

REPORTS

ONTARIO.

COUNTY COURT OF THE COUNTY OF SIMCOE.

MITCHELL *qui tam* v. PHILLIPS.*Justices of the Peace—Return of conviction—When to be made—33 Vict. c. 27 (D).*

Held, that a return by the defendant on the 19th January of a conviction made on the day before the "second Tuesday in the month of December" preceding, was sufficient under the above statute.

[Barrie, ARDAGH, Co. J.]

The defendant applied to set aside the judgment by default obtained against him by the plaintiff, and the execution issued thereon, and for an order to stay payment over to the plaintiff of the moneys in the hands of the sheriff.

The facts of this case were not disputed, and may be stated as disclosed by the defendant's affidavit. On Monday, the 12th day of December last, the defendant, who resided at Bondhead, happening to be at Beeton, another village some six miles distant, was applied to for a warrant against this plaintiff for an assault and breach of the peace. He granted the warrant and the same night convicted the plaintiff, the proceedings coming to a close about midnight. Defendant then returned to his home at Bondhead, where he arrived about two o'clock in the morning of Tuesday, the 13th December. The only mail from Bondhead to Barrie, the county town, closed at 6 a.m. No return of this conviction was made by defendant until the 19th of January following. On March 13th the plaintiff commenced this action, endorsing his writ for the penalty of \$80.00 prescribed by the statute. No appearance was entered by the defendant; whereupon the plaintiff entered judgment and issued execution in due course. Upon the sheriff's officer's demand under the execution the defendant paid over to him the full amount claimed thereunder. The affidavit of the defendant shews to my mind a sufficient excuse for the delay and neglect on his part; and, that being so, I think I ought, as to this part of his application, to interfere and give him what relief he is entitled to, so long as the money has not reached the plaintiff's hands.

The question then arises, whether upon the

facts stated, about which there is no dispute, the defendant has really any defence if allowed to appear.

The action is brought under sect. 3 of 33 Vic. c. 27, which, after referring to 32-33 Vic. c. 31, goes on to say, "the returns required by the 76th section of the Act hereinbefore recited shall be made by every Justice of the Peace quarterly, on or before the second Tuesday in each of the months of March, June, September and December in each year, to the Clerk of the Peace," &c. It is to be observed that sect. 76 of the old Act is not repealed but only amended; this it is important to bear in mind.

If we refer to that Act (32-33 Vict. c. 31), we find sect. 76 enacting that "Every Justice of the Peace shall make return in writing under his hand of all convictions made by him to the next ensuing general or quarterly Sessions of the Peace, or to the next term or sitting of any court having jurisdiction in appeal. . . . at which in either case the appeal can be heard," &c.

The object of this is plain enough; for by reference to section 65 of the same Act, we find the practice in appeal to be: (1) If the conviction was made not less than twelve days before the next sessions, then the appeal was to be to such sessions; (2) If the conviction was made less than twelve days before the next sessions, then the appeal was to the sessions *after* the then next sessions; so that if a conviction were made under that Act within twelve days before any session, no return by the Justice of this conviction was required before the *second* sessions thereafter, inasmuch as there would be no necessity for the return to be made any earlier than that sitting of the Court at which the appeal was to be tried. This section (65) was directly repealed by sect. 1 of 33 Vict. c. 27, which preserves the same distinction as in the old Act, adding, however, a day to the twelve therein mentioned. As far as this case is concerned this alteration in the practice need not be noticed.

We now come to sect. 3 of 33 Vict. c. 27, which amends sect. 76 of 32-33 Vict. c. 31, and we find it begins with a recital as to the necessity for amending the old section: "Whereas in some of the Provinces of Canada the terms or sittings of the General Sessions of the Peace or other Courts to which, under sect. 76 of the said Act, Justices of the Peace are requested to