*Privy Council Appeal No. 97 of 1921.*

**The King** - - - - - - - - - *Appellant*

*v.*

**Nat Bell Liquors, Limited** - - - - - - - *Respondents*

FROM

**THE SUPREME COURT OF CANADA AND FROM THE SUPREME COURT OF ALBERTA.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 7TH APRIL, 1922.

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*Present at the Hearing:*

LORD BUCKMASTER.
LORD ATKINSON.
LORD SUMNER.
LORD WRENBURY.
LORD CARSON.

[*Delivered by* LORD SUMNER.]

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On the 7th October, 1920, an information was laid at Edmonton, Alberta, against the respondents, Nat Bell Liquors, Limited, before a magistrate of that province, charging them with unlawfully keeping for sale a quantity of liquor contrary to the Liquor Act, that is to say for sale within the province. The offence, which is created by the Alberta Liquor Act of 1916, Section 23 is one triable by a Court of Summary Jurisdiction.

The respondents were convicted and were fined $200. The conviction, which is in the form provided by the Criminal Code (R.S.C. 1906 amended to 1920) ran, that Nat Bell Liquors, Limited, "is convicted . . . for that they, the said Nat Bell Liquors, Limited, on the 1st and 2nd days of October, 1920, at Edmonton, did unlawfully keep for sale a quantity of liquor." The quantity of liquor was the whole of the respondents' stock of whisky in

the warehouse in question, though only one case of twelve bottles was actually sold. By a subsequent order, dated the 4th November, 1920, the magistrate declared the whole of it, and the vessels in which it was contained, to be forfeited to the Crown. Nothing turns on the form of this order.

Thereupon the now respondents moved, by way of *certiorari*, to quash both orders. In accordance with Rule 4 of the Crown Practice Rules of the Supreme Court of Alberta, the magistrate returned the conviction and the order of forfeiture and with them the information and the evidence taken at the hearing in writing as required by statute. Hyndman J. quashed the convictions, and on appeal his judgment was affirmed by the Supreme Court of Alberta (Harvey, C.J., dissenting).

The appellant then appealed to the Supreme Court of Canada, which dismissed the appeal formally, affirming without reasons given the Registrar's decision that any appeal was incompetent, the proceedings having been " on a criminal charge " within the meaning of the Supreme Court Act. Against this decision an appeal has been taken to their Lordships' Board, but it has become of minor importance, seeing that, by special leave subsequently granted by His Majesty in Council, an appeal has been lodged against the decision of the Supreme Court of Alberta, quashing the conviction and the order for forfeiture, and this is the principal matter now to be decided.

Both before Hyndman, J., and before the Supreme Court of Alberta the evidence was elaborately examined and weighed. The judgments both set out its general effect and frequently quote it *in extenso*, and it will be convenient, in order to explain what follows, to summarise them.

Nat Bell Liquors, Limited, were incorporated by Dominion charter in 1917, and did a very large business in Edmonton as exporters of liquor. They held a licence from the Attorney-General of Alberta under the Export Liquor Act and its amendments and complied with the requirements of that Act. The officers of the company in control of the business were Nathan Bell and W. Sugarman. They had a warehouse, fully stocked, from which liquor was despatched for export in accordance with orders received, and their warehouseman, one Angel, was strictly commanded by his superiors to have nothing to do with any local sale or delivery, but to observe carefully all the provisions of the Liquor Act.

The police determined to test the business actually done by the respondents. They employed for this purpose, as a temporary detective-constable and *agent provocateur*, a man named Bolsing, who posed as a working carpenter and was provided by the police with a sum of marked money. He was a man who had been convicted some time before of stealing beer, and when cross-examined about it he unsuccessfully denied the conviction. He went to the respondents' warehouse, asked for and saw Angel, and after interviews on three successive

days, succeeded in inducing him to sell him for $45 12 bottles of whisky, which were given to him and taken away. Either Bell or Sugarman saw him on the premises before the final day, but he was not proved to have then known what he was about. When Bolsing paid the money to Angel, Bell and Sugarman were in another part of the room, though not within earshot, nor did they see the bottles given to him, but he swore that Angel then and there gave the money to them, saying " Here's $45 more." This they denied, as did a girl typist, who was also present. It was common ground that Angel did sell his employers' whisky and took the money, but the defendants' evidence was that he gave the money to a man named Morris Rosenberg, to keep for him. Bolsing also swore that he was allowed to select the case out of the entire stock, and to buy whichever whisky he liked. Hyndman, J., records the fact that it was not clear whether or not Angel was still in the respondents' employment at the time of the hearing. He was, at any rate, doing work for them at the warehouse after his misconduct had become known, and was not shown to have ever been definitely discharged.

Of the numerous contentions raised by the respondents, those which logically come first, though not the most fully argued, relate to the validity of the provision as to forfeiture, and indeed of the whole Act, as it stood at the time of the conviction. It appears that the Liquor Act was passed in 1916 under the following circumstances. In the previous year, pursuant to Section 6 of the Direct Legislation Act, an initiative petition was duly presented to the Legislative Assembly of Alberta, praying that a Bill, which was identical in all material respects with the Liquor Act, should be enacted. Thereupon, as the Act requires, the Bill was presented to the people of Alberta to be voted on, and, having been passed by a considerable majority, was passed by the Legislature without substantial alteration. The respondents contend that the Liquor Act is *ultra vires*, because, even if it related to matters named in Section 92 of the British North America Act, regarding which a provincial legislature is " exclusively " empowered to make laws, still it was not " exclusively " made by the Legislature, but partly also by the people of Alberta. Indeed, the part played in the matter by the legislature was practically only formal. It was further argued that the Direct Legislation Act was itself *ultra vires* upon the ground that it altered the scheme of legislation laid down for Canada by the British North America Act, a scheme which vests the provincial legislative power in a legislature, consisting of His Majesty, as represented by the Lieutenant-Governor, and of two Houses, and introduced into it a further and dominant legislative power in the shape of a direct popular vote taken upon a Bill, which the statutory legislature must pass, whether it really assents to it or not. On the first point it is clear that the word " exclusively " in Section 92 of the British North America Act means exclusively of any other legislature,

and not exclusively of any other volition than that of the provincial legislature itself. A law is made by the provincial legislature when it has been passed in accordance with the regular procedure ~~of both Houses~~ and has received the Royal Assent duly signified by the Lieutenant-Governor on behalf of His Majesty. Such was the case with the Act in question. It is impossible to say that it was not an Act of the legislature and it is none the less a statute because it was the statutory duty of the legislature to pass it. If the deference to the will of the people, which is involved in adopting without material alteration a measure, of which the people has approved, were held to prevent it from being a competent Act, it would seem to follow that the legislature would only be truly competent to legislate either in defiance of the popular will or on subjects upon which the people is either wholly ignorant or wholly indifferent. If the distinction lies in the fact that the will of the people has been ascertained under an Act which enables a single project of law to be voted on in the form of a Bill, instead of under an Act which, by regulating general elections, enables numerous measures to be recommended simultaneously to the electors, it would appear that the legislature is competent to vote as its members may be pledged to vote individually and in accordance with what is called an electoral "mandate," but is incompetent to vote in accordance with the people's wishes expressed in any other form. Unless the Direct Legislation Act can be shown, as it has not been shown on this occasion, to interfere in some way formally with the discharge of the functions of the legislature and of its component parts, the Liquor Act, 1916, being in truth an Act duly passed by the legislature of Alberta and no other, is one which must be enforced, unless its scope and provisions can themselves be shown to be *ultra vires*. As for the Direct Legislation Act, its competency is not directly raised in the present appeal. What was done in this case was done under the Liquor Act, and if that Act is sustained there is no utility in going behind it to decide the validity of another Act, which merely conditioned the occasion on which the Liquor Act was duly passed.

