

the deceased, if he had lived; and no action will lie against the defendant, unless Wooley could have been sued.

The remedy in this case, if there be any, should have been against the servant of the defendant: secs. 12-13-40-41-42 of the act.

J. Gwynne, Q. C., contra:

A by-law did not require to be stated in this case: such a law is only required to give effect to merely local provisions. The declaration, therefore, is sufficient in charging the sale of liquor to have been contrary to the Temperance Act. See sec. 16 of this act and the form in schedule C.

The plaintiff had a right of action against Wooley under the Act of Canada, Consol. Stats. ch. 78. The defendant is by the Temperance Act liable with Wooley, which makes him is effect liable in the same way and to the same extent as Wooley; and as Wooley is liable under ch. 78, so also is the defendant.

A. WILSON, J., delivered the judgment of the court.

The Temperance Act (in sec. 1) authorizes any municipal council "to pass a by-law prohibiting the sale of intoxicating liquors and the issue of licenses therefor." Sec. 12 provides that while the by-law "continues in force, no person, unless it be for exclusively medicinal or sacramental purposes, or for *bona fide* use in some art, trade or manufacture, or as hereinafter authorized by the third or fourth sub-sections of this section, shall within such county, &c., by himself, his clerk, servant or agent, expose or keep for sale, or directly or indirectly on any pretence, or by any device, sell or barter, or in consideration of the purchase of any other property, give to any other person any spirituous or other intoxicating liquor, or any mixed liquor capable of being used as a beverage, and part of which is spirituous, or otherwise intoxicating." The third sub-section provides that licensed distillers or brewers may expose at their distilleries or breweries, and keep for sale, such liquor as shall have been manufactured thereat and no other, and may sell thereat quantities not less than five gallons at a time, to be wholly removed and taken away in quantities not less than five gallons at a time; and licensed brewers may sell bottled ale or porter of such manufacture in quantities not less than one dozen bottles of at least three half pints each at a time, to be wholly removed and taken away in quantities not less than one dozen such bottles at a time. Sub-sec. 4 makes a somewhat similar provision in favor of merchants and traders.

From the 39th to the 46th clauses inclusively they are headed "General provisions, irrespective of local prohibition."

The 40th section is: "Whenever in any inn, * * * wherein intoxicating liquor of any kind is sold, whether legally or illegally, any person has drunk to excess of intoxicating liquor of any kind therein furnished to him, and, while in a state of intoxication from such drinking, has come to his death by suicide or drowning, or perishing from cold or other accident caused by such intoxication, the keeper of such inn, * * * and also any other person or persons who, for him or in his employ, delivered to such person the liquor whereby such intoxication was caused, shall be jointly and severally liable to

an action as for personal wrong, if brought within three months thereafter, but not otherwise, by the legal representatives of the deceased person, and such representatives * * * may recover such sum, not less than \$100 nor more than \$1000, in the aggregate of any such actions, as may therein be assessed by the court or jury as damages."

The 41st section is: "If a person in a state of intoxication assaults any person or injures any property, whoever furnished him with the liquor which occasioned his intoxication, if such furnishing was in violation of this act, or otherwise in violation of law, shall be jointly and severally liable to the same action by the party injured as the person intoxicated may be liable to; and such party injured, or his legal representatives, may bring either a joint and several action against the person intoxicated and the person or persons who furnished such liquor, or a separate action against any or either of them."

By the Consolidated Statutes of Canada, ch. 78, it is provided: "Whenever the death of a person has been caused by such wrongful act, neglect or default, as would [if death had not ensued] have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although his death has been caused under such circumstances as amount in law to a felony."

The action under this act must be brought by the personal representatives of the person injured in case of his death.

In the case of death by duelling, the person inflicting the wound or injury, and all others aiding or abetting the parties, as seconds or assistants, may be proceeded against, although no action for damages could have been brought by the person whose death may be so caused, had death not ensued.

The actions under the statute must be brought within twelve months after the death of the deceased person.

This declaration does not set out, or profess to set out, a by-law of any municipal body as in operation under the Temperance Act in the township of Ashfield: it alleges that the furnishing of the liquor was done "wrongfully and in violation of the Temperance Act in the township of Ashfield, then and there being fully in force," which may be sufficiently maintained by the fact that the 41st sec., under which this action is brought, is one of a number of clauses which are by the express provisions of the act in force everywhere in the province, irrespective of local prohibition, without holding that *fully* in force means that the *full* Temperance Act was in force in the township; which would have required a by-law to have been first passed for the purpose.

The 41st section gives a right of action, if the furnishing of the liquor was in violation of that act, or otherwise in violation of law; and under this the plaintiff may rely on the violation of the local prohibition or by-law, or on the violation of the enactments which have effect irrespective of local prohibition, or on the violation of the provisions of general law, if there be any such. We do not say there are, but we think this action