Privy Council Appeal No. 24 of 1925.

Frank Nadan - - - - - - - - *Appellant*

v.

The King - - - - - - - - - *Respondent*

and

The Attorney-General of England and the Attorney-General of Canada - - - - - - - - - - *Interveners*

Same - - - - - - - - - - *Appellant*

v.

Same - - - - - - - - - - *Respondent and Interveners*

(*Consolidated Appeals.*)

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 25TH FEBRUARY, 1926.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD DUNEDIN.
LORD SHAW.
LORD PHILLIMORE.
LORD BLANESBURGH.

[*Delivered by* THE LORD CHANCELLOR.]

These are appeals from two judgments of the Appellate Division of the Supreme Court of Alberta dismissing appeals against convictions by a police magistrate; and, in the course of the argument, important questions have been raised as to the Royal Prerogative and as to the jurisdiction of this Board.

On the night of the 29th–30th September, 1924, the appellant, who was in the employment of a firm of carriers in Fernie, in the Province of British Columbia, was driving a motor car containing a consignment of intoxicating liquor from Fernie through the

Province of Alberta to Sweet Grass, Montana, in the United States of America. Whilst in the neighbourhood of Coleman, in the Province of Alberta, in the course of this journey he was arrested by the Alberta Provincial Police; and, on the following morning, the 30th September, 1924, he was charged before a police magistrate at Blairmore, Alberta, (*a*) with having liquor within the Province of Alberta without the package containing the same being or having been sealed with the official seal prescribed by the Government Liquor Control Board of Alberta, contrary to the Government Liquor Control Act of Alberta (chapter 14 of the Statutes of Alberta, 1924), and (*b*) with carrying or transporting through the Province of Alberta intoxicating liquor otherwise than by means of a common carrier by water or by railway, contrary to the provisions of the Canada Temperance Act (R.S.C., chapter 152), as amended by chapter 8 of 10 George V. These charges were duly heard before the police magistrate, who, on the 14th October, 1924, convicted the appellant on both charges. On the first charge he sentenced the appellant to a fine of $200 and $7·50 costs, or in default thirty days' imprisonment with hard labour, and declared the motor car forfeited to His Majesty in the right of the Province of Alberta, the liquor being *ipso facto* forfeited. On the second charge he sentenced the appellant to a fine of $500 and $2 costs, or, in default, three months' imprisonment with hard labour.

The appellant carried both these decisions to the Appellate Division of the Supreme Court of Alberta, the first by an appeal by way of stated case and the second by motion by way of *certiorari* to quash the conviction; but that Court (by a majority) dismissed both appeals, the conviction on the second charge being amended in minor respects. By order dated the 19th February, 1925, the Appellate Division of the Supreme Court of Alberta granted to the appellant leave to appeal to His Majesty in Council from the judgments of that Division and to consolidate the appeals.

On the 5th May, 1925, the respondent presented a petition to His Majesty in Council, asking that the appeals might be quashed or dismissed as incompetent, mainly on the ground that the appeals were brought in criminal cases, and that, by virtue of section 1025 of the Criminal Code of Canada, no Court in Canada had jurisdiction to grant leave to appeal to the King in Council in criminal cases. Some technical objections were also taken to the appeal. Upon this petition coming on for hearing, the questions raised were adjourned to be dealt with on the hearing of the appeals; and a petition for special leave to appeal, which had been lodged by the appellant, was adjourned in like manner. Leave was given to His Majesty's Attorney-General and to the Attorney-General for Canada to intervene, and they have intervened accordingly and have taken part in the argument.

It is convenient before considering the merits of the appeals to deal with the questions which have been raised as to the validity and effect of section 1025 of the Criminal Code, which runs as follows :—

> " 1025. Notwithstanding any Royal Prerogative, or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any Court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard."