The Liquor Act, as passed in 1916, contained clauses obviously designed to save it from offending against the provisions of the British North America Act. These clauses were numbered 27 and 72, and they provided as follows :—

> "27. Nothing herein contained shall prevent any person from having liquor for export sale in his liquor warehouse provided such liquor warehouse and the business carried on therein complies with requirements in Sub-section (1) hereof mentioned or from selling from such liquor warehouse to persons in other provinces or in foreign countries or to a vendor under this Act."
>
> "72. While this Act is intended to prohibit and shall prohibit transactions in liquor which take place wholly within the Province of Alberta except as specially provided by this Act and restrict the consumption of liquor within the limits of the Province of Alberta, it shall not affect and is not intended to affect *bona fide* transactions in liquor between a person in the Province of Alberta and a person in another Province or in a foreign country, and the provisions of this Act shall be construed accordingly."

Since then the Liquor Act has been repeatedly amended. In 1917 among other amendments Section 27 was repealed and Section 72 in 1918. Accordingly the Act now reads, "No person shall within the Province of Alberta . . . keep for sale . . . any liquor except as authorized by this Act" (Section 23), and there is nothing in this Act itself, which authorizes a liquor exporting business to be carried on or the keeping of liquor for export to persons in other provinces or in foreign countries. The question now raised is whether the Act is now within the competence of the provincial legislature, containing as it does no disclaimer of any operation affecting such a business, but on the contrary expressly forbidding the keeping of liquor for sale in terms of such generality as would make the prohibition apply to such a business.

In their Lordships' opinion the real question is whether the legislature has actually interfered with inter-provincial or with foreign trade. The presence or absence of an express disclaimer of any such interference may greatly assist where the language of the provincial legislature does not in itself determine the question and define its effect. If, however, it is otherwise clear that there is such an interference, or that there is none, and the language actually used sufficiently decides that question, there is no such sovereign efficacy in such a clause as Section 72 as to make its presence or absence in an enactment crucial. As to the other section repealed in 1918, it is of capital importance to note that on the 13th April, 1918, the day on which the amending statute, which effected this repeal, received the Royal Assent, that assent was also given to another statute of the legislature of Alberta, the Liquor Export Act, which under conditions not at the moment material legalized the export of liquor, and authorized liquor to be kept in the province of Alberta for the purpose of such a trade. In their Lordships' opinion the Liquor Act as amended in 1918 must be taken to authorize by implication that which the legislature, simultaneously and almost *uno flatu*, authorizes in express terms by another statute directed to that very matter. It is an inconvenient mode of drafting, provocative of doubts and not without considerable peril to the Act in question, to use terms in the Liquor Act, which either import a recognition of another Act without any mention of it, or expressly annul while professing to ignore it. The dilemma is this. When the legislature passed these two Acts, which became law on the same day, did it intend by a simple repeal expressed in the one to stultify all its work expressed in the other, which is what the literal reading of its language leads to, or did it intend to imply the words "or by the Liquor Export Act" after the words "this Act" in Section 23 of the Liquor Act, and so effect a saving exception, which a literal construction of its language clearly negatives? On the principle *ut res magis valeat quam pereat*, their Lordships think that in this Act and in these circumstances the latter alternative is the one to be adopted, but they would be loth to apply this precedent in any other than an exactly similar case.

There are some other sections in the Liquor Act, certainly of a stringent character, which the respondents contended to be generally *ultra vires*. Some of these may be dismissed from consideration now as not imperilling the validity of the Act at large and not affecting the particular offence charged and the particular proceedings taken in this case. Such are Section 78, which makes it an offence to publish any letter referring to any intoxicating liquor or giving the name of any person manufacturing intoxicating liquor; Section 79, which authorizes a magistrate to arrest the occupant of any premises on which, under his search warrant, there has been found any liquor unlawfully kept; and Section 80 under which the owner of any liquor may be summoned before a magistrate, whereupon, if it be found to be his liquor, he is to suffer forfeiture of it, unless he shows that he did not intend it to be sold or kept for sale in violation of the Act. Their Lordships do not think that if the Act is otherwise within the competence of the legislature the inclusion of any of these provisions, remarkable as they are, makes it *ultra vires* as a whole. It is not an interference with Section 121 of the British North America Act, for the word "free," applied to admission into a province, does not further mean that when admitted the article in question can be used in any way its owner chooses, and although this Act, like many other Liquor Acts, has been made increasingly restrictive of individual freedom and enforced by legal measures of progressive severity, its competence depends on its general character and objects and not on the weight, with which the legislature lays its hand on those who violate its statutes. These sections appear to be susceptible of being read and should be read as merely dealing with matters of a local nature in the province and particularly with the steps, by which competent legislation is to be enforced there. One of these provisions, however, is separately challenged. It is that which affects the order forfeiting the respondents' stock of whisky. It is contended that the forfeiture provided in Section 79 is *ultra vires*, because the powers of the provincial legislature are only those given in head 15 of Section 92 of the British North America Act, viz., "the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the Province." It is true that this head does not name a forfeiture, but their Lordships think that it is covered by the word "penalty." The word is not defined in the Act. No doubt the commonest form of penalty is a money penalty, but as that is already dealt with in its most obvious form by the antecedent word "fine," their Lordships are not prepared to put so limited an interpretation on the word "penalty" as would rob the provincial legislature of the power, for example, of depriving an illegal vendor of poisons of his stock in trade and would leave it to him ready for further operations on his release from gaol.

The respondents then contended that, if they were within the Liquor Export Act by reason of the business which they carried on, and if they had complied with the provisions and formalities of

that Act, they must *ipso facto* be outside the Liquor Act altogether, so that the presumption arising under that Act from the possession of liquor would not affect them and the lawfulness of their possession and of their purpose under the Liquor Export Act would, of itself, defeat any charge under the Liquor Act. The contention seems to their Lordships to be unfounded and not even easy to understand. Neither Act contains any provision excluding everything, which comes within the purview of the Liquor Export Act, from the operation of the Liquor Act. Presumably full effect must be given to the provisions of both. No doubt what the Liquor Export Act expressly legalises cannot be made an offence under the Liquor Act, for it cannot be supposed that, by similar and simultaneous enactments, the legislature meant to contradict itself, but beyond this the matter cannot go. It is not necessary to examine the effect, which compliance with the Liquor Export Act would have on the presumption raised by the Liquor Act, or to ask whether it would conclusively rebut the presumption or only have the effect of shifting the burden of proof, for these are matters relating to the weighing of evidence and do not arise on *certiorari*.

Coming to the proceedings taken in this case, it is necessary at the outset to appreciate the general character and scheme of the Liquor Act and its relation to the Canadian Criminal Code. The expression "liquor," as used in the Liquor Act, includes "all fermented spirituous and malt liquors and all liquors 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" (Section 2 (*c*)), and it is important to realize that every one, who is in possession of "liquor," is presumably a criminal, and is liable to be sent to gaol. (Section 54.)

Certain persons, such as chemists and clergymen in respect of liquor kept for dispensing and eucharistic purposes, and certain small quantities of liquor kept in a private house, are exempted from this criminality, and a distinction is made between possession for sale and possession in a private dwelling-house, but generally the provisions are as follows:—

> "Section 23. No person shall within the Province of Alberta by himself, his clerk, servant or agent, expose or keep for sale or directly or indirectly, or upon any pretence or device, sell, barter or offer to any other person any liquor except as authorized by this Act.
>
> "Section 24. No person within the Province of Alberta by himself, his clerk, servant or agent, shall have, keep or give liquor in any place wheresoever other than in the private dwelling-house in which he resides except as authorized by this Act.
>
> "Section 24A. No person within the Province of Alberta shall have or keep in his private dwelling-house a quantity of liquor exceeding one quart of spirituous liquor and two gallons of malt liquor.
>
> "Section 54. If in the prosecution of any person charged with committing an offence against any of the provisions of this Act in the selling or keeping for sale or giving or having or purchasing or receiving of liquor, *primâ facie* proof is given that such person had in his possession or charge

> or control any liquor in respect of or concerning which he is being prosecuted, such person shall be obliged to prove that he did not commit the offence with which he is so charged."

