

in any warlike or military operation in the service of or for or under or in aid of any foreign power, state, potentate, colony, province or part of any province or people, or of any person or persons exercising or assuming to exercise the power of government in or over any foreign country, colony, province or part of a province or people, either as an officer, soldier, sailor or marine, or in any other military or warlike capacity—or (the other definition of offence not bearing on this case) such offender may be prosecuted either in the manner provided in the 59 Geo. 3, ch. 69, (the Foreign Enlistment Act) or in a summary way before (among others) any judge of either of the Superior Courts of Common Law for Upper Canada, or any judge of a County Court, recorder, judge of the Sessions of the Peace or police magistrate, or before any two justices of the peace for the district or county where the offence shall have been committed, and if convicted on the oath of one or more credible witness or witnesses, may be condemned to pay a penalty of \$200 with costs, and may be committed to the common gaol of the district, county or city, for a period not exceeding six months at hard labor. And if such penalty and costs be not forthwith paid, then for such further time as the same may remain unpaid; and such penalty shall belong one-half to the prosecutor and one-half to Her Majesty, for the public uses of the Province.

It is objected,

1. That it does not appear for what place the convicting magistrate is police magistrate. Each warrant has in the margin these words, "Province of Canada, county of Kent, to wit," and is dated "at Chatham in the county of Kent," but there is a township of Chatham as well as a town of Chatham in that county, and *non constat*, the magistrate was a police magistrate for the town, nor that he was exercising jurisdiction within the town.

2. That the offence is not sufficiently described according to the statute which prohibits the hiring, retaining, &c., any person to enlist or to serve in any warlike or military operation, for any foreign power, &c., "as an officer, soldier, sailor or marine, or in any other military or warlike capacity." The latter words are not set out as part of the prisoner's offence.

3. The penalty is not discretionary in amount. The statute fixes it at \$200, peremptorily. The adjudication is for a fine or penalty of only \$100.

4. The amount of costs is not stated in the body of the commitment, nor in the recital of the conviction.

I incline to hold that each of these objections is fatal.

But as to the first it may be said that a general and not a local jurisdiction is given by the letter of the statute to the judges of the county courts, recorders, judges of the sessions of the peace and police magistrates, and that it is only where two justices of the peace are acting that they must be justices of the country where the offence is committed. For the purposes of this case it is not necessary to determine this point.

The second objection is clearly fatal—for the offence is not simply hiring, &c., any person to enlist or serve in any warlike or military operation for a foreign power, but hiring, &c., such person to enlist, &c., as an officer, soldier, &c.

The statutory definition is only half followed, and the prisoner is convicted of part and not the whole of what the statute declares to be punishable.

The third objection is clearly fatal, "A judgment for too little is as bad as a judgment for too much," *R. v. Salomons*, 1 T. R. 252. See also *Whitehead v. Reg.* in Error 7 Q. R. 582, where a sentence of seven years transportation was passed on a conviction for an offence punishable by statute by transportation for not more than fifteen nor less than ten years.

The fourth objection is supported by Lord Mansfield's judgment in *Rez. v. Hall*, Cowp. 60.

In my opinion the prisoner is entitled to his discharge.

Order accordingly.

HOPE V. MUIR ET AL.; (BANK OF BRITISH NORTH AMERICA, GARNISHEES.)

Married Woman's Act—Con. Stat. U. C. cap. 73—Marriage, 28th May, 1859—Attachment of interest arising from her legacy to answer her husband's debts.

Where, on a debt contracted in the year 1855, plaintiff, on the 26th November, 1864, recovered judgment against M. and others, he was held entitled to attach the interest of moneys arising out of the amount of a legacy deposited by the wife of M. in her own name in the Bank of the garnishees, she having been married on the 28th May, 1859. [Chambers, June 3, 1865.]

On a debt contracted in the year 1855, the plaintiff recovered a judgment in this court against the defendant Muir and others, on the 26th November, 1864, for \$1,492 47.

On the 28th May, 1859, the defendant Muir married Eliza his present wife, who, by the will of her late uncle, Robert W. Harris, took to her own use a legacy to a large amount. Part of the interest arising therefrom, namely, \$462 22, she lately deposited, to her own credit, in her own name, in the Bank of British North America, at its agency in Hamilton.

This money, by an order dated the 16th May, 1865, was ordered to be attached, and the garnishees were called upon to show cause why they should not pay it over to the judgment creditor. After the service of this order, Muir and his wife sued the garnishees; and while the garnishee proceedings were pending, were proceeding to enforce the payment of the money. Whereupon the defendants in that action and the garnishees in this matter applied for leave to pay the money into court, which was granted, and they paid it into court. The sole question raised was, whether this money was liable for the debt of Muir.

_____ for judgment creditors.

Rusk Harris for judgment debtors and Mrs. Muir.

T. H. Spencer for garnishees.

J. WILSON, J.—It is enacted by chapter 73 of the Consolidated Statutes of Upper Canada, section 2, among other things, that every married woman, who, on or before the 4th day of May, 1859, married without any marriage contract or settlement, shall and may, from and after that day, notwithstanding her coverture, have, hold and enjoy all her personal property not then reduced into the possession of her husband, whether belonging to her before marriage or in any way acquired by her after her marriage, free from his debts and obligations contracted after the 4th day of May, 1859, and from his control