It was argued on behalf of the appellant that neither of these appeals was brought in a " criminal case " within the meaning of the above section ; but, in their Lordships' opinion, this argument cannot prevail. In each of the cases the appellant was charged with an offence against the public law, and a sentence of imprisonment could be, and was, imposed. An attempt was made to distinguish the appeal against the conviction under the Government Liquor Control Act of Alberta from the appeal against the conviction under the Canada Temperance Act on the ground that the penalties under the former statute are imposed by a Provincial statute which does not incorporate section 1025 of the Criminal Code ; but this contention appears to their Lordships to be negatived by the judgment of the Board in *Rex* v. *Nat Bell Liquors, Ltd.* (L.R. 1922, 2 A.C. 128, 167). Section 1025 is expressed to apply to an appeal in a criminal case from " any judgment or order of any Court in Canada," and this expression is wide enough to cover a conviction in any Canadian Court for breach of a statute, whether passed by the Legislature of the Dominion or by the Legislature of the Province.

Their Lordships proceed, therefore, to consider the effect of section 1025 on the assumption that it applies to these appeals. Having regard to the course taken by the argument, it appears that one question only falls to be decided in this case, namely, whether that section prevents the King in Council from granting special leave to appeal. The Attorney-General, who argued the case for the Crown, did not contest the view that, having regard to the provisions of section 1025, it was not open to the Supreme Court of Alberta to give leave to appeal in this case—presumably on the ground that the Dominion Parliament, having exclusive legislative authority in respect of the procedure in criminal matters throughout Canada, had power to deprive the Canadian Courts of any jurisdiction to grant leave to appeal in those matters. In these circumstances their Lordships will assume, for the purposes of this case, that the leave to appeal granted by the Supreme Court was ineffective, and they will confine their decision to the question whether the Board can and should advise the granting of special leave to appeal.

It was suggested by the Attorney-General that, as the section provides only that " no appeal shall be brought " in a criminal case, it may be construed as applying only to appeals originating in the Dominion and not to appeals for which special leave may be

granted by His Majesty on the advice of this Board. But having regard to the reference in the section to the Royal Prerogative, their Lordships have difficulty in putting upon it the limited construction which is suggested; and they think it right to deal with the matter upon the footing that the section was intended to apply even to appeals brought by special leave granted under the Prerogative, and to consider whether the section, so far as it applies to such appeals, is or is not valid. This broad question might apparently have been raised in *Wentworth* v. *Mathieu* (L.R. 1900, A.C. 212), *Townsend* v. *Cox* (L.R. 1907, A.C. 514), and *R.* v. *Nat Bell Liquors, Ltd.* (L.R. 1922, 2 A.C. 128); but for some reason it was not in fact raised in those cases. In *Toronto Railway Company* v. *The King* (L.R. 1917, A.C. 630), and *Attorney-General of Ontario* v. *Daly* (L.R. 1924, A.C. 1011), the point was raised; but as the appeals failed on other grounds it became unnecessary to decide it. It is very desirable that a decision upon the question should now be reached.

The practice of invoking the exercise of the Royal Prerogative by way of appeal from any Court in His Majesty's Dominions has long obtained throughout the British Empire. In its origin such an application may have been no more than a petitory appeal to the Sovereign as the fountain of justice for protection against an unjust administration of the law; but if so, the practice has long since ripened into a privilege belonging to every subject of the King. In the United Kingdom the appeal was made to the King in Parliament, and was the foundation of the appellate jurisdiction of the House of Lords; but in His Majesty's Dominions beyond the seas the method of appeal to the King in Council has prevailed and is open to all the King's subjects in those Dominions. The right extends (apart from legislation) to judgments in criminal as well as in civil cases (see *Reg.* v. *Bertrand*, L.R. 1 P.C. 520). It has been recognised and regulated in a series of statutes, of which it is sufficient to mention two, namely, the Judicial Committee Act, 1833 (3 & 4 Wm. IV, c. 41), and the Judicial Committee Act, 1844 (7 & 8 Vict., c. 69). The Act of 1833 recites that "from the decisions of various courts of judicature in the East Indies and in the Plantations, Colonies and other Dominions of His Majesty abroad, an appeal lies to His Majesty in Council," and proceeds to regulate the manner of such appeal; and the Act of 1844, after reciting that "the Judicial Committee, acting under the authority of the said Acts [the Act of 1833 and an amending Act] hath been found to answer well the purposes for which it was so established by Parliament, but it is found necessary to improve its proceedings in some respects for the better despatch of business and expedient also to extend its jurisdiction and powers," enacts (in section 1) that it shall be competent to Her Majesty by general or special Order in Council to "provide for the admission of any appeal or appeals to Her Majesty in Council from any judgments, sentences, decrees or orders of any Court of Justice within any British Colony or Possession abroad." These Acts, and other

later statutes by which the constitution of the Judicial Committee has from time to time been amended, give legislative sanction to the jurisdiction which had previously existed.

