In the Privy Council.

No. 26 of 1940.

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 FOR ONTARIO
THE ATTORNEY-GENERAL FOR BRITISH COLUMBIA
THE ATTORNEY-GENERAL FOR NEW BRUNSWICK
THE ATTORNEY-GENERAL FOR NOVA SCOTIA ... *Appellants*

AND

THE ATTORNEY-GENERAL OF CANADA
THE ATTORNEY-GENERAL FOR MANITOBA
THE ATTORNEY-GENERAL FOR SASKATCHEWAN... *Respondents.*

CASE OF THE APPELLANT, THE ATTORNEY GENERAL FOR ONTARIO.

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1.—This is an appeal by special leave from the judgment of the Supreme Court of Canada announced on the 19th day of January, 1940, p. 123
answering a question referred to the said Court for hearing and consideration by order of His Excellency the Governor-General in Council, dated the 21st day of April, 1939, of P.C. 908, pursuant to the provisions of Section 55 of the Supreme Court Act, R.S.C. 1927, Chapter 35, touching the respective legislative power under the British North America Act, 1867, of the Parliament of Canada and the Legislatures of the Provinces in relation to appeals to His Majesty in Council.

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p. 6, l. 17

2.—The question so referred was—

Is said Bill 9, entitled " An Act to Amend the Supreme Court Act," or any of the provisions thereof, and in what particular or particulars, or to what extent, *intra vires* of the Parliament of Canada ?

p. 6, l. 23

3.—The said Bill 9 is printed in the Record and provides, in effect that—

p. 36, l. 12, *et seq.*

(*a*) The Supreme Court of Canada shall have, hold and exercise ultimate appellate civil and criminal jurisdiction within and for Canada ;

(*b*) The judgment of the said Court shall in all cases be final and conclusive ;

(*c*) The Royal Prerogative permitting appeals to His Majesty in Council shall not be exercised in any case brought from any Court now or hereafter established within Canada ;

(*d*) No appeal shall lie to His Majesty in Council by virtue of any Act of the Parliament of the United Kingdom from any Court now or hereafter established within Canada ;

(*e*) No appeal shall lie to His Majesty in Council by virtue of any Act of the Parliament of Canada from any Court now or hereafter established within Canada ;

(*f*) No appeal shall lie to His Majesty in Council by virtue of any Act of the legislature of any province from any Court now or hereafter established within Canada ;

(*g*) The Acts of the Parliament of the United Kingdom of Great Britain and Ireland, viz., The Judicial Committee Act, 1833 (3 & 4 William IV, Chapter 41) and The Judicial Committee Act, 1844 (8 Vict. Chapter 69) and all orders, rules or regulations made under the said Acts in so far as they are part of the law of Canada are repealed.

p. 7, l. 23

4.—By order of the Right Honourable the Chief Justice of Canada, dated the 1st day of May, A.D. 1939, notice of the hearing of the argument was given to the Attorneys-General for the Provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta and Saskatchewan.

5.—At the hearing of the argument the Attorneys-General for Canada, Ontario, Nova Scotia, New Brunswick, Prince Edward Island, British Columbia and Manitoba were represented by Counsel.

6.—The Counsel for the Attorney-General of Canada submitted that the provisions of the said Bill 9 are, in their entirety, *intra vires* of the Parliament of Canada for the following reasons :—

p. 12, l. 32 *et seq.*

(*a*) In exercise of the residuary legislative power of the Parliament of Canada to make laws for the peace, order and

good government of Canada conferred by the introductory words of Section 91 of the British North America Act, 1867, or

(*b*) Alternatively its exclusive, paramount and plenary legislative authority, under Section 101 of the said Act.

7.—Counsel for the Attorneys-General of Ontario, Nova Scotia, New Brunswick and British Columbia submitted that the provisions of the said Bill are beyond the powers of the Parliament of Canada to enact for the following reasons :—

(*a*) That the Bill is in relation to matters coming within the classes of subjects assigned exclusively to the provincial legislatures under Section 92 of the British North America Act, Clauses—

"(1) The Amendment from time to time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the office of Lieutenant-Governor.

"(13) Property and civil rights in the Province.

"(14) The administration of justice in the Province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts."

8.—Counsel for the Attorney-General for Prince Edward Island did not take part in the argument and did not file a factum.

9.—The Attorneys-General for the Provinces of Quebec and Alberta were not represented by counsel at the hearing and did not file factums.

