The
Ontario Weekly Notes

VOL. XVI. TORONTO, MAY 2, 1919 No. 7

HIGH COURT DIVISION.

MIDDLETON, J. APRIL 22ND, 1919.

RE ANGLO-AMERICAN FIRE INSURANCE CO. (No. 1).

Company—Winding-up—Report of Referee—Appeal from—Order of Referee Directing Amendment or Setting aside of Notice of Appeal and Staying Hearing of Appeal—Order Vacated as Made without Jurisdiction—Costs.

Motion by creditors of the company (in liquidation) by way of appeal from an order made by CAMERON, Official Referee, in Chambers, directing the amendment of a notice of appeal from a report made by him upon the claims of creditors in the winding-up of the company, and, in default of amendment, setting the notice aside, and directing that the hearing of the appeal should be in the meantime stayed.

The motion was heard in the Weekly Court, Toronto.
W. D. McPherson, K.C., for M. Esbert, a foreign creditor.
J. H. Moss, K.C., for another foreign creditor.
G. M. Clark and A. Cohen, for other foreign creditors.
J. H. Spence, for Canadian creditors.
A. C. Heighington, for the liquidator.
H. J. Scott, K.C., for a number of shareholders, contributories.

MIDDLETON, J., in a written judgment, said that he was clearly of opinion that the Referee to whom a winding-up is referred, subject to an appeal, is functus officio as to all matters dealt with by his report, and cannot directly or indirectly interfere with any appeal that may be had from his report.

The order should be vacated, and the contributories upon whose application it was made should pay the costs, which may be set off against any costs heretofore or hereafter allowed to the contributories, and, if they cannot be recovered, must be paid out of the fund.

MIDDLETON, J. APRIL 22ND, 1919.

RE ANGLO-AMERICAN FIRE INSURANCE CO. (No. 2).

Company—Incorporation of Insurance Company under Ontario Laws—License from Dominion—Authority to Do Business throughout Canada—Validity of Contracts of Insurance Made outside of Ontario in Respect of Property outside of Ontario.

Appeals, by persons claiming as creditors of the company, from the report of CAMERON, Official Referee, in a winding-up matter.

The appeals were heard in the Weekly Court, Toronto.

W. D. McPherson, K.C., J. H. Moss, K.C., J. H. Spence, G. M. Clark, and A. Cohen, for the claimants.

A. C. Heighington, for the liquidator.

MIDDLETON, J., in a written judgment, said that the company was incorporated by letters patent issued by the Provincial Secretary on the 16th March, 1899, and had licenses from both the Province and Dominion. Under the former it was licensed "to carry on in the Province of Ontario the business of general fire insurance," and under the latter "to transact throughout Canada the business of fire insurance."

The charter recited the desire of the corporators for incorporation "for the transaction of such kind or kinds of insurance as may be authorised by" Provincial licenses issued to the company, and they are created "a body corporate and politic," "capable of exercising all the functions of an incorporated company for the transaction of such insurance as if incorporated by a special Act of the Legislature of Ontario."

These letters patent were under the great seal of the Province and signature of the Lieutenant-Governor.

The company issued policies insuring property outside of Ontario. The insured in many instances resided out of Ontario; and the policies, though under the corporate seal and due signature of the company's chief officers, were issued and countersigned by agents out of Ontario.

In the winding-up, claims were made for losses payable under such policies, and for unearned premiums paid up to the date of cancellation by the liquidator, and for refund of premiums paid if the policies were ultra vires of the company.

All such claims had been disallowed by the Referee, and this appeal was from the disallowance.

In Canadian Pacific R.W. Co. v. Western Union Telegraph Co.

(1889), 17 Can. S.C.R. 151, Ritchie, C.J.C., stated the general principle of law (p. 155): "The comity of nations distinctly recognises the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation, and not prohibited by its charter, and not inconsistent with the local laws of the country in which the business was carried on."

In Canadian Pacific R.W. Co. v. Ottawa Fire Insurance Co. (1907), 39 Can. S.C.R. 405, it was held "that a company incorporated under the authority of a Provincial Legislature to carry on the business of fire insurance is not inherently incapable of entering, outside the boundaries of its Province of origin, into a valid contract of insurance relating to property also outside of those limits." The Ottawa Fire Insurance Company was incorporated by Ontario in the same way and under the same statute as the company now in liquidation.