At the hearing of the summons the Attorney-General does not appear to have taken full advantage of the statutory presumption, contained in Section 54, for, instead of simply proving that Nat Bell Liquors, Limited, had in their possession the liquors to which the charge referred, and leaving it to them to rebut the presumption of guilt thereon arising, he went into the case from the outset, as if the ordinary burden of proof rested on the prosecution. Probably this was the more convenient course under the circumstances of the case, but the result may be that, if the question whether there was evidence to convict can be raised at all, the time, at which it arose, was the conclusion of the case for the Crown, and that the statutory presumption should not be regarded as making good defects, if otherwise established, in a prosecution, in which the Crown had voluntarily undertaken the affirmative. At any rate, the effect of Section 54 is made less of by the learned Judges than might perhaps have been expected, and, after the course which the case has taken, it would be unsatisfactory to dispose of the matter by simply saying that the Court did not accept the defendants' evidence on an issue upon which the burden of proof lay upon them. It will be convenient to state at the outset that none of the ordinary grounds for *certiorari*, such as informality disclosed on the face of the proceedings, or want of qualification in the justices who acted, are to be found in the present case. The charge was one which was triable in the Court which dealt with it, and the magistrate who heard it was qualified to do so. There is no suggestion that he was biased or interested, or that any fraud was practised upon him. His conduct during the proceedings is unimpeached, and nothing occurred to oust his initial jurisdiction after the commencement of the inquiry. No conditions precedent to the exercise of his jurisdiction were unfulfilled, and the conviction, as it stood, was on its face correct, sufficient and complete.

In the superior Courts the proceedings in the Court below were kept throughout in the forefront of the case, sometimes in the form of asking what evidence the Court was entitled to consider, sometimes in the form of considering its sufficiency and effect. The real question, though it might present itself as one of evidence, was one of the jurisdiction of the superior Court on *certiorari*. Hyndman, J., cited from *R.* v. *Covert* (10 Alberta Law Reports 349) a series of rules which, rightly or wrongly, purport to lay down the conditions, under which alone a judge of fact can refuse to accept, that is to say, to believe evidence given before him, and, after elaborately examining the evidence, concludes by saying :—

> " Looking at the whole case I am of opinion that the evidence of the defence meets, as squarely and satisfactorily as can reasonably be expected, the presumption raised against the defendants by the evidence for the

Crown, and that it fulfils the requirements set forth in the judgment in *Rex* v. *Covert* and that consequently the Magistrate should have accepted such denials and explanations."

On appeal Stuart, J., while declining to discuss *Rex* v. *Covert*, says :—

"After reading the reasons the Justice gave for convicting" (which were neither part of the formal conviction nor part of the depositions), "I cannot discover that he kept in mind, as he should have kept in mind, his duty to receive a spy's evidence with caution, or that he even remembered the untruths in the spy's evidence to which I have referred. . . . It was so easy for Bolsing to add the one circumstance to his story" (that was his statement about "$45 more") "which was necessary to make his work as a detective successful, that this quite evident failure on the part of the magistrate would be almost, if not quite, sufficient of itself in my opinion to justify the quashing of the conviction. . . . If the use of the little word 'more' by Bolsing is adverted to, I must reply that that is too slight a cord upon which to hang anything, and in addition to the interest of the witness using the expression, and the obvious advantage of adding it, even the word itself is open to other interpretations. If I had been engaged with a jury on the trial of this case, I should undoubtedly have withdrawn it from their consideration on this latter ground at least."

Thereafter Beck, J., after laying down as a principle—

"that the Court has the right and the duty, in the exercise of its inherent plenary jurisdiction in supervising the proceedings of inferior tribunals, to examine the entire proceedings certified to it, and to deal finally with the case according to right and justice,"

proceeds to examine the statements of the witnesses, dwells on the fact that Bolsing was an accessory and was uncorroborated, and says :—

"Had the charge been one not of keeping for sale but even for the lesser offence of selling, it seems clear to me that, had the case been before a judge and a jury, the judge ought to have withdrawn the case from the jury, or at the very least to have pointed out to the jury the danger of convicting upon such evidence, in view of the presumption of innocence, and the necessity for excluding all reasonable doubt, and in the event of a verdict of guilty to have given leave to appeal on the weight of evidence . . . in which event the verdict would have been undoubtedly set aside."

It appears to their Lordships that, whether consciously or not, these learned Judges were in fact rehearing the whole case by way of appeal on the evidence contained in the depositions, a thing which neither under the Liquor Act nor under the general law of *certiorari* was it competent to them to do. As, however, the majority in the Supreme Court proceeded on a view of *certiorari*, which purported to justify this mode of dealing with the evidence, their Lordships will consider the case in that light without disposing of it as a case of entertaining an appeal, where no appeal lay.

The reasons, expressed or implied, which in the view of the learned Judges warranted the Court in quashing this conviction appear to have been the following :—

(i) Without Bolsing there was no evidence of the commission of the offence by the accused company, and his

evidence was no evidence, since he was an accessory before the fact and was uncorroborated;

(ii) It was not evidence on which a jury could safely convict, and ought therefore to be treated as no evidence at all;

(iii) Want of evidence or of sufficient evidence makes the conviction one pronounced without jurisdiction;

(iv) Such want of jurisdiction can be established by evidence *dehors* what is set out on or forms part of the record of the conviction;

(v) In any case, by the statute law of Alberta the depositions are part of the record, or can be examined on *certiorari* as if they were part of the record; and finally,

(vi) In Alberta, at any rate in connection with cases arising under the Liquor Act, the superior Court can do more than could be done on *certiorari* by the High Court of Justice in England, and can, as matter of law, review the whole proceedings to see that justice has been done.

Their Lordships think that of these contentions the first and second may be shortly disposed of. They have not been referred to any decisive authority, which applies to *certiorari* the same considerations as apply to testing a jury's verdict, when challenged on a motion for a new trial or on an appeal; nor, apart from a few expressions, here and there, not very carefully considered, can any judicial dicta be found to support it. Whether the verdict was one which twelve reasonable men could have found, whether the evidence was such that twelve reasonable men could find on it otherwise than in one way, whether the evidence was such that a jury could safely convict upon it, and whether it was such that a Court of Criminal Appeal should refuse to interfere with the conviction, are questions which, though fully argued, have no relation to the functions of a superior Court on *certiorari*. They all imply that there was evidence, but not much; they all ask whether that little evidence was enough; they are all applied to a body of men, who are not the absolute judges of fact but only judges, whose decision may, though rarely, be disturbed. On *certiorari*, so far as the presence or absence of evidence becomes material, the question can at most be whether any evidence at all was given on the essential point referred to. Its weight is entirely for the inferior Court:—

> "If there had been any evidence whatever, however slight, to establish this point," says Lord Kenyon in *Smith's* case (8 T.R., 589), "and the magistrate, who convicted the defendant, had drawn his conclusion from that evidence, we would not have examined the propriety of his conclusion, for the magistrate is the sole judge of the weight of the evidence. And for this reason I think there is no foundation for the first objection . . . there was some evidence, from which he might draw the conclusion."

The majority in the Supreme Court of Alberta appear to have accepted this principle, but to have thought that it might be met by inquiring, whether the justices had misdirected themselves

as to the law of evidence, under which term they sought to include a failure to give sufficient or any weight to features in the evidence, which appeared to them to be of preponderating importance. It may well be that error as to the law of evidence, like any other error of law, if it is apparent on the record, is ground for quashing the order made below, but none of the objections taken here show that the magistrate acted under any misapprehension of the law. Their Lordships, beyond pointing out the fact, will not stay to consider that the charge was a charge of keeping the liquor for an unlawful purpose, to which Bolsing was not an accessory, and not one of selling it, to which he was. Assuming that Bolsing was an accessory, still he was a competent witness. If he impressed the justice as a witness of truth, no error in law was committed in believing him even without corroboration, but only an error of judgment. Corroboration, however, there was in fact on the point about the money so much adverted to, for, as Hyndman. J., points out (though he fails to see the significance of it), Angel, who on the case for the defence had disobeyed his orders in the most serious way and had disposed of his masters' whisky for his own profit, was still at the time of the hearing acting as their employee, a circumstance tending to show that what he had done was not really a piece of flagrant disobedience and roguery but a thing within the scope of his duties, though unfortunately unsuccessful. The weight of this was for the magistrate, and was, if he so chose to regard it, some corroboration of Bolsing's tale.

