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*March 19, 20. *March. 21.

IN RE PLACIDE RICHARD.

CASE REFERRED BY MR. JUSTICE DUFF IN CHAMBERS.

Canada Temperance Act—Conviction — "Criminal case" — R.S.C. c. 135, s. 32—Habeas corpus—Penalty—"Not less than $50"—Conviction for $200.

A commitment on conviction for an offence against Part II. of the Canada Temperance Act is a commitment in a criminal case under sec. 32 of R.S.C. ch. 135 (R.S. 1906, ch. 139, sec 62) which gives a Judge of the Supreme Court of Canada power to issue a writ of habeas corpus.

By 4 Edw. 7, ch. 41 (R.S. 1906, ch. 152, sec. 127) for a first offence against Part II. of the Canada Temperance Act a fine may be imposed of "not less than $50" and for a second offence of "not less than $100."

Held, that for a first offence the justice cannot impose a fine of more than $50. Maclennan J. dissenting.

On application to a Judge for a writ of habeas corpus he may refer the same to the Court which has jurisdiction to hear and dispose of it. Idington and Maclennan J. dissenting.

APPLICATION to His Lordship Mr. Justice Duff in Chambers for a writ of habeas corpus and referred by him to the court.

The application for the writ was made on behalf of Placide Richard, who was confined in the common gaol at Dorchester, N.B., on commitment under a conviction for an offence against Part II. of The Canada Temperance Act. The ground on which his discharge was claimed was that for a first offence against the Act a fine of $200 had been imposed while the penalty authorized by the Act was "not less than $50" which,

*PRESENT:—Fitzpatrick C.J. and Girouard, Davies, Idington, Maclennan and Duff JJ.

it was contended, meant neither more nor less than $50. Or if the magistrate had authority to impose a greater penalty than $50 he could not go beyond $100, the minimum for a second offence.

J. A. Ritchie, who opposed the application, took the preliminary objection that a judge only could grant a writ of *habeas corpus.* Mr. Justice Duff had no power to refer the case and the court could not deal with it.

Masters K.C. and *C. Lionel Hanington* were heard *contra.*

The court took time to consider the objection and it was overruled. The following opinions were presented on the point.

THE CHIEF JUSTICE.—For the course adopted by Mr. Justice Duff under the circumstances explained in his reasons for judgment and of which course the majority of the court fully approves, there is ample authority in the case of *In re Sproule*(1).

It is quite impossible to add anything of value to the very learned discussion of the whole subject in that case by three such eminent lawyers as Ritchie C.J., Strong C.J., and Taschereau C.J.

In Mr. Justice Duff's conclusions on the merits, we also concur and for his reasons.

GIROUARD J.—Mr. Justice Duff, to whom an application for *habeas corpus* was made by the petitioner under section 62 of the "Supreme Court Act," has re-

(1) 12 Can. S.C.R. 140.

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ferred the same to the full court. Mr. Ritchie, counsel for the City of Moncton, New Brunswick, from which province the case comes, raised objection that we have no jurisdiction to hear the application and that the jurisdiction is limited to the judge individually. He admits that a prisoner could go before every judge separately, but he cannot go to the full court and get the opinion of all the judges as forming the court. Of course, no one can dispute that this court is a statutory one, but it has never been disputed that it is a superior court and as such has jurisdiction over every proceeding in the court whether sitting as such or in chambers. This rule is not new; it was fully discussed *In re Sproule*(1) by Ritchie C.J., Strong and Taschereau JJ., Fournier and Henry JJ. dissenting.

Chief Justice Ritchie said:

> That this is a matter pertaining to the court, and one with which it can deal, and not a jurisdiction conferred on a judge of the court outside of and independent of the court, and that the judge has no independent jurisdiction unconnected therewith, is, I think, very obvious from the fact that he can only act as a judge of this court through the instrumentality of the writ of this court, obedience to which could not be enforced by authority of the judge but by the court, which alone could issue an attachment for contempt of the court in not obeying its process, the contempt being contempt of the process of the court, not of the fiat of the judge authorizing its issue, and therefore the impossibility of enforcing obedience to the process of the court without the assistance of the court, seems to me to prove, conclusively, that the matter is within the jurisdiction of the court.

