

clause 3 the testator was simply expressing clearly how he desired his daughter to have the advantage of his gifts in clause 2. Consequently clause 3 prevailed—and the result was the same as if the more stringent rule were to be applied.

Costs as usual.

MASTEN, J., IN CHAMBERS.

MARCH 19TH, 1920.

*REX v. HOGAN.

Ontario Temperance Act—Magistrates' Conviction for Offence against sec. 40—Keeping Intoxicating Liquor for Sale—Taking Liquor from Express Office—Fictitious Name—Application of sec. 70—Possession of Liquor—Presumption under sec. 88—Failure to Rebut—Trial of Accused—Criminal Code, sec. 715—Accused not "Admitted to Make his Full Answer and Defence"—Consultation of Magistrates with Crown Attorney before Decision Given—Argument Addressed to Magistrates and Crown Attorney by Counsel for Prosecutor in Absence of Defendant and his Counsel—Crown Attorneys Act, R.S.O. 1914 ch. 91, sec. 8 (g)—Unfair Trial—Conviction Quashed with Costs to be Paid by Magistrates—Protection of Magistrates.

Motion to quash a conviction of Samuel Hogan by two Justices of the Peace, at the City of Kingston, on the 29th January, 1920, for that he did unlawfully keep intoxicating liquor for sale, barter, or traffic, contrary to the Ontario Temperance Act.

A. B. Cunningham, for the defendant.

Edward Bayly, K.C., for the magistrates.

MASTEN, J., in a written judgment, said that it was admitted by counsel for the magistrates that the decisions under sec. 70 of the Ontario Temperance Act made it plain that that section does not apply to this case, and that the taking of the liquor by Hogan from the express office, where it was lying, addressed to "S. Holding," did not afford ground for a conviction.

It was, however, contended that sec. 40 of the Act applied. It was not disputed that Hogan had the liquor in his house; and it was contended that, under sec. 88 (as to burden of proof) and under the decision in *Rex v. Le Clair* (1917), 39 O.L.R. 436, the possession of the liquor concerning which Hogan was being prosecuted constituted prima facie evidence that he was guilty of the offence with which he was charged; and that, as he failed to rebut this