be tried either on indictment or on summary conviction. For example, this is true of common assault, of assaulting or obstructing a peace officer in the execution of his duty, and of being in charge of a motor vehicle while intoxicated; and the Excise Act, which creates a number of indictable offences, provides[8] that those which are punishable within a stated limit may be tried on summary conviction. The cases to which this alternative applies are not numerous, yet a noticeable lack of accord has arisen in the decisions of the Courts affecting them.

In a case in which the accused had been convicted of obstructing a peace officer in the execution of his duty, it was argued on appeal that the trial before the magistrate had been held under Section 773 (e) of the Code and that the accused should have been asked to elect. The Court did not give effect to this contention. Its opinion was that the Code clearly provided alternate methods of procedure and—without giving reasons—that the choice between those methods lay with the *prosecution*.[9]

Later in another province application was made for a writ of prohibition to restrain a magistrate from proceeding by way of summary conviction in a case for which the statute provided alternate methods. "My opinion," said one of the Judges, "is that the Justice of the Peace has a discretion and that as guardian of the interests of the public, he can and must decide in which way he is to proceed." Another put it this way:

"It is true that in many cases the accused is given the option of a summary trial instead of a trial on indictment but if without any statutory authority for it we were to hold that in this case, he is entitled to the same option we must negative or nullify one part of the section. If he says, 'I will not be tried on indictment,' then he repeals that portion of the section which says he is triable on indictment, and if he says, 'I will only be tried by indictment,' then the other portion of the section has no application to him.

I cannot see how the jurisdiction of the magistrate to proceed in either way can depend on the will of the accused."[10]

Two cases under the Opium and Narcotic Drug Act show a similar variance. In one which was tried in Ontario, the Court remarked simply, "It is of course, at the option of the Crown how to proceed,"[11] while the other, which was tried in Manitoba and from the report of which the following extract is taken, seems to indicate that the choice may lie either with the Crown or the magistrate:

"The record of the trial if it is the record of a trial under Part XV, is unobjectionable, but if of a trial under Part XVI it shows defects which go to the very jurisdiction of the magistrate to try the case. Why should we go out of our way to discover something to destroy this conviction? It is all very well to protect an accused, but our protection should go no further than to assure him of a fair trial according to law, it should never seek to

[8]Sec. 118.

[9]Rex v. West, 25 C.C.C. 145.

[10]Rex v. McNabb, 32 C.C.C. 166.

[11]Rex v. Rutherford, 48 C.C.C., at p. 240. See also Rex v. Mason, 63 C.C.C. 97; Rex v. Fanning, 63 C.C.C. 377; Rex v. Rhodenizer (No. 1), 67 C.C.C. 259.