And further on, at page 181, the learned Chief Justice said:

> The writ of *habeas corpus* is not the writ of a judge on whose fiat it issues. It is a high prerogative writ which issues out of the Queen's superior courts, and, in my opinion, is necessarily subject to the control of those courts, not necessarily by way of appeal, but by virtue of the power possessed by the court over the process of the court.

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Mr. Justice Strong and Mr. Justice Taschereau expressed their opinion in the same sense. Therefore if a judge of this court had jurisdiction to hear the application, I am of the opinion that the full court had also.

I agree with Mr. Justice Duff on the merits.

DAVIES J. concurred.

IDINGTON J. (dissenting).—In pursuance of the powers given by the "Supreme Court Act" respecting habeas corpus, my brother, Mr. Justice Duff, made an order upon the keeper of a common goal in Westmoreland, in New Brunswick, to return Placide Richard, with cause of his detention, if any, to him, the Honourable Mr. Justice Duff, in his chambers, at Ottawa, and by the order fixed Saturday, the 16th of March instant at said chambers, for hearing the application for the discharge of said prisoner.

That order has been returned and fully heard before the learned judge who has referred the matter of the disposal thereof to the full court. Objection has been taken, upon the opening of the motion before us, to our right to take up such reference and hear the motion.

I understand that a majority of the court, after consideration, have come to the conclusion that the objection should be overruled.

I am unable to agree with the majority of the court in regard either to the power to hear this motion, or the expediency of adopting such a practice as enlarging into the full court any motion which the statute gives a judge in chambers power to hear and deter-

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mine, but fails to provide for being enlarged into the full court.

Assuming for a moment that, in the absence of any express prohibition, such a course were open to us, I think, with the greatest submission and respect, that its adoption would be, to say the least, highly inexpedient.

Section 83 of the "Exchequer Court Act," section 44, sub-section 3 of the "Canadian Railway Act," and sections 104 and 106 of the "Winding-up Act," each confer power upon a single judge to give leave to appeal to this court.

Other similar powers are given to a single judge of this court.

I know not where, if we establish in this case a precedent for doing so, we can stop the practice of hearing chamber motions by the full court.

Those concerned in, and pressing for or opposing such motions, most of which, arising under such statutes as I refer to, are quite as important as this one, will be very astute in suggesting and magnifying the importance of the point to be decided.

We held in the case of *Williams* v. *Grand Trunk Railway Co.*(1), that no appeal would lie to us from a refusal of a single judge to give leave to appeal. This was upheld in the Privy Council.

But if we can hear this motion by way of acting in an advisory capacity, and we can hear it in no other way, why not in the same way hear any other?

If permissible, we might thus overcome the want of an appeal from the single judge in the cases I have enumerated.

It might be urged, moreover, that as there was no

(1) 36 Can. S.C.R. 321.

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appeal, it would improve matters to have the judge, who for the time being might be holding chambers, aided in this way.

In the case now in hand, I am happy to think that my brother Duff is, if I might be permitted to say so, quite able to do without the light to be got from the proposed argument before the full court. Moreover, the prisoner is entitled to his judgment in the matter.

Again there is an appeal given by the statute to the court from the learned judge's judgment, in case he refuses the writ or remands the prisoner.

There is much more reason for an anticipatory hearing of the subject matter (of what might well be subject for an appeal), where no appeal exists, than in the case where such relief can be given.

The matter may be summed up in a few words; the statute creating this court did not give, nor has any amendment thereto given, us the power, either directly or indirectly, to adopt the proceeding about to be entered on. Moreover, such a thing has never been done before, except where the statute expressly empowered the court to make the order.

The statute has, in some cases where Parliament chose to distinguish, given the power either to judge or court, as the case might be.

It is said, however, that the case of *Re Sproule*(1) is to be relied on as establishing a precedent in this court supporting the practice about to be adopted.

I am with due respect, utterly unable to comprehend how. I repeat what has been so often said that to constitute the decision in a case a precedent to bind, there must have been something decided thereby necessary to the determination of the case or matter

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under consideration, and that must be something properly under consideration.

All beyond is *obiter dicta.*

If I understand *Re Sproule*(1) in light of that, all it did decide and all it stands for, as good law, is that this court has jurisdiction to set aside an order made, or quash a writ improvidently granted, by one of the judges thereof, and that the order was so made and writ so issued when going beyond what was involved in

> an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada

as shewn by the facts of that case.

