

## HIGH COURT DIVISION.

KELLY, J., IN CHAMBERS.

MAY 12TH, 1920.

## REX v. SMITH.

*Ontario Temperance Act—Police Magistrate's Conviction for Offence against sec. 41 (1)—Having Intoxicating Liquor in Lodging-house—Sec. 2 (i) (i)—Liquor Procured on Prescription of Physician—Statutory Presumption of Guilt—Sec. 88—Evidence.*

Motion on behalf of the defendant, upon the return of a writ of habeas corpus and certiorari in aid, for an order for the discharge of the defendant, who was convicted by one of the Police Magistrates for the City of Toronto of an offence against the Ontario Temperance Act, and committed to the custody of the keeper of the Toronto municipal farm, upon default in payment of the fine imposed.

James Haverson, K.C., for the defendant.

F. P. Brennan, for the Crown.

KELLY, J., in a written judgment, said that the defendant was convicted on an information charging him with unlawfully having liquor in a lodging-house, in the city of Toronto, where there were more than three lodgers or boarders in addition to the keeper and his family (6 Geo. V. ch. 50, sec. 2(i) (i) and sec. 41 (1)).

On the hearing before the magistrate the only evidence submitted by the prosecution was that of a witness who swore that he found in the room occupied by the defendant in the house mentioned a bottle of whisky, and that there were more than three lodgers or boarders in the house besides the keeper and his family.

On the argument it was admitted that the accused had properly procured the liquor on a prescription properly obtained from a physician; it was also conceded that at the hearing before the magistrate it was admitted by the prosecution that the accused, having so obtained the liquor and taken it to and having it in his boarding-house or lodging-house, was not guilty of any offence until he partook of such a quantity thereof as made him intoxicated, the contention being that on that happening he lost the protection of the prescription. That was the position taken by the prosecution on the argument of the present motion as well.