Privy Council Appeal No. 26 of 1940

The Attorney-General of Ontario and others

v.

The Attorney-General of Canada and others (*Respondents*)
and The Attorney-General of Quebec (*Intervener*)

FROM

THE SUPREME COURT OF CANADA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH JANUARY, 1947.

Present at the Hearing:

THE LORD CHANCELLOR (LORD JOWITT)
VISCOUNT SIMON
LORD MACMILLAN
LORD WRIGHT
THE MASTER OF THE ROLLS (LORD Greene)
LORD SIMONDS
THE LORD CHIEF JUSTICE OF ENGLAND (LORD GODDARD)

[*Delivered by* THE LORD CHANCELLOR]

This appeal is brought from the judgment of the Supreme Court of Canada given on the 19th January, 1940 upon a question which was referred to that Court under the provisions of section 55 of the Supreme Court Act, R.S.C. 1927, Chapter 35.

From the recitals contained in the Order of Reference which was made by the Governor-General in Council on the 21st April, 1939, it appears that, at the 4th Session of the Eighteenth Parliament of Canada, Bill 9, entitled " An Act to amend the Supreme Court Act " was introduced and received first reading in the House of Commons on 23rd January, 1939 and that on April 14th of the same year the debate on the motion for the second reading of the Bill was adjourned in order that steps might be taken to obtain a judicial determination of the legislative competence of the Parliament in Canada to enact the provisions of the said Bill in whole or in part.

The following question was accordingly referred to the Supreme Court of Canada for hearing and consideration:

" 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? "

The contents of the Bill, a short but pregnant one, must be stated in full. They are as follows:

" 1. Section fifty-four of the Supreme Court Act, chapter thirty-five of the Revised Statutes of Canada, 1927, is repealed and the following substituted therefor:—

" 54. (1) The Supreme Court shall have, hold and exercise exclusive ultimate appellate civil and criminal jurisdiction within and for Canada; and the judgment of the Court shall, in all cases, be final and conclusive.

" (2) Notwithstanding any royal prerogative or anything contained in any Act of the Parliament of the United Kingdom or any Act of the Parliament of Canada or any Act of the legislature of any province of Canada or any other statute or law, no appeal shall lie or be brought from any court now or hereafter established within Canada to any court of appeal, tribunal or authority by which, in the United Kingdom, appeals or petitions to His Majesty in Council may be ordered to be heard.

" (3) The Judicial Committee Act, 1833, chapter forty-one of the statutes of the United Kingdom of Great Britain and Ireland, 1833, and The Judicial Committee Act, 1844, chapter sixty-nine of the statutes of the United Kingdom of Great Britain and Ireland, 1844, and all orders, rules or regulations made under the said Acts are hereby repealed in so far as the same are part of the law of Canada."

2. Nothing in this Act shall affect any application for special leave to appeal or any appeal to His Majesty in Council made or pending at the date of the coming into force of this Act.

3. This Act shall come into force upon a date to be fixed by proclamation of the Governor in Council published in the Canada Gazette."

On the 19th January 1940 the Supreme Court certified that the opinions in respect of the question referred to it were as follows:—" By the Court: the Parliament of Canada is competent to enact the Bill referred in its entirety; By Mr. Justice Crocket: the Bill referred is wholly *ultra vires* of the Parliament of Canada; By Mr. Justice Davis: The Bill referred 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 proceedings 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.".

