Overview | **[1926] AC 482**, | 95 LJPC 114, | 28 Cox CC 167, | 134 LT 706, | 42 TLR 356

NADAN APPELLANT; AND THE KING RESPONDENT. ATTORNEY-GENERAL FOR ENGLAND AND ATTORNEY-GENERAL FOR CANADA INTERVENERS. ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION. [1926] A.C. 482

[PRIVY COUNCIL.]

VISCOUNT CAVE L.C., VISCOUNT DUNEDIN, LORD SHAW LORD PHILLIMORE, and LORD BLANESBURGH.

1926 Feb. 25.

Canada — Legislative Power — Appeal to Privy Council — Royal Prerogative to grant Leave — "Criminal Case" — Colonial Laws Validity Act, 1865 (28 & 29 Vict. c. 63), s. 2 — British North America Act, 1867 (30 & 31 Vict. c. 3), s. 91 — Criminal Code (R. S. Can., 1906, c. 146), s. 1025.

Sect. 1025 of the Criminal Code of **Canada**, if and so far as it is intended to prevent the **King** in Council from giving effective leave to **appeal** against an order of a Canadian **Court** in a criminal case, is invalid. The legislative authority of the Parliament of **Canada** as to criminal law and procedure, under s. 91 of the British North America Act, 1867, is confined to action to be taken in **Canada**. Further, an enactment annulling the royal prerogative to grant special leave to **appeal** would be inconsistent with the Judicial Committee Acts, 1833 and 1844, and therefore would be invalid under s. 2 of the Colonial Laws Validity Act, 1865. The royal assent to the Criminal Code could not give validity to an enactment which was void by Imperial statute; exclusion of the prerogative could be accomplished only by an Imperial statute.

According, however, to the well settled practice of the Judicia Committee His Majesty is advised to intervene in a criminal case only if it is shown that, by a disregard of the power of legal process, or by some violation of natural justice, or otherwise, substantial and grave injustice has been done.

The **appellant** was convicted in **Alberta** of an offence under the Government Liquor Control Act of **Alberta** (14 Geo. 5, c. 14), which did not incorporate s. 1025 of the Criminal Code of **Canada**, and of an offence under the **Canada** Temperance Act (R. S. Can., 1906, c. 152). For each offence he was sentenced to a fine, and in default imprisonment. **The Supreme Court** of **Alberta**, rejecting contentions as to the construction and invalidity of the material sections, affirmed the convictions, but gave leave to **appeal** to the Privy Council. The Crown petitioned the Judicial Committee to quash the **appeals** as incompetent, having regard to s. 1025. The **appellant** petitioned for special leave to **appeal**. The petitions were heard with the **appeals**:-

Held, (1.) that each **appeal** was in a "criminal case" to which s. 1025 applied, so far as it was valid; (2.) that (in the absence of argument to the contrary) s. 1025 prevented the **Appellate Division** from giving effective leave to **appeal**; (3.) that s. 1025 did not exclude the prerogative right to give leave to **appeal**, but that the cases were clearly not within the category of the exceptional cases in which special leave to **appeal** was advised in a criminal matter.

CONSOLIDATED **APPEAL** (No. 24 of 1925) from a judgment of the **Appellate Division** of **the Supreme Court** of **Alberta** (January 7, 1925) affirming two convictions by a police magistrate in **Alberta**, also, heard with the **appeals**, petition to dismiss the **appeals** as incompetent, and petition for special leave to **appeal**.

The convictions affirmed were: (1.) Under the Government Liquor Control Act, Statutes of **Alberta**, 1924, c. 14, of having intoxicating liquor within the Province without having the package officially sealed; (2.) Under the **Canada** Temperance Act, R. S. Can., 1906, c. 152, as amended by 10 Geo. 5, c. 8, of transporting through the Province intoxicating liquor otherwise than by means of a common carrier by water or by rail. In respect of each offence the **appellant** was sentenced to a fine, or in default to imprisonment.

The **Appellate Division** (Harvey C.J., Stuart J.A. and Clark J.A.; Beck J.A. and Hyndman J.A. dissenting) affirmed the convictions, subject to an amendment of the second conviction, and gave leave to **appeal** to His Majesty in Council. The two proceedings in the **Appellate Division** are reported at 21 Alb. L. R,. 193, 231.

