REGINA v. MCAULEY

(1887), 14 O.R. 643

Ontario Common Pleas, Wilson C.J., 27 April 1887 and Armour J, 1887

(On appeal) Ontario Divisional Court, Cameron C.J., Galt and Rose JJ., 25 June 1887

Intoxicating liquors--Indians, selling liquor to--Sale by wife--Service on wife--Conviction of husband--Jurisdiction of Indian agent--Order pre- venting action against Magistrate--Power of single Judge to quash conviction--Appeal to Divisional Court.

An information for selling liquor to certain named Indians, but without describing them as of any particular tribe or locality, was laid by R. of the township of Rama, before D.M., described as "an Indian agent by Royal Authority duly appointed," and alleged that defendant and Fanny, his wife, or one of them, did on, &c., sell, &c., to the said Indians spirituous liquors contrary to the statute, &c. The summons issued thereon described D.M. as Indian agent, and shewed it was issued at Rama township. It was directed to the defendant and his wife, described as of Rama township, and was personally served on the wife and a copy left with her for husband at their most usual place of abode. This was proved by affidavit of service. The enquiry was held at Rama before D.M. as Indian agent, and he subscribed the different depositions as "Indian agent of the Chippewas of Rama," *ex officio* Justice of the Peace. The conviction was that on, &c. "at Rama Indian Reserve, in the township of Rama," the defendant "is convicted before D.M., Indian agent for the Chippewas at Rama, *ex officio* Justice of the Peace for the purpose and under the Indian Act 1880, for that he did on, &c., at the township of Rama, unlawfully sell to certain Indians, &c." The warrant of commitment recited that the conviction was before D.M. as Indian agent of the county of Ontario. The liquor was sold at defendant's hotel, in the township of Rama, by the defendant's wife, the husband being away at the time and for some time afterwards. There was nothing said to D.M. to shew why defendant was not present at the enquiry; and D.M. had no reason to believe that the case was other than a neglect or refusal to attend. In support of this application, defendant stated that he knew nothing of the summons having been issued, or of the proceedings thereon, and never authorized any one to act for him.

Held, per WILSON, C. J., that the service was regularly made, and duly proved before the Indian agent, and he was justified in proceeding to investigate the charge; and that the act of the wife was in law that of the husband, and that he could be convicted therefore.

Quære, whether D. M.'s appointment was as an Indian agent of the Chippewas of Rama, or for the county of Ontario, but the latter might include the former and so give jurisdiction.

Held, however, the conviction could not be supported, for none of the proceedings showed that the Indians to whom the liquor was sold were Indians over whom the agent had jurisdiction, as it did not appear they were Chippewa Indians, or Indians residing within the township, or even in the county.

The discharge of the defendant was granted, but the learned Chief Justice directed that, so far as necessary, and he had power to do so, no action should be brought against the Indian agent.

A substantive motion was made before Armour, J., to quash the conviction which was granted, he also directing no action to be brought against the Indian agent.

On appeal to the Divisional Court against so much of the judgments as pre- vented an action being brought, the appeals were quashed.

Quære, whether a single Judge has power to hear such motions to quash convictions. If he has power his

decision is final, and not appealable. If he has no power, then his action is of no avail, and still unappealable.

THIS was an application against a conviction of the defendant for selling liquor to Indians, and subsequent proceedings, and for the discharge of the defendant.

The information was laid by Simeon Rocky-Mountain, of the township of Rama, labourer, on the 17th of Novem- ber, 1886, before Duncan McPhee, an Indian agent, by Royal authority duly appointed, who said he was informed and believed that Alexander McAuley, of Rama, and Fanny, his wife, or one of them, did, on the 13th of November, 1886, sell, exchange with, barter, supply, or give to the following named Indians [naming five of them], or some or one of them, spirituous, fermented, or intoxicating liquor, contrary to the statute 43 Vic. ch. 28, the Indian Act (1880), and amendments thereto.

A summons was issued directed to McAuley and Fanny, his wife, requiring them to appear and answer the charge; and there was an affidavit of service of the summons on the 18th November, the deponent stating that on that day he served "Alexander McAuley and Fanny, his wife, with the within summons by delivering two copies of the same to, and leaving the same with, Fanny McAuley for herself and for the said Alexander McAuley at their most usual place of abode in Rama."

