

the charge "in a summary way" to do so subject to the subsequent provisions of Pt. XVI., and consequently to take the consent of the accused under sec. 778.

Still another theory was advanced in *R. v. Van Koolberger*, 16 Can. Cr. Cas. 228, 19 Que. K.B. 240, in which it was held that the procedure of Pt. XVI., including the provision of sec. 778 for the defendant's election or consent to be tried summarily, applied to a charge under sec. 169 brought before two justices in the province of Quebec who would have no power of summary trial for an indictable offence except under sub-sec. (a 7) of sec. 771 for theft not exceeding \$10 and in respect of certain disorderly house cases. Mr. Justice Cross there held that as authority is given to two justices to try such charge by Code sec. 169, and the offence is specifically named in Code sec. 773 (e), the accused is "charged before a magistrate" within the terms of sec. 773, although two justices in Quebec province are not constituted a statutory magistrate under Code sec. 771, except as to certain other offences named in sec. 773, paragraphs (a) and (f). He further held that the decision of the two justices in such a case is a "summary conviction," and subject to appeal as such, although the procedure of Part XVI. (Summary Trials) is applicable under Code sec. 706 as a "special provision otherwise enacted with respect to such offence": *R. v. Van Koolberger, Van Koolberger* (appellant) v. *Lapointe* (respondent), 16 Can. Cr. Cas. 228, 19 Que. K.B. 240.

As pointed out in *Ex parte McAdam, supra*, and in Daly's Criminal Procedure, 2nd ed., 386, the decision in *R. v. Crossen* may have been influenced by the circumstance that, for some reason not disclosed, the Crown was not seeking to sustain the conviction in that case.

It is submitted with deference that the most consistent theory amongst the various opinions referred to in these conflicting cases is the one to which effect is given in *R. v. West*, 24 Can. Cr. Cas. 249, 9 O.W.N. 9 (affirmed on appeal), and in *Ex parte McAdam, supra*, by Mr. Justice White of the New Brunswick Court.

The provision as to summary trial by a police magistrate for the offences stated in sec. 773 with the defendant's consent is one which originated in Ontario, and was extended, with various limitations as to the functionary upon whom this judicial power was conferred, to the other provinces of Canada. The summary trials provisions of sec. 773 are to be viewed as entirely independent of the power of summary conviction. While, prior to the amendment of 1909, some offences were specified which