There was nothing in Bonanza Creek Gold Mining Co. Limited v. The King, [1916] 1 A.C. 566, which in any way narrowed the application of this decision. There the powers of the company were found to be the powers of a common law corporation, and so somewhat wider than had been assumed by the Canadian Courts.

The question was determined by the decision of the Supreme Court of Canada: see Kettles v. Colonial Assurance Co. (1917), 35 D.L.R. 588.

The appeals should be allowed, and it should be declared that the claims should rank.

The creditors and liquidator should have their costs here and below out of the fund.

SUTHERLAND, J. APRIL 22ND, 1919.

CHAREZIN v. TUCKER.

Contract—Money Given to Woman for Immoral Purpose—Action by Donor to Recover Money—Claim Arising ex Turpi Causa—In Pari Delicto Melior est Conditio Possidentis.

Appeal by the plaintiff from the report of the Senior Judge of the District Court of the District of Algoma, upon a reference to him for the trial of the action, which was brought in the Supreme Court of Ontario. The Referee reported that there should be judgment for the plaintiff for $100 and Division Court costs with a set-off in favour of the defendant of the excess over Division Court costs of her costs incurred in the higher Court.

The appeal was heard in the Weekly Court, Toronto.

G. S. Hodgson, for the plaintiff.

G. H. Kilmer, K.C., for the defendant Annie Tucker.

SUTHERLAND, J., in a written judgment, said that the action was originally brought against Annie Tucker alone, the claim being for "money left in custody of the defendant by the plaintiff for safekeeping, $1,000," with a credit of $100 for "money returned," leaving a balance of $900 said to be due.

John Tucker, husband of Annie Tucker, was added as a defendant, but the action was dismissed as against him, and there was no appeal as to that.

It appeared from the evidence that the plaintiff, a boarder in the home of the defendants, became infatuated with Annie Tucker, and sought to seduce her. While the money in the first place was given to her with the suggestion that it was for safekeeping, the evidence which the District Court Judge gave effect to indicated that it was put into the custody of the woman for the purpose of influencing her, and a large part of it was spent by her with his consent. In the end he appeared to have made up his mind that he could not succeed in his improper advances, and then desired to get back his money. On his speaking to her about it, he was told that there was only $200 left, and this she gave him. After this, on her stating to him that she wished to buy a cow, he let her have $100 for that purpose. This $100, the District Court Judge thought, was so separated from the former transaction as to entitle the plaintiff to its recovery.

Once it appeared from the evidence, as it had been found, that the placing of the money in the woman's hands, and the permission given to her to do what she liked with it, were part of a scheme to seduce her from virtue, the claim asserted was shewn to arise ex turpi causa, and the plaintiff could not be assisted by the Court in its recovery. Both parties were at fault, and the maxim in pari delicto potior est conditio possidentis applied.

Reference to Holman v. Johnson (1775), Cowp. 341, 343; Walker v. Perkins (1764), 3 Burr. 1568; Egerton v. Brownlow (1853), 4 H.L.C. 1; Clark v. Hagar (1893), 22 S.C.R. 510; Gallagher v. McQueen (1898), 35 N.B.R. 198, 230; Farmers' Mart Limited v. Milne, [1915] A.C. 106; Broom's Legal Maxims, 8th ed. (1911), pp. 577, 578.

Appeal dismissed with costs.

LENNOX, J. APRIL 22nd, 1919.

BISSONNETTE v. PILON.

Slander — Words Imputing Criminal Offence — Housebreaking — Injury to Property—Criminal Code, sec. 539—Failure to Shew Actionable Wrong—Finding of Jury—Nonsuit—Costs.

An action for slander, trial with a jury at Cornwall.

F. T. Costello, for the plaintiff.
R. Smith, K.C., and D. A. McDonald, for the defendant.

LENNOX, J., in a written judgment, said that, on motion for a nonsuit, he allowed the case to go to the jury, reserving the question whether, if the jury found that the words were spoken and understood in a defamatory sense, they constituted an actionable wrong, that is, imputed an offence punishable by imprisonment. The jury found for the plaintiff and assessed the damages at $100.

It was objected that the alleged slanderous words, if spoken at all, were uttered in the French language, and were set out in the statement of claim in the English language only. Odgers, in his work on Libel and Slander, is not very emphatic on this point. It was contended too that the allegations were not substantially proven; there was some variance. But neither of these points was now of importance, except that it was to be noted that there was no proof of the words, "He is a house-breaker."