Rocky-Mountain said, at the examination before Duncan McPhee, the Indian agent at the Rama Reservation at Rama: "I was at the Temperance Hall on the 13th of November, at a temperance meeting held there. While there Gilbert Williams, Moffatt Bigwind, and Samuel Snake came there drunk. I believe they had with them a pail that had beer in. I believe beer from the smell of it, I can judge liquor by smelling it, because I drank a lot of it when I was young."

Cross-examined by Mr. *Gettings*: "I did not drink any of the contents of the pail. The boys, were lying down when I found them, and could not get up."

Gilbert Williams said, that on 13th November David Simcoe was at Alexander McAuley's hotel. He asked witness to come in and have a drink. He had a pail which had beer in it. Four drank contents of the pail--David Simcoe, Moffatt Bigwind, Samuel Snake, and witness. After drinking contents of the pail, they all went into the hotel. Mrs. McAuley was in. Simcoe asked her to give us some whiskey, and she gave us three or four drinks of whiskey, which Simcoe paid for. Peter Jacobs was inside when we went in. Then Simcoe treated. Peter asked for whiskey, and he got it. He remembered Peter drank that time. Mr. Gettings was there also: he was, he believed, a little drunk.

Peter Jacobs said he was at Alexander McAuley's hotel on 13th November. "Mrs. McAuley was serving the, 'boys,' with drink. Simcoe treated. I asked for whiskey, and Mrs. McAuley gave it to me. I got two glasses of whiskey that evening. Simcoe, Bigwind, Williams, and Snake were the only Indians present that evening. Mr. Gettings and Mr. English were there."

The conviction was: "Be it remembered that on 25th of November, 1886, at Benson Hall, Rama Indian Reserve, in the township of Rama, Alexander McAuley, of the town- ship of Rama, aforesaid, is convicted, before the under- signed Duncan McPhee, Indian agent for the Chippewas of Rama, *ex officio* a Justice of the Peace for the purposes of and under the Indian Act, 1880; for that he, the said Alexander McAuley, on the 13th of November, 1886, at the

township of Rama, did unlawfully sell to certain Indians--to wit, to David Simcoe, Gilbert Williams, Moffatt Bigwind, Samuel Snake, and Peter Jacobs--intoxicating liquor--to wit, whiskey, to the said Indians, not having been made use of by them, or any of them, in the case of sickness under the sanction of a medical man or under the directions of a minister of religion, such sale to the said Indians being contrary to the Indian Act, 1880; Simeon Rocky-Mountain being the complaintant. And I adjudge the said Alexander McAuley, for his said offence, to forfeit and pay the sum of $50, to be paid and applied according to law; and also to pay to the said Simeon Rocky- Mountain the sum of $1.85 for his costs in that behalf; and, if the said several sums are not paid forthwith, I adjudge the said Alexander McAuley to be imprisoned in the common gaol of the said county of Ontario, and there to be kept at hard labour for the term of ninety days, unless the said sums and the costs, and charges of conveying the said Alexander McAuley to the said common gaol are sooner paid. Given," &c.

A warrant of commitment was issued upon the conviction, on which the defendant was arrested at Rama on the 6th of April, instant, and committed to gaol.

The warrant recited that: "Whereas Alexander McAuley was this day convicted before me, the undersigned, an In- dian agent for said county of Ontario," &c. It was subscribed "Duncan McPhee, Indian Agent."

He swore he was not personally served with a summons to appear to answer the charge against him, and that he had no notice or knowledge of any proceedings against him before the said Duncan McPhee, except from a newspaper report which he read sometime after the date of the war- rant. He said he left his home in Rama on or about the 3rd of October, 1886, and proceeded to a lumbering shanty in the township of Longford, in the county of Victoria where he remained continuously till on or about the 21st of February, 1887, when he returned to his home in Rama. He asserted in this later affidavit he was not personally served with any summons, nor was he aware of any charge being laid against him until he saw it in the newspaper before mentioned. He did not, in fact, commit the offence charged, and he was wholly innocent of it. In another affi- davit he further said he did not instruct or authorize any person to appear for him before the said McPhee, or to cross-examine witnesses on his behalf, or in any way to act for him in respect of the said charge.

These facts were not contradicted.

The proceedings were removed by a writ of *certiorari*, and a writ of *habeas corpus* was also issued.

