

late to give such evidence in appeal; such evidence could only be given in these cases as in other appellate courts.

*Haverson, K.C.*, for the appellant.—Sec. 125 authorizes the serving of a notice not to deliver liquor to a person having the habit of drinking liquor to excess. Sub-s. 5 provides that if the person so notified delivers liquor to the person having such habit, the information charges that the defendant delivered liquor to W. a person having such habit, that he had such habit requires proof as much as the delivery of liquor.

*Sutherland, contra.*—It will be presumed the person has the habit of drinking otherwise the notice would not have been given, the notice is sufficient evidence.

*HATTON, Co.J.*—At the hearing before justices no evidence was given by the prosecutor that the interdicted person was a person who had the habit of drinking liquor to "excess." The prosecution contented itself with proving due service of the notice referred to in sub-s. 1 of s. 125. Objection was taken by defendant's counsel that this was insufficient but the objection was overruled and the conviction made. Under these circumstances I refused the request of the respondent to be allowed to give such evidence on the hearing of the appeal. This is the substantial objection to this conviction; and, contrary to my first idea at the hearing, I think it must prevail and the conviction must be quashed.

Sub-s. 5 of s. 125 does not in words apply a penalty for the selling, etc., to the person as to whom notice has been served, but for selling, etc., any such liquor to the person having such habit. Notice the difference between this and the language of sub-ss. 6 and 8. There is no form in the appendix for an information under this section and the prosecutor must follow the words of the section and allege as was done here that the interdicted person was a person having such habit, etc. This would appear to me to be an affirmative allegation which must be proven affirmatively by the prosecution unless such proof is rendered unnecessary by the express words of the statute. I do not find any such. This allegation seems to me as necessary of proof as would be the service and sufficiency of the notice required by the section. This point appears to have been decided in this way some years ago by the learned judge of the county of Westworth, in an unreported case.