

Appeal from the judgment of HON. MR. JUSTICE SUTHERLAND, dated November 2nd, 1912, reported 23 O. W. R. 219; 4 O. W. N. 207, dismissing a motion for prohibition.

An information was laid by Holman before the police magistrate at Stratford, charging Rea with the theft of a horse. A warrant was issued, and Rea was brought before the police magistrate at Stratford, when he was admitted to bail and directed to appear for trial before the police magistrate at St. Mary's.

The accused thereupon went before the police magistrate at St. Mary's, surrendered himself into custody on the charge, pleaded not guilty, and elected to be summarily tried by that magistrate. The complainant objected to the trial proceeding before the police magistrate at St. Mary's, and his counsel attended and protested against the assumption of jurisdiction; whereupon the magistrate proceeded with the trial, and the informant not appearing, the magistrate—although served with the notice of motion for prohibition—acquitted the accused. The informant had been served with a subpoena to attend, but failed to do so.

The appeal was heard by a Divisional Court, composed of the HONOURABLE JUSTICES MIDDLETON, LENNOX, and LEITCH.

F. Aylesworth, for the applicant.

R. H. C. Cassels, for the respondent.

HON. MR. JUSTICE MIDDLETON:—Upon the motion for prohibition the learned Judge took the view that the course adopted was justified by sec. 708 of the Code; his attention not having been drawn to the fact that this section is one of the group of sections, 705 to 770, relating entirely to summary convictions, and that the case in hand was a summary trial of the accused by his consent for an indictable offence.

The learned Judge also relied upon sec. 668 of the Code, which provides that "when any person accused of an indictable offence is before a Justice, whether voluntarily or upon a summons . . . the Justice shall proceed to enquire into the matters charged against such person in the manner hereinafter directed." This section, then, does not purport to confer jurisdiction, and must, I think, be confined to cases in which the accused is rightly before the Justice; in which case the procedure to be followed is pointed out.