George Bell, for the defendant. This was a matter of jurisdiction, and *certiorari* was not taken away. The defendant was not personally served with a summons to appear and answer the charge, nor had he any notice or knowledge of the summons, or of any charge being made against him until after his conviction, nor did he authorize any one to appear or act for him: *Regina v. Ryan*, 10 O. R. 254. It does not appear that the place where the offence was committed was within the locality for which the said Duncan McPhee was Indian agent, or was in the county of Ontario: *Regina v. Chandler*, 14 East 267. The combined operation of R. S. O. ch. 43, secs. 94-117, are insufficient to enable an Indian agent to act off an Indian reserve in the province of Ontario. The conviction does not state that Duncan McPhee, the Indian agent, acted as a justice of the peace for the locality; nor that the informer was corroborated, the informer, by

the Act, being required to be a credible witness; nor the place where the alleged offence was committed with certainty; and it states a multiplicity of offences by sales to different persons. The warrant of commitment is defective in all these respects.

Aylesworth, for the Indian agent, contra. The service was sufficient. The act of the wife was, under the circumstances, that of the husband. The conviction was valid, and so was the warrant of commitment. The Indian agent had power to adjudicate upon the charge. He referred to 43 Vic. ch. 28, sec. 90, (D.); 44 Vic. ch. 17, secs. 10,12, (D.); R. S. C. ch. 43, sec 94; 45 Vic. ch. 30, secs. 3, (D.); 47 Vic. ch. 27, sec. 22-3, (D.), and sec. 15, made by that Act sub-sec. 2 of 43 Vic. ch. 28, sec. 97; *Regina v. Wallace*, 4 O. R. 127; R. S. C. ch. 43, sec. 117; *Regina v. Campbell*, 8 P. R. 55; *Regina v. Howard*, 45 U. C. R. 346; *Regina v. Williams*, 42. U. C. R. 462.

Delamere, for the Crown.

April, 27, 1887. WILSON, C. J.--The first question is whether the defendant could be proceeded against as he was proceeded against in respect of the charge, by the summons being delivered to his wife although in the husband's house, for the sale of liquor made by his wife in his absence, and when he had been absent from the county from about the 3rd of October, 1886, continuously, as appears, up to the time of the sale of liquor upon the 13th of November, and from that time onward until about the 21st of February, 1887, and having had no knowledge of such sale of liquor, nor of the proceedings which were taken against him for it until some time after the conviction was completed?

The 32-33 Vic ch. 31, sec. 2 (D.), requires that the "summons shall be served . . . by delivering the same to the party personally, or by leaving with it with some person for him at his last or most usual place of abode."

The person serving the summons is to attend at the time and place and before the Justice in the summons mentioned to depose, if necessary, to the service thereof: sec. 3.

Sec. 7. If the party summoned "fails to appear in obedience to the summons, then, if it be proved upon oath or affirmation to the Justice or Justices present that a summons was duly served upon the party a reasonable time before the time appointed for his appearance, the Justice or Justices of the Peace may proceed *ex parte* to the hearing of the information or complaint, and adjudicate thereon, as fully and effectually to all intents and purposes as if the party had personally appeared before him or them in obedience to the summons."

The summons was issued at the township so Rama on the 17th of November, 1886. It was served on the 18th, the deponent stating that on that day he served "Alexander McAuley and Fanny McAuley, his wife, with the within summons, by delivering two copies of same to, and leaving same with, the said Fanny McAuley for herself and for the said Alexander McAuley, at their most usual place of abode in the township of Rama."

The case was heard before the magistrate on the 25th of November in the township of Rama. The informant and two other witnesses gave evidence in support of the charge.

The charge was, that the sale of the liquor was made by Mrs. McAuley, not by her husband, who was, no doubt, away from home at the time and for some time after it.

There was nothing said to the magistrate, from the papers before me, why Alexander McAuley was not present at the enquiry; nothing said of his not being at his home or residence at the time.

So far as the proceedings before the magistrate shew, it does not appear he knew or had reason to believe the case was any other than a neglect or refusal of the husband to attend. The service was therefore regularly made and duly proved before the magistrate; and he was justified in proceeding, as he did, to investigate the charge.

The next enquiry is, whether the magistrate proceeded properly in convicting the husband for a sale made by his wife of spirituous liquor in the husband's house, which is called a hotel, in his absence from the house, (the fact of the husband's absence at the time not appearing to have been made known to the magistrate, if that be of any consequence)?