Under what authority, then, can a right so established and confirmed be abrogated by the Parliament of Canada? The British North America Act (section 91) empowered the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects by that Act assigned exclusively to the Legislatures of the Provinces; and in particular it gave to the Canadian Parliament exclusive legislative authority in respect of "the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters." But however widely these powers are construed they are confined to action to be taken in the Dominion; and they do not appear to their Lordships to authorise the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal. Further, by section 2 of the Colonial Laws Validity Act, 1865, it is enacted that "any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament or having in the Colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative." In their Lordships' opinion section 1025 of the Canadian Criminal Code, if and so far as it is intended to prevent the Sovereign in Council from giving effective leave to appeal against an order of a Canadian Court, is repugnant to the Acts of 1833 and 1844 which have been cited, and is therefore void and inoperative by virtue of the Act of 1865. It is true that the Code has received the Royal Assent, but that Assent cannot give validity to an enactment which is void by Imperial statute. If the Prerogative is to be excluded, this must be accomplished by an Imperial statute; and in fact the modifications which were deemed necessary in respect of Australia and South Africa were effected in that way. (*See* Commonwealth of Australia Act, 1900, Section 74, and Union of South Africa Act, 1909, Section 106.)

Before parting with this question, it is desirable to consider certain previous decisions of the Board upon which arguments have been based. In *Cuvillier* v. *Aylwin* (1832, 2 Knapp P.C. 72), the Legislature of Lower Canada having passed an Act limiting the right of appeal to His Majesty in Council, the Board gave effect to that Act by refusing to hear an appeal which was in contravention of it; but, as has been pointed out in later cases, the Act of the Legislature of Lower Canada there in question was expressly authorised by the British Act of Parliament commonly called the Canada Act (31 Geo. III, c. 31), which empowered

the Legislature of Lower Canada to limit and define the right of appeal. (*See* 5 Moore P.C. 294, 304; 15 Moore P.C. 193; and L.R. 5 A.C. 417.) In *R.* v. *Ames* (1841, 3 Moore P.C. 409), a Jersey ordinance having declared that no appeal was admissible in criminal cases, Baron Parke, speaking for this Board, declined to admit that the Board had not power to advise His Majesty to allow an appeal. In *The Queen* v. *Eduljee Byramjee* (1846, 5 Moore P.C. 276) effect was given to a provision in the Bombay Charter of 1823 authorising the Supreme Court of Judicature of Bombay to deny an appeal to any party aggrieved by a decision of that Court; but it was pointed out that the Charter was granted under the express authority of an Act of the British Parliament (4 Geo. IV, c. 71) and that its provisions were valid on that ground. The same observation applies to the case of *The Queen* v. *Alloo Paroo* (1847, 5 Moore P.C. 296), where the point was further discussed in the judgment of Lord Brougham. In *Théberge* v. *Laudry* (1876, L.R. 2 A.C. 102), where the Legislature of Quebec, in creating a special tribunal for the trial of election petitions, had declared that the judgments of that tribunal should not be susceptible of appeal, it was held that this provision prevented an appeal to His Majesty in Council; but Lord Cairns, in declaring the decision of the Board to that effect, rested the decision upon the peculiar character of the enactment, and held that it was the intention of the Quebec Legislature, when creating a special tribunal, not to create it with the ordinary incident of an appeal to the Crown. In *Cushing* v. *Dupuy* (1880, L.R. 5 A.C. 409) the Board, while holding that the Dominion Parliament in creating a tribunal for dealing with the subjects of bankruptcy and insolvency had power to declare the decisions of that tribunal to be final, held also that the enactment did not derogate from the Prerogative of the Sovereign to allow such appeal as an act of grace. Sir Montagu Smith, in declaring the decision of the Board, reviewed *Cuvillier* v. *Aylwin* and other cases. In *Wi Matua's Will* (L.R. 1903, A.C. 448) it was held by this Board that the Royal Prerogative could not be excluded, even by Imperial statute, except by express words. In *Webb* v. *Outrim* (L.R. 1907, A C. 81), where it was argued that the Commonwealth Judiciary Act of Australia had indirectly prevented an appeal to His Majesty in Council, this Board held that the Commonwealth Parliament had no authority to pass an enactment having that effect; and Lord Halsbury in his judgment, given on behalf of the Board, expressed agreement with the statement of Mr. Justice Hodges in the Supreme Court of Victoria that "in such an important matter direct authority would be given or none at all," and with the following passage from the judgment of the same learned judge:—

