

OSLER, J.A.—The defendant was indicted for keeping a common gaming house contrary to secs. 196 (a) and 198 of the Code. The former defines a common gaming house as a house, room, or place kept by any person for gain to which persons resort for the purpose of playing at any game of chance.

The evidence shewed that the defendant was the manager of a cigar shop, in the rear of which was a room to which persons, chiefly customers, commonly resorted for the purpose of playing poker. Out of the stakes which were bet on most, though not all, of the different hands, a sum of 5 cents was withdrawn and put to one side as a "rake-off" to cover the expenses of the cigars and refreshments consumed by the players. The frequenters left as late as 3, 4, or 5 o'clock in the morning.

The manager and proprietor only charged and received the fair price of the refreshments furnished to the frequenters such as would be charged in an ordinary restaurant, and the cost of the cigars sold to them; 50 to 100 of these would be consumed in the course of an evening, the profit of which would be from 2 cents to 4 cents a piece. No charge was made for the use of the room.

One Repath, an informer who had given evidence in the Police Court before the police magistrate, when defendant was committed, was not present at the trial, being abroad in the United States, and his evidence was read to the jury. It was in effect that he had repeatedly been at defendant's place playing poker, 5 cents ante and 25 cents limit, with a rake-off of 5 cents on each hand, collected by or for the defendant; that this rake-off did not include refreshments, but that refreshments were served, and the amount received by defendant would more than cover the cost of the refreshments; that he knew defendant and that he had taken about \$50 as a rake-off at one sitting of the game. This was denied by the defendant.

The Crown contended that the use of the room in question as an adjunct to the cigar shop was a colourable transaction and that the profit made out of the sale of the cigars alone was sufficient to constitute a keeping "for gain."

The defendant on the other hand urged that the indirect advantage derived from the sale of cigars was the only benefit derived from playing of the game, and that this was in the ordinary course of his business and was no infraction of the Act.

The learned junior Judge of the County Court, before whom the case was tried with a jury, told them that if the