

Held, also, that the case was one in which the ordinary rule should prevail, and that defendant having succeeded as to the balance of the account was entitled to his costs.

W. M. Christie, for appellant. *A. Drysdale*, Q.C., for respondent.

Full Court.]

THE QUEEN v. DOHERTY.

[May 15.

Canada Temperance Act—Conviction by stipendiary magistrate affirmed—Appearance of defendant by counsel under protest—Effect of in waiving defect in service—Use of words "costs of commitment" in conviction—Treated as surplusage—Remedy of defendant—Tender of amount due.

Defendant was summoned to appear before the stipendiary magistrate of the town of P. to answer a charge of having unlawfully kept for sale intoxicating liquor contrary to the provisions of the second part of the Canada Temperance Act. On the return day of the summons counsel for defendant appeared and took the objection that the service was insufficient, the constable by whom it was effected not being a constable for the municipality of the county of P. The constable was called and was cross-examined, under protest, by defendant's counsel who then retired, and the magistrate, after hearing the evidence as to the commission of the offence charged, adjourned the case from the 21st January, 1899, until the 27th of the same month, and on that date, defendant not appearing either personally or by counsel, convicted him, and adjudged that he pay the sum of \$50, and also that he pay the informant his costs amounting to \$4.10, such sums if not paid forthwith to be levied by distress of the goods and chattels of defendant, and in default of distress, that defendant be imprisoned for the space of 60 days, unless such sums and the costs and charges of said distress, and of the commitment, and of conveying defendant to jail were sooner paid.

Held, affirming the judgment of MEAGHER, J., refusing a writ of certiorari. (1) That the appearance by counsel cured the defect, if any, in the service. (2) That the fact of defendant's solicitor having left the court did not deprive the magistrate of the right to adjourn. (3) That the magistrate, having adjourned, had the power on the day to which the case was adjourned to convict in the absence of defendant. (4) That the use of the words "costs of commitment" in the conviction, while irregular, should be treated as mere surplusage. (5) That if an attempt were made to enforce the warrant of commitment, in respect to the costs of commitment, defendant's remedy would be to tender the amount due.

WEATHERBE, J., and GRAHAM, E.J., dissented.

W. B. A. Ritchie, Q.C., for appellant. *Drysdale*, Q.C., and *McInnes*, for respondent.