JOHN DOHERTY (PETITIONER).....APPELLANT;

AND

JOHN B. HAWTHORNE ET AL (RESPONDENTS) ..... } RESPONDENTS.

1928

*Oct. 15.
*Oct. 16.
**Nov. 13.

Habeas corpus—Jurisdiction of judge of Supreme Court of Canada—"Commitment in any criminal case under any Act of the Parliament of Canada" (Supreme Court Act, s. 57).

The petitioner was convicted, in July and October, 1928, on charges under the *Intoxicating Liquor Act* of New Brunswick, and was committed to gaol in York County, N.B. He applied to a judge of this Court for a writ of *habeas corpus,* alleging that on and prior to December 10, 1917, the *Canada Temperance Act* was in force in said county, that on that date an Order in Council, passed pursuant to c. 30 of the Statutes of Canada, 1917, became effective, suspending the operation of the *Canada Temperance Act* in said county; that, at the time of the passing of said Order in Council, there was in force the New Brunswick *Intoxicating Liquor Act, 1916,* referred to in said Order in Council as being as restrictive as the *Canada Temperance Act;* that in 1927 the New Brunswick *Intoxicating Liquor Act, 1927,* (c. 3) came into force, which repealed the 1916 Act, and was less restrictive than the *Canada Temperance Act;* and he contended that, as a result, the said suspension of the operation of the *Canada Temperance Act* automatically ceased, and that Act came into force in said county, and that the offences for which he was convicted and committed to gaol were offences against that Act and not against the provincial Act.

Held (by Mignault J., and, on appeal, by the Court), without pronouncing on the merits of said contention, that a judge of this Court had no jurisdiction to issue the writ applied for, as the commitment was not "in any criminal case under any Act of the Parliament of Canada" within the meaning of s. 57 of the *Supreme Court Act* (*In re Roberts* [1923] S.C.R. 152; *In re Dean,* 48 Can. S.C.R. 235, referred to).

APPEAL from the judgment of Mignault J., dismissing a petition for a writ of *habeas corpus.* The material facts, and the grounds of the petition, are sufficiently set out in the judgment of Mignault J. now reported. The appeal from his judgment was dismissed.

The petition was heard by Mignault J. on October 15, 1928, and on October 16, 1928, he gave judgment as follows:

*Mignault J. in chambers.

**PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Smith JJ.

1928

DOHERTY v. HAWTHORNE

MIGNAULT J.—This is an application to me for a writ of *habeas corpus* on behalf of the petitioner Doherty. The respondents are John B. Hawthorne, keeper of the common gaol of the county of York, N.B., and Walter Limerick, Esq., police magistrate for the city of Fredericton.

The petitioner alleges that he is confined in the common gaol of the county of York in the province of New Brunswick under a warrant of commitment which he sets out in full. This commitment is signed by Walter Limerick, police magistrate, and commits the petitioner to the common gaol of the county of York under a conviction before the said police magistrate on October 1, 1928, and another conviction before the same magistrate on July 24, 1928. The conviction of October 1, 1928, was on a charge that Doherty "did sell intoxicating liquor, contrary to section 56 of the Intoxicating Liquor Act" (a New Brunswick statute), and the conviction of July 24, 1928, was on a charge that Doherty did "have liquor in his possession in an unauthorized place, contrary to the Intoxicating Liquor Act (also a New Brunswick statute), section 69."

The petition further alleges that on and prior to December 10, 1917, the *Canada Temperance Act* was in force in the county of York; and that by chapter 30 of the statutes of Canada of 1917, it was provided that on receipt of a petition in accordance with sections 111, 112 and 113 of the *Canada Temperance Act,* praying for the revocation of any Order in Council passed for bringing Part II of that Act into force in any city or county, if the Governor in Council should be of opinion that the laws of the province in which such city or county is situated, relating to the sale and traffic in intoxicating liquor, were as restrictive as the provisions of the *Canada Temperance Act,* the Governor in Council might, without the polling of any vote, by order published in the *Canada Gazette,* suspend the operation of the *Canada Temperance Act* in such city or county, such suspension to commence ten days after the date of the publication of such order and to continue as long as the provincial laws should continue as restrictive as aforesaid.

The petitioner states that, pursuant to the last mentioned statute, an Order in Council was passed on November 23, 1917, by the Governor in Council, and pub-

lished in the *Canada Gazette* on December 1, 1917, suspending the operation of the *Canada Temperance Act* in the county of York in terms of the last mentioned statute. He says that at the time of the passing of the Order in Council there was in force in the province of New Brunswick the *Intoxicating Liquor Act, 1916,* and an Act in amendment thereof, whereby the sale of intoxicating liquor in the province for beverage purposes was prohibited, and was prohibited for all purposes except mechanical, religious, scientific and medicinal purposes, which statute is that referred to in the Order in Council of November 23, 1917, as being equally restrictive as the *Canada Temperance Act.*