The evidence shewed the defendant then kept a hotel in Rama where the liquor was sold. A hotel is a place where liquor may be sold, but not to Indians, and the sale complained of was to Indians. The wife may be considered as the agent of the husband in carrying on the hotel, and more particularly in his absence. She did sell the liquor in fact. It will not be assumed that in merely selling liquor she was doing an unlawful act. She was, therefore, doing an act in the ordinary and legitimate business of a hotel keeper.

But the illegality consists, not in the mere selling of the liquor, but in selling it to Indians, to whom personally the sale of liquor is interdicted by statute.

I am of opinion, therefore, the act of the wife was, in law, the act of the husband. There are several cases of the kind.

A person in the employ of another who sells a libelous article for that other is the agent of his employer in doing that act, and the employer is responsible for it.

There are numerous cases in which a wife doing business for her husband is held to be his agent.

So a woman may be convicted with her husband of keeping a house of ill-fame; and that would shew the husband might be convicted of the offence if his wife carried it on with his knowledge, although he was temporarily absent while she had charge of the house.

If the liquor had been lawfully sold, no doubt the husband could recover for it, unless there was some special cause to prevent it.

I am of opinion the husband could be convicted for the sale made by the wife.

The next enquiry is, whether Mr. McPhee, the Indian agent, had the power to adjudicate upon the charge in question?

The proceedings were taken and carried on under the Indian Acts.

The section which applies here is sec. 90 of the 43 Vic. ch. 28, (D.) The part of it which is applicable is the first part: "Whoever sells, exchanges with, barters, supplies, or gives to any Indian or non-treaty Indian in Canada, any kind of intoxicant, or causes or procures the same to be done . . . shall, on conviction thereof before any judge, stipendiary magistrate, or two justices of the peace, upon the evidence of one credible witness other than the informer or prosecutor, . . .

be liable to imprisonment for a period not less than one month nor exceeding six months, with or without hard labour, or be fined not less than $50 nor more than $300, with costs of prosecution--one moiety of the fine to go to the informer or prosecutor and the other moiety to Her Majesty, to form part of the fund for the benefit of that body of Indians or non-treaty Indians, with respect to one or more members of which the offence was committed; or he shall be liable to both fine and imprisonment in the discretion of the convictions judge, stipendiary magistrate, or justices of the peace . . . : but no penalty shall be incurred in case of sickness where the intoxicant is made use of under the sanction of a medical man or under the directions of a minister of religion."

The 45 Vic. Ch. 30, (D.) enacts that, wherever power is given in The Indian Act, 1880, or in the 44 Vic. ch. 17 (D.), or "in this Act," to "any stipendiary magistrate or police magistrate to dispose of cases of any infraction of the provisions of the said Acts" brought before him, any Indian Agent shall have the same power as a stipendiary magistrate or a police magistrate has in respect to such cases.

The 44 Vic. ch. 17 sec. 12 (D.), also enacts, that: "Every Indian commissioner, assistant Indian commissioner, Indian superintendent, Indian inspector or Indian agent shall be *ex officio* a justice of the peace for the purposes of this Act." "The term agent includes a commissioner, superintendent, agent, or other officer acting under the instructions of the superintendent-general."

There appears to be no doubt that *any Indian Agent* has the all the powers under the statutes above mentioned, and to adjudicate upon a case of this kind in like manner as a stipendiary magistrate has under the 43 Vic. ch. 28, sec. 90 (D.), who is specially named in that section.

The stipendiary magistrate, Indian agent, or justice of the peace, must of course be appointed to exercise his jurisdiction within some prescribed area.

Does it appear that Mr. McPhee was Indian agent for any defined area or locality? And, if so, for what locality? Or that he was agent for any particular reserve or body of Indians? He describes himself as follows; and he shews where he acted and where the offence was committed:

The information states it was laid before him "an Indian agent by Royal authority duly appointed" at "the town- ship of Rama in the county of Ontario;" and the jurat describes him as "Indian agent for the Chippewas of Rama, *ex officio* justice of the peace under the Indian Act, 1880 and amendments thereto."

The summons describes him as "Indian agent," and shews he issued the summons at *Rama township*, and directed it to the defendant and his wife, who are described as of the township of *Rama*. The enquiry was held at *Rama* before Mr. McPhee as Indian agent; and he subscribes the different depositions as "Indian agent for the Chippewas of Rama, *ex officio* justice of the peace."

