

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
(COMMERCIAL LIST)**

**IN THE MATTER OF THE *COMPANIES' CREDITORS  
ARRANGEMENT ACT*, R.S.C. 1985, c C-36 AS AMENDED**

**AND IN THE MATTER OF A PLAN OF  
COMPROMISE OR ARRANGEMENT WITH RESPECT TO  
EXPRESS GOLD REFINING LTD.**

**BOOK OF AUTHORITIES OF THE MONITOR  
(returnable December 4, 2023)**

**DATED:** November 29, 2023

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Upper Canada Court of Queen's Bench

Madden, Re

1871 CarswellOnt 193, 31 U.C.Q.B. 333

### **In re Robert Madden**

William Buell Richards, C. J., Joseph Curran Morrison, J., Adam Wilson, J.

Judgment: 1871

Subject: Criminal

#### **Headnote**

Criminal Law --- Appeals — Appeal of summary conviction offence — Appeal of conviction or acquittal — Costs  
Appeal from Q.S. — Power to give costs — 33 Vic. ch. 27, sec. 1.

Under 32-33 Vic. ch. 31, sec. 65, and 33 Vic. ch. 27 D., the Court of Quarter Sessions has no power to award costs on discharging an appeal for want of proper notice of appeal, for the words "shall hear and determine the matter of appeal" mean decide it upon the merits.

IN Hilary Term last *Holmested* obtained a rule calling upon Robert Madden to shew cause why the order of Mr. Justice Gwynne, made on the 7th February, 1871, directing a writ of prohibition to issue to William Henry Wilkison, Esquire, Chairman of the General Sessions of the Peace for the County of Lennox and Addington, should not be rescinded, and all proceedings had thereon, on the ground that the Court of General Sessions had power to make the order for payment of costs by the said Robert Madden, and to estreat the recognizance in the Judge's order referred to.

The facts were, that Robert Madden on the 23rd of March, 1870, was convicted before James C. Huffman, a Justice of the Peace for the County of Lennox and Addington, for unlawfully and wilfully passing with a team of horses and vehicle the toll gate on the Kingston Road east of Napanee, without first paying the legal toll, and refusing to pay the same after a demand made, contrary to the statute.

Madden served a notice of appeal to the General Sessions of the Peace on the 25th March, on the prosecutor, Files, the toll-gate keeper, and on the convicting magistrate.

At the June Sessions, when the case was called on it was objected that the notice of appeal was not sufficient under the Dominion Act 32-33 Vic. ch. 21, and the chairman of the sessions sustained the objection and dismissed the appeal, with costs to be paid by the appellant to the clerk of the peace on or before the 1st of July, 1870.

The appellant's counsel objected to the judgment as respected the costs, because the appeal having been dismissed for the want of service of the notice of appeal the Court had no jurisdiction to award costs.

In this term *Osler* shewed cause. He referred to the Act 32-33 Vic. ch. 31, secs. 65, 66, 69: *Regina v. Padwick*, 8 E. & B. 704, which referred to the two Imperial Acts, 5 & 6 Wm. IV. ch. 50, and 12 & 13 Vic. ch. 45; *The King v. The Justices of the West Riding of Yorkshire*, 3 T.R. 776.

*Holmested* supported the rule. The Court had more jurisdiction here than in the case of *Regina v. Padwick*, 8 E. & B. 704, for there the Court had no jurisdiction over the subject of appeal at all, while here it had, and therefore could more properly award costs.

***Wilson, J.*, delivered the judgment of the Court.:**

1 The General Sessions of the Peace, it seems well settled, had no power to award costs on appeals unless expressly authorized by statute to do so.

2 Under the Imperial Statute 5 & 6 Wm. IV., ch.50, sec.105. the sessions had power to give costs "upon hearing and finally determining the matter of such appeal," that is, deciding it upon the merits; and a case dismissed because the Court had no jurisdiction to entertain it was not a case in which the Court, under these words of the statute, could award costs. Under the 12 & 13 Vic. ch. 45, sec. 5, which gave power "upon any appeal, ... the Court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided to pay to the other party or parties such costs and charges as to such Court may appear just and reasonable," the Court could award costs of an appeal brought which the Court had no jurisdiction to entertain. In such a case the decision could not be on the merits. A decision that no appeal lies will justify the awarding of costs.

3 The Dominion Act, 32-33 Vic. ch. 31, sec. 65, referred to on the argument, was repealed by the 33 Vic. ch. 27, sec. 1, and re-enacted with some amendments.

4 This notice of appeal was served in March. The amending Act was passed on the 12th of May, and the appeal was dismissed in June.

5 It is of no consequence under which Act the case in considered, for the words applicable to costs are precisely the same in both Acts. They are that "the Court shall hear and determine the matter of appeal, and make such order therein, with or without costs to either party, as to the Court seems meet."

6 The question is, what is the meaning of the words "The Court shall hear and determine the matter of appeal." They are very similar to those used in the Imperial Act 5 & 6 Wm. IV., ch. 50, "on hearing and finally determining the matter of such appeal," on which language the Court, in *Regina v. Padwick*, 8 E. & B. 704, declared the sessions had no power to adjudge costs when they dismissed an appeal because they had no jurisdiction to try it, or when the case was disposed of not upon the merits.

7 We have no reason to be dissatisfied with that decision; it appears to be expressly in point; and we must therefore affirm the order of the learned Judge awarding the prohibition, and discharge this application, with costs.

*Rule discharged.*

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c C-36 AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT WITH RESPECT TO EXPRESS GOLD REFINING LTD.

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PROCEEDING COMMENCED AT TORONTO

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