From this judgment of the Court the Attorneys-General of Ontario, British Columbia and New Brunswick have by special leave brought this appeal which the Attorney-General of Quebec has intervened to support. The Attorneys-General of Canada and of Manitoba and Saskatchewan are respondents to the appeal. The hearing of the appeal was postponed until the conclusion of the war. Their Lordships think it worth while to observe that H.M. Attorney-General in England took no part in the controversy, which has throughout been between the Dominion of Canada and certain of the Provinces on the one hand and others of the Provinces on the other hand. The single issue has been whether, as the appellants contend, the subject matter of Bill 9 falls within the exclusive powers committed to the Provincial Legislatures of the Provinces of Canada under section 92 of the British North America Act 1867, or, as the respondents contend, is within the powers of the Parliament of Canada under section 101 or alternatively under section 91 of that Act. An alternative argument was faintly addressed to their Lordships by counsel for the appellants, that the Bill lay within the powers of neither Provinces nor Dominion, but H.M. Attorney-General in England did not intervene to support this view and their Lordships see no valid reason for accepting it.

The sections of the British North America Act to which it is necessary to refer are sections 91, 92, 101 and 129.

Sections 91 and 92 fall within Part VI of the Act which is entitled " Distribution of Legislative Powers " and by section 91 it is enacted that " It shall be lawful for the Queen by and with the Advice and Consent of the Senate and House of Commons to make Laws for the Peace Order and good Government of Canada in relation to all Matters not coming within the Classes of Subjects by this Act exclusively assigned to the Legislatures of the Provinces, and for greater Certainty, but not so as to restrict the generality of the foregoing Terms of this Section it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all matters coming within the Classes of Subjects next hereinafter enumerated: that is to say:— ". Then follow 29 enumerated classes covering a very wide field, of which for reasons which will later appear mention must be made of number 27

" The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction but including the Procedure in Criminal Matters ". Section 91 ends with the words " And any matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces ".

Section 92 is as follows " In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say:— ". Then follow 16 enumerated classes, in which the provincial aspect of the subject matter is reiterated. It is upon the 14th class that the appellants rely " The Administration of Justice in the Province, including the Constitution Maintenance and Organisation of Provincial Courts both of Civil and Criminal Jurisdiction and including Procedure in Civil Matters in those Courts ". They also call in aid the 13th class " Property and Civil Rights in the Province ". The 16th and last class is " Generally all Matters of a merely local or private Nature in the Province ".

Section 101 (which falls within Part VII of the Act entitled " Judicature ") is in these Terms:

" The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the Constitution, Maintenance and Organisation of a General Court of Appeal for Canada and for the Establishment of any additional Courts for the better Administration of the Laws of Canada."

Before stating how this power has been exercised it will be convenient to refer to section 129 of the Act and briefly to restate the familiar facts in regard to appeals to His Majesty in Council.

Section 129 of the Act provides that, except as thereby otherwise provided, all laws in force in Canada, Nova Scotia or New Brunswick at the Union and all Courts of Civil and Criminal Jurisdiction and all legal Commissions Powers and Authorities and all Officers Judicial, Administrative and Ministerial existing therein at the Union should continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively as if the Union had not been made subject nevertheless (except with respect to such as should be enacted by or exist under Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland) to be repealed abolished or altered by the Parliament of Canada or by the Legislature of the respective Province according to the authority of the Parliament of that Legislature under that Act.

The Act further made provision for the admission of other Colonies or Provinces into the Union. The manner in which this power was exercised and the growth of Canada to a great Dominion are matters of history which need not be narrated here. Suffice it to say that to the Provinces originally brought within the Union and to those afterwards admitted to it the relevant provisions of the British North America Act which have been cited equally apply. And for them all the question is the same, whether it is for them or for the Dominion to legislate in regard to appeals to His Majesty in Council whether from their own Provincial Courts or from the Supreme Court of Canada set up under section 101 of the Act.