The house spoken of was vacant, and it was at least debatable whether it could be regarded as a "dwelling house;" it was not referred to as a dwelling house, simply as "my house;" actual entry was not charged, nor did the circumstances suggest bodily entry; no crime was committed *in* the house, nor was criminal intent charged. The house was broken into, but whether in the day or in the night was not very clear, and at all events there was nothing known to the hearers, or in the language used, that covered this point. Interpreted in the way most favourable to the plaintiff to sustain a cause of action, the most that could be urged was that what was said was the imputation of an offence under sec. 539 of the Criminal Code (injury to property). This was not actionable per se: Routley v. Harris (1889), 18 O.R. 405; Webb v. Beavan (1883), 11 Q.B.D. 609.

The action should not have been brought; but, on the other hand, the defendant did too much blabbing, and if it should cost him something he would not be unduly punished. The action should be dismissed, but, if this ended the litigation, without costs.

LENNOX, J. APRIL 22ND, 1919.

McMILLAN v. PILON.

Slander—Words Imputing Criminal Offence—Failure to Establish Actionable Wrong—Finding of Jury—Nonsuit—Costs.

An action for slander, tried with a jury at Cornwall.

F. T. Costello, for the plaintiff.
R. Smith, K.C., and D. A. McDonald, for the defendant.

LENNOX, J., in a written judgment, said that this action was tried with the Bissonnette action, supra, but if anything it was more flimsy. The publication of the alleged slander was not as widespread, for the language used did not always identify this plaintiff. For the reasons given in the other action, the learned Judge was of opinion that an actionable wrong has not been established. But the defendant did quite too much talking, and he escaped damages more by good luck than by reason of the propriety of his conduct.

The jury assessed the damages at $50. There should be judgment dismissing the action, and, if this ended the litigation, without costs.

LENNOX, J. APRIL 22ND, 1919.

TOWNSHIP OF CHARLOTTENBURGH v. BARRETT.

Principal and Surety—Fidelity-bond—Collector of Municipal Taxes—Liability of Sureties—Bond Executed by one Proposed Surety and by him for the other—Failure to Ratify Execution—Acceptance by Municipal Corporation in Good Faith—Failure to Notify Corporation—Claim against Non-Executing Party not Pressed—Liability of Executing Party—Taxes not Collected which should have been Collected—Liability of Collector but not of Surety.

Action against a tax collector and his sureties to recover the amount of taxes collected or which should have been collected in 1916.

The action was tried without a jury at Cornwall.
G. A. Stiles, for the plaintiffs.
A. L. Smith, for the defendant Barrett.
G. I. Gogo, for the other defendants.

LENNOX, J., in a written judgment, said that Barrett was the plaintiffs' collector of the taxes on the roll of 1916. He undertook to collect all the taxes on the roll that could be collected, and to account for and pay them over to the plaintiff municipality, at the latest by the 1st March, 1917.

The defendant Peter L. Bonneville delivered to the defendant Barrett a bond in favour of the plaintiff municipality, purporting to be signed by all the defendants, guaranteeing the faithful performance by Barrett of his duties as collector, and particularly that he would account for and pay over all taxes collected by the 1st March, 1917. This instrument was to be delivered by Barrett to the municipality. Zenophile Bonneville was absent at the time, and his father, Peter L. Bonneville, signed for him. Peter said that, when he gave the bond to Barrett, he told him that he would not himself be bound if his son did not ratify what he had done; but he handed it over to Barrett with all the indications of a completed instrument on its face, and it was accepted and acted upon by the plaintiff municipality in good faith and without notice or suspicion that it was not what it purported to be. When the son returned, the father told him what he had done, and it was said that the son did not concur in his father's act, but neither of them gave notice to the plaintiffs, although they must have known that the plaintiffs were permitting Barrett to collect the taxes and relying upon the bond as their security.

Both these defendants contended that the son was not liable, and judgment was not pressed for against Zenophile Bonneville, the son. Cases where the party to be benefited by a bond, promissory note, or the like, undertakes to obtain additional signatures, or to do some other act by way of completing the transaction, were clearly distinguishable, having regard to the facts of and the principles governing this case. There was no evidence clearly shewing that the collector failed to collect taxes which he should have collected; and it was not for the learned Judge to be astute to find means of increasing the burden to be borne by Peter L. Bonneville. This consideration did not apply to the defendant Barrett. The Bonnevilles were defended by the same solicitor, and he represented both as counsel. Zenophile Bonneville could not have incurred much costs. The action should be dismissed as against him, with costs fixed at $50. There should be judgment declaring that the defendant Peter L. Bonneville was liable upon the bond for such taxes as the defendant Barrett collected and failed to account for and pay over, with interest on the aggregate of these sums from the 1st March, 1917; declaring that the defendant Barrett was liable for these sums, together with such other taxes as he could but for his neglect or default have collected, with interest upon the aggregate of these sums from the 1st

March; directing a reference to the Local Master at Cornwall to take an account of the indebtedness of these defendants on the basis aforesaid and to compute and state the result; and directing that judgment be entered against these defendants for the amounts so ascertained respectively, with costs of the action and reference.

