

convicted, but reserved the question whether, upon the admissions, the defendant could be convicted as a vagrant under sec. 238 (1) of the Criminal Code: "Every one is a loose, idle or disorderly person or vagrant who,— . . . (1) having no peaceable profession or calling to maintain himself by, for the most part supports himself by gaming or crime, or by the avails of prostitution."

The case was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, J.J.A.

T. C. Robinette, K.C., for the defendant.

E. Bayly, K.C., for the Crown.

MEREDITH, J.A.:—The conviction cannot be sustained. The charge against the accused was vagrancy, in "having no peaceable profession or calling to maintain himself by, but, for the most part," supporting "himself by gaming" . . . "

The conviction is based entirely upon the admission of the accused, that he made his living, for the most part, by betting on horse races. There was no sort of admission, or evidence, of "gaming."

Gaming and betting on horse races are different things; and the difference between them, under the Criminal Code, is marked, as secs. 226 and 227 shew: the one is aimed against gaming, the other against betting, in the manner dealt with in them: and all of the provisions of the Criminal Code, touching the subject, indicate the intention of Parliament to steer clear of making mere betting a crime: see sec. 235 especially.

Having regard to the language employed in the sections of the Act to which I have referred, as well as to sec. 238, it seems plain to me that, if it had been intended to make such things as the accused admitted he had done a crime such as he was accused of, the vagrancy section of the Criminal Code, in the part from which I have quoted, would have, in conformity to other sections I have referred to, have had added to it the words "or betting" after the word "gaming." If this were not so, there would have been a great waste of energy in "barking up the wrong tree" in such cases as *Saunders v. The King*, 38 S. C. R. 382.

I would answer the question in the negative and direct that the accused be discharged.

OSLER, J.A., agreed, for reasons to be stated in writing.

MOSS, C.J.O., GARROW and MACLAREN, J.J.A., also concurred.