The **respondent** petitioned that the **appeals** should be quashed or dismissed on the ground that they were not competent having regard to s. 1025 of the Criminal Code of **Canada**, and on the ground that the leave given was not competent having regard to the **Alberta** Order in Council, 1910.

The **appellant** petitioned for special leave to **appeal**.

It was ordered that the hearing of both petitions should stand over until the hearing of the consolidated **appeal**.

His Majesty's **Attorney-General** and the **Attorney-General** for **Canada** were given leave to intervene.

---------- ***[1926] A.C. 482 at 484***

1925. Dec. 10, 11, 14. The consolidated **appeal** having been partially opened on the merits, their Lordships desired to hear the questions arising on the petitions argued.

R. B. Bennett K.C. and ***Pritt*** for the **respondent**. The **Appellate Court** had no jurisdiction to give leave to **appeal** to the Privy Council having regard to s. 1025 of the Criminal Code of

Canada. That section was intra vires under the British North America Act, 1867, s. 91, the general words and head 27 as to criminal law. The power conferred was complete: **Attorney-General** for *Ontario v.* ***Attorney-General*** *for* ***Canada***(1); it included power to limit the royal prerogative in that respect. The cases were "criminal cases" within the meaning of s. 1025, even though they depended upon questions of ultra vires and of construction. Nor was it material that the first conviction was under a Provincial statute imposing penalties under the power contained in s. 92, head 15: *Rex v. Nat Bell Liquors*.(2) [Reference was made also to *Toronto Street Ry. Co. v. The* ***King***(3); ***Attorney-General*** *for Ontario v. Hamilton Street Ry. Co*.(4); Interpretation Act (R. S. Can., 1906, c. 1), s. 28.]

Clauson K.C. (***T. Mathew*** with him) for the **Attorney-General** for **Canada**, **intervener**. Sect. 1025 excludes the **appeals** and the right to grant special leave. The **King** and His Parliament of **Canada** have complete legislative power in the matters in respect of which legislative authority is given by the British North America Act: *Bank of Toronto v. Lambe*(5); ***Attorney-General*** *for Ontario v.* ***Attorney-General*** *for* ***Canada***(6); *In re the Initiative and Referendum Act*.(7) It was therefore competent to enact that in no circumstances should a person who had been convicted of a criminal offence ask for an exercise of the prerogative right. The British North America Act, 1867, does not, as it might have done, expressly exclude the legislative power to deal with the royal prerogative. The section is not invalid under the Colonial Laws Validity

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(1) [1912] A. C. 571.

(2) [1922] 2 A. C. 128, 167.

(3) [1917] A. C. 630, 637.

(4) [1903] A. C. 524, 528.

(5) (1887) 12 App. Cas. 575, 588.

(6) [1912] A. C. 571, 581.

(7) [1919] A. C. 935, 942.

Act, 1865, as conflicting with the Judicial Committee Acts, because those Acts are merely enabling Acts, and are not the source of the prerogative. The **Alberta** Order in Council, 1910, giving a right of **appeal** with the leave of the **Court** in **Alberta**, does not apply to criminal cases; if it does, the same argument applies. Further, the Colonial Laws Validity Act, 1865, ceased to operate in the matter when the British North America Act, 1867, was passed. Even if s. 1025 is ultra vires so far as it purports to deal with the prerogative right, the Judicial Committee would hesitate to advise special leave being given in a class of cases as to which the Dominion Parliament has deliberately expressed the view that there should be no **appeal**.

Sir Douglas Hogg A.-G. (***Giveen*** with him), **intervener**. Sect. 1025 is not effective to deprive His Majesty of the prerogative right to grant special leave to **appeal**. That right can be taken

away only by an Imperial Act, or by a charter or statute having the authority of an Imperial statute: *Reg. v. Bertrand*.(1) Precise words must be used: *Th,berge v. Laudry*(2); *Cushing v. Dupuy*(3); it is, at any rate, very unlikely that, if the Imperial Legislature intended to limit the royal prerogative, it would not have used precise words. The British North America Act, 1867, therefore does not confer the power. There is no direct authority, but the following support the contention: Opinion of Lord Brougham cited in *Cuvillier v. Aylwin*(4), which case was overruled in *Cushing v. Dupuy*(5); *Reg. v. Edulji Bryamjee*(6); *Reg. v. Alloo Paroo*(7); *Townsend v. Cox*(8); ***Attorney-General** for **Canada** v. **Attorney-General** for Ontario*(9); *Webb v. Outrim*(10); Keith's Representative Government in the British Dominions, 1912 ed., vol. ii., pp. 980, 981; Wheeler's Confederation Law of **Canada**, 1896, p. 34; Quick and Gorran's Constitution of the Australian Commonwealth,

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(1) (1867) L. R. 1 P. C. 520, 530.

