

THE KING VS. J. W. GEROW.

Full Text of the Judgment Delivered by Judge Wilson.

Following is the full text of the judgment lately delivered by His Honor Judge Wilson of the county court in the case of the King vs. J. Wellington Gerow:

This is an appeal from a conviction under the provisions of the Indian Act, a minute of which is as follows:

"I adjudge the Defendant for his said offence, to pay a fine of \$50.00 and \$6.10 costs to be paid forthwith and in default, I adjudge that the defendant be imprisoned in the common goal of the county of York for the term of one month unless the said several sums be sooner paid."

(Sgd.) JOHN L. MARSH, Police Magistrate.

Dec. 5th, 1905.

Notice of appeal in form NXX, in part LVIII of the Criminal Code, dated the 15th day of December and signed by the appellant, was served upon the respondent and police magistrate on the said 15th day of December, and a deposit of \$85.00 made with the police magistrate to cover the costs of appeal and if the conviction was confirmed to pay the amount of conviction and costs.

J. H. Barry, counsel for respondent, admitted the services of the notice, in its present form upon the parties and at the times above stated, but objected to the jurisdiction of the court or judge to hear the appeal on the following grounds:

1. That the notice of appeal is not sufficient as it is to the York County Court, instead of to the judge of the said court, as required by section 108 of the Indian Act.

2. That no recognizance has been entered into for the purpose of the appeal as required by Section 4 of Chapter 10, 4 and 5 Edward VII., amending sub-section C. of section 880 of the Criminal Code.

3. That no notice in writing setting forth with reasonable certainty the conviction appealed against has been filed in the office of the clerk of the court appealed to within ten days after the conviction; nor one on the respondent within five days at least thereafter, setting forth the grounds of the appeal, as required by said amending act.

4. That the appeal has not been prosecuted within thirty days after the date of the conviction as required by said section 108 of the Indian Act.

Shortly his argument is that the right of appeal is a statutory one, and the conditions prescribed by the act giving it and those in amendment thereof must be strictly complied with before the court to which, or the judge to whom, the authority to hear it is given, has jurisdiction. These conditions not having been complied with in this case, neither the court nor the judge thereof has jurisdiction to hear the appeal.

It is contended by the counsel for the appellant:

That this appeal is taken under section 108 of the Indian Act and the only pre-requisite there provided is that the appeal should be brought within thirty days from the conviction.

That the bringing of the appeal is simply giving the notice thereof, and cites Reg. vs. McGauley 12 Ont. Prac R. 262.

That unless the defect in the notice is one by which the respondent has been misled it cannot prevail as a ground to quash the appeal.

That it cannot be said that he has been misled as there is a clear intimation in the notice as to the authority by whom and the time when the appeal is to be heard.

That no recognizance is necessary under the Indian Act, nor is any required under the provisions of sub-section C of section 880 of the code as amended by section 4 of Chapter 10, 4th and 5th Edward VII., as this is an appeal from a conviction adjudging a pecuniary penalty, and not one adjudging imprisonment.

That in any case the recognizance is not a condition precedent to the appeal, but only for the purpose as a means to a discharge from imprisonment.

That it is not necessary to file in the office of the clerk of the court or serve the respondent with the ground of the appeal under the Indian Act, and in any case the provisions of the Statute requiring such to be done are merely directory.

That the appeal has been brought within the thirty days after the conviction by the giving of the notice within that time which has been held to be the bringing of the appeal.

To assist in the endeavour to decide the questions raised upon the notice to dismiss this appeal it will be advisable to see:

1. What are the provisions of the Indian Act for the convictions of offenders thereunder.

2. Is there an appeal from such convictions?

3. If so, what act governs such appeal.

Section 94 of the Indian Act provides:

"That every one who sells, exchanges with, barter, supplies or gives to any Indian any intoxicant shall on summary conviction before any police magistrate, etc., be liable to the penalties therein set out."

Now, the procedure relating to summary convictions is to be found not in the Indian Act but in part LVIII of the Criminal Code and under which the police magistrate convicted the appellant in this case; and in all such cases tried thereunder, unless there is a special provision otherwise in the act under the provisions of which the information is laid, in which an appeal is taken it must be governed by the practice laid down in the code relating thereto.

There is no legal machinery provid-

ed in the Indian Act for an appeal from a conviction; nor do I find any reference in it to any provisions for an appeal in any other act. Certainly none was referred to in the argument. I think it is therefore clear from a perusal of the act itself and of the case of Reg. vs. McGauley before cited that all appeals from convictions under the Indian Act must be governed by the procedure relating to appeals laid down in part LVIII of the Criminal Code.

To what court then under this procedure must the appeal be taken, and what are the conditions of the appeal?

Section 879 of the code provides that in this province such appeal shall be to the county court of the district where the cause of the information or complaint arose, unless it is otherwise provided in any special act under which the conviction was made.

By section 880—Every right of appeal unless it is otherwise provided in any special act shall be subject to the conditions following, that is to say:

(a) If the conviction or order is made more than fourteen days before the sitting of the court to which the appeal is given it shall be made to the next sitting of such court, but if made within fourteen days of the sitting of such court, then to the 2nd sitting next after such conviction or order.

