

MIDDLETON, J., IN CHAMBERS.

OCTOBER 30TH, 1920.

REX v. McEWAN.

*Ontario Temperance Act—Magistrate's Conviction of Physician for Offence against sec. 51—Prescription for Intoxicating Liquor—Evidence—Good Faith—Onus—Sec. 88—Finding of Magistrate—Motion to Quash Conviction—Notice of Motion not Served within 30 Days—Sec. 102 (2) of Act (7 Geo. V. ch. 50, sec. 33).*

Motion to quash a conviction of the defendant, by the Police Magistrate for the Town of Carleton Place, for an offence against sec. 51 of the Ontario Temperance Act, 6 Geo. V. ch. 50.

J. P. Ebbs, for the defendant.

F. P. Brennan, for the magistrate.

MIDDLETON, J., in a written judgment, said that the defendant was a medical practitioner. The offence was said to have been committed on the 20th May, 1920, and the conviction was on the 24th June, 1920. A notice of motion for an order quashing the conviction was served on the 20th July, 1920; but this was irregular and not in conformity with the Act. No return having been made to this notice, no order was made. On the 24th September, 1920, a new notice was served. This was not served within 30 days from the date of the conviction; and so, under sub-sec. 2 of sec. 102 of the Act (see sec. 33 of the amending Act of 1917, 7 Geo. V. ch. 50), the learned Judge was precluded from hearing the motion. The irregular and inoperative motion did not help, as what the statute requires is "notice of such motion," that is, of the motion before the Judge.

Upon the merits, which were fully argued, the learned Judge referred to *Rex v. Rankin* (1919), 45 O.L.R. 96, as establishing that "a physician who honestly believes that liquor is necessary for the health of his patient and prescribes it in accordance with the provisions of the Act" is not guilty of an offence. But he could not say that there was not some evidence before the Police Magistrate upon which, if he chose to attach weight to it and less weight to other evidence, he could fairly reach the finding which he made. If there is any evidence to sustain a conviction, the magistrate's tribunal is that in which it is to be weighed.

The application therefore failed.

In the circumstances, the learned Judge hoped that the matter would be allowed to end, and that the conviction might not be used as the basis for an attack on the defendant's professional standing.