Passing from considerations of the weight of the evidence, we come to the questions whether, there was any evidence, and what materials are to be looked at, in order to answer that question, and further what effect a decision, that on some essential point evidence was completely lacking, would have on the jurisdiction respectively of the magistrates and the superior Court. In the different provinces of Canada there has, from time to time, been much diversity of view as to the powers and duties of the superior Court on *certiorari*. Though the principles laid down in *Reg.* v. *Bolton* (1 Q.B. 66) and the *Colonial Bank* v. *Willan* (L.R. 5 P.C. 417) have been accepted in Ontario, the attempt to distinguish them, as Stuart, J., and Beck, J., distinguished them in the present case, was made at any rate as long ago as 1883 (*Reg.* v. *Wallace* 4 Ont. R. 127 per Cameron, J., dissentientem). The Courts of Ontario have considered themselves free and even bound, under the legislation applicable, to examine the evidence returned by the inferior Court and to inquire whether the justices had before them any evidence of an offence, such as was within their jurisdiction, though they have uniformly purported to recognize that the weight and credibility of it, when given, were entirely for the justices. There has been considerable diversity in the language used. Sometimes the question has been whether there was "any sufficient evidence of the offence" (*R.* v. *Wallace*); sometimes whether there was "any evidence of an offence" (*R.* v. *Coulson*, No. 1, 24 Ont. R.

246 and *R.* v. *Coulson*, No. 2, 27 Ont. R. 59) ; sometimes whether there was "reasonable" evidence to support the conviction (*R.* v. *Borin* 29 O.L.R. 584) ; but the general view has been that, if there is some evidence, there is jurisdiction to hear and determine, and thereafter the superior Court will not interfere (*Rex* v. *Reinhardt* 11 O.W.N. 346 ; *R.* v. *Cantin* 11 O.W.N. 435 ; *R.* v. *Thompson* 12 O.W.N. 25, 39 O.L.R. 108). The Courts of New Brunswick and Nova Scotia have decided that want of evidence is not a ground for quashing a conviction, and in *Hawes* v. *Hart* (6 R. and G. 42) and *Reg.* v. *Walsh* (29 N.S.R. 521), the authorities are collected.

In Manitoba, Saskatchewan and Alberta a different view has asserted itself, though not without much difference of opinion. In *R.* v. *Pudwell* (1916) (10 W.W.R. 205) Hyndman, J., adopted the regular view of *Willan's* case, and refused to quash a conviction, where the charge was within the jurisdiction and the proceedings were regular on the face of them Later on in 1916, in the case of *R.* v. *Carter*, Harvey, C.J. (9 Alberta L.R., 481), laid it down, after a full and careful examination of the authorities, that, if a conviction is valid on its face, absence of evidence to support a conviction is not a ground for quashing it, but in the main two decisions, *R.* v. *Emery* (1916, 10 Alberta L.R., 139) in Alberta, and *R.* v. *Hoffman* (1917, 28 Man. R. 7) in Manitoba, have caused the view to prevail in those provinces and in Saskatchewan, which was applied in the present appeal, and has also been followed in Quebec (*Lacasse* v. *Fortier*, 30 Can. Crim. Cases 87). The practical effect of those decisions is that, not only is the superior Court not precluded from examining the evidence given in the Court below or confined to ascertaining, as a point going to the jurisdiction of the magistrate, whether he had before him some evidence supporting his conviction, but it is free to range over the whole evidence and to subject it to criticism. This conclusion is arrived at by holding that legislation, which requires that depositions shall be taken in writing, and a rule, which requires them to be transmitted with the conviction on making a return to an order for *certiorari*, in effect make them part of the record for all purposes. This of course is a question of particular statutory practice and not of the general law. The decisions, however, go on to hold that, although in general the credibility and weight of the evidence is for the magistrate, the superior Court can, as a matter of law, consider whether he guided himself by a right view of the credibility of particular evidence, and it is plain that a practice to review the whole of the depositions, however the purpose of it is expressed, leads very easily to the conclusion that a conviction may be quashed, not so much because no witness has sworn to the particular facts required to make out a case for the prosecution, as because, on balancing it against the evidence given for the defendant, the great preponderance is thought to be on his side. This practice of examining the evidence, though of many years' standing before the present case, has been stated in the Manitoba and Alberta decisions as having

objects which vary considerably. The Court would not quash, it has been said, if there was evidence to go to a jury (*R.* v. *Grannis*, 5 Man. Rep., 153). There must be evidence, which the Court can see may reasonably support the conviction. Whatever the Court of Queen's Bench, upon an inspection of the proceedings, would deem sufficient to be left to a jury on a trial is, when set out on the face of a conviction, adequate to sustain it (*R.* v. *Davidson*, 8 Man. Rep., 325). The Court can only quash, if there is a complete absence of any evidence whatever of the commission of the offence (*R.* v. *Herrell*, 12 Man. Rep., 198). The Court examines the evidence to ascertain, not whether the tribunal reached the proper conclusion on the evidence, but whether there was any evidence upon which the tribunal could properly find as it did (*R.* v. *Emery*, 10 Alberta, L.R. 139). In the present case Stuart, J., says of the position occupied by the magistrate:—

> "He was not merely standing in the place of a jury. He was also a judge, with the duty of applying in his own mind sound legal principles in the consideration and the weighing of evidence. . . ."
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> "It is not acting at all on appeal on the facts to say that the magistrate misdirected himself in his duty as a judicial officer in failing to take into account the true character of the evidence of the prosecution on a crucial point. Particularly is this so when the magistrate knew that his decision against the accused was without appeal and would have tremendous consequences with respect to property, while a decision the other way would be subject to review at the instance of the prosecution by two appeals. . . . What I have said has no relation whatever to the questions discussed in *Rex* v. *Covert*."

Beck, J., states the matter with equal breadth, though in a somewhat different way:—

> "This Appellate Division held in *Rex* v. *Emery*, that the Court is entitled upon *certiorari*—at least in cases where *certiorari* is not taken away—to look at the evidence given before the convicting magistrate, to ascertain whether or not it is sufficient to sustain the conviction, and if it is not, to quash the conviction. . . . This view seems now to be that adopted in all the provinces of Canada. . . . I take occasion to endeavour to make clearer why the latter-day English decisions are of no authority upon this question, which, as I have said, seems at the present day to have become settled throughout Canada beyond reversal. . . .
>
> "The right and duty, therefore, of this Court to consider the evidence upon which a conviction is made, and if it is found to be insufficient, to quash the conviction, is then at least equal to the right and duty of the Court to set aside a verdict in a criminal case upon a case reserved, if it appears that the evidence is insufficient to support the conviction. The cases, therefore, in which upon a reserved case the Court has set aside a conviction for insufficiency of evidence, are therefore authorities applicable to cases arising on *certiorari* . . . but, as I shall endeavour to show, the power of the Court to set aside a conviction on *certiorari* is much greater than its power upon a reserved case."

*R.* v. *Emery* was a case to which both Stuart, J., and Beck, J., had been parties, and, in a measure, the present case may be said to be an appeal against it. In argument, however, it has been pointed out that *R.* v. *Emery* was a case of summary trial of an indictable offence, whereas the present is a case of the determination by a Court of Summary Jurisdiction of an offence cognisable

only by such a Court. In what their Lordships have to say of *R.* v. *Emery* they wish to keep open this distinction, if it be one, for consideration, if a case of an indictable offence should hereafter come before them, but, in so far as both cases are on all fours, *Emery's* case must be examined.

The proposition adopted may be stated thus: in exercising its inherent jurisdiction to supervise the proceedings of an inferior Court, the superior Court must inquire whether there was any evidence on which the tribunal below could have decided as it did decide, and this involves examining the evidence given to see if it was sufficient in this sense to sustain the conviction. If, on some part of the case, which was material to the charge and had to be legitimately established before the accused person could be convicted, no evidence was forthcoming at all, this would be error of law, which being duly brought to the notice of the superior Court would oblige it to quash the conviction. For this reliance was placed on the cases of *Smith* (8 T.R. 589), *Crisp* (7 East. 389), and *Chandler* (14 East. 267), *ex pte. Vaughan* (L.R. 2 Q.B. 114), and *Lovery* v. *Stallard* (30 L.T. 792).

