

Mun. Case.]

REG. EX REL. CHOATE V. TURNER—REG. V. BAKEWELL.

[Crim. Case.]

names of the candidates. They both said they requested the Deputy Returning Officer to mark the ballot paper for them, which he did, and there was no reason to doubt that he complied strictly with their request. But the declaration mentioned in section 144, sub-sec. 3, and marked "D," was not made by either of these voters, nor was the declaration under the same section and marked "F" made by the Deputy Returning Officer. It is further said that one or two others—persons who are unknown, but who represented themselves unable to mark or to distinguish the names—put in their votes in a similar way, and without the declarations mentioned. The Deputy Returning Officer swears that he took those votes at the request of these voters, and that in each case he asked the agent of the respondent whether he was satisfied with what was done, and that his reply was in the affirmative, or at least his assent was signified. It is not shown that the result of the election was affected in any way by what the Deputy Returning Officer did, but it is suggested that it may have been affected by it. But this is purely conjectural, and not probable. By section 168 of the Municipal Act non-compliance with the rules as to the taking of the poll . . . "shall not render the election invalid . . . if such non-compliance did not affect the result of the election." In *Regina ex rel. Walker v. Mitchell*, 4 P. R. 218, the successful candidate had only a majority of one. It appears that by a mistake of the returning-officer the name of a candidate had been omitted from the list until half the day of election had expired, and it was urged, with what appears to me much plausibility, that had it not been for this omission the result might have been very different. Nevertheless, Wilson, C. J., held that it did not appear to him, from what was shown, that the result would have been other than it was had the omission not occurred, and he held the election to be valid. If mere surmise or conjecture was allowed to be enough to invalidate an election, little ingenuity would be requisite to present a plausible reason for giving force to every irregularity, and I apprehend that comparatively few of these municipal elections, in the rural districts, are free from some defect of this description. In the case before me the Deputy Returning Officer has acted in that capacity on many previous occasions, without going through the formalities mentioned, and no objection has been made. This does

not excuse his non-compliance with the Act on this occasion, but it tends to show that such omissions are not uncommon. And when the respondent was well represented by his agent, as he was at this election, and he allowed the Deputy Returning Officer to proceed as he did without any complaint, if not with his approval, I certainly must conclude that he consented to what was done. I do not think there is any sufficient reason that I should pronounce this election invalid upon any ground which the respondent has advanced.

I have, therefore, to pronounce the relator the duly elected Councillor by a valid election, which I do to the exclusion of the respondent.

As respects the question of costs, I should have felt disinclined to allow them to either party had the contest been confined to the question of the validity of the two ballot papers, because that was a matter exclusively within the cognizance of the returning-officer. But as the respondent has raised questions by which the controversy has been prolonged, and in which he has failed, I see no reason why the common rule should be departed from, which is that the unsuccessful party pay the costs, and I so direct.

COUNTY JUDGES' CRIMINAL COURT —COUNTY OF ONTARIO.

REGINA V. BAKEWELL.

Arson—Setting fire to a chattel within a dwelling house—32-33 Vict., c. 22, sec. 8.

Recklessly and wantonly, or even maliciously, setting fire to a chattel within a dwelling house, is not, under all circumstances, a felony within the meaning of the "Malicious Injury to Property Act," (32-33 Vict., c. 22, sec. 8, Dom.)

[Whitby.—DARTNELL, J.J.]

The prisoner was committed for trial by a magistrate, and was indicted under the "Malicious Injuries to Property Act," sec. 8. It appeared in evidence that the prisoner, in a fit of drunken recklessness, struck a match, and set on fire a tissue paper "flycatcher" or ornament, attached to the ceiling of a room in a tavern, in the Village of Brooklin. The fire was extinguished without much damage being done.

DARTNELL, J.J.—The section of this Act under which the prisoner was indicted reads as