is not the only case in which an answer might be set up on the same facts, either in the shape of a legal defence or an equitable case or defence. The rule that you must necessarily elect to invoke the jurisdiction of either a court of law or a court of equity is not without its exceptions, and these exceptions have necessarily become more apparent since the system of equitable defences to legal claims has been adopted.

I think both pleas must be sustained, though grounded mainly on the same facts. Judgment for defendant.

QUARTER SESSIONS.

(In the Quarter Sessions for the County of Elgin, his Honor JUDGE HUGHES, Chairman.)

McLEAN, Appellant v. McLEAN, Respondent.

Power of Justices to alter their Order for Quashing a Summary Conviction during the same Session.

On the first day of the session, the appellant's counsel called on and proved his case. The respondent did not appear. It was not known that he had employed counsel. And the Court ordered the conviction to be granted

On the second day, counsel appeared and stated he had been employed, and was taken by surprise; and applied to have the order of the Court discharged for a hearing.

Held, that the Court had power to revoke the order for quashing the conviction.

On the 9th of December, 1862 (the first day of the sittings) *Horton*, for the appellant, entered an appeal, proved his case, and the conviction was ordered to be quashed. No one appeared for the respondent.

On the 10th of December (the second day of the session) *Stanton* appeared, and stated he had been employed as counsel by the respondent, and then, for the first time, to his surprise, learned that the appeal had been heard on the preceding day, and moved the Court to discharge the order for quashing the conviction, and for a rehearing.

Horton, contra, stated he was not aware Mr. Stanton had been retained, but objected that the case could not be heard again, nor could the Court grant a new trial.

HUGHES, County Judge, Chairman.—With reference to this appeal, and the application of the respondent's counsel for the Court to discharge its order for quashing the conviction, I think the authorities cited open the way for our doing so; but it must not be understood as in the nature of a new trial, for, had a jury decided this case, I doubt the authority of this Court to disturb the verdict.

Assuming that all the respondent's counsel has stated to the Court to be true, as explaining the cause of the respondent's not appearing yesterday, and its not appearing to be doubted on the opposite side, I think the case reported in 2 Salk., 494 and 606, as digested in Arch. Q. S. practice, 289 and 290, (*St. Andrews Holborn v. Clement Danes*) to be very similar to this case to establish the principle, and should govern us in the present application.

It is there said, "The Justices may alter their judgments at any time during the same session; where, upon hearing an appeal against an order for removal, the respondents not appearing, the order was quashed; but afterwards, during the same session, the respondents were let in to try the appeal, on payment of costs; and upon the trial the order was confirmed. All these orders being removed by *certiorari*, it was moved in one of the Superior Courts to quash the latter order of session, by which the order of removal was confirmed on the ground that the sessions having once made the order for quashing the order for removal, could not afterwards make another order to confirm it; but the Court above denied this, and said the sessions has authority to alter their judgments at any time during the same sessions."

The order of this Court, therefore, passed yesterday, should be cancelled upon payment of costs.

This power ought to be, as suggested in Dickenson Q. S. practice 934, "to be exercised with delicacy and discretion." I have known it once, in the spirit of party, to have been attempted to reverse the decision of about thirty magistrates of the Court by a fresh accession of justices the next day, after most of the thirty had gone to their homes; but all such instances will be discouraged. This application does not bear that complexion.

In this determination the Court are unanimous.

Per cur.—Order cancelled on payment of costs.

In the Matter of Appeal between ROBERT NEIL, Appellant, and JOHN SELLS, Respondent.

Appeal from a Summary Conviction in a case not criminal—Recognizance not necessary as a preliminary step to give the Court jurisdiction.

Appeal against a summary conviction for breach of a by-law of the Corporation of St. Thomas for selling spirituous liquors without license. The appellant gave notice of appeal in due time, but entered into no recognizance to prosecute his appeal with effect; nor did he afterwards give notice before the sittings of the Sessions, of the abandonment of his appeal, under Sec. 4 of Con. Stat. of U. C., page 964.

Held, respondent entitled to costs.

Horton, counsel for respondent, put in a notice of appeal, served upon his clients, which *Stanton*, for appellant, admitted was served, but contended that the Court could not make any order, as they had no jurisdiction, inasmuch as the appellant had not entered into a recognizance to prosecute his appeal with effect, and cited Dickenson, Q. S. 639. *Rex* v. *Oxfordshire*, 1 M. & S., 448. *Rex* v. *King's Langley*, Salk. 605. *Rex* v. *Lincolnshire*, 3 B. & C., 548; 7 U. C. L. J., page 6, and Arch. Q. S. practice, 280, and Con. Stat. of U. C., 114, section 1.

HUGHES, County Judge, Chairman.—There can be no question whatever, that in order to give the Court jurisdiction, or the parties a *locus standi* in the Court, the preliminaries required by law must be entered into.

It is to be observed, however, that the preliminary steps required by the statute respecting appeals in cases of summary conviction before Justices of the Peace, in cases not amounting to crimes, (Con. Stat. of U. C., 963) are different from those required by the Con. Stat. of Canada, page 1304, in cases of summary convictions under the criminal acts; for, in the latter it is necessary for the appellant, in all cases where the party thinks himself aggrieved by the conviction or decision, and wishes to appeal to the Sessions, within three days after the conviction, and seven days before the Sessions, to give to the other party notice in writing of his intention to appeal, and either to remain in custody until the Sessions, or enter into a recognizance with two sufficient sureties, before a Justice of the Peace, conditioned to appear at the Sessions and try the appeal.

Under the first named statute, the recognizance is not, in all cases, necessary. It is applicable only to cases where the convicted party is in custody or on bail.

This case is admitted not to be for breach of any criminal law, but for selling liquor without license, contrary to a municipal by-law, and that the appellant was neither in custody nor on bail. I therefore think the notice of appeal was all that was necessary, and that a recognizance was unnecessary, and that the respondent is entitled to ask for costs, because the appellant did not give notice to the respondent, under the 4th sec. of the act first alluded to, of the appeal being abandond. *Rex* v. *Justices of Essex*, 4 Bar. and Ald., 276, shews that under 30 Geo. 3, cap. 48, sec. 25, no notice of appeal was necessary, but merely a recognizance. Here the notice of appeal was necessary, and not the recognizance.

In an analogous case to the present, in this Court, of *Barclay*, appellant v. *Barr*, respondent, at the June Quarter Sessions, 1861, the counsel for this appellant contended that a recognizance was not necessary under the statute first referred to, and the Court thought with him, and so decided. This conviction must be affirmed.

Per cur.—Judgment for respondent, with costs.

In the case of an appeal against a poor rate, unless the appeal is *entered*, the Sessions cannot order the appellant to pay the costs which his notice may have occasioned to the respondents, in preparing to resist the appeal, for it is not "*heard and determined*." Dickenson Q. S. 659. In *Rex* v. *Justices of Essex*, 8 T. R. 583, it was determined that the Court of Quarter Sessions have no authority to award costs under 17 Geo. II. ch. 38, s. 4, unless an appeal has been "*entered and determined*"—for the determination of the appeal is a condition precedent to their power to give costs. The decision however, in the foregoing case, seems to have turned upon the necessity of entering into a recognizance under the particular circumstances and statute, to which allusion is made.