CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

IN RE BROWN AND WALLACE.

(Reported by HENRY O'BRIEN, Esq., *Barrister-at-Law.)*

32 Vic. cap. 32, secs. 23, 36, (Ont.)—Tavern License Act—Trial by Judge without jury—Depositions as evidence—Prohibition.

Held, 1. After an appeal to the Sessions from a conviction of a magistrate for selling liquor after 7 o'clock on Saturday evening, under 32 Vic. cap. 32, sec. 23, is confirmed a prohibition to the Sessions will not be granted.

Held, 2. That under the above section, it is irregular for the judge who tries the case to call a jury, or to receive depositions of witnesses as evidence, but this is not ground for a prohibition.

[Chambers, January 5, 1872—GALT, J.]

Osler obtained a summons, calling upon John Wallace, and George Duggan, Esq., the Chairman of the General Sessions of the Peace for the County of York, to shew cause why a writ of prohibition should not be ordered to issue out of this court to prohibit the said Court of General Sessions of the Peace from further proceeding in the matter of an appeal to the said court, wherein one Thomas Brown was appellant and one John Wallace was respondent, being an appeal from a certain conviction made by Alexander Macnabb, Esquire, Police Magistrate of the said City of Toronto, against the said Thomas Brown, on the twenty-third day of November, 1871, for that he the said Thomas Brown on November 11th, 1871, sold intoxicating liquors after seven o'clock in the evening of that day, and which said appeal came on to be tried at the said Sessions on December 16th, 1871, and was dismissed, and the said conviction affirmed with costs—on the grounds:

1st. That the said appeal was tried by a jury who were called and sworn upon the matter of the said appeal, and not by the said Chairman of the said Sessions, as required by the Statute in that behalf;

2nd. That the respondent gave no evidence in support of the said conviction, and that the learned Chairman of the said Sessions allowed the respondent to read to the said jury the depositions of the witnesses for the prosecution taken in the Police Court on the hearing of the information, instead of giving the *viva voce* testimony of the said witnesses themselves.

3rd. That the said conviction was affirmed without evidence, and the said Sessions exceeded their jurisdiction in so doing.

The facts of the case material to the application are the following:

The applicant Brown had been convicted in the Police Court of the City of Toronto, upon the evidence of two witnesses, and fined in the sum of $20 and costs, for selling liquor after 7 o'clock on Saturday evening contrary to sec. 23, cap. 32, 32 Vic., Ont. He appealed from this conviction to the Court of General Sessions, pursuant to C. S. U. C. cap. 114, and 32 Vic. cap. 32, Ont., sec. 36, which provides that such appeal "shall be tried by the Chairman of the Court without a jury."

The appeal came on to be heard at the Sessions, when the Chairman, with the consent of the appellant, but against the wish of the respondent, who contended that under the statute the appeal should be tried by him alone, directed a jury to be sworn to try the appeal. The respondent opened his case, and then offered evidence to shew that the witnesses upon whose evidence in the Police Court the appellant was convicted had left the Province, and he proposed to read their depositions taken in the Police Court as evidence in the trial of the appeal. The appellant objected that the depositions in question were not evidence, that the absence of the witnesses from the country did not entitle the prosecutor to read them, and that the witnesses themselves should be called. The learned Chairman of the Sessions overruled the objections, and the absence of the witnesses being proved, their depositions were admitted, and the conviction was affirmed with costs.

The summons for prohibition was then taken out.

Hurd, on behalf of the Chairman of the Sessions and of the respondent, shewed cause.

Prohibition is not the proper remedy, and justice has been done. The effect of a prohibition would be unfair, and put respondent in a worse position than before the appeal. If the appellant has any remedy it would be by error.

The effect of a prohibition if allowed would be the same as a *certiorari*, the right to which is taken away: 33 Vic. cap. 27, sec. 2 (Can.)

The appellant cannot take the objection that the case was tried by a jury, as the jury was called at his instance, and if he can, it may be said that the case was tried by the judge if he accepts their finding and makes it his own judgment. But we say that 32 Vic. cap. 32, sec. 36 (Ont.) is overridden by 32–33 Vic. cap. 31 (Can.) as amended by 33 Vic. cap. 27 (Can.), which govern in the matter of this appeal.

Osler supported the summons.

The Sessions have exceeded their jurisdiction in trying the case before a jury. The statute is express and positive in its terms, "*shall* be tried by the Chairman without a jury;" sec. 36, cap. 32, 32 Vic., Ont., and the appellant is not estopped from objecting to the jurisdiction by having consented to the jury being sworn: *Smith* v. *Rooney*, 12 U. C. Q. B. 66; *Yates* v. *Palmer*, 6 D. & L. 283; 1 T. R. 552; 2 Just. 602, 607.*

Prohibition lies from the Queen's Bench to the Sessions: *Reg.* v. *Herford*, 3 E. & E. 115.

If inferior court assume a greater or other jurisdiction than that allowed by law, or refuse to allow an act of Parliament, Superior Courts will control them by prohibition: Bac. Abr.; Title Prohibition, C. p. 568; *Ib.* prohibition, K. p. 557.

The court here has assumed a jurisdiction other than that allowed by law in another respect, in that it has decided the appeal without evidence, the depositions not being legal evidence and not receivable: Roscoe Cr. Ev., Ed. 6, pp. 65, 71; Dickenson's Qu. Sess., pp, 525, 643, 644; *Reg.* v. *Austin*, 25 L. J., M. C. 48; Indictable Offences Act, 32-33 Vic. cap. 30, sec. 30, Can., applies only to depositions

* See *Mossop* v. *Great Northern R. W. Co.*, 26 L. T. 92; and cases there cited.—EDS. L. C. G.