SUTHERLAND, J. APRIL 23RD, 1919.

RE CARSS.

Will—Construction—Trust-deed—Power of Appointment—Execution by Will—Defective Execution Aided by Court—"Personal Estate"—Inclusion of Real Estate according to Language Used by Testator—Legacies—Annuities — Repugnancy — Priority — Provision in Trust-deed for Life-annuity—Provision in Will for Ten-year Annuity to same Person—Cumulative Provisions.

Motion by the executor of the will of Edward Carss, deceased, for an order determining certain questions arising upon the terms of the will.

The motion was heard in the Weekly Court, Toronto.

A. W. Marquis, for the executor.

Grayson Smith, for the Northern Trust Company.

D. W. Saunders, K.C., for Mrs. George Cumming, a daughter of the testator.

H. H. Collier, K.C., for Jenny, Emily, and Bella Carss, sisters of the testator.

James A. Keyes, for Mrs. I. Marshall.

SUTHERLAND, J., in a written judgment, said that in December, 1913, the testator, who was then living in Saskatchewan, executed a deed of trust and conveyed certain lands to the Northern Trust Company, upon trust to sell and convert the lands into money, to invest the money, and to pay out of the income thereof $300 a year to Emily East during her life and the balance of the income to the settlor during his life, and after his decease to pay the balance of the income unto such persons as he might by deed appoint, and in default of such appointment and so far as any such appointment should not extend in trust for the Regina General Hospital, and upon the decease of Emily East in trust to convey unto such persons as the settlor might by deed appoint and in default of such appointment and so far as any such appointment should not extend in trust for the said hospital. In October,

1914, the testator conveyed other lands to the trust company upon the like trusts. The testator removed to Ontario, and lived for a time at Grimsby. Having gone from there to Tampa, Florida, he there made his will on the 25th December, 1914. The will was, in part, as follows:—

"I state my wish of the distribution of my property after the proper proceedings to Mrs. I. Marshall . . . $300 . . .of moneys in the Bank of Commerce. . . . My three sisters to receive the balance equally divided between Jenny, Emily, and Bella in the Bank of Commerce and Union Bank. My personal property in the West to be sold the money put at interest and divided equally between my brother Alfred . . . and my five sisters for the term of 10 years after it commenced to bear interest with this exception 40 acres more or less south of C.N.R. on section 36. 19. 22. W.R. the proceeds of which together with . . . $100 derived from the interest of my personal property a year to be paid to Mrs. George Cumming . . . $300 a year to be paid to Miss Emily East out of said interest at the end of 10 years this interest to revert to the Regina Hospital for all time to be known as from Edward Carss. I appoint James Taylor . . . executor."

Differences having arisen between the testator and his wife, a separation agreement was executed by them on the 11th January, 1915, by which he agreed to pay her half of the income arising from the trust fund.

The testator died at Tampa on the 20th February, 1915. His wife died between the 11th January and the 20th February, 1915.

The learned Judge said that he had come to the conclusion, upon a consideration of the whole will, that where the testator therein referred to his "personal estate" he meant the estate owned by him, real as well as personal, apart from the 40 acres specifically excepted, and apart from the moneys in the bank specifically dealt with, but inclusive of the realty covered by the trust-deeds.

The learned Judge was also of opinion that the will was a valid exercise by the testator of the power of appointment referred to in the trust-deeds. It was not a failure to execute, but, at the worst, a defective execution of, the power: White & Tudor, L.C. in Eq., 8th ed., vol. 2, p. 296; Tollett v. Tollett (1728), 2 P. Wms. 489; Farwell on Powers, 3rd ed., p. 380; Bruce v. Bruce (1871), L.R. 11 Eq. 371.

The provision in the trust-deeds for payment to Emily East of $300 a year for life and the legacy to her in the will of $300 a year for 10 years were to be regarded as cumulative: Hawkins on Wills, 2nd ed. (1912), p. 355, and cases there referred to.

