Counsel for the defendant objected to this and pointed out to the magistrate (as he, the counsel, swore) "that the magistrate should not take testimony not under oath in the absence of the accused and his counsel, and the said Police Magistrate stated that he desired to obtain all the facts from whatever source he could obtain them . . . and by reason of the said Joseph Stewart and the said W. F. Skitch giving unsworn statements to the said Police Magistrate in this case, in my belief the Police Magistrate's mind was prejudiced, and the defendant did not obtain a fair trial." Similar statements were made by another counsel present at the trial.

Three affidavits, made respectively by Stewart, the inspector, Skitch, the express agent, and the counsel for the prosecution, were filed in answer. One conversation with the magistrate was admitted; the second was neither admitted nor denied. The suggestive expression "No new evidence was taken" was used; and then a statement was made, in reference to the earlier and apparently the less objectionable interview, that "the magistrate chatted in a general way about the case." The counsel for the prosecution, apparently not knowing about either conversation, merely stated that "no evidence to my knowledge was taken by the magistrate after the trial."

In the absence of any denial by the magistrate, the statements quoted must be taken to be admitted; and the conviction cannot, in these circumstances, be permitted to stand.

The administration of justice should not only be free from impropriety, but it should be so conducted as to avoid all appearance of impropriety. A judicial officer ought not to receive communications from either side ex parte. From the nature of the discussion, it was hard to avoid the impression that the magistrate was influenced by the opinions, views, and unsworn statements of those interested in the prosecution.

The learned Judge would have been compelled to quash the conviction also on the ground that there was no evidence to shew what were the contents of the box. Such evidence could have been given without great difficulty, but was not; and there is no provision in the Ontario Temperance Act making the label upon a box or bottle conclusive or even prima facie evidence of its contents. In fact sec. 70 (9) indicates that too often "things are not as they seem."

The learned Judge, with some hesitation, decided to award no costs against the magistrate, and made the usual order for protection, awarding costs against the informant, who actively took part in the proceedings complained of.