It is evident that this exact point must be one of rare occurrence. It assumes complete jurisdiction, complete absence of any testimony on a definite and essential point, and complete presentation to the superior Court of this omission in the Court below. Only if the whole evidence given can be got before the superior Court can this difficulty be raised. Only when it appears that no witness whatever has said a thing that must be said by someone will it fall to be discussed. It will have two aspects: the first, whether the omission from the record of any statement that the necessary piece of evidence was given raises the presumption, that it must nevertheless have been given or the justices would not have convicted, or the presumption that, as it was not stated, it cannot have been given at all, or whether, at any rate, it shows that the record is in need of further and fuller statement; and the second, whether pronouncing a conviction, notwithstanding such an absence of necessary proof, is an error of law or a mistake in fact. More generally speaking, it becomes necessary to ask, what is the "record" and when can the superior Court go outside it, and, if want of evidence can be established, does that establish want of jurisdiction in the magistrate?

When justices were required to set out the evidence on the record of the conviction, as nearly as might be in the terms in which it was given, detection of a hiatus on the record would justify a mandamus to them, to complete the record by setting out the evidence on the point. In taking this course in *R.* v. *Warnford* (5 D. & R. 489) Abbott, C.J., says: "The conviction must set out the language used by the witness, in order that it may be seen whether a right conclusion is drawn from it. The Court will not assume that the justice has done his duty, unless he tells us so by his own act." On the other hand, if legislation has

provided for a shorthand note of the whole of the evidence and for its attachment to the conviction as a part of it, when returned on *certiorari*, the record itself shows, when it reaches the superior Court, whether or no the evidence in question was given. It seems to have been by no means settled on authority that, even when the evidence eventually reaches the Court in a complete form, the Court should criticise the absence of the material evidence as error in law, and as ground for quashing the conviction. In *ex pte. Vaughan*, Shee, J., alone of the Judges who expressed opinions, dealt with the case of there being no evidence at all on which justices could adjudicate, but all he says is that then " they would be acting improperly." Lord Coleridge in *Lovery* v. *Stallard*, says generally that " the existence of evidence is for the Court." On the other hand, in *Rex* v. *Justices of Galway* (1906 Irish L.R. vol. 2, 446) Palles, C.B., points out that a conviction which sets out no evidence cannot be questioned as to the evidence given before the justices on material *dehors* the conviction. In *Reg.* v. *Justices of Cheshire* (8 A. & E. 398), it actually appeared on the affidavits filed on the question of the justices' jurisdiction, that, in making their order, they had acted on a view of the facts not testified to at all, but merely stated to them by one of their own body as being within his knowledge. The Court of Queen's Bench nevertheless, having decided that there was jurisdiction, declined to interfere. Though one member of the Court said that the justices had decided " absurdly," they refused to criticise the decision further. " This," said Lord Denman, " we cannot look into."

It has been said that the matter may be regarded as a question of jurisdiction, and that a justice who convicts without evidence is acting without jurisdiction to do so. Accordingly, want of essential evidence, if ascertained somehow, is on the same footing as want of qualification in the magistrate, and goes to the question of his right to enter on the case at all. Want of evidence, on which to convict, is the same as want of jurisdiction to take evidence at all. This, clearly, is erroneous. A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a Judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction, which he has not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given, can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see. It cannot be said that his conviction is void, and may be disregarded as a nullity, or that the whole proceeding was *coram non judice*. To say that there is no jurisdiction to convict without evidence is the same thing as saying that there is jurisdiction if the decision is right, and none if it is wrong; or that jurisdiction at the outset of a case continues so long as the decision stands, but that, if it is set aside,

the real conclusion is that there never was any jurisdiction at all. This appears from the very full and able discussion of all the authorities in *The King* (*Martin*) v. *Mahony*, Irish Reports, 1910, Vol. 2, 695. On this point *ex pte. Hopwood* (15 Q.B. 121) may also be referred to. In that case *certiorari* having been taken away by statute, the Court could only interfere, if the justices had convicted without having any jurisdiction at all. It was alleged on affidavit that, on the particular summons in question, they had had no evidence before them, even of the service of the summons. The Court held that, even so, the fact did not take away jurisdiction. " As to the want of evidence on matter of fact ," says Patteson J., " that cannot possibly take away jurisdiction ; no case can be cited where that has ever been said." To the same effect is *Re the Justices of Shropshire* (14 L.T.N.S. 598). Furthermore a conviction, regular on its face, is conclusive of all the facts stated in it, not excepting those necessary to give the justices jurisdiction, and it is from the facts stated in the conviction that the facts of the case are to be collected. Thus, in the well-known case of *Brittain* v. *Kinnaird* (1 Brod. & B. 432), the plaintiff had been convicted under the Bumboat Act, and the conviction stated his offence in terms of the Act simply, " for that he had unlawfully in his possession in a certain boat certain stores," very much as the conviction runs in this case. He said that his vessel was of 13 tons burthen and was not a boat, and sued the justice ; but it was held that the conviction was conclusive evidence that a boat it was, and no distinction is drawn, which would limit the conclusive character of the conviction as an answer to civil proceedings in trespass taken against the magistrate.

In *Reg.* v. *Bolton* (1 Q.B., at pp. 72–74) Lord Denman, in a well-known passage, says :—

> " The case to be supposed is one . . . . in which the legislature has trusted the original, it may be (as here) the final, jurisdiction on the merits to the magistrates below ; in which this Court has no jurisdiction as to the merits either originally or on appeal. All that we can then do . . . is to see that the case was one within their jurisdiction and that their proceedings on the face of them are regular and according to law. . . Where the charge laid before the magistrate, as stated in the information, does not amount in law to the offence, over which the statute gives him jurisdiction, . . . or, if the charge being really insufficient, he had misstated it in drawing up the proceedings, so that they would appear to be regular, it would be clearly competent to the defendant to show to us by affidavits, what the real charge was and, that appearing to have been insufficient, we should quash the conviction. . . . But as . . . we cannot get at the want of jurisdiction but by affidavits, of necessity we must receive them. It will be observed, however, that here we receive them, not to shew that the magistrate has come to a wrong conclusion, but that he never ought to have begun the inquiry.
>
> " But where a charge has been well laid before a magistrate, on its face bringing itself within his jurisdiction, he is bound to commence the inquiry ; in so doing he undoubtedly acts within his jurisdiction ; but in the course of the enquiry evidence being offered for and against the charge, the proper or it may be the irresistible conclusion to be drawn may be,

that the offence has not been committed and so that the case in one sense was not within the jurisdiction. Now to receive affidavits for the purpose of shewing this, is clearly in effect to show that the magistrate's decision was wrong, if he affirms the charge, and not to show that he acted without jurisdiction. . . . The question of jurisdiction does not depend on the truth or falsehood of the charge, but upon its nature; it is determinable on the commencement, not at the conclusion of the inquiry, and affidavits, to be receivable, must be directed to what appears at the former stage and not to the facts disclosed in the progress of the inquiry."

The law laid down in *Reg.* v. *Bolton* has never since been seriously disputed in England. In *Colonial Bank of Australia* v. *Willan* the Judicial Committee settled that the same rules are applicable to the Dominions, except in so far as they may be affected by competent legislation. The respondents must, therefore, distinguish these authorities, since, where they apply, it is not now possible to argue that they were not rightly decided, or else they must show special legislation applicable in Alberta. *Willan's* case is said to be distinguishable on two grounds, firstly, that it was not, nor was *Bolton's* case a criminal case; and, secondly, because Sir James Colvile's language shows the decision to have turned on the Committee's being satisfied from the evidence before it, that the material allegations had been proved by evidence given in the Court below. If so, both cases were merely decisions on the admissibility upon *certiorari* of fresh affidavit evidence to impugn or to confirm the regularity of the proceedings below, as returned to the superior Court.