Where two parts of a will are repugnant to each other, the

later should be accepted: In re Bywater (1881), 18 Ch.D. 17, 19, 20; In re Williams (1895), 43 W.R. 375. The legacies of $100 a year to Mrs. George Cumming and $300 to Emily East have, upon that principle, priority over the legacies to the brother and sisters.

At the end of the 10 years, these two legacies will cease, as also those to the brother and five sisters, and the "interest" will "revert" to the Regina Hospital, with the qualification that the income arising from the trust-fund will continue to be charged with the annuity of $300 for the life of Emily East.

Order declaring accordingly; costs of all parties out of the estate.

MIDDLETON, J. APRIL 24TH, 1919.

RE RANTON.

Will—Construction—Bequest to "any Daughter Unmarried"—Widowed Daughter not Included—Distribution of Residue among Members of Class—Division per Capita.

Motion by the executors of the will of A. H. Ranton, deceased, for an order determining certain questions in reference to the distribution of the testator's estate, arising upon the terms of the will.

The motion was heard in the Weekly Court, Toronto.

H. R. Frost, for the executors.

J. D. Bissett, for the widow.

A. R. Hassard, for Jennie Partridge and her six daughters.

J. Gilchrist, for the testator's brother and his two daughters.

F. W. Harcourt, K.C., Official Guardian, for the infants.

MIDDLETON, J., in a written judgment, said that two questions remained for determination:—

(1) Do the words "any daughter unmarried (at my death) of my brother W. J. Ranton" include a daughter who was then a widow?

The cases all shew that the primary meaning of the word "unmarried" is, "never having been married," but this meaning may be easily displaced by anything in the will indicating that the testator meant "not having a husband" (or wife). Here the will was absolutely without colour, and the words must have their primary meaning. In re Collyer (1907), 24 Times L.R. 117, contains a discussion of most of the cases.

(2) The second question was, whether the "daughters" of

Jennie Partridge who were to share in the residue took one share among them or took per capita.

The cases upon this were also quite clear and the will itself was free from difficulty. The residuary estate was to be divided "equally among" a class or body of persons described, "my brother," "my sister," "her daughter," &c. As soon as it appeared that any individual came within the class, that individual took an equal share. The division was on a basis of equality.

Order declaring accordingly; costs out of the estate.

MIDDLETON, J. APRIL 25TH, 1919.

RE TEMPLE.

Will—Construction—Effect of Codicil—Change in Disposition of Residuary Estate—Gift of Residue Made Subject to Legacies and other Benefits.

Motion by the executor and trustee under the will of Gertrude L. Temple, deceased, for an order determining certain questions with regard to the distribution of her estate, arising upon the terms of the will and a codicil thereto.

The motion was heard in the Weekly Court, Toronto.

W. Lawr, for the executor and trustee.

J. J. Maclennan, for Arthur Temple.

A. J. Anderson, for Cuthbert and Marion Temple.

J. J. Smith, for Ida Dunbar.

F. W. Harcourt, K.C., Official Guardian, for the infants.

MIDDLETON, J., in a written judgment, said that, by the will, after certain bequests of jewelry, the testatrix provided for two contingencies: "Should my father survive me" the residue goes to him "for his own use absolutely," "but in event of my father having predeceased me" then the residue goes to her half brother and cousin upon certain trusts—first to pay certain legacies, and the "remainder" to a brother and sister equally.

The codicil, prepared some years later, created some difficulty, but the learned Judge retained the view expressed upon the argument, that it substituted for the residuary provisions found in the will a gift of the residue to the testatrix's brother Arthur, subject to the father's right to live in the house during his life, but that this gift to Arthur was also subject to the legacies given by the codicil. The change in the residuary disposition, standing

alone, would have defeated the pecuniary legacies—so would the survivorship of the father—but the mere fact that in the codicil the giving of each of the legacies was prefaced by the statement—"Instead of the $—— to —— I bequeath to him $——"—did not in any way detract from the absolute character of the gift.

Order declaring that Arthur Temple takes the residuary estate subject to the bequests of jewelry, the legacies given by the codicil, and the right of the father given by the codicil.

Costs out of the estate.

MIDDLETON, J., IN CHAMBERS APRIL 25TH, 1919

REX v. BANNI.