(Sub-section b has been revealed and the following substituted):

(b) The appellant shall give notice of his intention to appeal, filing in the office of the clerk of the court appealed to and serving the respondent with a copy thereof, a notice in writing setting forth with reasonable certainty the conviction appealed against and the court appealed to, within ten days after the conviction complained of, and shall at least five days before the hearing of such appeal, serve upon the respondent or his solicitor a notice setting forth the ground of such appeal.

(Sub-Section (c) of the code has been amended and is now as follows):

The appellant, if the appeal is from a conviction adjudging imprisonment, shall either remain in custody until the holding of the Court to which the appeal is given or shall enter a recognizance in form O O O in the said schedule with two sufficient sureties before a county court judge, clerk of peace, or a justice of the peace of the county in which the conviction has been made conditioned personally to appear at said court and to try such appeal and to abide the judgment of the court thereupon and to pay such costs as are awarded by the court and upon such recognizance being given the justice before whom such recognizance is entered into (or deposit made) shall liberate such person, if in custody.

In addition to the above conditions section 108 of the Indian Act, under which the conviction in this case was made, provides that no appeal shall be allowed from any conviction under the fourteen sections next preceding except to a judge of a superior court county circuit or district court or to the chairman or judge of the court of sessions of the peace having jurisdiction where the conviction is had; and no such an appeal shall be brought after the expiration of thirty days from such conviction."

In this case the following is the notice above referred to as served upon the respondent and police magistrate:

"To James Farrell, Esquire, of the city of Fredericton in the county of York, Indian Commissioner:

"Take notice that I, the undersigned, J. Wellington Gerow, of the city of Fredericton in the county of York, intend to enter and prosecute an appeal at the next sitting of the York county court to be held at the city of Fredericton and for the county of York aforesaid against a certain conviction bearing date on or about the fifth day of December instant, and made by John L. Marsh, Esq., police magistrate of the city of Fredericton, whereby I, the said J. Wellington Gerow, on the information of you, the said James Farrell, was convicted of having between the 10th and twenty-third days of November last past at the city of Fredericton in the county of York aforesaid supplied or given intoxicants to an Indian man contrary to the provisions of the Indian Act and the act's amending the same, such intoxicants not having been made use of in case of sickness under the sanction of a medical man or under the sanction of a minister of religion.

Dated at Fredericton this fifteenth day of December one thousand nine hundred and five."

(Sgd.) J. WELLINGTON GEROW.

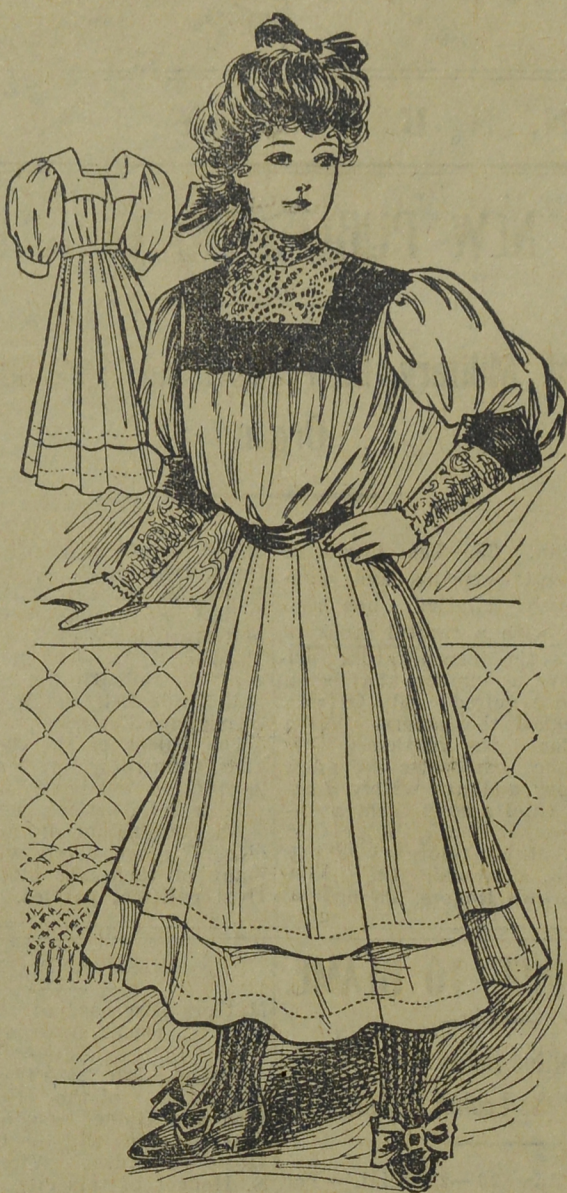
The serving of this notice and the making of the deposit were all the preliminary steps taken by the appellant to perfect his appeal. No notice was filed in the office of the Clerk of this court within ten days after the conviction; nor was there one served upon the respondent or his attorney within five days at least after the conviction setting forth the ground of the appeal.

