

or the orders in council respecting censorship, to try the defendant upon the information—the defendant's contention being that he was entitled to a trial by jury.

R. McKay, K.C., for the defendant.  
Edward Bayly, K.C., for the Crown.

MASTEN, J., in a written judgment, said that this was a second motion for prohibition in respect of the same proceeding. The first motion was refused by Sutherland, J. (*ante* 9), and his order was affirmed by a Divisional Court (*ante* 55).

It was argued that successive applications are allowable, and that the present application was upon a ground not brought forward upon the former.

Successive applications, the learned Judge said, are sometimes allowed, but largely in cases where the first application has failed because of the lack of some formality in the proceedings.

After a careful perusal of all the material, the learned Judge was unable to see that the situation had in any way altered since the former application.

The grounds upon which the present application was made—that the magistrate had no jurisdiction to try the defendant, and that the defendant was entitled to a trial by jury—were open and available to the defendant at the time of the former motion.

The second objection appeared to be fully covered by *Rex v. West* (1915), 34 O.L.R. 368, 35 O.L.R. 95.

The order in council, order 3, para. 3 (2), directs that the penalty may be recovered or enforced either by indictment or by summary proceedings, and conviction, under the provisions of Part XV. of the Criminal Code. These proceedings are taken under Part XV. of the Code, and, as shewn by *Rex v. West*, the choice of tribunal rests entirely with the prosecutor.

The first objection was based upon the argument that, while admittedly sec. 6 of the War Measures Act, standing alone, would have authorised the passing of the order in council under which the information was laid, yet that sec. 6 is modified by sec. 10; that sec. 10 gives authority to the Governor in Council to impose penalties and to prescribe whether a penalty is to be imposed upon summary conviction or upon indictment; that only one method of prosecution can be prescribed by the order in council; that the power given by the order in council is in the alternative; and that the order in council thus exceeds and transcends the statute by providing that the prosecution may be conducted either upon summary proceedings or upon indictment.

Without expressing any final conclusion upon this argument, the learned Judge was definitely of opinion that the lack of juris-