

Counsel for the prisoner, in support of the motion, takes the following grounds:—

1st. That no demand was made of the defendant for goods whereon to levy the penalty for the non-payment of which the prisoner is committed. That the constable executing the warrant of distress did not make diligent search for such goods.

2nd. That the warrant of commitment omits the allegation: "And whereas the said John A. McGillivray has not paid the said several sums or any part thereof, although the time of payment thereof has expired," as required by form "W" in the Canada Temperance Act—form of warrant of commitment for first offence where penalty is imposed.

3rd. That it was not shewn at the trial below that the Canada Temperance Act was in force in the county within which the alleged violation of it was committed, and that in order to do so it must be shown that there was no license in force at the date of the proclamation.

The prisoner is in jail on a warrant of commitment for non-payment of a penalty imposed for violation of the second part of the Canada Temperance Act, in respect of which he had been convicted, and ordered to pay a pecuniary penalty and costs, for non-payment of which a warrant of distress was ordered, and for want of sufficient distress, commitment until the penalty and costs were paid.

The Crown produced the constable who had the distress warrant for execution. He admitted that he did not see the prisoner when he went to execute the warrant, that the defendant was not at home. He said that his barns were locked and he could see no goods whereon to levy. The counsel for the prisoner tendered evidence by a witness who was present in defendant's house while the constable was there. This witness deposed that the constable did not go in the direction of the barn on that occasion; that the barn was not locked; that there were two cows and hay in the barn that day. It was about the end of December last.

The magistrate should satisfy himself that no sufficient distress could be found, and the constable should have done