No. 26 of 1940.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

IN THE MATTER of a Reference as to the legislative competence of the Parliament of Canada to enact Bill No. 9 of the Fourth Session, Eighteenth Parliament of Canada entitled " An Act to amend the Supreme Court Act."

BETWEEN

THE ATTORNEY-GENERAL OF ONTARIO, THE ATTORNEY-GENERAL OF BRITISH COLUMBIA, THE ATTORNEY-GENERAL OF NEW BRUNSWICK and THE ATTORNEY-GENERAL OF NOVA SCOTIA - - *Appellants*

AND

THE ATTORNEY-GENERAL OF CANADA, THE ATTORNEY-GENERAL OF MANITOBA and THE ATTORNEY-GENERAL OF SASKATCHEWAN - - - - - - *Respondents.*

Case

FOR THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

RECORD.

1. This is an appeal from the decision of the Supreme Court of Canada (Duff C.J., and Rinfret, Crocket, Davis, Kerwin and Hudson JJ.) on a reference as to the legislative competence of the Parliament of Canada to enact Bill No. 9 of the Fourth Session, Eighteenth Parliament of Canada entitled " An Act to amend the Supreme Court of Canada " and hereinafter called " the bill." The Court (Crocket and Davis JJ. dissenting) held the bill to be intra vires. p. 123. pp. 5–6. p. 6, l. 23–p. 7, l. 20.

2. The bill purports to abolish all appeals to the Judicial Committee of the Privy Council from all Canadian courts, provincial as well as Dominion, not only in matters pertaining to criminal law but also in all civil causes and matters.

3. Criminal law and procedure (except for the imposition of punishment for enforcing provincial laws and the constitution of courts of criminal jurisdiction) is within the exclusive legislative competence of the p. 185, l. 12; p. 186, l. 28.

p. 122, ll. 16–21. Parliament of Canada under head 27 of section 91 of the British North American Act, 1867 (30 & 31 Vict. c. 3). By section 1024 (4) of the Criminal Code, introduced by an Act to amend the Criminal Code in 1934 (23 & 24 Geo. 5 c. 53), the Parliament of Canada prohibited appeals to His Majesty in Council in criminal cases, and this prohibition was held to be valid in *British Coal Corporation* v. *The King* [1935] A.C. 500.

p. 201, ll. 39–41. 4. By section 7 (2) of the Statute of Westminster (22 Geo. 5 c. 4) no act of a provincial legislature in Canada otherwise within its competence is void or inoperative on the ground that it is repugnant to Imperial law or

p. 185, l. 26–p. 186, l. 33. legislation. By virtue of this provision and of section 92 of the British North America Act, the Attorney-General of British Columbia contends that, subject to the provisions hereinafter referred to of the British North America Act, in all civil causes and matters in British Columbia, the legislature of British Columbia and only the legislature of British Columbia is competent to abolish appeals to His Majesty in Council.

p. 192, l. 29–p. 195, l. 11. 5. The colony of British Columbia was admitted into Canada as a province thereof by order in council dated the 16th May, 1871 made pursuant to section 146 of the British North America Act. At that time

p. 187, ll. 10–22. there was in British Columbia a right to appeal to Her Majesty in Council by virtue of the following acts, orders and proclamations :

pp. 203–205. Judicial Committee Act, 1833 (3 & 4 Wm. 4 c. 41)

pp. 206–207. Judicial Committee Act, 1844 (7 & 8 Vict. c. 69)

p. 114, l. 24–p. 115, l. 25. An Act to Provide for the Administration of Justice in Vancouver's Island, 1849 (12 & 13 Vict. c. 48)

p. 115, l. 26–p. 117, l. 26. Order in Council of the 4th April, 1856 made pursuant to the last mentioned Act

p. 118, l. 4–p. 119, l. 12. An Act to Provide for the Government of British Columbia, 1858 (21 & 22 Vict. c. 99)

p. 117, l. 28–p. 119, l. 20. Proclamation of Governor Douglas of the 19th November, 1858 made pursuant to the last mentioned Act bringing the Act into force

p. 119, l. 22–p. 120, l. 18. Proclamation of Governor Douglas of the 19th November, 1858 proclaiming English law in force in British Columbia

p. 120, l. 20–p. 121, l. 4. The British Columbia Act, 1866 (29 & 30 Vict. c. 67)

p. 121, ll. 6–40. The English Law Ordinance, 1867.

