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HIGH COURT DIVISION.

Middleton, J., in Chambers. September 9th, 1915.

*REX v. WEST.

Criminal Law—Obstructing Peace Officer—Criminal Code, sec. 169 — Summary Conviction by Magistrate — Indictable Offence — Option of Crown—Procedure — Conviction by Police Magistrate—Secs. 773 (e) and 778 of Code.

Motion, upon the return of a habeas corpus and certiorari in aid, for the discharge of the defendant from custody under a warrant of commitment pursuant to a conviction for obstructing a peace officer in the execution of his duty, made by the Police Magistrate for the Town of Wiarton.

G. H. Kilmer, K.C., for the accused.
Edward Bayly, K.C., for the Crown.

Middleton, J., said that sec. 169 of the Criminal Code created the offence, and gave the Crown the right either to try summarily, when a less severe punishment might be inflicted, or, if the Crown thought the offence serious enough to warrant an indictment, the accused might, at the Crown's election, be prosecuted as for an indictable offence, with the result that he had the right of election afforded by sec. 778, and upon conviction more serious punishment might follow. The right to choose the mode of prosecution is a right given to the Crown, and not the right of the accused. His sole right is to select the tribunal to try him if the Crown elects to prosecute for an indictable offence.

Section 773 (*e*) of the Code mentions this particular crime in the catalogue of indictable offences which may be tried sum-

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

marily; but the whole of Part XVI. of the Code, secs. 771 to 799, relates solely to the trial of indictable offences, and sec. 773 (*e*) must relate to cases where the charge is laid as an indictable offence.

Regina v. Crossen (1899), 3 Can. Crim. Cas. 152, a Manitoba case, and Rex v. Carmichael (1902), 7 Can. Crim. Cas. 167, a Nova Scotia case, not followed.

Rex v. Nelson (1901), 4 Can. Crim. Cas. 461, a British Columbia case, approved.

The defendant was rightly tried under the summary convictions procedure; and there was some evidence which, if believed, justified his conviction.

The defendant was remanded to custody.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 9TH, 1915.

*RE REX v. WHITE.

Criminal Law—Police Magistrate—Adjournment — Jurisdiction —Criminal Code, sec. 722—Trial de Novo—Prohibition.

Motion by Elizabeth White, the defendant, for an order prohibiting the Police Magistrate for the City of Toronto from taking any further proceedings against her upon a charge of keeping a common betting-house.

On the 24th June, 1915, evidence upon the charge was taken before the Police Magistrate; the defendant was then "remanded for trial till called on." On the following day, a summons was served upon the defendant calling upon her to appear before the Magistrate to "receive judgment upon" the charge. Upon the return of that summons, the Crown proposed to give further evidence against the defendant.

T. H. Lennox, K.C., for the defendant.
J. R. Cartwright, K.C., for the Crown.

MIDDLETON, J., said that the hearing on the 24th June was intended to be a full and complete trial. The evidence of the Crown was heard; the accused was called upon for her defence and gave her evidence. The evidence which it was now sought to give was not then tendered, nor was it known to the Crown, and, if admitted against the accused, was evidence in

chief and not in reply. What was really intended was to commence de novo and try the prisoner again upon this further evidence—a jurisdiction which the magistrate does not possess.

The adjournment was not such an adjournment as is contemplated by sec. 722 of the Criminal Code.

If the magistrate is prepared to find guilt, but, in the circumstances, does not think it proper that punishment should be imposed, power is given to him to suspend sentence (in certain cases); but sentence cannot be suspended until there is an adjudication of guilt. There is no power to adjourn the trial merely because the evidence for the Crown is unsatisfactory and inconclusive; in that case the prisoner is entitled to an acquittal.

Prohibition granted.

MIDDLETON, J. SEPTEMBER 10TH, 1915.

RE DURRELL.

Will—Construction—Specific Bequest of Chattel—Direction by Codicil that Chattel be Buried with Testatrix—Invalidity—Pecuniary Legacies—Failure of Assets—Administration of Estate—Payment of Debts—Legacies Charged on Realty—Primary Resort to Residue of Personalty—Costs.

Motion by the executors, upon originating notice, for an order determining questions arising upon the will of Margaret Jane Durrell, deceased.

By her will the testatrix gave a certain diamond ring to her sister Maria Hendron, who was also the residuary legatee of her personal property. She then gave several pecuniary legacies, and directed the erection of a monument over her grave. She next gave the residue of her real and personal property to her executors, and directed them to sell the real property and to divide the proceeds, after payment of the legacies, equally among her sister and two brothers. Although there was a second residuary bequest of the personal estate, there was no direction to the executors concerning it. This will was made on the 24th March, 1914. On the 2nd April, by a codicil, the testatrix directed that her diamond ring be buried with her, and she gave certain other pecuniary legacies. The testatrix left some realty, heavily incumbered, and the surplus from this real

estate was insufficient to pay her debts; so that there would be nothing for the legatees. The diamond ring was not buried with the testatrix, but was removed from her corpse by the sister before interment, and the sister claimed to be entitled to retain it.