10.—The Attorneys-General for Saskatchewan and Manitoba filed factums supporting the submissions of the Attorney-General for the Dominion of Canada.

11.—The hearing of the argument came on before the Supreme Court of Canada on the 19th, 20th and 21st days of June, A.D. 1939, before the Right Honourable Sir Lyman P. Duff, P.C., G.C.M.G., Chief Justice, The Honourable Mr. Justice Rinfret, The Honourable Mr. Justice Crocket, The Honourable Mr. Justice Davis, The Honourable Mr. Justice Kerwin and the Honourable Mr. Justice Hudson, when the Court was pleased to direct that the said reference should stand over for consideration.

12.—By the judgment of the Supreme Court of Canada, dated the 19th day of January, 1940, the opinion of the majority (The Right Honourable Sir Lyman P. Duff, P.C., G.C.M.G., Chief Justice, The Honourable Mr. Justice Rinfret, The Honourable Mr. Justice Kerwin and The Honourable Mr. Justice Hudson) was that the Parliament of Canada was competent to enact the said Bill in its entirety. p. 123

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13.—The Honourable Mr. Justice Crocket and the Honourable Mr. Justice Davis dissented.

p. 137, l. 4 14.—Duff, C.J.C.—The learned Chief Justice was of the opinion, "first, that since, by the Statute of Westminster, the obstacles have been removed which prevented the Parliament of Canada giving full effect to legislation for objects within its powers affecting the appeal to His Majesty in Council, there is now full authority under the powers of Parliament in relation to the peace, order and good government of Canada in respect of the objects within the purview of Section 101 to enact the Bill in question."

p. 137, l. 10 "Secondly, that neither the prerogative power of His Majesty to admit appeals from Canadian Courts, nor the exercise of that power in admitting such appeals, nor the jurisdiction of the statutory tribunal, the Judicial Committee of the Privy Council, in respect of such appeals, or in respect of appeals as of right, is subject matter for the legislative jurisdiction of the provinces as comprised within the local matters assigned to the legislatures by Section 92, and all such matters are, therefore, within the general authority in relation to peace, order and good government."

p. 138, l. 16 15.—Rinfret, J.—The learned justice was of the opinion that the only head of provincial legislative jurisdiction which had to be considered was head (14) of Section 92 :—

> "The administration of justice in the province including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts."

p. 138, l. 22 That "if the matter of appeals to the Privy Council be within the legislative competence of the provinces, it must fall under this head, for the several compartments of Section 92 cannot overlap and it must be obvious that head (14) excludes the others." That "the controlling words in head (14) are 'The administration of justice in the province.' The words are not: 'in respect of or for the province;' they restrict the power to the administration of justice 'in the province.' These words cannot include matters of appeal from Canadian Courts to the Privy Council in London."

p. 139, l. 10 "The effect of those two decisions" (*Nadan's Case*, [1926] A.C. 482 and *British Coal Corporation Case* [1935] A.C. 500) "is clearly that the matter of the appeal to the Privy Council was then considered outside the territory of Canada and could only be effectively dealt with by Canadian legislation if that legislation could have extra-territorial operation, which it had not at the time. By the Statute of Westminster the restriction imposed by the Colonial Laws Validity Act has been removed both as regards the Dominion Parliament and the provincial legislatures. The Dominion Parliament was further given full power to make laws having extra-territorial operation; but such power was not given to the provincial legislatures."

"We must conclude that *a fortiori* the provincial legislatures could not effectively legislate with regard to the abolition of appeals to the Privy Council as the law stood before the Statute of Westminster: and as they continue as before to have no legislative capacity to make any law having extra-territorial operation, they have no power to deal with the matter of appeals to the Privy Council. p. 139, l. 31

"The result would be that this matter not being within the legislative competence of the Provinces it must fall necessarily within the competence of the Dominion Parliament."

16.—Crocket, J.—(dissenting)—The learned justice was of the opinion that "the undoubted effect of the enactment of such a measure by the Parliament of Canada would be an open defiance by that body of the authority of any of the provincial legislatures of Canada to legislate in respect either of appeals as of right directly to the Judicial Committee of the Privy Council from the judgments of provincial courts now or hereafter established within Canada, or in respect of the royal prerogative to grant leave to appeal thereto independently of the provisions of any statute or law duly enacted by the legislature of any province or duly established by order-in-council under the provisions of the Imperial Judicial Committee Acts of 1833 and 1844. It would amount to an attempt on the part of the Parliament of Canada to arrogate to itself the complete control of the administration of justice in all the provinces of the Dominion in so far as the finality of judgments in civil as well as in criminal cases is concerned and the right of the subject or anybody submitting to the jurisdiction of the provincial court to petition His Majesty for leave to appeal to him for redress through his Judicial Committee, and thus to strike at the constitutional integrity of all the provinces of Canada as self-governing entities under the British Crown." p. 141, l. 30

