 28 Vic.)

In this case, *Diamond* obtained a rule *nisi* calling upon the clerk of the peace to shew cause why a peremptory writ of mandamus should not issue, commanding him to grant a certificate of non-payment of costs of the appeal in which John Wonnacott was respondent, in pursuance of the order of the chairman of Quarter Sessions, as required by Consol. Stats. C., ch. 103, sec. 67.

C. S. Patterson shewed cause.

DRAPER, C. J.—The decision in the foregoing case necessarily disposes of this application for a mandamus, which is sought with a view to further proceedings founded upon the appeal therein referred to. Having granted a prohibition against proceeding, we cannot by mandamus command ulterior proceedings to be adopted.

We have observed in the papers before us an order signed by the judge of the County Court in his character of chairman of the Quarter Sessions, and dated on a day when that court was not sitting, during the interval between two Quarter Sessions of the peace, and not professing to be done at an adjourned session. We are not aware of any authority under which the chairman can make orders of sessions except during the sessions, either regular or adjourned.

CROSS v. WATERHOUSE.

Costs—C. L. P. A., secs. 324, 328.

Where in an action for false imprisonment the plaintiff obtained a verdict for 1s., and no certificate *Held*, that as he was entitled to no costs, defendant could not, under the 328th section of the C. L. P. A. set off or recover his costs against him.

(Q. B., T. T., 28 Vic.)

In this case *M. C. Cameron*, Q. C., obtained a rule *nisi* calling upon the plaintiff to shew cause why an order of the learned Chief Justice of this court, made on the 12th of April last in this cause, should not be rescinded and set aside, on the ground that the defendant was entitled to his costs in this action, and to have execution therefor, and the said order ought therefore not to have been made, and why the plaintiff should not pay the costs of the application