D. O. Cameron, for the executors and for Maria Hendron personally.

T. N. Phelan, for John Wainwright, brother of the testatrix.

M. Wilkins, for the other legatees.

Middleton, J., said that, if the direction in the codicil revoked the specific gift contained in the will, even though the direction in the codicil should itself be invalid, the sister would then take it under the residuary gift of the personalty; but this would be called upon to abate before the specific legacies in the order of administration.

This motion was launched upon the theory that the debts would not require this ring to be sold to pay creditors; and the contest was between the pecuniary legatees and the sister.

Two questions appeared to be involved: first, what was the effect of the direction found in the codicil; secondly, if it was invalid, did it revoke the specific gift to the sister?

The proper conclusion was that the direction contained in the codicil was invalid in law. A testator has the power to make a gift of personal property, but the gift implies the existence of a donee. A direction that property is to be buried or destroyed falls short of being a gift. It is not such a disposition of the property as is recognised by law. The ring, therefore, passed to the sister under the gift to her. This gift had not been revoked by any other disposition of the property; and she was, therefore, entitled to it under the specific bequest; and the pecuniary legatees could not call upon her to sacrifice a chattel specifically devised to her, to pay their legacies which fail for lack of assets.

Another question arising on the will was, whether the proceeds of the real estate should be resorted to for payment of debts in priority to the personal property passing to the sister under the residuary devise. The legacies were made a charge upon the proceeds of the sale of the land, and the effect of this was to make the residue of the personal property primarily subject to the payment of the debts.

If there was any estate other than that specifically devised which would not be required for payment of the testator's debts, the costs of this motion should be paid out of it; otherwise, there should be no costs.

MIDDLETON, J., IN CHAMBERS. SEPTEMBER 11TH, 1915.

*REX v. SCAYNETTI.

Liquor License Act—Keeping Intoxicating Liquor for Sale—Magistrate's Conviction — Motion to Quash — Evidence — "Liquor"—"Beer"—R.S.O. 1914 ch. 215, sec. 2(i)—Judicial Knowledge.

Motion to quash a conviction of the defendant under the Liquor License Act, R.S.O. 1914 ch. 215, upon the ground that the evidence disclosed no offence, because (1) it was not shewn that the beer found on the defendant's premises was intoxicating liquor, and (2) the convicting magistrate could not, upon the evidence, infer that the beer was kept for sale.

M. J. O'Reilly, K.C., for the defendant.
Edward Bayly, K.C., for the Crown.

MIDDLETON, J., said that there was evidence upon which the magistrate could infer that the beer was kept for sale; whether another tribunal would arrive at the same conclusion upon the same evidence was not the question.

The evidence disclosed that beer was sold and being consumed. There was no contention before the magistrate that the beer was not in fact intoxicating—it was a brand of lager labelled "Regal." The defendant asserted that he purchased the beer as the agent of his boarders and for them, and he contended that this did not in fact constitute an offence against the Act. Apparently the magistrate discredited this story.

By the Act, sec. 2(*i*), "liquor" includes all spirituous and malt liquors, and all combinations of liquors and drinks and drinkable liquids which are intoxicating; and any liquor which contains more than $2\frac{1}{2}$ per cent. of proof spirits shall be conclusively deemed to be intoxicating. It is not necessary to prove that the liquor was intoxicating if it was shewn that it was a spirituous or malt liquor. Looking at the definitions of "beer" in the Concise Oxford Dictionary and the Century Dictionary, beer is both a spirituous and a malt liquor.

The learned Judge has no sympathy with the view that there is no such thing as judicial knowledge. The true principle is indicated by Eyre, C.B., in Attorney-General v. Cast-Plate Glass Co. (1792), 1 Anst. 39, 44.

Application dismissed without costs.

MIDDLETON, J. SEPTEMBER 11TH, 1915.

LEVINSON v. GAULT AND MACKEY (No. 1).

Payment—Voluntary Payment of Debt of Another—Absence of Request—Right to Recover from Debtor—Judgment—Admissions on Examination for Discovery—Rule 222—*Costs.*

Appeal by the defendants from an order of the Local Judge at Kenora allowing the plaintiff to enter judgment against the defendants for $1,990.63, upon admissions made by the defendant Mackey in his examination for discovery in the action.