Their Lordships have in the consideration of this case been greatly assisted by the elaborate statements appearing in the factums and formal cases of the parties and in the opinions of the learned Judges of the Supreme Court in regard to the manner in which the appeal from the several Provinces to His Majesty in Council has from time to time been regulated. It does not however appear to their Lordships to be necessary to consider these matters in detail nor to distinguish those cases in which appeal is said to lie as of right from those in which it is said to lie by leave under the Prerogative. This has been for practical purposes a convenient mode of division. But fundamentally in both classes of case the appeal is founded on that prerogative which as long ago as 1867 in *Reg.* v. *Bertrand* (L.R. 1 P.C. 520) was described as " the inherent prerogative right and, on all proper occasions, the duty of the Queen in Council to exercise an appellate jurisdiction with a view not only to

ensure, as far as may be, the due administration of justice in the individual case but also to preserve the due course of procedure generally ". The exercise of this appellate jurisdiction is regulated generally by the Judicial Committee Acts and in regard to each of the Provinces of Canada either (as, for example, in the case of Manitoba) by Orders in Council or (as in the case of Ontario and Quebec) by Provincial Statutes made under the authority or assumed authority (it matters not which) of the Constitutional Act of 1791 or (as in the case of British Columbia) by an Imperial Statute, and the only difference between the two classes of case is that an appeal may be said to lie as of right when an appellant brings his appeal under the provisions of the relevant Order in Council or Statute; when he cannot do so, but can only appeal by special leave of the Sovereign on the advice of the Judicial Committee itself, then the appeal is sometimes said to be under the prerogative, a description which if it is intended to be exclusive, is inaccurate.

It is convenient shortly to restate what immediately after the Act and indeed at all times until the passing of the Statute of Westminster (to which reference will shortly be made) was the constitutional bar to legislation whether by Dominion or Province in regard to appeals to His Majesty in Council.

In the first place it must be remembered that by the Colonial Laws Validity Act, 1865, any Colonial Law which was repugnant to the provisions of an Act of the United Kingdom extending to the Colony either by express words or necessary intendment was void and inoperative to the extent of such repugnancy. It followed that neither Dominion nor Province could then validly legislate so as to abolish a right of appeal to the King in Council which was provided by Imperial Acts.

In the second place the doctrine which imposed a territorial limitation upon the powers of Colonial Legislatures, might be regarded as a fetter upon the legislative competence of Dominion or Province to deal with the so-called " prerogative " right of appeal.

In the third place the express terms of the exception in section 129 of the Act, to which reference has been made, precluded any alteration of Imperial Acts.

It is now necessary to return to section 101 of the Act. Acting under its authority the Parliament of Canada in the year 1875 passed the Supreme Court of Canada Act, which has from time to time been amended and as amended is now R.S.C. 1927, Chapter 35. Under that Act a Supreme Court of Appeal was established which under section 35 was to have, hold and exercise, an appellate civil and criminal jurisdiction within and throughout Canada. It prescribed the limits within, and the terms upon which, an appeal might be brought from the Courts of the Provinces and by section 54 provided that the judgment of the Court should in all cases be final and conclusive and that no appeal should be brought from any judgment or order of the Court to any court of appeal established by the Parliament of Great Britain and Ireland by which appeals or petitions to His Majesty in Council might be ordered to be heard saving any right which His Majesty might be graciously pleased to exercise by virtue of His royal prerogative. It is this section 54 which the Bill now challenged seeks to amend, and two things may be noticed about the section as originally enacted. In the first place it is silent, as is the whole Act, about appeals from the Provincial Courts to His Majesty in Council. In the second place so far as appeals from the Supreme Court are concerned, it expressly saves the prerogative while denying any appeal as of right.

Such being the position before the year 1931, in that year was passed the Statute of Westminster 1931, an Act of the Imperial Parliament, which has as its sub-title " An Act to give effect to certain resolutions passed by Imperial Conferences held in the years 1926 and 1930 ".

The recitals in the preamble of this Act after referring to the Reports of the Conferences affirm that it is proper to set out that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another

that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles should thenceforth require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom and that it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion.

By section 2 (1) it is provided that the Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of the Act by the Parliament of a Dominion (which by definition includes the Dominion of Canada), and by section 2 (2) that no law and no provision of any law made after the commencement of the Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament of the United Kingdom or to any order, rule or regulation made under any such Act and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.