> "If the Federal Legislature had passed an Act which said that hereafter there shall be no right of appeal to the King in Council from a decision of the Supreme Court of Victoria in any of the following matters, and had then

> set out a number of matters, including that now under consideration, I should have felt no doubt that such an Act was outside the power of that Federal Legislature. And, in my opinion, it is outside their power to do that very thing in a roundabout way."

In the case of the *Initiative and Referendum Act* (L.R. 1919, A.C. 935 at p. 943), Lord Haldane, in declaring the judgment of the Board, referred to "the impropriety in the absence of clear and unmistakable language of construing Section 92 as permitting the abrogation of any power which the Crown possesses through a person directly representing it"; an observation which applies with equal force to Section 91 of the Act of 1867 and to the abrogation of a power which remains vested in the Crown itself. Upon a review of these authorities, it appears to their Lordships that they contain nothing inconsistent with the conclusion which their Lordships have reached upon principle, and that, so far as they go, they support that conclusion.

It remains to consider whether in the case of the two judgments now under consideration His Majesty should be advised to grant special leave to appeal. Their Lordships have no hesitation in answering this question in the negative. It has for many years past been the settled practice of the Board to refuse to act as a court of criminal appeal, and to advise His Majesty to intervene in a criminal case only if and when it is shown that, by a disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done. This practice and the reasons for it were clearly explained in the above-cited case of *The Queen* v. *Eduljee Byramjee* (5 Moore P.C. at p. 289), where Dr. Lushington pointed out the extreme inconvenience which would arise from permitting a long series of appeals from decisions in criminal cases. This view has been repeated and enforced in a number of later cases, such as *Falkland Islands Company* v. *The Queen* (1863, 1 Moore N.S. 299), *R.* v. *Dillet* (1887, L.R. 12 A.C. 459), *Arnold* v. *The King Emperor* (1914, L.R. 41 I.A. 149), *Ibrahim* v. *The King* (L.R. 1914, A.C. 599), and *Dal Singh* v. *The King Emperor* (1917, L.R. 44 I.A. 137). Their Lordships have not left out of mind the consideration that the learned Judges in the Supreme Court of Alberta deemed these cases to be the proper subjects of appeal. But notwithstanding this, their Lordships must be guided by the established principle which applies with full force to the present application.

The present appeals are clearly not within the category of exceptional cases in which leave to appeal would be advised by this Board. The appellant has been convicted (*a*) of having liquor within the Province of Alberta without the package containing it being sealed with the official seal, and (*b*) of transporting through the Province of Alberta intoxicating liquor otherwise than by means of a common carrier by water or by rail. The former conviction is questioned on grounds relating to the construction and validity of certain sections of the Government Liquor Control

Act of Alberta and the Liquor Act of that Province, and the second conviction is questioned for similar reasons connected with the Canada Temperance Act. The arguments of the appellant on these points, which in the case of the former conviction were twenty-two and in the case of the latter fourteen in number, were fully heard by the Appellate Division of the Supreme Court of Alberta and were dealt with by the learned Judges of that Division in reasoned judgments ; and there can be no possible question of a disregard of the forms of legal process or the violation of any principle of natural justice. It is of the utmost importance that a decision on a criminal charge so reached should take immediate effect without a long-drawn-out process of appeal, and it is undesirable that appeals upon such decisions should be encouraged by the Board.

For these reasons their Lordships will humbly advise His Majesty that these appeals and the two petitions should be dismissed, but (in the circumstances) without costs.

In the Privy Council.

FRANK NADAN

v.

THE KING

AND

THE ATTORNEY-GENERAL OF ENGLAND AND THE ATTORNEY-GENERAL OF CANADA.

SAME

v.

SAME.

(*Consolidated Appeals.*)

DELIVERED BY THE LORD CHANCELLOR.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1926.