

Held, (per Bramwell, Channell, and Pigott, BB., Pollock, C. B., dissentiente) that the note was a promissory note within the statute of Ann, and that days of grace must be allowed upon the first instalment.—*Miller v. Biddle*, 14 W. R.

UPPER CANADA REPORTS.

QUEEN'S BENCH.

(Reported by C. ROBINSON, Esq., Q.C., Reporter to the Court.)

IN THE MATTER OF DAVID HARTLEY AND THE CORPORATION OF THE TOWNSHIP OF EMILY.

Temperance Act of 1864.

Where a by-law was passed under "*The Temperance Act of 1864*," having been adopted by the electors at a meeting at which the township clerk took the poll, and conducted all the proceedings, no person presiding thereat as directed by sec. 3, sub-sec. 3.—*Held*, that the provision was imperative: that in the absence of the person appointed to preside, no poll could be legally taken; and the by-law therefore was quashed, with costs.

Although no one appeared to shew cause, the court, having regard to the evident intention of the legislature to sustain such by-laws unless clearly bad, would not make the rule absolute without seeing that the objections were fatal.

[Q. B., T. T., 1865.]

In Easter term *C. S. Patterson* obtained a rule calling upon the Corporation of the Township of Emily to shew cause why the by-law submitted to the electors of the said township on the 9th and 10th of January, 1865, for adoption under "*The Temperance Act of 1864*," should not be quashed, on the grounds, *first*, that no person presided at the meeting in pursuance of the third sub-section of section three, of the said statute; and, *second*, that the township clerk closed the poll on the second day before all the electors had polled their votes, and before the hour of five o'clock in the afternoon.

These objections were sustained by affidavits, stating that although the reeve was present at a part of the meeting, neither he nor any municipal councillor or municipal elector presided thereat, nor was any person chosen to preside; and that he opened the poll on the second day, and closed it finally at or about thirty minutes after three o'clock in the afternoon of such second day, alleging as his reason for so finally closing the same that more than half an hour had elapsed without any vote having been offered, although before so closing he was informed, as the fact was, that several duly qualified voters were then coming for the purpose of voting, and was requested not to close the poll, in order to give them an opportunity to vote.

It further appeared that on the poll-book was endorsed a certificate, as follows: "We, the undersigned, do hereby certify that one hundred and eleven voted yes, and fifty-nine nay, at a meeting called on the 9th and 10th days of January, 1865, to pass the Temperance by-law.

Chairman.
" (Signed) { Robert Grandy, Tp. Clerk."

This rule was served on the township clerk and on the reeve of the township. Copies of the affidavits on which the rule was granted, and a notice that they were such copies, were also

served on the clerk. The rule was enlarged until this term, and was then moved absolute.

No one appeared to oppose its being made absolute.

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

In matters of ordinary proceeding in a cause, we should probably make a rule absolute which having been duly granted and regularly served, was not opposed by the party called upon to shew cause. In the present case, however, looking at the tenor and spirit of "*The Temperance Act of 1864*," we deem it our duty to see that the objections raised are sustained in fact by the affidavits, and if so, that they are sufficiently in accordance with the statute to call for the by-law being quashed; for considering that the 37th section of the act declares that no by-law passed under its authority shall be set aside for any defect of procedure or form whatever; and that no by-law adopted by the electors of a municipality under the 4th and 5th sections of the act shall be set aside for any defect whatever, whether of form or substance, affecting the requisition therefor, the authenticity or number of the signatures thereto, the qualification of the signers thereof, or any matter, thing or procedure antecedent to the first publication of the notice given for the poll taken, unless the same be authorized by the act; we can scarce doubt that the legislature desired to sustain all such by-laws unless there were very clear and very substantial grounds for setting them aside. This by-law was adopted under the 4th and 5th sections of the statute.

When the rule was moved absolute, I was doubtful whether we might not treat the provision of the 3rd sub-section of section 5, in respect to the person who should preside at the meeting for taking the poll, as directory only, and that provided some person did preside it would be sufficient. My attention was not called to the statement in the affidavit of Thomas Stephenson, that "the said township clerk took the poll, and conducted all the proceedings of the said meeting without any person presiding thereat." Now under section 97 of the Municipal Institutions Act, sub-sec. 7, it is the returning officer who is to close the poll, as well as adjourn it, when an adjournment is required. This duty is to be performed by the person who presides, and he is also, under sub-sec. 8 of sec. 5 of the Temperance Act, to count the yeas and nays, and to ascertain and certify on the face of the poll-book the number of votes given for and against the by-law, and the certificate is to be countersigned by the poll clerk, who would usually be the township clerk; and by section 6 every by-law so passed is to be communicated by delivery of a copy certified by the township clerk to the collector of inland revenue.

The first objection is certainly sustained in fact, and the more I consider it the more substantial it appears to me. It cannot be mere matter of procedure or form that there should be no person presiding at the meeting, in whom is vested the authority for conducting the election and for maintaining peace and order, to whom the legislature has entrusted the counting the votes and certifying the result. In the absence of any such person I do not see how a poll can be taken, under the statute, or the