

Province of New Brunswick.

SUPREME COURT.

En banc.]

KING v. DELEGARDE.

[April 22.]

Summary conviction—Steps to appeal—Failure of magistrate to certify proceedings—Circumstances indicating fraud—Certiorari.

An information was laid before Delegarde, J.P., for assault against the applicant and one J. C. No summons was served, but the defendants having heard of the matter went to the magistrate and promised to enter into recognizance to appear. The magistrate then gave them a written notice, not in the form of a summons, stating when the trial would be held. Some days afterwards the applicant was informed by the magistrate that the trial would take place on the day stated, but a day or two later the defendants received through the mail a post-card from the magistrate stating that the trial was postponed until August 7, and that it would not be necessary to appear before then. On July 31 the applicant was arrested under a warrant and taken before the magistrate when the trial was proceeded with against both defendants notwithstanding the absence of J. C. Both were convicted. They gave notice of appeal to the County Court for the next November term. They asked the magistrate to certify the proceedings and duly entered into recognizance for the appeal, but the magistrate failed to certify the proceedings and the County Court Judge decided he could not go on with the appeal for this reason.

Held, 1. On motion to make absolute a rule nisi for certiorari to remove the conviction, that certiorari would lie notwithstanding section 887 of the Criminal Code, and notwithstanding the steps taken to appeal, the applicant having been thwarted in the prosecution thereof through failure of duty on the part of the magistrate.

2. The magistrate had no jurisdiction to proceed against both defendants in the absence of one of them, and there were circumstances indicating that the magistrate acted fraudulently, which of themselves would warrant the granting of the writ.

Rule absolute for certiorari.

G. G. Gilbert, in support of rule. Barry, K.C., for contra.

En banc.]

READ v. MCGIVNEY.

[April 22.]

Negligence—Fire set by servant in violation of master's orders—Misdirection.

In an action brought in the York County Court to recover damages for the destruction of plaintiff's lumber and woodland by a fire alleged to have been negligently set by the defendant, and to have extended to the plaintiff's land, the defendant testified that he and a hired man, B., went to his fallow on the day in question (when a high wind was blowing during