pass. The defendant pleaded to the count on the covenant, *non est factum* and *non demisit*, and to the counts in trespass, not guilty. The plaintiff obtained a verdict for one shilling. No certificate for costs having been granted by the learned Judge who tried the cause, the taxing officer refused to tax the plaintiff his cost of suit. A summons was taken out to review the decision of the taxing master.

W. S. Smith shewed cause.

Creelman supported the summons. The question of title arises under the plea of *non demisit* which ousts the jurisdiction of the County and Division Courts, and therefore no certificate was necessary.

Wilson, J., allowed the appeal.

Order accordingly.

Regina v. Clancy.

Vagrant Act—32, 33 Vict. cap. 28—Justice of the Peace sitting for Police Magistrate.

Held, that a conviction by one Justice of the Peace under the Vagrant Act is bad.

Quære. Whether if the Justice of the Peace were sitting for and at the request of a Police Magistrate, the conviction would be good.

[December 12, 1876.—Wilson J.]

The prisoner was arrested in the town of Belleville without any warrant having been issued for his arrest, and was tried before one Mackenzie Bowell, Esq., a Justice of the Peace for the County of Hastings, who convicted him of being a common vagrant, under 32 & 33 Vict. cap. 28, and committed him to the common gaol for the term of six months with hard labour.

J. B. Clarke having obtained from Mr. Justice Wilson a writ of *habeas corpus*, on the return of the writ, moved for the discharge of the prisoner on the ground that the committing magistrate had no jurisdiction under the Act, that the powers of such Act required to be exercised by a Stipendiary or Police Magistrate, Mayor, or Warden, or two Justices of the Peace.

Capreol for the Attorney-General, asked for an enlargement to file an affidavit shewing that Mr. Bowell was sitting for, and at the request of the Police Magistrate when he convicted the prisoner.

Wilson, J.—The conviction having been made by only one Justice is bad, and I must discharge the prisoner. Admitting that the Justice of the Peace was sitting at the request of the Police Magistrate, I doubt whether that would get over the difficulty.

Prisoner discharged.

GENERAL SESSIONS OF THE PEACE FOR THE COUNTY OF ELGIN.

Regina v. Bradshaw—In the matter of Appeal between Henry Bradshaw, *Appellant*, and Richard B. Nicholl, *Respondent*.

Summary conviction for destroying a fence under 32 & 33 Vict. cap. 22, D. sec. 29—Malice.

The defendant Bradshaw had buried a child in a graveyard near the remains of his own father. The complainant Nichol had a parcel of ground which the sexton of the church had appropriated to his exclusive use without any authority from the incumbent or church wardens. The complainant subsequently extended his fence, by the like consent of the sexton only, and enclosed more ground, so that the fence crossed diagonally over the grave of defendant's child; defendant remonstrated, but obtaining no redress, or a removal of the fence, proceeded to remove it himself. In process of doing so he broke a marble pillar of complainant's fence, for which he was summoned before the Police Magistrate of St. Thomas, for "wilfully and maliciously" destroying a fence under sec. 29 of 32 & 33 Vict. cap. 22, D. He was fined $10, and ordered to pay for the damages. From this conviction the defendant appealed to the General Sessions of the Peace.

Held, that although the defendant was guilty of trespass, for which he might be mulcted in damages in a civil action, he was not liable to a fine, and that, acting under a claim of right, the act was not necessarily *malicious*.

[St. Thomas, Jan. 15, 1876.—Hughes, Co. J., Chairman.]

This was an appeal from a conviction by the Police Magistrate of the town of St. Thomas, for unlawfully and maliciously breaking down and destroying a fence in a graveyard under sec. 29, of 32 & 33 Vict. cap. 22, D.

J. McLean for appellant.

Horton for respondent.

The judgment of the Court was delivered by

Hughes, Co. J., Esq., Chairman.—This appeal is in the nature of a new trial. We think the only important point for consideration is whether the act complained of was *maliciously* done.

There can be no question whatever that it was unlawful, and that the appellant would have been liable to damages in an action of trespass, but it must have been maliciously done or the conviction must fall. The proceeding before the Police Magistrate was one not only seeking for damages to be awarded to the respondent, but for a penalty to be inflicted besides: the one for the unlawfulness of the act and redress of the private injury to the property of the respondent, the other as a punishment or penalty for the alleged maliciousness of it.