Inland Revenue Act—Unlicensed Distilling—Magistrate's Conviction for Offence against Act—Summary Prosecution Authorised by Act, R.S.C. 1906 ch. 51, secs. 32, 33—Defendant Having in his Possession "Mash or Wash" contrary to Provisions of Act—Evidence—Saccharine Matter Producing "Wash" Suitable for Manufacture of Spirits—Secs. 3 (e), (h), 180 (e), 199, 204—Onus.

Motion to quash a conviction of the defendant, by the Police Magistrate for the City of Fort William, for that the defendant had in his possession "mash or wash," contrary to the provisions of the Dominion Inland Revenue Act, R.S.C. 1906 ch. 51.

J. Haverson, K.C., for the accused.
W. G. Thurston, K.C., for the Crown.

MIDDLETON, J., in a written judgment, said that it was urged that the proceedings were irregular in that the provisions of Part XVI. of the Criminal Code, relating to the summary trial of indictable offences, had not been followed. But the Inland Revenue Act (secs. 132 and 133) provides for summary prosecution with respect to offences created by that Act.

It was more strenuously argued that, upon the evidence, an offence against the Act was not disclosed.

The defendant placed raisins in a hogshead with water; the saccharine matter contained in the raisins induced fermentation; and a liquor containing a substantial quantity of alcohol was the result. This was consumed upon the premises by foreigners, Italians and Galicians, and resulted in intoxication and disorder.

It was admitted that there was no distillation of the mash; but the fermented liquor was consumed.

By sec. 3 (*e*) "distillery" includes, inter alia, any place or premises where any process of fermentation for the production of wash is carried on. "Wash" is defined by clause (*h*), and in the case of distilleries it includes "all liquor, fermented or unfermented, made in whole or in part from grain, malt or any saccharine matter." Section 180 (*e*) makes it an offence, inter alia, for any person without a license to have in his possession "any beer or wash suitable for the manufacture of spirits." Section 204 makes it an offence for any person without a license to brew "any beer or other fermented liquor, except for the use of himself or his family, as by this Act provided."

It was argued that the offence, if any, here fell within sec. 204, and that it did not appear that the brew in question was not for the use of the accused or his family, and that the offence did not fall within the provisions of sec. 180 (*e*).

These two sections deal with entirely different matters. The earlier prohibits entirely the having of beer or wash suitable for the manufacture of spirits. Section 204, on the other hand, relates to the actual brewing of beer or other fermented liquor, and excepts from its operation such brewing for the use of the individual or his family, as is permitted by the Act. This exception is found in sec. 199, which requires due notice of the possession of the utensils necessary for brewing to be given to the Department at Ottawa; it is confined to the production of domestic beer, and is not applicable to mash or wash which is suitable for the manufacture of spirits.

On the facts of this case, the magistrate could only come to the conclusion that the mash found on the defendant's premises, coumpounded of raisins and probably other material, was one which contained saccharine matter and produced a wash suitable for the manufacture of spirits, and there could be no possibility of this being regarded as the brewing of beer for domestic use such as is permitted by the Act. Apart from this, the onus of establishing the exception would be upon the accused, and there is no suggestion that any notice of the intention to brew had been given by him to the Department at Ottawa.

Motion dismissed with costs.

MIDDLETON, J., IN CHAMBERS. APRIL 25TH, 1919.

*REX v. AVON.

Criminal Law—Keeping Disorderly House—Summary Trial and Conviction by Police Magistrate—Sentence—Imprisonment for one Year—Power of Magistrate Exceeded—Criminal Code, secs. 228, 773 (f), 774, 777, 781—Refusal to Discharge Defendant upon Habeas Corpus—Amendment of Conviction by Reducing Term of Imprisonment—Powers of Court under secs. 754 and 1124 of Code—Conviction and Proceedings before Magistrate Brought before Court but not on Certiorari—Objection to Procedure before Magistrate—Absence of Summons—Defendant Appearing and Pleading—Objection not Open on Habeas Corpus—Waiver.

Motion, upon the return of a habeas corpus, for the discharge of Luigi Avon, convicted by the Police Magistrate for the City of Guelph, for that he, the defendant, did, on the 28th March, 1919, at Guelph, unlawfully keep a disorderly house, and sentenced to one year's imprisonment in the Ontario Reformatory at Burwash.

No certiorari in aid had been issued, but the proceedings before the Police Magistrate were before the Judge upon the hearing of the motion.