"So far as the exercise by the Sovereign of the royal prerogative is concerned, it cannot in any sense be said to be localized, either in the place where the Sovereign resides nor in the place where His Judicial Committee sits, as was so clearly pointed out by Viscount Haldane in delivering the judgment of the Judicial Committee of the Privy Council in *Hull* vs. *McKenna* (1926) I.R. 402 at 404." p. 142, l. 21

"It is only necessary to examine ss. 2 of s. 2 of the Statute of Westminster in connection with and in the light of ss. 2 of s. 7 of that Statute to see that s. 3 of the Statute respecting the power of the Parliament of the Dominion to make laws having extra-territorial operation could not reasonably be held to apply to such a matter as the royal prerogative to grant leave to appeal to the Judicial Committee of the Privy Council." p. 144, l. 7

"By the operation of this ss. 3 of s. 7 alone s. 3 could not well be held to confer upon the Parliament of Canada any power to make laws in relation to matters, which were not already within its competence at the time of the passing of this Imperial Statute." p. 145, l. 3

"Far, then, from conferring any new legislative powers upon the Parliament of Canada in derogation of the legislative powers of its several p. 146, l. 1

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provinces, the Statute of Westminster plainly preserves the British North America Acts, 1867-1930, intact and, moreover, explicitly restricts the legislative powers of both the Dominion Parliament and the provincial legislatures to their respective legislative fields as prescribed by those Acts."

p. 146, l. 41 "That the proposed enactment directly and vitally concerns the administration of justice in all the provinces of Canada is self-evident."

p. 148, l. 35 "Relating as it does so essentially to the administration of justice, as that expression is ordinarily understood, in all the provinces of Canada alike, it is, as I have already indicated, impossible to say that the main purpose and the real subject matter of the proposed enactment now before us does not fall within the classes of subjects, which the British North America Act has assigned exclusively to the legislatures of the provinces. For that reason the residuary power of the Dominion Parliament cannot properly be invoked in its support."

p. 149, l. 38 "While it is true that the decision of the Privy Council in *British Coal Corporation* vs. *The King* [1935] A. C. 500 settled the question that s. 91 invests the Dominion Parliament with the power to regulate or prohibit appeals to the King in Council in criminal matters, that decision, as previously pointed out, manifestly proceeded on the ground that The Criminal Law, including procedure in criminal matters, was specifically placed within its jurisdiction by enumerated head 27."

p. 151, l. 21 "Unless such power" (to abolish appeals) "is necessarily incidental to the constitution, maintenance and organization of a general Court of Appeal for Canada, I cannot, for my part, see how it can be justified by the terms of s. 101 or any of the cases relied upon by Counsel for the Attorney-General of Canada. To hold otherwise would, in my most respectful opinion be to practically ignore s. 92 (14) as well as s. 92 (13) and virtually transfer to the Dominion Parliament the regulation and control of these two classes of subjects—the most general and important of all the sixteen classes of subjects which the British North America Act has marked out as the exclusive legislative jurisdiction of the provinces—by the simple expedient of amending the Supreme Court of Canada Act."

p. 156, l. 43 "The legislative power of the provinces in relation to the appealability or non-appealability of the judgments of their own courts is derivable in my opinion from the principal general subject of the administration of justice, which unmistakably would have comprised that power, had the subordinate subject of the constitution, maintenance and organisation of provincial courts not been introduced into enumeration 14."

p. 158, l. 27 He therefore answered the question referred by saying that the Bill is wholly *ultra vires* of the Parliament of Canada.

p. 160, l. 8 17.—Davis J (dissenting).—The learned justice was of the opinion that "the proposed abolition of appeals to the Privy Council is not however legislation in relation to the administration of justice 'in the province' nor can head 13 of Section 92 'property and civil rights in the province' be

regarded as controlling the Dominion power in relation to matters within the exclusive legislative authority of the Parliament of Canada."