There is no reason to suppose that, if there were any difference in the rules as to the examination of the evidence below on *certiorari* before a superior Court, it would be a difference in favour of examining it in criminal matters, when it would not be examined in civil matters, but, truly speaking, the whole theory of *certiorari* shows that no such difference exists. The object is to examine the proceedings in the inferior Court to see whether its order has been made within its jurisdiction. If that is the whole object, there can be no difference for this purpose between civil orders and criminal convictions, except in so far as differences in the form of the record of the inferior Court's determination or in the statute law relating to the matter may give an opportunity for detecting error on the record in one case, which in another would not have been apparent to the superior Court, and, therefore would not have been available as a reason for quashing the proceedings. In this connection, reliance was placed on a passage in the opinion of Lord Cairns in the *Walsall* case (4 A.C. 30). The question for decision there was simply whether or not the Court of Appeal had jurisdiction to entertain an appeal from an order of the Court of Queen's Bench, discharging a rule *nisi* for a *certiorari* to quash an order of Quarter Sessions in a rating matter. Lord Cairns, speaking of *certiorari* generally, says :—

"If there was, upon the face of the order of Quarter Sessions, anything which showed that that order was erroneous, the Court of Queen's Bench

> might be asked to have the order brought into it and to look at the order and view it upon the face of it, and, if the Court found error upon the face of it, to put an end to its existence by quashing it; "

and then, turning to the kind of order under discussion, and after stating how much in that matter, both of fact and of law, the Sessions were bound to set out on the face of their order, he proceeds :—

> " The statements, which had led to its decision, making it not an unspeaking or unintelligible order, but a speaking one, . . . that order on *certiorari* could be criticised as one which told its own story, and for error could accordingly be quashed."

It is to be observed on this passage, that the key of the question is the amount of material stated or to be stated on the record returned and brought into the superior Court. If justices state more than they are bound to state, it may, so to speak, be used against them, and out of their own mouths they may be condemned, but there is no suggestion that, apart from questions of jurisdiction, a party may state further matters to the Court, either by new affidavits or by producing anything that is not on or part of the record. So strictly has this been acted on, that documents returned by the inferior Court along with its record, for example, the information, have been excluded by the superior Court from its consideration. That the superior Court should be bound by the record is inherent in the nature of the case. Its jurisdiction is to see that the inferior Court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would itself, in turn, transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise.

The view taken in the Supreme Court of Alberta of the real grounds for the decision in the *Colonial Bank of Australia* v. *Willan* proceeds on a complete misapprehension. At p. 446 of L.R. 5 P.C., Sir James Colvile says of the order, which had been wrongly quashed :—

> " The order was one made by a competent Judge, showing on the face of it that every requirement of the Statute under which it was made had been complied with, . . . and containing an express adjudication upon a fact which, though essential to the order, the Judge was both competent and bound to decide, viz., that the sum claimed to be due to the petitioning creditors was then due to them from the mining company. Nor can it be said that there was no evidence to support this finding, since the affidavit filed in support of the petition distinctly swears to the debt.
>
> " This being so, it seems to follow that the Supreme Court could only arrive at the opposite conclusion upon a retrial of the question of the petitioning creditors' debt, and that upon evidence which was not before the inferior Court."

Commenting on this passage Beck, J., in *R.* v. *Emery*, expresses the opinion that what the Judicial Committee condemned and all that it condemned was a retrial of the existence of the debt by the superior Court on fresh evidence, which had not been adduced below; and in *R.* v. *Hoffman* (28 Manitoba Rep. 7), which adopted the reasoning and conclusions of *R.* v. *Emery* in the following year, it is said that all that was decided in *Willan's* case was the question of the admissibility of fresh evidence by affidavit in the superior Court, which had not been before the justices in the Court below. All this seems to have hung on Sir James Colvile's commencement of a new paragraph and a new step in the reasoning with the words "this being so." This was taken not as comprehending all that had preceded but as relating solely to the sentence beginning "Nor can it be said that there was no evidence . . ." The report shows that no such point was taken by Mr. Benjamin for the respondents. His argument was that the proceedings were heard *ex parte*, for the company did not appear on the winding-up petition; but that the winding-up Judge had assumed the preliminary question, viz., whether or not there was a creditor before the Court, to have been conceded in consequence of the absence of controversy; that in the result he had established his jurisdiction by proceeding upon an assumed fact; and that the reality of that assumption having been inquired into in the superior Court on affidavit as to the fact, since questions going to the jurisdiction of the Court below must in case of need be inquired into, and it having been found that in fact no petitioning creditor existed, the order was rightly quashed (pp. 443 and 445). The passage above relied on is the answer to this argument, which is briefly dismissed at the end of the main conclusion by recalling that the Judge had uncontradicted affidavit evidence of the existence of the debt before him, and found and recited the existence of the debt, and in doing so was examining into the reality of an alleged fact, which it was within his competence to decide, although, had the alleged fact been found to be untrue, he would have been bound to dismiss the petition to wind up the company.

This misapprehension of the meaning of the Judicial Committee's opinion is probably due to the not infrequent confusion between facts essential to the existence of jurisdiction in the inferior Court, which it is within the competence of that Court to inquire into and to determine, and facts essential thereto, which are only within the competence of the superior Court. As Lord Esher points out in *The Queen* v. *Commissioners of Income Tax* (21 Q.B.D. at p. 319), if a statute says that a tribunal shall have jurisdiction if certain facts exist, the tribunal has jurisdiction to inquire into the existence of these facts as well as into the questions to be heard, but while its decision is final, if jurisdiction is established, the decision that its jurisdiction is established is open to examination on *certiorari* by a superior Court. On the other hand, the fact on which the presence or absence of jurisdiction turns may itself be one which can only be determined as

part of the general inquiry into the charge which is being heard. The following is a real instance of this. In an anonymous case reported in I.B. and Ad. 382, justices who had jurisdiction to hear a charge of common assault were precluded by statute from exercising it, if the evidence disclosed that the assault was accompanied by an attempt at felony. Although such an attempt was deposed to in the course of the evidence supporting the charge of assault, a rule to quash a conviction for a common assault was discharged upon the ground, that it was for the justices to decide whether they believed the part of the evidence which disclosed the attempt, and if they did not their jurisdiction to convict was not ousted by the statute. In the language of Coleridge, J., delivering the judgment of the Court in *Bunbury* v. *Fuller* (9 Exch. p. 111), the rule is thus stated :—

> " No court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case, upon which the limit to its jurisdiction depends ; and, however its decision may be final on all particulars making up together that subject-matter, which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question its decision must always be open to inquiry in the superior Court."

In addition, however, to this mistaken attempt to place the decisions in *Bolton's* and *Willan's* cases on a too limited ground the majority of the Supreme Court of Alberta acted on a view of the English legislation of 1848, which without foundation is deemed to differentiate the law of *certiorari* in England and in Canada.

The learned Judges appear to have thought that the application of these cases depends on the effect in England of the Summary Jurisdiction Act of 1848 (11 and 12 Vict., c. 43); that the law applicable in Canada is the law, as it was in England before 1848, and not the law as it has stood ever since, and that under the earlier law the superior Court on *certiorari* was entitled to examine generally into the evidence on which the conviction was pronounced on the pretext of inquiring whether the conviction was within the jurisdiction of the justices. Their Lordships think that there has been a mistake on both points.

The *Queen* v. *Bolton*, undoubtedly, is a landmark in the history of *certiorari*, for it summarises in an impeccable form the principles of its application under the *régime* created by what are called Jervis's Acts, but it did not change, nor did those Acts change the general law. When the Summary Jurisdiction Act provided, as the sufficient record of all summary convictions, a common form, which did not include any statement of the evidence for the conviction, it did not stint the jurisdiction of the Queen's Bench or alter the actual law of *certiorari*. What it did was to disarm its exercise. The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record " spoke " no longer : it was the inscrutable face of a Sphinx. Efforts have indeed been

made to avoid this result by purporting to question the jurisdiction of the Court below, while really inquiring into its exercise, thus bringing before the superior Court, otherwise than on the record itself, matters which ought to be before it on the record or not at all, but these efforts have been made under some confusion of thought.