I have not had time to read since this motion was launched the ninety pages of the report of *Re Sproule.*

I see, however, that the motion there was to quash and nothing more decided on such motion than I have stated. I agree therewith. I do not think it at all applicable to this case. We have not heard of anything like it in this case. And I have no doubt we will not in this case, hear of anything like it.

The decision was given on a substantive motion to quash.

How can a decision, granting a motion to quash, bind this court to sit in full court, to hear a motion for discharge?

If there are opinions expressed in the judgments in that case that go the length some of the head notes of the report suggest, I beg respectfully to differ.

But I see nothing even there to warrant our sitting to consider the motion now pending.

(1) 12 Can. S.C.R. 140.

Section 62 now in question of the "Supreme Court Act" is as follows:

> Every judge of the court shall except in matters arising out of any claim for extradition under any treaty, have concurrent jurisdiction with the courts or judges of the several provinces, to issue the writ of *habeas corpus ad subjiciendum*, for the purpose of an inquiry into the cause of commitment in any criminal case under any Act of the Parliament of Canada.
>
> 2. If the judge refuses the writ or remands the prisoner, an appeal shall lie to the court.

It, as plainly as language can express it, gives to the judges of this court, singly, and only to each of them so sitting singly, and not to the court

> concurrent jurisdiction with the courts or judges of the several provinces to issue the writ of *habeas corpus ad subjiciendum*.

But for the second sub-section of the clause it might be fairly arguable, having regard to the past history of the writ of habeas corpus, that its return might be made to the court though issued by a single judge.

The second sub-section giving an appeal seems to destroy any such implication as within the purview of this section.

With every respect for the opinions that may have led to the head-notes I have referred to, I submit that in trying to find the limits of the jurisdiction of this court, which is only the creature of a statute, we ought to keep to the plain meaning when we find it so clearly written as expressed above.

It confides to the judge the right to issue the writ, and to determine the result of its issue. If he cannot grant it or release the prisoner he says so, and then appeal clearly lies. If appeal is not given in case of discharge any opinions given by us in relation thereto

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would be *obiter dicta* and can receive no consideration, for we would be deciding nothing.

In the past history of the writ of habeas corpus we find it a moot point whether at common law it could have been issued by a judge in chambers; that it always could have been issued by the court and that when, in the troublous times of Charles I., its issue with greater certainty and expedition was found necessary the statute 16 Car. I. ch. 10, was enacted to give the writ, in cases named, to bring the body of any person restrained before the Court of King's Bench or Common Pleas.

It was found necessary to amend this and 31 Car. II. ch. 2, gave power where the commitment was not for treason or felony, plainly and specially expressed in the warrant of commitment, that the prisoner should be brought before the Lord Chancellor, the Lord Keeper of the Great Seal or the judges or barons of the court from which the writ should issue or such other person or persons before whom the writ *should be made returnable.*

Section 3 of that Act made it clear that any of these judges could in the cases specified hear the motion in vacation as well as in term.

I need not follow the next important Act of 56 Geo. III. ch. 100, expanding the remedies of such writ, or later amendments of the law, relative to habeas corpus.

This outline of legislation is referred to here to indicate how differently these Acts present the legal functions of judge and court from that which section 62 of our Act presents the duties to be done by each of us and this court, and how when the former are studied historically the cases shew strict adherence to the statutes in giving effect to them.

It is most instructive to trace the history of the legislation on the subject of habeas corpus. Its development shews how careful the courts and judges have been, not to arrogate to themselves any power as inherent in any one beyond that expressly given by statute, or coming down as part of the common law.

Every step taken beyond the common law has been rested upon statute. And it seems to me, when we are asked to go beyond that which the statute expressly empowers us in this statutory court, we are invited to err.

There seems to be abundant reason for constituting and separating the respective powers and duties of judge and court in the way that section 62 has done.

The moot point of the common law right of a judge in vacation to grant the writ was finally settled by the Canadian prisoner's case reported in 9 A. & E. 731.

The writ which, on the facts there and the nature of the charge, had to rest on the common law had been issued in vacation. The return was not heard until term, and then *only by consent of counsel as the report indicates;* and after an exhaustive argument by Sir John Campbell, then Attorney-General, in support of the objection that, at common law a judge could not in vacation direct the issue of the writ, the court decided that the practice had *always been* that a judge could grant the writ in vacation returnable before himself or the court.

No two of the provinces present, by legislation, identically the same procedure.

The statute giving the judges of New Brunswick or court power is chapter 133 of the Consolidated Statutes of New Brunswick (1903).