p. 195, ll. 4–10. By paragraph 10 of the terms of union scheduled to the order in council admitting British Columbia into Canada the provisions of the British North America Act, with immaterial exceptions, were made applicable to

p. 186, l. 39–p. 187, l. 8. British Columbia. Accordingly under section 129 of the British North America Act all laws in force in British Columbia at the time of the union were continued as if the union had not been made subject nevertheless (except with respect to Acts of the Parliament of Great Britain or of the United Kingdom of Great Britain and Ireland) to be repealed, abolished or altered by the Parliament of Canada or by the provincial legislature according to the authority of the parliament or of the legislature under that Act.

6. It is submitted that section 7 (1) of the Statute of Westminster preserves intact section 129 of the British North America Act, and that therefore where a right of appeal existed at the union in British Columbia or in any other province by virtue of any Imperial Act extending to such province, the law giving such right can only be repealed, abolished or altered by the Imperial Parliament. p. 201, l. 36.

7. Moreover, and apart from the provisions of section 129 of the British North America Act, the division of legislative powers under the British North America Act assigns the whole administration of justice in each province (excepting criminal law and other subjects assigned exclusively to the Dominion under section 91, the appointment of judges and constitution of Dominion courts) to the province by head 14 of section 92. In *British Coal Corporation* v. *The King* [1935] A.C. 500 at 520 the Judicial Committee say : pp. 184–186. p. 186, ll. 24–27.

> " A most essential part of the administration of justice consists of the system of appeals. It is not doubted that with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian courts are within the legislative control of Canada, that is, of the Dominion or the Provinces as the case may be."

The Attorney-General of British Columbia contends that in all civil causes and matters legislative competence in respect of all appeals is (subject to the powers of the Parliament of Canada under section 101 of the British North America Act) vested in the legislature of each province by head 14 of section 92. This is the view which has been taken in Ontario. In *Regina* v. *Bush* (1888) 15 Ontario Reports 398, Street J. after referring to sections 96 to 101 of the British North America Act relating to the appointment of judges and constitution of a general Court of Appeal and to the allocation of criminal law to the Dominion under head 27 of section 91, stated at page 403 :

> " Everything coming within the ordinary meaning of the expression ' the administration of justice ' not covered by (these) sections remains in my opinion to be dealt with by the provincial legislatures in pursuance of the powers conferred upon them by paragraph 14 of section 92 . . . It is clearly the intention of the Act that the provincial legislatures shall be responsible for the administration of justice within their respective provinces except in so far as the duty was cast upon the Dominion Parliament. The only duty cast upon the Dominion Parliament in the matter is contained in the clauses to which I have referred."

8. The sections relating to the appointment of judges appear to have no bearing on the point now at issue but in the present reference the Supreme Court has held that section 101 gave Parliament the power to prohibit appeals from the court established under that section to the Privy Council. Whether this is so or not (and the Attorney-General of British Columbia contends that it is not so), there is nothing in that section giving the Parliament of Canada the right to prohibit appeals direct from provincial courts to His Majesty in Council.

9. Regarding appeals in matters other than criminal from the Supreme Court of Canada it is submitted that where the case originates in a provincial court the appeal is a part of the administration of justice in the province and therefore within sole provincial jurisdiction ; *a fortiori* where the subject-matter of the appeal is in relation to matters coming within the classes of subjects enumerated in section 92 of the British North America Act, in relation to which the Parliament of Canada has no legislative power.

