

SECOND DIVISIONAL COURT.

NOVEMBER 23RD, 1917.

\*REX v. MARTIN.

*Ontario Temperance Act—Magistrate's Conviction for Offence against sec. 41—Unlawfully Having Intoxicating Liquor—"Indian"—Jurisdiction of Magistrate—Indian Act, R.S.C. 1906 ch. 81, secs. 2 (f) (i.), 137—Evidence—Proof that Accused was an Indian—Right to Supplement Evidence before Magistrate—Habeas Corpus Proceeding—Appeal—Certificate of Attorney-General—6 Geo. V. ch. 50, sec. 95.*

Appeal by the defendant from the order of SUTHERLAND, J., 12 O.W.N. 396.

The appeal was heard by MEREDITH, C.J.C.P., RIDDELL, LENNOX, and ROSE, JJ.

J. B. Mackenzie, for the appellant.

J. R. Cartwright, K.C., for the Crown.

MEREDITH, C.J.C.P., read a judgment, in which he said that the real question involved was, whether the Ontario Temperance Act applied to Indians. For, if not, the magistrate who made the "conviction" was without jurisdiction; and so there was really no conviction; and the appellant should be discharged in these habeas corpus proceedings.

By sec. 95 of the Act, an appeal to this Court lies from any judgment or decision of a Judge of the Supreme Court, upon any application to quash a conviction made under this Act, or to discharge a prisoner who is held in custody under any such conviction; but no such appeal lies unless the Attorney-General for Ontario certifies that he is of opinion that the point in dispute is of sufficient importance to justify the case being appealed. But in such a case as this, the absence of such a certificate cannot prevent this Court from ruling that there was really no conviction, and that the prisoner should be discharged. An act done without jurisdiction, by whatever name it may be called, cannot be a conviction under the Act; the Legislature cannot have meant the section to apply to anything but a conviction made by a person having jurisdiction under the Act, for an offence within its provisions, committed by a person to whom it is applicable.

The general right of appeal to this Court, in habeas corpus proceedings, given by the Ontario Habeas Corpus Act, R.S.O. 1914 ch. 84, sec. 8, is curtailed by sec. 95 of the Ontario Temperance Act, but only in cases of conviction under that Act.