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The judge is entrusted with nearly all the duties created by this Act.

In certain cases, specified and provided for, he can refer to the court. None of these touch what is being done here. A consideration of this Act, however, shews why the jurisdiction given by section 62 above quoted confers on every judge of this court concurrent jurisdiction with the courts or judges of the several provinces.

In Ontario the judge can make the writ returnable to the Divisional Court. I refer to this to shew that jurisdiction given a judge or court differs in each case.

I assume that the word "concurrent" in section 62 must be interpreted distributively; and that this case coming from New Brunswick must be governed by the Act of New Brunswick referred to. The Act in New Brunswick must be that to which we must look for the basis of the concurrent power; a power, however, limited as section 62 expresses.

It seems clear to me that the motion should not be heard.

Having at the close of the argument on the preliminary objection had the opportunity of considering the same and come to this conclusion, I took no part in the hearing on the merits and take no part in the decision thereof.

MACLENNAN J.—I concur in the opinion of my brother Idington, and having heard the argument on the merits I am of opinion that the conviction was right.

Mr. Ritchie also raised the objection that the applicant was not committed "in a criminal case," which

it had to be to empower the judge to issue the writ. The court did not wish to hear counsel for the applicant as to this.

The argument then proceeded on the merits.

Masters K.C. and *Hanington,* in support of the application. The expression "not less than 50" as the penalty for a first offence means "$50 and no less" as said by Armour C.J., and held by the court in *Reg.* v. *Smith*(1). The Supreme Court of Nova Scotia in *Reg.* v. *Porter*(2) has held the same, and the Supreme Court of New Brunswick also in *Reg.* v. *Rose*(3). In *Stimpson* v. *Pond*(4) Judge Curtis, an associate judge of the United States Supreme Court, expressed the same view of a similar expression.

If the magistrate has jurisdiction to impose a greater penalty than $50 his discretion must be exercised reasonably and the statute has fixed the limit at the penalty for a second offence, namely, $100. See *Reg.* v. *Smith*(1), *per* Falconbridge J.

J. A. Ritchie, contra. The words "not less than $50" should be construed according to their grammatical sense, which is, $50 or more and the excess is in the discretion of the magistrate. See *Reg.* v. *Cameron*(5).

DUFF J.—Application under section 62 of the "Supreme Court Act" for habeas corpus to procure the discharge from custody of a prisoner convicted of an offence under section 100 of "Canada Temperance Act," as amended by section 1 of 4 Edw. VII. ch. 41.

(1) 16 O.R. 454.
(2) 20 N.S. Rep. 352.
(3) 22 N.B. Rep. 309.
(4) 2 Curtis Cir. Ct. 502.
(5) 15 O.R. 115.

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The warrant under which the prisoner is held recites that he was convicted at Moncton, N.B., of the offence of unlawfully keeping intoxicating liquors for sale contrary to the provisions of Part II. of the "Canada Temperance Act," for which offence he was condemned to pay a fine of $200 and costs; and that having made default in payment of these sums he was committed to the common gaol of the County of Westmoreland for one month unless they should in the meantime be paid.

The argument on the return of the order *nisi* disclosing a conflict of judicial opinion respecting the construction to be put upon the enactment under which the prisoner was convicted—which had been construed by the Supreme Court of New Brunswick in one sense and by a Divisional Court in Ontario in the opposite sense—it seemed in order to set the question at rest desirable to, and I accordingly did, refer the application to the court.

On the point raised respecting the jurisdiction of the court to hear and adjudicate upon the application, I agree with the views expressed by the Chief Justice and Girouard J.

Two questions arise: First, does section 62 of the "Supreme Court Act" confer in such a case jurisdiction in habeas corpus? In other words, are the proceedings leading to a conviction for such an offence within the meaning of the words "criminal case" used in that section?