10. The contention that the exclusive competence of each provincial legislature in respect of " the administration of justice in the province " does not include appeals to His Majesty in Council as this would involve legislation having an extra-territorial or extra-provincial effect is, in the submission of the Attorney-General of British Columbia, unsound. It is submitted that the words " in the province " should not be given such a narrow or restricted meaning. In this connection the words of Lord Haldane delivering the judgment of the Judicial Committee in *Hull* v. *McKenna* [1926] I.R. 402 at 404 are apposite :

> " The Judicial Committee of the Privy Council is not an English body in any exclusive sense. It is no more an English body than it is an Indian body, or a Canadian body, or a South African body, or for the future, an Irish Free State body. There sit among our members Privy Councillors who may be learned Judges of Canada—there was one sitting with us last week—or from India, or we may have the Chief Justice, and very often have had them from the other Dominions, Australia and South Africa. I mention that for the purpose of bringing out the fact that the Judicial Committee of the Privy Council is not a body, strictly speaking, with any location. The Sovereign is everywhere throughout the Empire in the contemplation of the law. He may as well sit in Dublin, or at Ottawa, or in South Africa, or in Australia, or in India as he may sit here, and it is only for convenience, and because we have a Court, and because the members of the Privy Council are conveniently here that we do sit here ; but the Privy Councillors from the Dominions may be summoned to sit with us, and then we sit as an Imperial Court which represents the Empire, and not any particular part of it."

11. In *British Coal Corporation* v. *The King* [1935] A.C. 500 Lord Sankey, delivering the judgment of the Judicial Committee, dealt with the extra-territorial argument at page 521 as follows :—

> " It may now be considered whether there is since the statute (authorizing appeals as of right to the Privy Council) any sufficient reason why this matter of the special or prerogative appeal to the King in Council should be treated . . . as being something quite special and as being a matter standing, as it were, on a pedestal by itself. Ought it not to be treated as simply one element in the general system of appeals in the Dominion ? The appeal, if special leave is granted, is from the decision of a Canadian court, and is to secure a reversal or alteration of an order of a Canadian court : if it is successful, its effect will be that the order of the Canadian

court will be reformed accordingly. Rights in Canada and law in Canada will thus be affected. The appellant and respondent in any such appeal must be either Canadian citizens or persons who have submitted to the jurisdiction of the Canadian courts. Such appeals seem to be essentially matters of Canadian concern, and the regulation and control of such appeals would thus seem to be a prime element in Canadian sovereignty as appertaining to matters of justice. But it is said that this class of appeal is a matter external to Canada: emphasis is laid particularly on the fact that the Privy Council sits in London, and that in form the appeal by special leave is not to the Judicial Committee as a Court of Law, but to the King in Council exercising a prerogative right outside and apart from any statute. As already explained, this latter proposition is true only in form, not in substance. But even so, the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian court and which concludes and reaches its consummation in the Canadian court. What takes place outside Canada is only ancillary to practical results which become effective in Canada. And the appeal to the King in Council is an appeal to an Imperial, not a merely British, tribunal".

The Attorney-General of British Columbia submits that by exactly the same reasoning the regulation of appeals from provincial courts is part of the administration of justice in the province. This is clearly so in cases where there is an appeal as of right from a provincial court and the order admitting such appeal is made by the provincial court.

12. It is further submitted that the right to appeal to His Majesty in Council, whether by virtue of the prerogative or by right of grant, was and is a civil right in the province within the meaning of head 13 of section 92 of the British North America Act.

13. In the Supreme Court reliance was placed upon the case of *Crown Grain Company Limited* v. *Day* [1908] A.C. 504, which decided that a provincial legislature could not circumscribe the appellate jurisdiction of the Supreme Court of Canada. From this it was argued that a provincial legislature could not circumscribe the appeal to His Majesty in Council and therefore the power must reside in the Dominion. The decision in the *Crown Grain* case, however, was based on the principle that by section 101 authority rested with the Parliament of Canada and not with a provincial legislature to determine the jurisdiction of the Supreme Court of Canada. No such consideration with regard to section 101 arises in determining the right of the provinces to legislate in respect of appeals direct from provincial courts to His Majesty in Council. p. 186, ll. 34–38.