By section 3 it is declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation. (It may be noticed that this power is not given to the Legislature of a Province.)

By section 4 it is provided that no Act of Parliament of the United Kingdom passed after the commencement of the Act shall extend or be deemed to extend to a Dominion as part of the law of that Dominion unless it is expressly declared in that Act that that Dominion has requested and consented to the enactment thereof.

It remains only to refer to section 7, which deals with Canada only. By that section it is provided (by subsection (1)) that nothing in the Act shall be deemed to apply to the repeal amendment or alteration of the British North America Acts, 1867 to 1930, or any order, rule or regulation made thereunder, (by subsection (2)) that the provisions of section 2 of the Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces and (by subsecton (3)) that the powers conferred by the 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.

It is in the light of this Act of transcendent constitutional importance that the question must now be considered whether it is competent for the Parliament of Canada to enact not only that the Supreme Court of the Dominion shall have appellate civil and criminal jurisdiction within and for Canada, but also that that jurisdiction shall be " exclusive " and " ultimate ".

This question must be considered under two heads, first, in regard to appeals from the Supreme Court itself; and, secondly, in regard to appeals direct from the Provincial Courts to His Majesty in Council.

First, then, as to appeals from the Supreme Court itself. Here the question is whether under subsection (1) of the substituted section 54 the jurisdiction can validly be made " ultimate ", by which, as the subsequent new subsections make clear, is intended the abolition of appeal from the Supreme Court to His Majesty in Council. Upon this question their Lordships can entertain no doubt. The power vested in the Dominion Parliament by section 101 of the British North America Act to establish a general Court of Appeal for Canada was necessarily subject to the prerogative right of His Majesty, since that right was not expressly or by necessary intendment excluded, and this limitation was recognised in the first words of section 54 of the Supreme Court Act. But that was a restriction or fetter upon the legislative power of the Dominion, which could be removed and has been removed by an Act of the Imperial Parliament, and, since it has been removed, it must be within the power of the Dominion Parliament to enact that the jurisdiction of its Supreme Court shall be ultimate. No other solution is consonant with the status of a self-governing Dominion.

Secondly, as to appeals direct from Provincial Courts to His Majesty in Council. It is in regard to these appeals that the validity of the Bill has been more strenuously challenged and their Lordships have felt the familiar difficulty of determining which of two alternative meanings is to be given to an instrument, the authors of which did not contemplate the possibility of either meaning. For how could it be supposed in 1867, only two years after the passing of the Colonial Laws Validity Act, that the competence of either the Dominion or the Provincial Legislatures to pass laws directly repugnant to Acts of Parliament of the United Kingdom and to the common law relating to the prerogative could be the subject of judicial determination? Yet this is the question which must now be decided. In its solution their Lordships have the advantage of two recent pronouncements of the Board, *Nadan* v. *The King* [1926] A.C. 482 and the *British Coal Corporation* case [1935] A.C. 500, the first before, the second after, the passing of the Statute of Westminster, and it will be convenient to see what these cases decided.

In *Nadan's* case the question was as to the validity of section 1025 of the Criminal Code of Canada if and so far as it purported to prevent The King in Council from giving effective leave to appeal against an Order of a Canadian Court in a criminal case. Criminal law, including the procedure in criminal matters, was, it will be remembered, one of the subjects to which under section 91 of the Act the exclusive authority of the Parliament of Canada extended. It was argued that the legislative power so conferred was complete and included power to limit the Royal Prerogative to entertain an appeal. The Board after a review of the prerogative and of the manner in which the Judicial Committee had been in effect established as a Court of Appellate Jurisdiction rejected the argument, holding that however widely the powers conferred by section 91 were construed they were confined to action to be taken in the Dominion and did not authorise the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal, and further holding that section 1025 of the Criminal Code if and so far as it was intended to have that effect was repugnant to the Judicial Committee Acts and therefore void and inoperative by virtue of the Colonial Laws Validity Act, 1865.