"The Statute of Westminster does not make it competent to the Dominion to legislate in relation to classes of subjects which before the statute were outside its competence (such, for example, as 'property and civil rights in the Province,' head 13, and 'all matters of a merely local and private nature in the province,' head 16 of Section 92). The assigned limits of subject and area under the British North America Act as between the Dominion and the Provinces are not disturbed. The true character and position of the provincial legislatures remain and ought to be given full recognition. p. 160, l. 43

"Section 101 of the British North America Act which enables the Dominion Parliament to provide for the constitution, maintenance and organization of 'a general Court of Appeal for Canada' cannot in my opinion be so interpreted as to extend power to the Parliament of Canada to make the jurisdiction of such Court exclusive and final in relation to subject-matters which are within the sole legislative authority of the provincial legislatures." p. 161, l. 5

"It is inadvisable and indeed unnecessary to consider what powers may be possessed in a relevant regard by the legislatures of the provinces; it is sufficient for the purpose of the question submitted to the court to determine only the powers of the Dominion Parliament itself." p. 161, l. 15

He was, therefore, of the opinion "that the Bill if enacted would be within the authority of the Dominion Parliament if amended to provide that nothing therein contained shall alter or affect the rights of any province in respect of any action or other civil proceeding commenced in any of the provincial courts and solely concerned with some subject-matter, legislation in relation to which is within the exclusive legislative competence of the legislature of such province." p. 161, l. 19

18.—Kerwin, J.—The learned justice was of the opinion "that by the very terms of head 14, the administration of justice is confined to the provinces, the courts which the provincial legislatures are authorized to constitute, maintain and organize are provincial courts, and the procedure in civil matters is confined to procedure in those, i.e., provincial courts." p. 170, l. 17

"Under the opening clause of Section 91, Parliament may make laws for the peace, order and good government of Canada and by Section 101 'The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organization of a General Court of Appeal for Canada.' In my opinion, the power thereby conferred includes the power to make the decisions of such appellate court exclusive and ultimate." p. 172, l. 8

"Granting, however, the entire premises and conclusion of this contention" (that in Ontario the provincial statute regulates appeals as of right to His Majesty in Council and that the provincial legislature has also acquired power to abolish the right of His Majesty in Council to grant special leave to appeal) "it will be recollected that the power deemed to p. 172, l. 41

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reside in Parliament to make the decisions of the Supreme Court of Canada exclusive and ultimate may be exercised 'notwithstanding anything contained in this Act.' This *non obstante* clause places the Dominion power on the same footing as those conferred by the specially enumerated heads of Section 91."

p. 173, l. 13 "The pith and substance of the proposed Bill is the jurisdiction of that General Court of Appeal, so that even if Ontario had authority the two powers overlap and 'the enactment of the Dominion Parliament must prevail'."

p. 174, l. 25 "I would answer the question submitted to us 'Yes, in its entirety'." 10

p. 176, l. 29 19.—Hudson, J.—The learned justice was of the opinion "that the Canadian Parliament has a right to abolish any right of appeal to the Judicial Committee in any matter falling within the legislative jurisdiction of the Dominion Parliament, including an appeal from the decision of the Supreme Court of Canada in any matter whatsoever."

As to appeals from the decisions of provincial courts where the law involved is within the exclusive legislative jurisdiction of the Provinces, the

p. 180, l. 35 learned justice was of opinion that "none of the headings in Section 92 confer on the provincial legislatures expressly or impliedly, power to abolish the right of appeal, then the reserve powers of the Dominion would 20 come automatically into operation, and it is, therefore, 'otherwise provided' in the Act that the Dominion should have any rights which the provinces theretofore may have had in the matter."

p. 182, l. 19 He was of the opinion "that a Bill in substantially the form of Bill Number 9 would be *intra vires* of the Parliament of Canada."

20.—It is submitted on behalf of the Attorney-General for Ontario that the judgment of the majority of the Supreme Court of Canada is wrong and ought to be reversed and that on the true construction of the relevant provisions of the British North America Act, the Statute of Westminster, 1931, and of the said Bill No. 9 the said Bill would be beyond the competence 30 of the Parliament of Canada to enact for the reasons stated in the Factums filed on behalf of the Attorneys-General for Ontario, Nova Scotia, New Brunswick and British Columbia in the Supreme Court of Canada and, for the following among other

REASONS.

1. Because the said Bill 9 falls within the exclusive powers committed to the provincial legislatures under Section 92 of the British North America Act and particularly heads 1, 13 and 14.

2. Because the system of appeals to His Majesty in Council is 40 an integral part of the administration of justice in the Province.