14. Moreover, the Statute of Westminster, 1931, in no way increases the legislative jurisdiction of the Parliament of Canada at the expense of the provincial legislatures, or vice versa. On the contrary, by section 7 of that Act it is provided that the respective legislative functions of the Dominion on the one hand and the provinces on the other shall not be disturbed. pp. 200–202. p. 201, ll. 36–46.

p. 123, l. 25. 15. After hearing argument on the 19th 20th and 21st June, 1939, the Supreme Court reserved judgment until the 19th January, 1940, when reasons for judgment, which are summarised in the Case for the Attorney-General of New Brunswick, were given. The Chief Justice of Canada, and Rinfret, Kerwin and Hudson, JJ. were of opinion that the bill in its entirety is intra vires of the Parliament of Canada. Crocket, J., on the other hand, after examining in detail the arguments in support of the validity of the bill, held that the bill is wholly ultra vires of the Parliament of Canada; while Davis J. thought that the bill would be within the authority of the Parliament of Canada only if it were amended to provide that nothing therein contained shall alter or affect the rights of any province in respect of civil proceedings in provincial courts concerned with some subject-matter within the exclusive legislative competence of the legislature of such province.

16. The Attorney-General of British Columbia submits that the question referred to the Court should be answered to the effect that the bill is ultra vires to the extent that it purports to affect or prohibit appeals to His Majesty in Council in civil matters, and in particular appeals direct to His Majesty in Council from provincial courts in civil cases; and that as it is impossible (unless the bill be radically amended) to sever from the rest of the bill the parts which purport to affect or prohibit such appeals the bill is in its entirety ultra vires of the Parliament of Canada.

17. The Attorney-General of British Columbia therefore humbly submits that the judgment of the Supreme Court of Canada is wrong and should be reversed for the following amongst other

REASONS.

(1) BECAUSE the system of appeals to the Privy Council formed a fundamental part of the law of the Colony of British Columbia when the Colony was admitted into and became part of the Dominion of Canada.

(2) BECAUSE the right of appeal was established and existed at the Union by virtue of Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland and can only be repealed, abolished or amended by Imperial enactment.

(3) BECAUSE the right of appeal as part of the law of British Columbia was guaranteed to the province under section 129 of the British North America Act, 1867, and under the terms and conditions upon which British Columbia was admitted into and became part of the Dominion of Canada.

(4) BECAUSE neither the British North America Act, 1867, nor any amendments thereto limit or affect this right of appeal except perhaps with respect to those subjects (including criminal law) allocated to the legislative jurisdiction of the Parliament of Canada under section 91 of the British North America Act.

(5) BECAUSE the system of appeals in civil matters forms part of the administration of justice in the province allocated to the province under head 14 of section 92 of the British North America Act, and therefore is a matter of provincial jurisdiction.

(6) BECAUSE section 101 of the British North America Act does not give the Parliament of Canada the power directly or indirectly to legislate with regard to appeals from provincial courts to His Majesty in Council in civil matters or with regard to appeals from the Supreme Court of Canada in civil causes originating in provincial courts.

(7) BECAUSE the Statute of Westminster, 1931, does not increase the legislative jurisdiction of the Parliament of Canada under the British North America Act at the expense of the provincial legislatures or at all, but on the contrary provides in section 7 that the British North America Act and the division of powers thereunder shall not be affected by the statute.

(8) BECAUSE the Parliament of Canada has no power to legislate as to appeals to His Majesty in Council in civil matters.

(9) BECAUSE the reasons of Mr. Justice Crocket and Mr. Justice Davis are to be preferred to the reasons of the other judges.

WILFRID BARTON.

FRANK GAHAN.

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FOR

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA.

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