In 1935 there came before the Board the *British Coal Corporation* case in which the same question was raised but with this vital difference that in the meantime the Statute of Westminster had been passed. The section of the Criminal Code then in force purported in unambiguous terms to abolish the appeal to His Majesty in Council; " 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 in which in the United Kingdom appeals or petitions to His Majesty may be heard ". The validity of this provision was challenged by certain persons who sought leave to appeal in a criminal case from a Judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec. But it was challenged in vain. The Board after once more expounding the nature of appeals to His Majesty in Council explained the decision in *Nadan's* case thus: " Their Lordships are of opinion that the judgment was based on two grounds only: (1) that section 1025 was repugnant to the Privy Council Acts of 1833 and 1844 and was therefore void under the Colonial Laws Validity Act, 1865; (2) that it could only be effective if construed as having an extra-territorial operation whereas according to the law as it was in 1926 a Dominion statute could not have extra-territorial operation. These two difficulties as the law then stood could only be overcome by an Imperial Statute . . . Such, their Lordships think, is the meaning of the decision in *Nadan's* case . . . ". The Board proceeded to consider the question whether the difficulties had been overcome. Recalling the words used by Lord Loreburn in delivering the judgment of the Judicial Committee in *A.G. for Ontario* v. *A.G. for Canada* ([1912] A.C. 571 at 581) " Now there can be no doubt that under this organic instrument the powers distributed between the Dominion on the one hand and the Provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive

of the entire scheme and policy of the Act to assume that any point of internal self government was withheld from Canada " (words that their Lordships reiterate in regard to the present appeal) the Board concluded that both difficulties had been removed by the Statute of Westminster. " There now remain " it was said " only such limitations as flow from the Act itself, the operation of which as effecting the competence of Dominion legislation was saved by section 7 of the Statute, a section which excludes from the competence of the Dominion and Provincial Parliaments any power of ' repeal, amendment or alteration ' of the Act ". It has been properly urged on behalf of the appellants that at the conclusion of their judgment the Board observed that they were dealing only with the legal position in Canada in regard to that type of appeal in criminal matters and that it was there neither necessary nor desirable to touch on the position as regards civil cases. It was this consideration that led Davis J. in the present case to give the qualified opinion already cited in regard to the validity of the referred Bill. This opinion rightly recognises that whether or not the reasoning of the Board in the *British Coal Corporation* case extends beyond the subject matter of legislation which was by section 91 of the Act confided to the Dominion Parliament, at any rate it cannot be limited to one only of the 29 classes of subject matter enumerated in that section and that just as an appeal to His Majesty in Council may by Dominion Legislation be abrogated in respect of " the criminal law . . . including the procedure in criminal matters," so it may be abrogated in respect of, e.g., class 21 ' Bankruptcy and Insolvency ' or class 22 ' Patents of Invention and discovery.'

But the conclusion reached by Davis J. involves a distinction which their Lordships would not willingly adopt. For if, as he holds, the subject matter provides the test whether the right of appeal may be abrogated by Dominion legislation so that it may not be abrogated in respect of classes of subjects assigned exclusively to the Provinces under section 92, a strange result would follow. It must be remembered that in the Provincial Courts the subject matter of litigation may arise as well under Dominion as under Provincial Legislation. The judicial and legislative spheres are not coterminous, Provincial Courts determining all questions except those for which a special Court is set up under section 101, whether the rights of the parties spring from the common law or Dominion or Provincial Statutes. Thus if the right of the Dominion Parliament to prohibit appeals to His Majesty in Council from a Provincial Court depended on the subject matter in suit, the result would be that from the same Court an appeal might lie in one suit to the Supreme Court of Canada only but in another to that Court or to His Majesty in Council, nor is it impossible that in the same suit two or more questions might be raised in respect of which different rights of appeal would arise. This result is yet more remarkable when it is remembered how wide is the scope of those classes of subjects which, falling within section 91 of the Act, can on this hypothesis be excluded from appeal to His Majesty in Council. Only the residue of civil cases, in which the rights of the parties were determinable by reference to other than Dominion legislation, would remain the subject of such appeal.

