

liquor in a place other than the private dwelling house in which he then resided," etc., and imposed a fine of \$500 or in default thereof 3 months' imprisonment.

It is possible to suggest many cases where sec. 88 may be applied so as to shift the burden of proof. But in the present case the proof that the place where the defendant had the liquor was his private dwelling house was clear, and the magistrate so found. How could such possession be *prima facie* proof of the offence of having liquor in a place other than his private dwelling house? The very evidence which, it is contended, shifts the onus to the accused, furnishes the proof in answer. Section 88 cannot, in the very nature of the circumstances, be deemed to apply to this case.

Rex v. Moore (1917), 13 O.W.N. 315, is not a decision upon the point raised here.

The conviction, therefore, could not stand.

It was open to the magistrate, under sec. 78, to amend the information, and, having due regard to the protection of the defendant under the concluding provisions of that section, to have convicted for an offence under sec. 40. But he had not done so; and no suggestion as to an amendment under sec. 102 had been made to the learned Judge. Had such suggestion been made, it could not have been complied with without remitting the case to the magistrate. The power to amend under sec. 102 is given only in cases where it appears that the merits have been tried. To amend by convicting for an offence under sec. 40, without giving the accused an opportunity of meeting that charge, would not be proper.

The conviction should, therefore, be quashed with the usual order for the magistrate's protection.

Reference to Rex v. Newton, ante 249.

McMILLAN V. DINGWELL—KELLY, J., IN CHAMBERS—DEC. 20.

Judgment—Action for Recovery of Land—Motion for Summary Judgment under Rule 57—Affidavit of Merits—Cross-examination—Disclosure of Triable Issue.—An appeal by the defendant from an order of one of the Registrars, holding Chambers in the place of the Master in Chambers, granting summary judgment under Rule 57. KELLY, J., in a written judgment, said that the defendant's affidavit set out that he had a good defence on the merits, and it and his cross-examination thereon shewed the nature of his defence and referred to facts and circumstances—which he deemed entitled him to defend—with sufficient particularity to indicate that there was a triable issue which could not be properly disposed