

Anglin, J.]

REX v. SIMMONS.

[Oct. 16.]

*Criminal law—Conviction—Commitment—Habeas corpus—Proceedings anterior to conviction—Liquor License Act—Second offence—Admission of previous offence—Record—Magistrate's minute—Uncertainty—Discharge of prisoner—Excessive penalty—Power to amend.*

Although a conviction on its face appears sufficient to support the commitment of the defendant, the court will, on the return of a habeas corpus, examine the proceedings anterior to the conviction to see if they warrant his detention, and, if they do not, will order his discharge. *Regina v. St. Clair* (1900) 27 A.R. 308 followed.

The defendant was convicted on the 15th September, 1908, for selling liquor without a license; the conviction recited that the defendant had been convicted on the 17th October, 1907, of having unlawfully sold liquor without a license; and the punishment adjudged was imprisonment for four months without hard labour—the statutory penalty for a second offence. The only record in the proceedings in respect to any previous conviction was contained in an indorsement upon the information in the handwriting of the magistrate, as follows: "The defendant makes a statement that he was convicted of selling between 4 Oct. and the 14 Oct., 1907, and I find the within charge a second offence for selling. I commit the defendant to the county gaol for four months' without hard labour."

*Held*, that sub-s. 6, of s. 101, of the Liquor License Act, R.S.O. 1897, c. 245, requires that the subsequent offence and the earlier offence shall each be an offence in contravention of one of the sections numbered 49, 50, 51, 52, or 72, or an offence against some other section for which no penalty is provided except by s. 86. The admission as recorded might mean that the defendant had previously been convicted of an offence against s. 78 (2) or against s. 124 (1), or of selling on licensed premises in prohibited hours; proof or the admission of a former conviction for any of these offences would not warrant a later conviction under s. 72 being treated as a second offence under sub-s. 6 of s. 101; and this fact sufficed to render the admission of the accused as recorded by the magistrate so uncertain that it was inadequate to sustain his conviction as for a second offence; and he should be discharged from custody under the commitment.