The conviction begins: "Be it remembered that on the 25th day of November, 1886, at Benson Hall, Rama Indian Reserve, in the township of Rama, in the county of Ontario, Alexander McAuley, of the township of Rama aforesaid, is convicted before the undersigned Duncan John McPhee, Indian agent for the Chippewas of Rama, ex-officio Justice of the Peace, for the purposes of and under Indian Act, 1880, for that," &c.; and it is subscribed by Mr. McPhee in substantially the like manner.

The warrant of commitment recites that "whereas Alex- ander McAulay was this day convicted before me, the undersigned, Indian agent for said county, for that," &c.; and it is subscribed "Duncan McPhee, Indian agent."

It is quite clear Mr. McPhee carried on all his proceedings in the township of Rama, and that the alleged offence was committed there, and the defendant's home and residence were there.

It appears also he was "Indian agent for the Chippewa Indians of Rama."

As to his being *ex officio* a justice of the peace, is of no consequence, for as a justice of the peace he could not have made this conviction, for the 43 Vic. ch. 28, sec. 90, (D.), requires *two justices* to convict; so it does not matter that he does not describe himself as a justice of the peace for any particular locality; although it might be assumed he would be a justice of the peace for the locality for, from, and over which his ex-officio title and power arose and extended.

The commitment is more particular, for it recites that Mr. McPhee was "Indian agent for said county," that is, for the county of Ontario.

In all the proceedings before the warrant of commitment he describes himself as "Indian agent for the Chippewa Indians of Rama," and in the warrant as "Indian agent for the county of Ontario." He might, however, be Indian agent for the county including the township of Rama, and so be agent in that sense for the Chippewa Indians of Rama; and be might, perhaps, although not quite correctly, but sufficiently to sustain this conviction, describe himself as "Indian agent for the Chippewa Indians of Rama," as the offence was committed in that township and the defendant resided there, and, also, the proceedings were carried on there.

If Mr. McPhee was the agent for the county, and if he was describing his titular office, appointment and jurisdiction, as I am rather of opinion he was, then he was not acting as agent for the Chippewa Indians of Rama, but by virtue of his office and appointment as the Indian agent for the county of Ontario. But I do not think that would invalidate his acts, for as agent for the county he would have jurisdiction over the Indians of Rama.

There is a further point to be considered with respect to jurisdiction, which is, that if Mr. McPhee was the Indian agent for the Chippewa Indians of Rama, should he not have shewn that the Indians to whom the liquor was sold were *Chippewa* Indians? He had, from his own statement, the appointment, authority, and jurisdiction over no other than that particular body of Indians; and it does not appear these were Chippewa Indians, or that it was a Chippewa Indian reserve, or that there was no other tribe, band, or body of Indians in Rama than Chippewas. Judicially it does not appear, at or up to the time of conviction, Mr. McPhee had jurisdiction over any of these Indians to whom the liquor was sold, for it does not appear they were, or that any one of them was, a Chippewa Indian. But if it be assumed that it was shewn, still it does not appear that any of the four named Indians who got the drink complained of, was shewn to have been an Indian residing in the township of Rama or even in the county of Ontario; and it does not appear that Mr. McPhee, as Indian agent of the Indians of Rama, had jurisdiction over any Indians not residents of the township or of the county, even although they were Chippewa Indians.

The first objection I have stated, that Mr. McPhee has described himself as Indian agent for the *Chippewa Indians of Rama* in the proceedings before the warrant of commitment, and Indian agent for the *county of Ontario* in the warrant, shews an authority which, so far as mere locality

is concerned, might be consistent by reason of the township being within the county as before stated; and the warrant might be supported as valid, for it is not to "be held void by reason of any defect therein, provided it is therein alleged that the person has been convicted and there is a good and valid conviction to sustain the same:" 47 Vic. ch. 27, sec. 15, (D.)

And that raises the question, is there a good and valid conviction to sustain the warrant?

The second objection I have mentioned is, that none of the proceedings, including the warrant of commitment, show any one of the four Indians who got the liquor was a *Chippewa* Indian; but, if that is to be assumed,--and it would be difficult to do so,--not one of the four is shewn to have been a *Rama* Indian. They may, for any account given of them, have been resident in a different township or county, having a home or residence in a different reserve and under the jurisdiction of another Indian agent than Mr. McPhee.