(2) (1876) 2 App. Cas. 102, 106.

(3) (1880) 5 App. Cas. 409, 416.

(4) (1832) Stuart's L. C. Rep. 527; also (without the Opinion) 2 Knapp 72.

(5) 5 App. Cas. 409, 417.

(6) (1846) 5 Moo. P. C. 276.

(7) (1847) 5 Moo. P. C. 296.

(8) [1907] A. C. 514.

(9) [1897] A. C. 199.

(10) [1907] A. C. 81.

2nd ed., pp. 60 to 62. When the Imperial Parliament intended to give authority to limit the royal prerogative, as in the case of the Australian Commonwealth and South Africa, it has done so expressly. There have been **appeals** to the Privy Council where s. 1025 might have been relied on, but was not: *Wentworth v. Mathieu*(1); *Rex v. Nat Bell Liquors*.(2) In other cases the question has arisen, but no decision was necessary: *Toronto Ry. Co. v. The **King***(3); ***Attorney-General** for Ontario v. Reciprocal Insurers*(4); ***Attorney-General** for Ontario v. Daly*.(5) Further, so far as s. 1025 purports to take away the prerogative right to grant special leave it conflicts with the Judicial Committee Acts, 1833 and 1844, and is therefore invalid under the Colonial Laws Validity Act, 1865. Sect. 1025 is effective, however, to preclude any **Court** in **Canada** from granting leave to **appeal**: *Cushing v. Dupuy*.(6) The view that if s. 1025 is ineffective to take away the prerogative yet weight should be given to it upon an application for leave to **appeal**, is supported by *Reg. v. Ames*.(7)

Frank Ford K.C. and ***Hon. Geoffrey Lawrence K.C.*** for the **appellant**. The **appellant** adopts

the argument of the **Attorney-General** as to the incompetence of s. 1025 to take away the right to grant special leave. Further, if the Dominion Parliament has that power, so also have the Provincial Legislatures as to penalties imposed under the British North America Act, 1867, s. 92, heads 13 and 14; for the power of a Provincial Legislature, within its sphere, is as plenary as that of the Parliament of **Canada**: *Hodge v. The Queen*.(8) By s. 101 the Parliament of **Canada** was given power to set up a **Court** of **Appeal** for **Canada**, but no mention was made of authority to take away or limit the prerogative.

In s. 1025 "criminal case" is used in the sense in which it is used in s. 91, head 27, of the British North America

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(1) [1900] A. C. 212.

(2) [1922] 2 A. C. 128.

(3) [1917] A. C. 630.

(4) [1924] A. C. 328, 348.

(5) [1924] A. C. 1011, 1015.

(6) 5 App. Cas. 409.

(7) (1841) 3 Moo. P. C. 409, 413.

(8) (1883) 9 App. Cas. 117, 132.

---------- ***[1926] A.C. 482 at 487***

Act, 1867; the words do not include the case under the Government Liquor Control Act, which did not adopt s. 1025. On this point *Rex v. Nat Bell Liquors*(1) is distinguishable, as there the Dominion Legislature was dealing with **the Supreme Court**, its own creation. It would be ultra vires for the Dominion to limit the right of **appeal** in cases arising out of a Provincial Act imposing penalties: ***Attorney-General*** *for Ontario v. Reciprocal Insurers*.(2) Nor is the case under the **Canada** Temperance Act a "criminal case"; that Act was not passed under the power as to criminal law, but under the general power to legislation for peace, order, and good government: *Toronto Electric Commissioners v. Snider*.(3) Even if the cases are criminal cases the **Appellate Court** had power under the **Alberta** Order in Council, 1910, to grant leave.