Long before Jervis's Acts statutes had been passed, which created an inferior Court, and declared its decisions to be "final" and "without appeal," and again and again the Court of King's Bench had held that language of this kind did not restrict or take away the right of the Court to bring the proceedings before itself by *certiorari*. There is no need to regard this as a conflict between the Court and Parliament; on the contrary, the latter, by continuing to use the same language in subsequent enactments, accepted this interpretation, which is now clearly established and is applicable to Canadian legislation, both Dominion and provincial, when regulating the rights of *certiorari* and of appeal in similar terms. The Summary Jurisdiction Act, 1848, was intended to produce and did produce its result by a simple change in procedure; not in the procedure of the Court of Queen's Bench or in the practice of *certiorari*, but in that of Courts of Summary Jurisdiction, and in this way effective means were found for putting a limit upon harassing and dilatory applications without unduly ousting the supervisory jurisdiction of the superior Court.

The matter has often been discussed, as if the true point was one relating to the admissibility of evidence, and the question has seemed to be whether or not affidavits and new testimony were admissible in the superior Court. This is really an accidental aspect of the subject. Where it is contended that there are grounds for holding that a decision has been given without jurisdiction, this can only be made apparent on new evidence brought *ad hoc* before the superior Court. How is it ever to appear within the four corners of the record that the members of the inferior Court were unqualified, or were biassed, or were interested in the subject-matter? On the other hand, to show error in the conclusion of the Court below by adducing fresh evidence in the superior Court is not even to review the decision: it is to retry the case. If the superior Court confines itself to what appears on the face of the record, evidently the more there is set out on the record the more chance there is that error, if there was error, will appear and be detected. It by no means follows, however, that, because error has been detected injustice has been done, and so long as the choice for the superior Court lies only between quashing, if any error is found, and discharging the rule, if there be none, the real injustice may be done in the superior Court, and be simply due to the absence of any power to amend the proceedings or to substitute for the decision given the decision which ought to have been arrived at. The Summary Jurisdiction Act, by prescribing a brief form of conviction, generally applicable and not involving

any recital of the evidence, found a practical solution for many of these difficulties by preventing errors from being found out. It did not justify what was previously error; it did not enlarge the inferior jurisdiction or alter the law to be enforced either in the inferior or the superior Court; it simply cut down the contents of the record, and so did away with a host of discussions as to error apparent on its face. The superior Court acquired no new and more extensive right to admit fresh evidence by affidavit or to contradict the record of the conviction by matter *dehors* its contents. When it would previously have been confined to matter appearing on the face of the record, it continued to be so confined, but now that very little appeared on the face of the record, the grounds for quashing on *certiorari* came in practice to be grounds relating to competence and disqualification.

It follows that there is not one law of *certiorari* before 1848 and another after it, nor one law of *certiorari* for England and another for Canada. The real questions are—(1) has any statute, having force in Alberta, prescribed a form of conviction which omits all evidence from the record and leaves nothing but the statement that the accused was duly convicted to take its place; and (2) has any other such statute modified the practical effect of that provision, which, of course, must otherwise be the same for Canada as for England?

The Legislatures of Canada have not failed to profit by the experience of England in framing new or amending statutes directed to the removal of difficulties in the administration of the law, which arose out of common law rules and forms no longer adapted to the purposes of the day. Even before the British North America Act was passed, legislation had been enacted in Canada prescribing a general form of conviction for offences within the competence of a summary jurisdiction. That form was in substance the form prescribed in the English Act of 1848, the form now in force under the Criminal Code of Canada, and the form in which the conviction in the present case was expressed. Special Canadian legislation has long dealt with the subject of temperance and restricted or prohibited the sale of intoxicants, and Alberta, too, has for many years enacted strict measures of her own, the present Liquor Act being the last result of much amendment and reamendment of the earlier steps taken in that direction. All this has been done with the history of *certiorari* and of the effect of prescribing a general form for conviction present to the mind of the legislature concerned, and the enactments so passed must be read in the light of these general provisions. If so, no marked difference can be found between the systems under which in England and in Canada summary jurisdiction is applied to offences against liquor laws, and it follows *primâ facie* that Canadian legislation, affecting summary convictions and the powers of superior Courts to quash them upon *certiorari*, is to be construed, in accordance with the older English decisions, as limiting the jurisdiction by way of *certiorari* only where explicit

language is used for that purpose, and, on the other hand, as contenting itself with an indirect limitation on the exercise of that jurisdiction, by substituting for the detailed record of a century and more ago the " unspeaking " form of a general conviction such as was prescribed in 1848. Of course, it is competent for the legislature to go further than this, and, where the language used shows such an intention, the presumption above stated is negatived. This may be done notably in two ways. The one is to take away *certiorari* explicitly and unmistakably, or to limit it in a manner not within the older decisions upon such words as " final " or " without appeal " ; the other is, on the other hand, to restore it to its pristine rigour by restoring to the record a full statement of the evidence. In the present case it is argued that both methods have been employed in Alberta. The record, it is said, is made to contain the whole of the evidence and on *certiorari* the superior Court is directed to examine it. Three enactments are relied upon as differentiating the present case from the " latter-day " English cases. They are (1) Sections 682, 683, 721, 793, 1017 and 1124 of the Canadian Criminal Code. The first two require that the evidence given before justices shall be taken down in the form of written depositions ; Section 793 binds the magistrate to transmit the depositions with other papers to the clerk of the peace to be placed among the records of the general sessions of the peace ; Section 1017 only refers to appeals and applications for new trials ; Section 1124 is to the like effect ; it uses practically the same terms as Section 62 of the Liquor Act, hereinafter quoted, and is re-enacted from 55 and 56 Vic., c. 29, Sec. 889 ; (2) the provision in the Crown rules, which requires depositions to be returned with the conviction on *certiorari* ; and (3) Sections 62 and 63 of the Liquor Act, which are relied on as specific legislation, directing what is to be done with those depositions in the superior Court on *certiorari* to bring up a conviction under the Liquor Act.

Their Lordships think it reasonably plain that no great reliance can be placed on any but the last of these provisions. To say that there would be no use in written depositions, if they were not to be available for use in a superior Court on *certiorari*, is to beg the question. Till the hearing is concluded, and the decision is pronounced, it cannot be known whether or not an appeal may be taken in appealable cases, but, if it is to be taken to good purpose, the depositions must have been put into permanent form while the evidence is being given. Even where there is no appeal, the process of taking down what the witnesses say, as they say it, tends to care both on the part of the witnesses and of the Court, and makes it all the more possible to ensure that no conviction will be pronounced unless evidence has been given of each essential feature of the charge. Either of these considerations provides an abundant satisfaction for the sections, which require the evidence to be taken down, and it is unnecessary to speculate further as to their

possible admissibility in the particular case of *certiorari*. Again, Rule No. 4 of the Crown Practice Rules only requires that the evidence shall be returned with the conviction, and it refers to the depositions as separate papers or documents. Since the statute expressly provides that the record of the conviction may be sufficiently recorded in the statutory form, a mere general rule of practice is not to be read as altering that provision or as requiring that the record of it shall include a separate document sent along with it, that is to say, virtually, as declaring that the general form of conviction shall not be in itself a sufficient record, the statute notwithstanding.

Sections 62 and 63 of the Liquor Act are headed " Convictions and Subsequent Proceedings," and are as follows :—

> " Section 62. No conviction order or warrant for enforcing the same or other process shall upon any application by way of *certiorari* or for a *habeas corpus* or upon any appeal be held insufficient or invalid for any irregularity, informality or insufficiency therein, or by reason of any defect of form or substance therein, if the Court or judge hearing the application or appeal is satisfied by a perusal of the depositions that there is evidence on which the justice might reasonably conclude that an offence against a provision of this Act has been committed.
>
> " Section 63. The Court or judge hearing any such application of appeal may upon being satisfied as aforesaid, confirm, reverse or modify the decision, which is the subject of the application or appeal, or may amend the conviction or other process or may make such other conviction or order in the matter as he thinks just."