As to the first ground:—

It will be seen by section 108 of the Indian Act above referred to that one of the functionaries having power to hear an appeal from a conviction thereunder is the judge of this court while the notice above set out is of an appeal to be presented at the next sitting of this court.

I have failed to find any authority to the effect that a notice of an appeal to a court is not a notice thereof to the judge of that court. Certainly none was cited upon the argument. There is to be found, however, in the decisions of judges of the

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woolen material forms a little blouse waist, caught into the belt, and both blouse and skirt are sewn to the same belt tape. The skirt has pleats at the band, stitched down for a few inches only and then left to flare. A deep tuck above the hem makes a quaint finish. The guimpe is of a false lining, so that the gown may be worn with or without it, as caprice or occasion may dictate.

highest authority and in works on law references to the court which necessarily mean the judge or judges. Thus in Broom's legal maxims, in treating of the judicial office these expressions are used:—"It is the duty of the court to construe written documents,"—"to decide as to the competency of witnesses and the admissibility and rejection of evidence." "The jury are the judges of the facts of the court of the law."

On page 368 of Paley on convictions there is this remark referring to the case of ex parte Curtis L. J. M. C. 35 where the question was whether a notice of appeal had been properly served:—"It would seem from that case that the expression the court of summary jurisdiction means the convicting justices."

In the case of Reg. vs. Judge of the Bloomsbury county court, Benman, judge said:—"There is no magic in the words, 'apply to court.' They are to be construed with reference to the practice of the court, the intention of the legislature, and the rights of the parties, and judge Gwynne Reg. vs. Nichol et al. We must read these notices not with a critical eye, but liberally so as to uphold not to defeat the right of appeal given to parties summarily convicted." Then again there is the authority of the interpretation act for slight deviations in these forms. Section 44 of that act provides:—"That whenever forms are prescribed slight deviations not affecting the substance or calculated to mislead shall not vitiate them."

I am therefore of the opinion that the notice above set out as to its form is sufficient for the purpose of this appeal.

As to the second ground:—

Under the provisions of sub-section C. of section 880 of the code as amended by section 4 of chapter 10, 4th and 5th Edward VII it is clear to my mind that no deposit is necessary as a condition precedent to the right of appeal from a conviction adjudging a pecuniary penalty. It was contended by the learned counsel for the respondent that in consequence of this amendment a recognizance is now required as a condition precedent to an appeal as well from a conviction adjudging a pecuniary penalty as from one adjudging imprisonment. I cannot concur in this contention. Whatever was the intention of Parliament in making the amendment, it has in my opinion, done away with the requirement of a deposit entered as a condition precedent to an appeal and substituted a recognizance only in cases where the appeal is from a conviction adjudging imprisonment and as this is an appeal from a conviction adjudging a pecuniary penalty no recognizance is necessary.

As to the 3rd. ground:—

It is contended for the appellant that the words of section 3 chapter 10, 4th and 5th Edward VII amending sub-section (b) of section 880 of the code above referred to are not imperative, but merely directory.

In Maxwell on statutes on page 521 of the library edition it is laid down: "That where powers or rights are granted with a direction that certain formalities shall be complied with it seems neither unjust nor inconvenient to exact a rigorous observance of them as essential to that right or authority conferred; and on page 525 on the same work it is said:—"That enactments regulating procedure in courts seem usually to be imperative and not merely directory."

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No. 301 Express for Montreal, Chatham, Loggieville.....	16.20
No. 317 Suburban for Marysville.....	6.15
" 321 Suburban for Marysville.....	11.15
" 327 Suburban for Marysville.....	18.25
" 328 Suburban for Marysville.....	21.00

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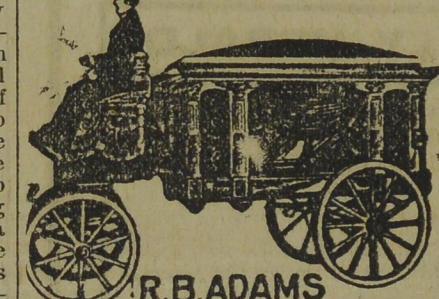
No. 302 Express from Montreal, Quebec, Chatham and Loggieville.....	13.00
No. 304 Mixed from Chatham Junction, Chatham and Loggieville.....	18.25
" 318 Suburban from Marysville.....	6.15
" 322 Suburban from Marysville.....	18.20
" 326 Suburban from Marysville.....	19.15

All trains are run by Atlantic Standard time. Twenty-four hour notation. 24.00

12.00 12.00 12.00 12.00 12.00

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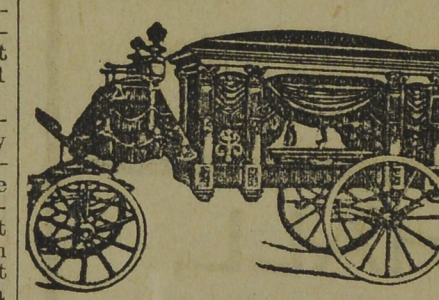
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