The petitioner alleges that on September 6, 1927, the Act of Assembly of the Province of New Brunswick, assented to on April 20, 1927 (c. 3 of the Acts of 1927), came into force, and the *Intoxicating Liquor Act, 1916,* with amendments thereto, was repealed. Chapter 3 of 1927, he says, permits the sale of intoxicating liquor for beverage purposes, as well as for mechanical, religious, scientific and medicinal purposes, and is less restrictive in respect of provisions for the sale of intoxicating liquor than the *Canada Temperance Act.*

It is further alleged that upon repeal of the *Intoxicating Liquor Act, 1916,* and amendments, and the coming into force of the *Intoxicating Liquor Act, 1927,* the *Canada Temperance Act* came into force in the county of York; and that the offence of which the petitioner was convicted, and for which he was committed to the common gaol of the county of York, is an offence against the *Canada Temperance Act* and not against the *Intoxicating Liquor Act, 1927.*

On these grounds, the petitioner prays for the issue of a writ of *habeas corpus ad subjiciendum,* with a writ of *certiorari* to the police magistrate to produce all proceedings on record.

At the hearing, Mr. J. J. F. Winslow, K.C., appeared for the petitioner, and Mr. J. B. M. Baxter, K.C., Attorney General of New Brunswick, for the respondents. Mr. Baxter immediately took exception to my jurisdiction to issue the writ, on the ground that the petitioner had not been committed to gaol under an Act of the Parliament of

1928

DOHERTY v. HAWTHORNE.

Mignault J.

Canada, citing section 57 of the *Supreme Court Act* (R.S.C., 1927, c. 35), subsection one of which is as follows:

> 57. 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.

I thought it preferable to restrict the hearing to the discussion of Mr. Baxter's objection to my jurisdiction, for if the objection be well taken, it disposes of the application.

Mr. Winslow's contention is sufficiently shewn by the averments of the petition which, for that reason, I have deemed it proper to set out in full detail. It is that, on the enactment by the New Brunswick Legislature of the 1927 statute, and the repeal of the statute of 1916, the suspension of the *Canada Temperance Act* by the Order in Council of 1917, automatically came to an end, and the latter Act is now in force in New Brunswick, and the offences committed by the petitioner were offences against it, the new provincial statute being alleged to be less restrictive than the *Canada Temperance Act*. A similar contention, I may say, was rejected by the Supreme Court of New Brunswick in *Sheehan* v. *Shaw* (1), which considered that the suspension could cease only if the Governor in Council revoked the suspending Order in Council.

I have not, however, to pronounce on the merits of the point raised by Mr. Winslow, that the suspension of the *Canada Temperance Act* automatically came to an end on the enactment of the new provincial statute, for I am of opinion that Mr. Baxter's objection to my jurisdiction to issue a writ of *habeas corpus* is well taken.

All the pertinent authorities are cited in the recent decision of Mr. Justice Anglin (now Chief Justice of Canada) in *In re J. H. Roberts* (2), by which it was held that the limitation imposed by the concluding words of section 57, subsection 1, (then section 62) of the *Supreme Court Act* is absolute. Here, on its face, the commitment shews that the petitioner was committed under a conviction for an offence against a provincial statute, the New Brunswick *Intoxicating Liquor Act*. The second charge against Doherty, which I have seen, is that he did "sell intoxicat-

(1) [1928] 2 D.L.R. 468. (2) [1923] S.C.R. 152.

ing liquor contrary to section 56 of the Intoxicating Liquor Act, 1927," and the penalty imposed, counsel states, is that provided by the provincial law. It follows that the criminal case in which the petitioner was convicted and committed to gaol was not a criminal case under the *Canada Temperance Act,* and I cannot say that the commitment was "in any criminal case under any Act of the Parliament of Canada."

Mr. Winslow strongly relied on the decision of Mr. Justice Duff in *In re Dean* (1). In my opinion, however, it fully supports the conclusion to which I have come. There the offence charged was the crime of house-breaking, which was a criminal offence under the law of British Columbia, so that, as in the present case, the commitment was not in a criminal case under an Act of the Parliament of Canada.

I can feel no doubt whatever that I am without jurisdiction to grant the writ, so I do not think I should accede to Mr. Winslow's request to refer this application to the court.

The petition is dismissed. I make no order as to costs.

The appeal from the above judgment was heard by the Court on November 13, 1928.

J. J. F. Winslow K.C. for the appellant (petitioner).

J. B. M. Baxter K.C. for the respondents.

On conclusion of the argument by counsel for the appellant, and without calling on counsel for the respondent, the judgment of the Court was orally delivered by

ANGLIN C.J.C.—We are all of the opinion that the appeal fails; the judgment appealed from seems entirely right; it is clear that a judge of this Court has no jurisdiction, there being no commitment in a criminal case under an Act of the Parliament of Canada. Section 57 of the *Supreme Court Act* is explicit. The appeal is dismissed without costs.

Appeal dismissed.

Solicitors for the appellant (petitioner): *Winslow & McNair.*

Solicitor for the respondents: *J. B. M. Baxter.*

(1) (1913) 48 Can. S.C.R. 235.