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Conviction—Sale of liquor contrary to by-law—27 & 28 Vic. cap. 18—32 Vic. cap. 32 (Ont.)—Certiorari—Appeal.

The above persons were convicted of selling intoxicating liquors without license, in a township where the sale of intoxicating liquors and the issue of licenses were prohibited, under the Temperance Act of 1864, 27 & 28 Vic. cap. 18, and a memorandum of the conviction, simply stating it to have been a conviction for selling liquor without a license, was given by the justices to the accused.

An application for writs of certiorari to remove the convictions for the purpose of quashing them was refused; for even if the conviction should have been under the Temperance Act of 1864, and not under 32 Vic. cap. 32 (Ont.), it was amendable.

Quere, whether the conviction could not be supported as it stood.

Seem, that although 27 & 28 Vic. cap. 18, sec. 36, takes away the right of certiorari and appeal, a certiorari may be had when there is an absence of jurisdiction in the convicting justice, or a conviction on its face defective in substance, but not otherwise.

[Chambers, Sept. 12, 1870.—Gwynne, J.]

These were applications for writs of certiorari to remove two several convictions, whereby the above named parties were respectively convicted of selling liquors in the township of Ernestown without a license.

The applications were supported by affidavits showing the summonses, which charged that the accused "did within the last twenty days sell or dispose of intoxicating liquors without the license required by law so to do, and contrary to the by-law of the corporation of the township of Ernestown, prohibiting the sale of intoxicating liquor in Ernestown;" and a memorandum dated 30th July, 1870, which was signed by the convicting magistrates, whereby it was said that after hearing the evidence, they adjudged that each of the above parties respectively is guilty of selling intoxicating liquors in the township of Ernestown without a license within the last twenty days.

There were also affidavits showing that by-law No. 1, of the year 1870, passed by the Municipal Council of the township of Ernestown, on the 17th January, 1870, whereby the sale of intoxicating liquors, and the issue of licenses for the purpose, is prohibited within the township of Ernestown, under the authority of the Temperance Act of 1864 (27 & 28 Vic. cap. 18). The affidavits show this to be a valid and subsisting by-law, and that it was brought under the notice of the magistrates at the hearing of the respective charges.

The ground of the application was that the memorandum of the justices showed the convictions to have been under the statute of Ontario, 32 Vic. cap. 32, whereas it was contended that the conviction should have been under the Act of 1864, 27 & 28 Vic. cap. 18.

McKenzie, Q. C., for the convicting justices and the prosecutor, shewed cause.

Holmsted supported the application.

GWYNNE, J.—The point made in favor of the applicants is, that a person cannot be convicted of selling intoxicating or spirituous liquors without a license in the township of Ernestown, because, by reason of the by-law, the issuing of such license is prohibited.

In my opinion, there is nothing in these cases to justify the issuing the writ. The statute of Ontario, 32 Vic. c. 32, s. 1, enacts that "no person shall sell by retail any spirituous, fermented or other manufactured liquors, within the Province

of Ontario, without having first obtained a license authorizing him so to do," as provided by the act. The act provides that these licenses shall be issued upon the certificate of the clerks of the respective municipalities, which were empowered to pass by-laws for granting the certificates, and for declaring the terms and conditions upon which the licenses shall issue.

Now, assuming a complaint to be made for selling spirituous liquors without a license, I am not at all prepared to say that a conviction which finds that the accused is guilty of that offence is bad because he may have adduced evidence which shows not only that he sold the spirituous liquors without a license, but that he could not have obtained a license, because its issue was prohibited by a by-law.

Since the passing of 32 Vic. cap. 32, any sale of intoxicating liquors is in effect illegal as made without license, unless the accused has the protection not only of a license, but also of a by-law of the municipality authorizing the same. Why may not, then, a person be convicted under 32 Vic. cap. 32, for selling without a license, when the accused produces a by-law prohibiting instead of authorizing the issue of a license?

I am not at all prepared to say that there is anything in the point made, even if the magistrates had conclusively prepared and returned their conviction in the terms of their memorandum; but it is said that in fact they have returned a conviction which sets out the by-law and convicts the parties of selling liquor in violation of the by-law.

However, whether this be so in fact or not, I do not enquire; because it is quite apparent that the charge against the accused was of selling liquor without any legal warrant to do so, and in fact in defiance of a law forbidding it. Now, in whatever form the magistrates may have expressed their conviction of that offence, I apprehend, if an appeal be not taken away, that the conviction would be amendable under 29 & 30 Vic. cap. 50, that is, that the charge which was before the magistrate should have to be heard on the merits, "notwithstanding any defect of form or otherwise in the conviction," and, if necessary, upon the party complained against being found guilty, the conviction would be amended, so as to conform with the facts adduced. The matter then, if appeal be not taken away, being capable of being amended on appeal, I do not think that a certiorari should issue. But whether the conviction be under 32 Vic. cap. 32, or 27 & 28 Vic. cap. 18, there is no appeal from this conviction to any court. Now, it would be defeating the object of the statute if, notwithstanding they declare that there shall be no appeal, still a party should be permitted to remove a conviction for the purpose of quashing it in respect of a matter not appearing upon the conviction itself to be a defect rendering it bad, and which, if the appeal had not been taken away, would have been rectified on an appeal.

I do not think that these writs of certiorari should be granted, except in cases where there appears to be an absence of jurisdiction in the convicting justice, or a conviction, upon the face of it, defective in substance.

Here the applicants in substance admit that they have sold the spirituous liquors contrary to