R. L. McKinnon, for the defendant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., in a written judgment, referred first to the contention that the defendant, though he appeared before the Magistrate, and was charged before him for the offence of keeping a disorderly house, and pleaded to the charge, was not duly summoned. This ground, the learned Judge said, was not open upon a motion to discharge upon a habeas corpus; and, besides, it is competent for an accused person to waive any summons and appear before the magistrate and plead; and, when this is done, he cannot upon conviction set up any defect in the procedure bringing him before the tribunal for trial; so that, even if the Judge should go behind the conviction, the defendant would not be benefited. There was no doubt, upon the evidence, of the guilt of the defendant.

As to the propriety of the sentence imposed, the learned Judge referred to secs. 228, 773 (*f*), 774, 777, 781 of the Criminal Code, and said that, reading these provisions together, if, instead of proceeding by indictment, the Crown chooses to proceed under Part XVI. of the Code, and to seek a summary trial of that which

* This case and all others so marked to be reported in the Ontario Law Reports.

is an indictable offence, the accused will, by sec. 774, be precluded from objecting, and the jurisdiction of the magistrate to deal with the case will be absolute, but the consequence of conviction will be the penalty found in sec. 781, imprisonment "not exceeding 6 months," which is different from that found in the section creating the offence, and which is to be imposed in the event of guilt being found upon an indictment—"liable to one year's imprisonment" (sec. 228). That was the view of the Manitoba Court of Appeal in Rex v. Shing (1910), 17 Can. Crim. Cas. 463.

The penalty was, therefore, excessive, but the defendant was not entitled to his discharge. In this respect the learned Judge did not agree with the Court which decided Rex v. Shing—he preferred the decision of the Supreme Court of Alberta in Rex v. Crawford (1912), 20 Can. Crim. Cas. 49. The powers of amendment given by secs. 754 and 1124 of the Code should be exercised. It was true that those powers are not exercisable upon a motion to discharge upon the return of a habeas corpus, but only on motion when the conviction is before the Court upon a certiorari. Nevertheless, effect should be given to the intention of the Legislature to prevent a guilty person escaping punishment by reason of an error of the magistrate. In an ordinary case, the decision should be delayed for the purpose of allowing the Crown to bring the conviction before the Court upon certiorari. But here the conviction and the proceedings before the magistrate were already before the Court, and it would be idle to go through the form of sending them back to the magistrate to be brought up again on certiorari; and, therefore, the conviction should be amended by reducing the sentence to imprisonment for 6 months, a proper warrant should issue upon the amended conviction, and the defendant should be remanded in custody thereunder.

In all the circumstances, it was not a case for costs.

SUTHERLAND, J., IN CHAMBERS. APRIL 25TH, 1919.

REX v. KALLAS.

Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41 (1) of 6 Geo. V. ch. 50—Having Liquor in Unlawful Place—Boarding-house—Clause (a) of sec. 41 (1), Added by 7 Geo. V. ch. 50, sec. 10—Motion to Quash Conviction—Objections to Conviction—Defendant not Allowed Counsel and not Allowed to Adduce Evidence—Failure of Objections on Facts—Absence of Evidence of Defendant Having Liquor in Place Named in Information—Evidence that Defendant had Liquor in Public Street—Effect of sec. 78 of Principal Act—Amendment not Made or Suggested by Magistrate—Prima Facie Case—Onus—Secs. 85, 88—Conviction Quashed.

Motion to quash the conviction of the defendant by the Police Magistrate for the City of Brantford, upon an information for that the defendant unlawfully had liquor in an unauthorised place, namely, 17 Scarfe avenue, in the city of Brantford, a boarding-house where there are more than three boarders, contrary to the provisions of the Ontario Temperance Act, sec. 41.

Section 41 (1) of the Act, 6 Geo. V. ch. 50, provides that no person shall have or keep or give liquor in any place other than in the private dwelling-house in which he resides, without having a license; and clause (*a*), added by sec. 10 of 7 Geo. V. ch. 50, provides that "any person who drinks liquor in a place where such liquor cannot lawfully be kept shall be deemed to have liquor in contravention of this section."

A. R. Clute, for the defendant.
J. R. Cartwright, K.C., for the Crown.

SUTHERLAND, J., in a written judgment, said that the first objection was that the defendant was not permitted to have counsel. There was nothing on the face of the proceedings to shew that he represented to the magistrate that he had no counsel or requested a delay of the trial to retain counsel. The motion failed on this ground.

The second point was that the defendant was not given any opportunity on the hearing to adduce evidence on his own behalf. The proceedings shewed that he did testify on his own behalf, and the proceedings did not disclose any request on his part to offer further evidence or obtain delay to produce it. This ground failed also.