This question seems to be now presented for the first time. In *Ex parte McDonald*(1) an application for an order directing the issue of a writ of habeas corpus on behalf of a prisoner convicted

(1) 27 Can. S.C.R. 683.

under the same enactment, was heard before Girouard J. and disposed of on its merits. No objection to the jurisdiction was taken and no opinion was expressed upon the point before us. But the point I think is concluded by the language of the Judicial Committee in *Russel* v. *The Queen*(1), at page 838. Sir Montague Smith, referring to the enactment in question, there says:

> Next, their Lordships cannot think that the Temperance Act in question properly belongs to the class of subjects "property and Civil Rights." It has in its legal aspect an obvious and close similarity to laws which place restrictions on the sale or custody of poisonous drugs, or of dangerously explosive substances. These things as well as intoxicating liquors can, of course, be held as property, but a law placing restrictions on their sale, custody or removal, on the ground that the free sale or use of them is dangerous to public safety, and making it a criminal offence punishable by fine or imprisonment to violate these restrictions, cannot properly be deemed a law in relation to property in the sense in which those words are used in the 92nd section. What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same consideration the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful. Laws which make it a criminal offence for a man wilfully to set fire to his own house on the ground that such an act endangers the public safety, or to overwork his horse on the ground of cruelty to the animal, though affecting in some sense property and the right of a man to do as he pleases with his own, cannot properly be regarded as legislation in relation to property or to civil rights.

Their Lordships, it is true, abstain from deciding the question whether the competence of Parliament to pass the enactment can be supported on the ground

(1) 7 App. Cas. 829.

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that it was passed in exercise of the exclusive power to legislate respecting the criminal law conferred by section 91 of the "British North America Act, 1867." But it seems to me that there is no good ground for holding that—where Parliament under its power to make laws for the peace, order and good government of Canada declares in the interests of public order that certain acts shall be offences punishable by fine or imprisonment—the proceedings by which such laws are enforced are any the less proceedings in a "criminal case" because in enacting them Parliament did not formally profess to be dealing with the criminal law.

The second question is whether in imposing a fine of $200 the convicting magistrate has exceeded the powers conferred by the statute under the authority of which he acted. The material provision (section 100, amended as above mentioned) is as follows:

> 100. Every one who, by himself, his clerk, servant or agent, exposes or keeps for sale, or directly or indirectly, on any pretence or by any device, sells or barters, or in consideration of the purchase of any other property, gives to any other person any intoxicating liquor, in violation of the second part of this Act, shall, on summary conviction, be liable to a penalty for the first offence of not less than fifty dollars, or imprisonment for a term not exceeding one month, with or without hard labour, and for a second offence to a fine of not less than one hundred dollars, or imprisonment for two months, with or without hard labour, and for the third and every subsequent offence, to imprisonment for a term not exceeding four months, with or without hard labour.

The point to be determined is whether or not this section in conferring the power to impose a penalty of "not less than $50," authorizes the imposition of a penalty greater than $50. I have come to the conclusion that it does not.

The construction of the language is not unattended

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with difficulty. But on the whole, the reasoning of Armour C.J. in *Reg.* v. *Smith*(1), convinces me that this interpretation—which was adopted by the majority of the court in that case—does no violence to the words used, and is that most consonant with the probable intention of Parliament as one may gather it from the scope and purpose of the enactment as a whole.

The power to impose fines unlimited in amount in respect of the offences created by this Act is clearly a power which, not being conferred expressly, can only be held to be conferred at all if plainly and necessarily implied in the language used. There is, I think, in the section quoted, no such plain and necessary implication. There is nothing in the section or, I think, in the Act as a whole, which would justify us in imputing to the words referred to any meaning other than that which they literally convey, namely, that the penalty imposed shall not be less than the sum mentioned. One may concede that the use of the phrase "not less than $50" is an unhappy way of providing for a penalty of $50 precisely; but beyond that, except in the case of a second offence, no power is given to the magistrate by the terms of the statute; and one cannot presume an intention to authorize the magistrate to inflict any penalty he pleases. The point is compactly put by Curtis J. in *Stimpson* v. *Pond*(2) in a passage cited by Armour C.J., which I quote:

> Power to inflict a particular penalty must be conferred by Congress in such terms as will bear a strict construction. The only power expressly given by this Act is to impose a penalty of not less than one hundred dollars. This power may be exhausted by imposing a

(1) 16 O.R. 454.

(2) Curtis Cir. Ct. 502.

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penalty of just one hundred dollars. The terms of the Act do not authorize the infliction of a penalty greater than one hundred dollars. Is there a safe implication that authority to inflict a greater penalty was intended to be conferred? The objections to this seem to me too strong to be overcome. In the first place, mere implication can hardly ever be safe ground on which to rest a penalty and when penalties of unlimited magnitude are the subjects of the implication, the danger of making it, and the improbability of the implication, are proportionately increased.

Application granted.