Here, no doubt, there is an express definition of the relation of depositions to *certiorari*, which excludes any implied relation such as has been referred to above. The depositions are not made part of the record. They are used as independent materials, upon which the judge must uphold a conviction, which upon its face he might otherwise be bound to quash for irregularity, informality or insufficiency, provided that he is satisfied within the terms of the section. It seems to have been thought in the Court below that, if the depositions could be looked at for one purpose on *certiorari*, they could be looked at for another, and that, as it is expressly provided that they are materials available for affirming an otherwise dubious conviction, they must also, by necessary implication, be materials available for quashing a conviction, which on its face appears to be beyond doubt. This is not so. Plainly, the object of the section is to stop every chance of the accused's escaping after conviction, so far as it is possible to do so ; but it contains no word in his favour. The only wonder is that it does not provide for *certiorari* to bring up and quash an order dismissing the information.

The next Section 63 does, it is true, contain the word " reverse," but on examination it is clear that this is not a reversal that is to benefit the accused. The Court, upon being satisfied as aforesaid, that is, in the words of Section 62, being :—

> " satisfied by a perusal of the depositions that there is evidence on which the justice might reasonably conclude that an offence against a

provision of this Act has been committed, . . . may confirm, reverse or modify, . . . or may amend the conviction or make another conviction."

The condition of power to reverse, in the sense of a power to let the guilty person off, cannot be a conclusion from evidence that the Act has been violated, and it is to be noted that the word is " reverse " and not " quash." What evidently is meant is that, on drawing the above conclusion from the evidence, the Court may, if it thinks fit to exercise the power of making some other conviction, reverse for that purpose the conviction actually made below, which otherwise would stand in the way, and direct the conviction, which in its opinion the justices should have pronounced.

Their Lordships are of opinion that the provisions of the Canadian Criminal Code and of the Alberta Liquor Act have not the effect of undoing the consequences of the enactment of a general form of conviction ; that the evidence, thus forming no part of the record, is not available material on which the superior Court can enter on an examination of the proceedings below for the purpose of quashing the conviction, the jurisdiction of the magistrate having been once established, and that it is not competent to the superior Court, under the guise of examining whether such jurisdiction was established, to consider whether or not some evidence was forthcoming before the magistrate of every fact, which had to be sworn to in order to render a conviction a right exercise of his jurisdiction.

The magistrate's order for the forfeiture of the entire stock of whisky in cases stands or falls by the same considerations as the conviction for keeping it unlawfully, though in itself it constituted by far the severest penalty. The learned Judges below were not unnaturally impressed by the fact, that one reason for selecting as the offence to be charged an unlawful keeping instead of an unlawful selling, was to get the opportunity, after establishing the offence, of applying for the forfeiture of the stock of whisky. This, however, makes no difference to the legal aspect of the matter. There was also some irregularity in the issue of the search warrant, which preceded the application for forfeiture, and in the information on which it was applied for, but this does not afford a ground for quashing the order, if otherwise it is not impeachable. It is urged that there was no evidence, which would justify the forefeiture, since proof of the unlawful sale of one case is no evidence of an unlawful keeping of the entire stock of cases, thousands in number. This, of course, is only another way of contending that there was no evidence of the commission of the principal offence. Even if the superior Court was entitled to investigate the nature and extent of the evidence, as to which the considerations already advanced need not be repeated, their Lordships are of opinion that this matter was one for the magistrate. If he believed the evidence as to the circumstances under which the whisky sold was inquired for,

selected, sold and taken away, it cannot be said that his conclusion, that the whole stock and not the single case only was unlawfully kept, exceeded the provisions of the Liquor Act.

As leave was given for the appeal from the judgment of the Supreme Court of Alberta, upon which all the questions that arise can be completely disposed of, it became unnecessary, for the purpose of this case, to proceed with the appeal from the refusal of the Supreme Court of Canada to entertain the matter, and their Lordships might well have declined to entertain it. They have, however, been asked to give a decision on this point also, in order that a question of law, which it is suggested is at least doubtful, may be set at rest. On this ground, and not as opening the door in future to any general admission of argument upon points, which do not necessarily arise, their Lordships are content to deal with it. The question is whether an appeal from the Supreme Court of Alberta in this case to the Supreme Court of Canada would have been a criminal cause or matter within the words of the Dominion statute (10 and 11 Geo. V c. 32). This Act, which received the Royal Assent shortly before the commencement of the proceedings now in question, excepted by Section 36 from the appellate jurisdiction of the Supreme Court of Canada, " proceedings for or upon a writ of *certiorari* arising out of a criminal charge." In substance and for present purposes this was the law as laid down in the Supreme Court Act, Sections 35, 36 and 39, and the alterations made in 1920 are not now material.

The question whether a prosecution under a typical Temperance Act is or is not a criminal charge has twice been before the Supreme Court in recent years, viz., *Re McNutt* (47 S.C.R., 259), which was a case of *habeas corpus*, and *Mitchell* v. *Tracey* (55 S.C.R., 640), which was a case of prohibition. In the first, six judges took part in the hearing. Three of them held that the application for the writ arose " out of a criminal charge " ; one held that it did not, and one seriously doubted whether it did ; the remaining judge expressed no opinion on the point. The case was, however, capable of being disposed of on other grounds. Duff, J., delivered an elaborate and striking judgment, to the effect that the application for the writ did not arise out of a criminal charge, and the principal judgment *contra* was that of Anglin, J. In the second case, out of five judges who took part, three followed the conclusion of Anglin, J., in the earlier case, Anglin, J., himself being one, and two expressed no opinion on the point at all. Under these circumstances it becomes desirable to examine the question more fully than would otherwise be required, in view of the fact that the present case has been substantially disposed of on the appeal from the Supreme Court of Alberta.

The issue is really this. Ought the word " criminal " in the section in question to be limited to the sense in which " criminal " legislation is exclusively reserved to the Dominion legislature by the British North America Act, Section 91, or does it include that power of enforcing other legislation by the imposition of penalties, including imprisonment, which it has been held that

Section 92 authorizes provincial legislatures to exercise ? It may also be asked (though this question is not precisely identical) under which category does this conviction fall of the two referred to by Bowen. L.J., in *Osborne* v. *Milman* (L.R. 18 Q.B.D., 471), when he contrasts the cases " where an act is prohibited, in the sense that it is rendered criminal," and " where the statute merely affixes certain consequences, more or less unpleasant, to the doing of the act."

Their Lordships are of opinion that the word " criminal " in the section and in the context in question is used in contradistinction to " civil," and " connotes a proceeding which is not civil in its character." *Certiorari* and prohibition are matters of procedure, and all the procedural incidents of this charge are the same whether or not it was one falling exclusively within the legislative competence of the Dominion legislature, under Section 91, head 27. When the Supreme Court was established by statute in 1875, and this exception out of its powers as to *habeas corpus* was enacted by Sections 23 and 51, there was then in existence a substantial body of undoubtedly criminal matters, which did not rest on any statute, and this must have been within the purview of these sections, the British North America Act notwithstanding. After all, the Supreme Court Act is concerned not with the authority, which is the source of the " criminal " law under which the proceedings are taken, but with the proceedings themselves, and all the arguments in favour of limiting appeals in such cases apply with equal force, whether the provincial legislature is or not the competent legislative authority.

Their Lordships will therefore humbly advise His Majesty that on the appeal from the judgment of the Supreme Court of Alberta the appeal should be allowed ; that the judgments of the Supreme Court and of Hyndman, J., should be set aside, and that the conviction and order for forfeiture should be restored, and the appeal from the Supreme Court of Canada should be dismissed. Their Lordships were given to understand that an arrangement has been made between the parties, which makes any direction as to costs unnecessary on the present occasion.

**In the Privy Council.**

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THE KING

*v.*

NAT BELL LIQUORS, LIMITED.

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DELIVERED BY LORD SUMNER.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.

1922.