I am of opinion either of these objections just named is valid; and, the two together, I do not see how they can be answered.

I am, therefore, of opinion I must make the order absolute for the discharge of the defendant; for I am of opinion the conviction and warrant for enforcing the same, are invalid for the insufficiencies therein, and that I must so decide; for "upon perusal of the depositions," I am satisfied that, although *an offence* of the nature described in the conviction or warrant has, in a general sense, been committed, such an offence has not been committed in respect of persons over whom the Indian agent had jurisdiction; and, in that sense, which must of necessity be the true reading and construction of the Act, "an offence has not been committed, over which Mr. McPhee is shewn to have had jurisdiction." I refer to the late enactment of 49 Vic. ch. 49, sec. 2 (D.), now in the R. S. C. ch. 178, sec 87.

It is not necessary I should further examine the case. I give no opinion, therefore, on any matter upon which I have not expressly decided. The notice is simply to discharge the defendant from custody; and that is what I feel obliged to do.

The order will, therefore, be absolute for that purpose.

I add, so far as there is any necessity, or so far as I have the power, I direct that no action shall be brought against the Indian agent for or in respect of the said imprisonment of the said defendant.

A substantive motion was subsequently made before Armour, J., to quash the conviction. The learned Judge quashed the conviction, but imposed the condition "that no action be brought against the said Duncan McPhee for or in respect of anything done under the said conviction, or against any officer acting under the warrant to enforce the said conviction."

In Easter Sittings, May 21, 1887, *George Bell* moved by way of appeal from so much of the order of Wilson, C.J., made herein, directing the discharge of the prisoner upon a writ of *habeas corpus* as imposed a condition that no action of trespass should be brought against the convicting magistrate; and on the 27th of May moved further by way of appeal from so much of the order of Mr. Justice Armour, quashing the conviction, as imposed the condition "that no action be brought against the said Duncan J. McPhee for or in respect of anything done under this conviction, or against any officer acting under the warrant issued to enforce the said conviction."

During the same Sittings *George Bell* supported the motion.

Aylesworth, contra.

June 25, 1887. ROSE, J.--The clause in the order of the learned Chief Justice of the Queen's Bench Division was as follows: "And it is ordered that, so far as there is any necessity, or so far as there is power so to order, no action be brought against the said Indian agent for or in respect of the said imprisonment of the said defendant."

The conviction was by Duncan J. McPhee, as Indian agent for the county of Ontario, for selling liquor to Indians contrary to the provisions of the Indian Act of 1880 and amendment thereto.

The *certiorari* was issued pursuant to the order of Mr. Justice Robertson, tested in the name of the President of the High Court at Toronto, and returnable "to us in our High Court of Justice, Common Pleas Division, at Toronto, as ancillary to a writ of *habeas corpus*, bearing even date herewith."

It was agreed that it was unnecessary to consider the propriety of the condition imposed by the learned Chief Justice, unless we could interfere with the order of Mr. Justice Armour.

Mr. Bell urged that the evidence did not warrant the imposition of any condition. On that point we expressed our opinion as against the appellant.

He urged further that the Parliament of Canada had no jurisdiction to take away the right of bringing a civil action.

Mr. Aylesworth took the preliminary objection that the Divisional Court had no power to hear and determine an appeal from an order quashing the conviction.

Regina v. Fee, 13 O. R. 590, was cited against such contention.

A careful reading of the judgment in that case will, I think, shew that the point now raised for decision was not there decided; and, if it were, we are bound, I think, to decide according to our convictions of the law in a crim- inal case.

The language of the learned Chancellor leaves the question quite open, as it seems to me, when we remember that the motion was enlarged by Mr. Justice Ferguson into the full Court. The learned Chancellor said, at p. 592: "If there was jurisdiction to apply to a single Judge to quash the conviction there is jurisdiction in the full Court to reconsider his decision. If the single Judge had no jurisdiction then the whole proceeding was *coram non judice* so far as he was concerned, and the conviction remains in full force."

It is apparent that the learned Chancellor was not satisfied as to the jurisdiction of the Provincial Legislature to give to a single Judge the right to hear motions to quash convictions, as it has been assumed it did by 37 Vic. ch. 7, (O.), R. S. O. ch. 50, sec. 281. It did not, as I have pointed out, become necessary in that case to decide the power of the Legislature to give a right to the full Court to re-hear the decision of the single Judge.