A. McLean Macdonell, K.C., for the defendants.
Harcourt Ferguson, for the plaintiff.

MIDDLETON, J., said that the plaintiff introduced the defendants to a bank as would-be customers, and the bank accepted them. Later, the defendants appearing to be in an unsatisfactory financial condition, the manager of the bank reproached the plaintiff, and the plaintiff in consequence made himself liable to the bank for the defendants' account, and the bank sued him upon the document signed. In that action, he denied liability, but the finding was against him; and he secured the bank not merely for the indebtedness of the defendants, but for the bank's costs of that action. In this action he sued the defendants for the sums so secured. The plaintiff, when he first made himself liable to the bank, did so without any request on the part of the defendants, and contrary to their wishes; there was no assignment to the plaintiff of the bank's claim; and it was contended that there was no true contract of suretyship, and that the plaintiff's voluntary assumption and payment—if the security was equivalent to payment—of the indebtedness of the defendants to the bank did not confer upon him any right of action against them.

Upon the defendant Mackey's examination for discovery, he said that he considered himself morally liable to the plaintiff for the debt paid, but not for the costs.

The learned Judge was of opinion that that statement was not a consent on the part of Mackey to judgment against him for the principal sum, nor an admission within the meaning of Rule 222—quite apart from the question of Mackey's authority to bind his co-defendant—and that there was nothing to take the case out of the established rule that the voluntary payment by one of the debt of another, without his request, gives no claim for money paid against the person whose debt is discharged.

Assuming the accuracy of the defendant Mackey's statements, which the plaintiff should assume when he moves upon admissions, there was no necessity for sending the case down for trial.

Appeal allowed and action dismissed, but without costs.

TRAVATO V. DOMINION CANNERS LIMITED—CLUTE, J., IN CHAMBERS—SEPT. 2.

Writ of Summons—Failure to Serve—Negligence of Solicitor —Renewal after Expiry of Year—Workmen's Compensation for Injuries Act, sec. 9—Time for Bringing Action — Statutory Bar.]—Appeal by the defendants from the order of Mr. N. F. Paterson, K.C., Registrar, holding Chambers in lieu of the Master in Chambers, ante 7, renewing the writ of summons and allowing the plaintiffs to serve it, although more than a year had elapsed since the issue, and although the right of action, under the Workmen's Compensation for Injuries Act, R.S.O. 1914 ch. 146, sec. 9, would be barred unless saved by the continuance of the action begun by the writ the renewal of which was allowed by the Registrar's order. CLUTE, J., read a short judgment in which he stated the facts and referred to Doyle v. Kaufman (1877), 3 Q.B.D. 7, 340, and Hewett v. Barr, [1891] 1 Q.B. 98. Having regard to these cases, the learned Judge said, the renewal of the writ could not be supported. Appeal allowed and renewal set aside, without costs. J. W. Morison, for the defendants. A. W. Langmuir, for the plaintiff.

CRAWFORD V. TRUAX—TRUAX V. CARGILL—MIDDLETON, J.—SEPT. 9.

Parliamentary Elections—Controverted Election Petition—Money Paid into Court as Security—Petition not Brought to Trial—Payment out—Consent of Respondent.]—Motion in each

case for payment out of Court of the sum of $1,000 paid in as security under sec. 14 of the Dominion Controverted Elections Act, upon the filing of a petition and cross-petition in respect of a Dominion election. The petitions were filed after the Dominion elections held about four years ago. No trial had taken place; and, owing to the lapse of time, no trial, could take place. The $1,000 paid in as security in each case had remained in Court, and the respondent in each case assented to its being repaid to the petitioners or their nominees. MIDDLETON, J., said that he could see no reason why, in these circumstances, the money should be retained; and the orders sought should, therefore, be made. C. M. Garvey, for the petitioners in the first case and respondent in the second. A. H. Beaton, for the petitioner in the second case and respondent in the first.

LEVINSON V. GAULT AND MACKEY (NO. 2)—MIDDLETON, J.—SEPT. 11.

Injunction—Preservation of Assets Subject to Execution—Judgment Set aside—Continuance of Interim Injunction pending Appeal—Practice—Costs.]—Motion by the plaintiff to continue an interim injunction granted for the purpose of preserving assets sought to be taken in execution in satisfaction of the judgment in Levinson v. Gault and Mackey (No. 1), which judgment was set aside by MIDDLETON, J. (ante, 14). MIDDLETON, J., said that, if the order setting aside the judgment was accepted as final, the present motion should be turned into a motion for judgment and the action be dismissed without costs. If an appeal is at once launched and set down, the interim injunction granted should be continued until the appeal is heard and disposed of. If the appeal is unsuccessful, the action should then stand dismissed without costs; if it succeeds, the injunction should be further continued until the trial. The hearing of the appeal, if any, should be expedited. Harcourt Ferguson, for the plaintiff. A. McLean Macdonell, K.C., for the defendants.