Thirdly, it was contended that there was no evidence to sustain

the conviction. This was strictly true if the evidence must be confined to the charge laid in the information, because it did not disclose that the defendant unlawfully had liquor in the alleged unauthorised place, 17 Scarfe avenue.

It was contended by the Crown that, as the record disclosed evidence of a breach of the Act on the part of the accused in having or drinking liquor in an unlawful place, viz., in a certain street described in the evidence, the conviction was sustainable upon amendment of the information under sec. 78 of the Act of 1916. The proceedings, however, did not shew that the magistrate either made or even suggested such an amendment, nor that the defendant was given an opportunity to consider whether he would be misled thereby and whether an adjournment was necessary. The magistrate certified that the defendant admitted that the street described was in the city of Brantford.

There was evidence that the defendant drank whisky in the street; and, under secs. 85 and 88 of the Act of 1916, the onus was upon the defendant.

A prima facie case of a violation of the Act was made out; but, the amendment not having been made under sec. 178, and the procedure indicated in that section not having been followed, the learned Judge, with some hesitation, concluded that the conviction must be quashed, but without costs.

BROWN v. DENNON—LENNOX, J.—APRIL 19.

Contract—Rental of Dredging Plant—Claim for Balance—Overpayment—Counterclaim—Set-off—Costs.]—The plaintiffs sued to recover $1,212.21, the balance of the rental of a dredging plant for 313 days at $18 a day, and damages at the rate of $18 a day for 147 days, $2,446: total, $3,658.21. The plaintiffs, at the opening of the trial, asked for leave to add a claim for loss of profits. The defendants counterclaimed to recover for overpayments, $774; loss of the use of scow No. 1, $380; and money expended on repairs, $764.33: total, $1,918.33. The defendants also claimed a right to set off a claim for rent of a scow when one furnished by the plaintiffs became useless. The action and counterclaim were tried without a jury at Peterborough. LENNOX, J., in a written judgment, after discussing the evidence, said that the plaintiffs had been paid more than they were justly entitled to, but the defendants definitely took their position, and from that position they should not be allowed to recede merely because the plaintiffs subsequently made an unfounded and unsuccessful claim. The costs of the trial were not increased by the counterclaim. The action should be dismissed with costs, including the fees of all

witnesses called at the trial by the defendants; and the counterclaim should be dismissed without costs. Joseph Wearing and J. A. O'Brien, for the plaintiffs. E. G. Porter, K.C., for the defendants.

MORRISON v. CONNOR—LENNOX, J.—APRIL 22.

Fraud and Misrepresentation—Sale of Farm—Representation as to Acreage—Failure to Prove Fraud or Concealment—Dismissal of Action for Rescission or Damages.]—Action for a declaration that a certain agreement between the plaintiff and the defendant for the purchase by the plaintiff and sale by the defendant of a farm and some chattels was void on account of misrepresentations made by the defendant, and for damages. The action was tried without a jury at Cornwall. LENNOX, J., in a written judgment, said that from an advertisement offering the farm for sale, the plaintiff thought it consisted of about 97 acres; the farm was in fact only 64 acres; but the plaintiff saw it and had the opportunity of measuring it himself, was told by the defendant that he did not know the acreage, and signed the agreement without having a measurement made, and with the uncertainty as to quantity in his mind. The land was described in the agreement (without specification as to quantity) as the east half of lot 15 in the 3rd concession, excepting therefrom 3 acres on the corner, described by metes and bounds. After discussing the evidence, the learned Judge found that there was no fraud or misrepresentation, no concealment of anything the defendant was bound to disclose; that the statements of the defendant were true and were such as should have led the plaintiff to inquiry and investigation, unless he decided to purchase the property as it stood, which in fact he did. Rescission would, in any event, be out of the question, as the parties could not be restored to their original positions. Damages or compensation the plaintiff was not entitled to. Action dismissed with costs. G. A. Stiles, for the plaintiff. W. B. Lawson, K.C., for the defendant.

IMPORTANT TO SOLICITORS.

Attention is drawn to sec. 1 of the Ontario Statute Law Amendment Act, 1918, 8 Geo. V. ch. 20, by which "unless otherwise provided therein" a statute "shall come into force and take effect on the 60th day after the day of the date of the assent or signification, as the case may be."

Assent to the enactments of the Ontario Legislature at the session of 1919 was given on the 24th April, 1919.