If special leave is necessary it should be granted, as the cases involve important questions of construction of statutes and of legislative competence.

R. B. Bennett K.C. replied.

1926. Feb. 25. The judgment of their Lordships was delivered by

VISCOUNT CAVE L.C. 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 September 29-30, 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

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(1) [1922] 2 A. C. 128, 167.

(2) [1924] A. C. 323, 339.

(3) [1925] A. C. 396, 406, 407.

police; and, on the following morning, September 30, 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** (ch. 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. Can., c. 152), as amended by 10 Geo. 5, c. 8. These charges were duly heard before the police magistrate, who, on October 14, 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 February 19, 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 May 5, 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 s. 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

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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 s. 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 s. 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*.(1) Sect. 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

(1) [1922] 2 A. C. 128, 167.

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by the Legislature of the Dominion or by the Legislature of the Province.

Their Lordships proceed, therefore, to consider the effect of s. 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 s. 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*(1); *Townsend v. Cox*(2); and *Rex v. Nat Bell Liquors*(3);

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(1) [1900] A. C. 212.

(2) [1907] A. C. 514.

(3) [1922] 2 A. C. 128.

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but for some reason it was not in fact raised in those cases. In *Toronto Ry. Co. v. The* ***King***(1) and ***Attorney-General*** *for Ontario v. Daly*(2) 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*.(3) It has been recognized and regulated in a series of statutes, of which it is sufficient to mention two - namely, the Judicial Committee Act, 1833 (3 & 4 Will. 4, 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

(1) [1917] A. C. 630.

(2) [1924] A. C. 1011.

(3) L. R. 1 P. C. 520.

---------- *[1926] A.C. 482 at 492*

extend its jurisdiction and powers," enacts (in s. 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, by s. 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 authorize the Dominion Parliament to annul the prerogative right of the **King** in Council to grant special leave to **appeal**. Further, by s. 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 s. 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 appal against an order of a Canadian **Court**, is repugnant

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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, s. 74, and Union of South Africa Act, 1909, s. 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*(1) 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 authorized by the British Act of Parliament commonly called the **Canada** Act (31 Geo. 3, c. 31), which empowered the Legislature of Lower **Canada** to limit and define the right of **appeal**: see 5 Moo. P. C. 294, 304; 15 Moo. P. C. 193; and 5 App. Cas. 417. In *Reg. v. Ames*(2) 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 *Reg. v. Eduljee Byramjee*(3) effect was given to a provision in the Bombay Charter of 1823 authorizing **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. 4, c. 71) and that its provisions were valid on that ground. The same observation applies to the case of *Reg. v. Alloo Paroo*(4), where the point was further discussed in the judgment of Lord Brougham.

(1) 2 Knapp 72.

(2) 3 Moo. P. C. 409.

(3) 5 Moo. P. C. 276.

(4) 5 Moo. P. C. 296.

In *Th,berge v. Laudry*(1), 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*(2) 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*(3) and other

cases. In *Wi Matua's Will*(4) 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*(5), 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 Hodges J. 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

(1) 2 App. Cas. 102.

(2) 5 App. Cas. 409.

(3) 2 Knapp, 72.

(4) [1903] A. C. 448.

(5) [1907] A. C. 81.

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 *In re Initiative and Referendum Act*(1), Lord Haldane, in declaring the judgment of the Board, referred to "the impropriety in the absence of clear and unmistakable language of construing s. 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 s. 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 *Reg. v. Eduljee Byramjee*(2), 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 Co. v. The Queen*(3); *Reg. v. Dillet*(4); *Arnold v. The **King**-Emperor*(5); *Ibrahim v. The **King***(6); and *Dal Singh v. The **King**-Emperor*.(7)

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(1) [1919] A. C. 935, 943.

(2) 5 Moo. P. C. 276, 289.

(3) (1863) 1 Moo. P. C. (N. S.) 299.

(4) (1887) 12 App. Cas. 459.

(5) (1914) L. R. 41 I. A. 149.

(6) [1914] A. C. 599.

(7) (1917) L. R. 44 I. A. 157.

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.

Solicitors for **appellant**: *Lawrence Jones & Co*.

Solicitors for **respondent**: *Blake & Redden*.

Solicitors for **interveners**: Treasury Solicitor and Charles Russell & Co.

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