MAY 14TH, 1902.

DIVISIONAL COURT.

REX v. BENNETT.

Costs—Conviction—Quashing of—Jurisdiction in High Court to Give Costs in Criminal Matters—Judicature Act has no Application to Criminal Matters—Protection to Magistrate—Sec. 891, Criminal Code.

Motion to quash a conviction of defendant by a justice of the peace for the district of Algoma. It was conceded by counsel for the prosecutor and magistrate that the conviction must be quashed. The defendant asked for costs against both. The magistrate asked for an order for his protection under sec. 891 of the Criminal Code.

W. M. Douglas, K.C., for defendant.

F. Denton, K.C., for prosecutor.

W. E. Middleton, for magistrate.

The judgment of the Court (MEREDITH, C.J., LOUNT, J.) was delivered by

MEREDITH, C.J.—We are of opinion that this being a proceeding in a criminal matter the Court has no jurisdiction to give costs against the prosecutor or against the magistrate.

The question as to costs must be determined apart from the provisions of the Judicature Act, which have no application to the practice or procedure in criminal matters (sec. 191), as indeed they could not, because the power to legislate on that subject is by the British North America Act, 1867, assigned exclusively to the Parliament of Canada.

The practice and procedure in all criminal causes and matters in the High Court, as was pointed out by the present Chief Justice of Ontario, in Regina v. Beemer, 15 O.R. at p. 270, are to be the same as the practice and procedure in similar causes and matters before the establishment of the High Court : 46 Vict. ch. 10, sec. 2, now sec. 754 of the Criminal Code, 1892.

What that practice was is pointed out in Regina v. Parlby, [1889] W. N. 190, 6 Times L. R. 36, 53 J. P. 774, which shews that the Court has no inherent jurisdiction to award costs against the prosecutor on the making of a rule absolute to remove a conviction by *certiorari* or a rule absolute to quash a conviction so removed, and that the Court had no statutory authority conferred upon it to do so.

This view has been recognized in numerous cases as correct, and has been acted upon by the Court of Appeal : London County Council v. Churchwardens and Overseers of West Ham (2), [1892] 2 Q.B. 173; In re Fisher, [1894] 1