

REX v. MACKINTOSH.

1908. *March 2.* MAASDORP, C.J., and FAWKES and
WARD, JJ.

Liquor Law.—License.—Days of grace.—Sale of liquor during prohibited hours.—Retrospective effect of license.—Review.—Sec. 6 of Ordinance 38 of 1903.

Sec. 37 of Ordinance 10 of 1903 allows twenty-one days' grace between the expiry of an old license and the time when it becomes necessary to take out a new one. When a man commits an offence under the Liquor Law as a licensed holder between the expiry of his old license and the renewal he cannot be prosecuted for contravening the terms of the license or for selling liquor without a license till the completion of the days of grace, after which date, if the license is renewed by the holder, it becomes retrospective; if not, the holder may be prosecuted for having sold liquor without a license within the period of grace.

This was an argument on review under sec. 6 of Ordinance 38 of 1903, which gives the Attorney-General the right to bring in review any case where he is dissatisfied with the finding of a lower court upon any point of law in a criminal case, in order to take the opinion of the High Court on the point involved, for the future guidance of lower courts. The accused had been charged in the lower court under sec. 52 of Ordinance 8 of 1903 with selling liquor between 2.55 and 3.25 A.M. on the 5th January, 1908, without a license. He had been a licensed holder up to the 31st December, 1907, when his license expired. He was acquitted by the magistrate on the ground that he could not be prevented from selling liquor within the twenty-one days of grace allowed under sec. 37 of Ordinance 10 of 1903. He had been granted the right to take out a license for the current year by the licensing court, and the offence was committed between the date on which that court sat in December, 1907, and the date on which he actually took out a fresh license. The difficulty of

proceeding against a person for such an offence in future consisted in the fact that the accused had no license at the time, but under sec. 37 of Ordinance 10 of 1903 was entitled to sell liquor. He could not, therefore, be convicted of selling liquor without a license.

Lloyd, for the Crown, referred to the case of *Rex v. Pilcher* (unreported), in which the accused had sold liquor during prohibited hours, and had been convicted by the lower court of selling liquor in contravention of the terms of his license under sec. 51, sub-sec. 6, of Ordinance 8 of 1903. The conviction in this case was quashed on the ground that the offence had been committed at a time when the accused's license had expired. Counsel pointed out that if the magistrate's decision in the case before the Court were upheld it would be impossible to prevent a sale of liquor during prohibited hours within the twenty-one days of grace. He submitted that there were only two courses open, namely, (1) to hold that sec. 37 of Ordinance 10 of 1903 had impliedly repealed sec. 67 of Ordinance 8 of 1903, which provided that an annual liquor license should expire on the 31st December unless the licensing court was still sitting, and that the provision as to the period for which the license was granted should be held as merely directory, and the old license should hold good for the twenty-one days of grace; or (2) to hold that the decision in *Rex v. Pilcher* was wrong.

[FAWKES, J.: The wording in sec. 67 of Ordinance 8 of 1903 and sec. 37 of Ordinance 10 of 1903 is "renewal" and "renewed."]

MAASDORP, C.J.: The difficulty which arises in this case has been unnecessarily raised by the fact that no provision was inserted in sec. 37 of Ordinance 10 of 1903 as to the position of the holder of an expired license who sells liquor without a license during the twenty-one days of grace allowed by that section. But we have now to deal with the case as it stands here. The difficulty may be got over in this way: during the twenty-one days such a person cannot be prosecuted at all. If he subsequently takes out a license, such license will date back to the first day of the month, and then he may

be prosecuted for contravention of the terms of the license. If he does not, there will be no ratification and therefore no license, and such a person may then be prosecuted for having sold liquor without a license. I am referring to an offence committed within the twenty-one days. The magistrate's decision must, therefore, be upheld.

FAWKES and WARD, JJ., concurred.