Therefore, while their Lordships give full weight to the observation with which the judgment in the *British Coal Corporation* case concluded and do not doubt that that case rightly decided that the Dominion Parliament was competent to exclude appeals in criminal cases for the reasons therein appearing, they must observe that that decision can be supported on wider grounds which cover not only criminal cases and not only civil cases falling within the subject matter of section 91 but also every other case which can be brought before any Provincial Court in Canada.

In coming to this conclusion their Lordships do not think it useful to embark upon a nice discrimination between the legislative powers contained in sections 91 and 92 respectively of the Act. Nor, as it appears to them, is it necessary to determine whether the words of head 14 of section 92 " The Administration of Justice in the Province " would, if they were disembarrassed of any context, be apt to embrace legislation in regard to appeals to His Majesty in Council. There appear to be cogent reasons for thinking that they would not. But their Lordships do not make this the ground

of their decision; for it is elsewhere, it is in section 101 of the Act, that the solution lies.

In his judgment in the case under appeal the former Chief Justice of Canada, Sir Lyman Duff, used these words: " Assuming even that section 92 gives some authority to the Legislatures [of the Provinces] in respect of appeals to the Privy Council, that cannot detract from the power of Parliament under section 101. Whatever is granted by the words of the section read and applied as *prima facie* intended to endow Parliament with power to effect high political objects concerning the self-government of the Dominion (section 3 of the B.N.A. Act) in the matter of judicature is to be held and exercised as a plenary power in that behalf with all ancillary powers necessary to enable Parliament to attain its objects fully and completely. So read it imports authority to establish a court having supreme and final appellate jurisdiction in Canada ".

The vital words in the passage cited, with which their Lordships are in full agreement, are the words in the last line " and final ". But in the opinion of their Lordships the same considerations lead to the conclusion that the court so established must have not only " final " or " ultimate " but also exclusive appellate jurisdiction. They would emphasise that section 101 confers a legislative power upon the Dominion Parliament which by its terms overrides any power conferred by section 92 upon the Provinces or preserved by section 129. " Notwithstanding anything in this Act " are words in section 101 which cannot be ignored. They vest in the Dominion a plenary authority to legislate in regard to appellate jurisdiction, which is qualified only by that which lies outside the Act, namely, the sovereign power of the Imperial Parliament. This was fully recognised in the case of *Crown Grain Coy.* v. *Day* [1908] A.C. 504.

What then is the power of the Dominion Parliament since the Statute of Westminster has come into operation? It is useful to examine what the position would be if now for the first time the Dominion Legislature thought fit to exercise its power under section 101. Nor is this a fanciful or inept mode of examination, for the power is to provide " from time to time " for a general Court of Appeal. To their Lordships it appears reasonably plain that, since in the words used by Lord Robertson in delivering the opinion of the Board in the *Crown Grain Coy.* case " the subject in conflict belongs primarily to the subject matter committed to the Dominion Parliament, namely the establishment of the Court of Appeal for Canada ", to that Parliament also must belong the power not only to determine in what cases and under what conditions the appellate jurisdiction of that Court may be invoked but also to deny appellate jurisdiction to any other Court. That natural attribute of sovereign power was no doubt qualified by an external constitutional limitation, namely the existence of Imperial Statutes, but, given the power to abrogate such statutes, the authority conferred by section 101 stands unqualified and absolute.