3. Because the majority of the Supreme Court of Canada erred in holding that the power of the Parliament of Canada to abolish appeals to His Majesty in Council was in the exercise of the powers of Parliament over peace, order and good government of Canada or in the exercise of the powers of Parliament under Section 101 of the British North America Act.

4. Because the decision of the Judicial Committee of the Privy Council in the *British Coal Corporation Case* [1935] A.C. 500 was based upon the powers of Parliament to legislate in relation to one of the specific heads under Section 91 of the British North America Act, viz., head (27).

5. Because the legislative powers of the Dominion and the Provinces respectively were fixed by the Confederation Act.

6. Because the Statute of Westminster, 1931, Section 7 (3) provides that the powers conferred by that Act upon the Parliament of Canada or upon the legislatures of the Provinces shall be restricted to the enactment of laws in relation to matters within the competence of the Parliament of Canada, or of any of the legislatures of the Provinces respectively.

7. Because by the British North America Act, Section 129, the laws in force in the Provinces at Confederation were continued subject to being repealed, abolished or altered by the Parliament of Canada or by the legislatures of the respective Provinces in accordance with the distribution of legislative powers under Sections 91 and 92, and by the laws so in force at Confederation there was a right of appeal to His Majesty in Council, legislation in respect of which falls within Section 92.

8. Because the Parliament of Canada has no power to pass legislation giving a right of appeal to His Majesty in Council from provincial courts in matters within the classes of subjects enumerated in Section 92 of the British North America Act and cannot therefore abolish such right.

9. Because the right to legislate with respect to appeals to His Majesty in Council in matters within the classes of subjects set out in Section 92 of the British North America Act from provincial courts is within the exclusive jurisdiction of the provincial legislatures.

10. Because the British North America Act, Section 101, which gives to the Parliament of Canada the power to provide for the constitution, maintenance and organization of a general

Court of Appeal for Canada does not include the power to legislate with respect to the right of appeal from that Court to another tribunal.

11. Because the Parliament of Canada cannot in effect repeal provincial statutes validly passed under the provisions of Section 92 of the British North America Act regulating appeals to His Majesty in Council from the decisions of provincial courts.

12. Because the Royal Prerogative exercised by way of special leave to appeal to His Majesty in Council is merged in the Judicial Committee Act, 1833, and the Judicial Committee Act, 1844, and there is now no Royal Prerogative to admit appeals to His Majesty apart from the Statutes and the provincial legislature may repeal such statute in so far as they affect provincial subject matters.

13. Because the repeal of the Judicial Committee Act, 1833, and the Judicial Committee Act, 1844, in so far as they affect a province, would not revive the Royal Prerogative.

14. Because the Royal Prerogative (if any) admitting appeals to His Majesty in Council is a law in force in Canada and under the provisions of subsection 2 of section 2 of the Statute of Westminster, which by Section 7 (2) is made to apply to the legislatures of the provinces, the provincial legislatures may interfere with the Royal Prerogative in matters within the British North America Act, Section 92.

15. Because if any part of the Royal Prerogative admitting appeals to His Majesty in Council has been left intact it applies only to criminal cases.

16. Because prior to the passing of the Colonial Laws Validity Act, 1865, the legislatures of the colonies had jurisdiction to affect the Royal Prerogative admitting appeals to His Majesty in Council.

17. Because the power to legislate extra-territorially is not required in order to affect the Royal Prerogative permitting appeals to His Majesty in Council.

18. Because the power to legislate extra-territorially does not confer upon the Parliament of Canada jurisdiction to enact laws in relation to matters which before the passing of the Statute of Westminster were not within the competence of the Parliament of Canada.

19. Because if extra-territorial power is required in order to affect the Royal Prerogative admitting appeals to His Majesty in Council, the provincial legislatures have that power for that purpose.

20. Because the Parliament of Canada has no power to attempt to make uniform procedure in civil matters in the Provinces without providing for the coming into force of such law by provincial legislation.

21. Because Bill Number 9 is legislation with relation to some matters assigned exclusively to the provincial legislatures by Section 92 of the British North America Act, it cannot come under the power respecting peace, order and good government of Canada as provided by Section 91 unless there is an emergency amounting to national peril.

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22. For the other reasons given in the dissenting judgments of the Honourable Mr. Justice Crocket and the Honourable Mr. Justice Davis.

G. D. CONANT.
C. R. MAGONE.

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BLAKE & REDDEN,
17 Victoria Street, London, S.W.1.

(A3957I) VACHER & SONS, LTD., Westminster House, S.W.1.