By the British North America Act, sub-sec. 27, sec. 91, is given to the Parliament of Canada the exclusive jurisdiction to legislate concerning "the criminal law, except the constitution of Courts

of criminal jurisdiction, but including the procedure in criminal matters." And by sec. 92, sub-sec. 14, to the Provinces, concerning "the administration of justice in the Province, including the constitution, maintenance, and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in these Courts."

The Administration of Justice Act, above referred to, did not in express terms profess to deal with criminal procedure; but by its general language did direct that all matters, which would include criminal matters, that "according to the law or practice prevailing before the 24th day of March, 1874, had been heard in the Court of Queen's Bench or Common Pleas, before the full Court in Term, or in the Practice Court," should, "unless a Judge otherwise directs, be heard and disposed of in the first instance by a single Judge sitting under the 20th section of the Act respecting the Courts of Queen's Bench and Common Pleas" (R. S. O. ch. 39, sec. 20), which provided that "one Judge of each of the said Courts shall sit in open Court every week as well in as out of Term, except during long vacation; and except during the period from the 24th day of December to the 6th day of January thereafter, both days inclusive, for the purpose of disposing of all Court business which may be transacted by a single Judge."

It may well be doubted whether that Act did confer upon a single Judge the power to hear and dispose of motions in criminal matters which theretofore were required to be made before the full Court, and whether the Act should not be confined strictly to civil proceedings.

1. Because while it was within the power of the Provincial Legislature to constitute, maintain, and organize a Provincial Court of Criminal Jurisdiction, the section in question did not profess to constitute a single Judge such a Court, but merely provided that all matters which theretofore had been heard before the full Court should be heard and disposed of in the first instance by a single Judge. And sub-sec. 2 further provided that "every rule, order, or decision granted, made, or pronounced by such single Judge shall be subject to be reversed and re- heard by the full Court;" and permitted a Judge to direct that the motion be heard and disposed of by the full Court the first instance.

And 2. Because, if it did profess by such section to constitute a Judge a Court of Criminal Jurisdiction, it, by the same section, gave a right of appeal from such Judge, which it had not power to do, whether such right of ap- peal be or be not considered a new right or merely procedure. In either view the British North America Act reserved to the Parliament of Canada the right to legislate concerning "the criminal law" and "procedure in criminal matters."

It follows, therefore, that such Act, even if it did appoint a single Judge a Court of Criminal Jurisdiction, did not give a right of appeal, as such legislation was *ultra vires* the Provincial Legislature.

Prior to such Act motions to quash convictions had always been made to the full Court.

By 45 Vic. ch. 10, sec. 2, (D.), R. S. C. ch. 174, sec. 270: "The practice and procedure in all criminal causes and mat- ters, whatsoever, in the said High Court of Justice shall be the same as the practice and procedure in similar causes and matters before the establishment of the said High Court."

The Judicature Act in express terms, as pointed out by Osler, J. A., in *Regina v. Eli*, 13 A. R., 526, negatives any intention to deal with either practice or procedure in criminal matters; so that

no question arises as to assumed authority under the provisions of that Act.

The effect is, that motions to quash convictions must be made to the Court; and that no appeal lies from any rule, order, or decision made on such motion.

If the motion can properly be made to a Judge sitting alone his decision cannot be reviewed by the Divisional Court or by the Court of Appeal. For the latter proposee *Regina v. Eli, supra*. If it should be made to the Divisional Court it of course follows that it is final.

This latter question was not argued before us, and as to it we express no opinion; nor does it become necessary to say anything as to the power to impose the conditions above set out. If there was no power they will not stand in the way of an action. The result is, that if the single Judge had power to hear the motion his decision is final, not appealable. If he had no power to hear it, then his action was of no avail, and still unappealable.

The appeals must be quashed, with costs.

Appeals quashed. CAMERON, C. J., was not present through illness (a) ROSE, J., stated to the reporter that he was authorized by the learned Chief Justice to say that he concurred in the result, and as he did not wish the judgment to be delayed on account of his illness, he would subsequently hand over his reasons. This, his death, on the evening of the day that judgment was delivered, unfortunately prevented.--REF., and GALT, J., concurred.