It is possible to regard this matter from a somewhat wider point of view, as indeed it is regarded in the judgment of Sir Lyman Duff. Giving full weight to the circumstances of the Union and to the determination shown by the Provinces as late as the Imperial Conferences, which led to the Statute of Westminster, that their rights should be unimpaired, nevertheless it appears to their Lordships that it is not consistent with the political conception which is embodied in the British Commonwealth of Nations that one member of that Commonwealth should be precluded from setting up, if it so desires, a Supreme Court of Appeal having a jurisdiction both ultimate and exclusive of any other member. The regulation of appeals is, to use the words of Lord Sankey in the *Coal Corporation* case, a " prime element in Canadian sovereignty ", which would be impaired if at the will of its citizens recourse could be had to a tribunal, in the constitution of which it had no voice. It is, as their Lordships think, irrelevant that the question is one that might have seemed unreal at the date of the British North America Act. To such an organic statute the flexible interpretation must be given that changing circumstances require, and it would be alien to the spirit, with which the preamble to the Statute of Westminster is instinct, to concede anything less than the widest amplitude of power to the Dominion Legislature under section 101 of the Act.

In this connection some argument was addressed to their Lordships upon the importance of uniformity of legal decision, which, it was urged, could not be secured if appeal lay indifferently to the Supreme Court of Canada or to His Majesty in Council. For a decision of the Supreme Court would at least be final, though its jurisdiction would not on this hypothesis be exclusive. Against this it was contended that the British North America Act contained in section 94 a provision whereby the postulated uniformity of law could be obtained. In their Lordships' opinion this section provides an imperfect remedy for a state of affairs in which an important Dominion Act might be finally interpreted in one way by the Supreme Court for a Province which did not admit appeals to His Majesty in Council and in another way by the Judicial Committee for a Province which did admit such appeals, neither Tribunal admitting the authority of the other. But it is the possibility of such a conflict, creating a different law for different Provinces out of the same Dominion Act, which points the way to a truer interpretation of the British North America Act in the light of the Statute of Westminster. It is in fact a prime element in the self-government of the Dominion, that it should be able to secure through its own Courts of Justice that the law should be one and the same for all its citizens. This result is attainable only if section 101 now authorises the establishment of a Court with final and exclusive appellate jurisdiction. The words used by Lord Macmillan in delivering the opinion of the Board in *Croft* v. *Dunphy* [1933] A.C. 156, upon a question that arose in regard to one of the specific subjects enumerated in section 91 are equally applicable in the consideration of section 101; " their Lordships," he said, " see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign state."

It is right to conclude with some observations upon section 7 of the Statute of Westminster on which counsel for the appellants strongly relied.

Subsection (1) of section 7 is in general terms and it was urged that to interpret the Statute as vesting in the Dominion Parliament a power which it did not before possess was in effect to repeal or amend or at least to alter the British North America Act. But their Lordships cannot accept this reasoning. Necessarily the effect of the Statute is to amend and alter the Act in so far as from the operation of the Statute there arises a new power in the Legislatures both of the Dominion and the Provinces. The question is in which Legislature the power is vested in regard to this particular subject matter. That is a question of construction upon which their Lordships have stated their opinion.

Subsection (2) does not call for further comment here.

In regard to subsection (3) the same observations appear to apply as to subsection (1). If upon the true construction of the British North America Act the conclusion had been that the power to legislate for the abrogation of appeals to His Majesty in Council was vested under section 92 in a Provincial Legislature, that would have been an end of the matter. It is just because their Lordships have come to a different conclusion that subsection (3) does not assist the appellants.

Their Lordships are of opinion that this appeal fails and that it ought to be declared that Bill 9 of the Fourth Session of the Eighteenth Parliament of Canada entitled " An Act to amend the Supreme Court Act " is wholly *intra vires* of the Parliament of Canada and they will humbly advise His Majesty accordingly.

(54480) Wt. 8013—5 200 1/47 D.L. G.33

In the Privy Council

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AND OTHERS

v.

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AND OTHERS
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THE ATTORNEY-GENERAL OF QUEBEC

DELIVERED BY THE LORD CHANCELLOR

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