British Coal Corporation and Others v The King [1935] IR 487

6 JUNE 1935

6 June 1935The judgment of the Judicial Committee was delivered by Viscount Sankey LC.

VISCOUNT SANKEY LC:—

This is a petition for special leave to appeal from a judgment of the Court of King's Bench (Appeal Side) of the Province of Quebec, delivered on the 5th October, 1934. The petitioners had been convicted on the 12th December,

1933, under sect 498 of the Canadian Criminal Code and under sects 2 and 32 of the Combines Investigation Act, 1923, before the Court of King's Bench (Crown Side) and had been subjected to fines totalling $30,000, but the more serious effect to the petitioners of the conviction was that their business operations in the import of British anthracite coal were held to be illegal. The conviction was upheld by the judgment of the Appeal Court.

Before their Lordships proceeded to consider questions appertaining to the merits of the petition, they decided in the first instance to determine a preliminary objection, which was that the petition was incompetent by reason of the provisions of sect 17 of the Canadian Statute 23 and 24 Geo 5, c 53 (an Act to amend the Criminal Code) which was in the following terms: “sub-section 4 of section 10 of the said Act (the Criminal Code) is repealed and is hereby re-enacted as follows:—

> “(4) 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.”

It is clear that if this enactment is valid, the petition is barred. It is, however, contended on behalf of the petitioners that the section is invalid. A section in identical terms had been held invalid by the Judicial Committee in *Nadan v The King* (1), and that decision was founded upon in these proceedings by the petitioners, who contended on various grounds that the enactment of the Statute of Westminster, 1931, had not affected the position which the decision just cited had established. On behalf of the respondent it was argued that the Statute of Westminster, 1931 (which will be referred to here as the Statute), had removed certain fetters which according to that decision had till then affected the legislative competence of Canada in the relevant respects, and that, these fetters being removed, the provisions of the British North America Act of 1867 had full effect to invest the Parliament of Canada with power to enact the section in question.

It will be convenient to summarise in the briefest terms the nature of the appeal from Dominion or Colonial Courts to His Majesty in Council. The position of this Board, the Judicial Committee of the Privy Council, in relation to

(1) [1926] AC 482.

[1935] IR 487 at 489

such appeals may first be indicated. The Judicial Committee is a statutory body established in 1833 by an Act of 3 & 4 Will 4, c, 41, entitled an Act for the better Administration of Justice in His Majesty's Privy Council. It contains *(inter alia)* the following recital: “And whereas from decisions of various Courts of Judicature in the East Indies and the plantations and other colonies and dominions of His Majesty abroad, an appeal lies to His Majesty in Council.” The Act then provides for the formation of a Committee of His Majesty's Privy Council, to be styled the Judicial Committee of the Privy Council and enacts that “all appeals or complaints in the nature of appeals whatever, which either by virtue of this Act or of any law, statute or custom may be brought before His Majesty in Council” from the order of any Court or Judge should thereafter be referred by His Majesty to, and heard by, the Judicial Committee, as established by the Act, who should make a report or recommendation to His Majesty in Council for his decision thereon, the nature of such report or recommendation being always stated in open Court. The Act contained a great number of provisions for the conduct of appeals. It is clear that the Committee is regarded in the Act as a judicial body or Court, though all it can do is to report or recommend to His Majesty in Council, by whom alone the Order in Council which is made to give effect to the report of the Committee is made.

But according to constitutional convention it is unknown and unthinkable that His Majesty in Council should not give effect to the report of the Judicial Committee, who are thus in truth an appellate Court of law, to which by the Statute of 1833 all appeals within their purview are referred.

A later Act, the Judicial Committee Act, 1844, must next be mentioned. Apart from certain changes in procedure, the main effect of that Act was to authorise Her Majesty to provide, by Order or Orders in Council made for that purpose, for the admission of any appeals to Her Majesty in Council from judgments or orders of any Court of Justice within any British Colony or possession abroad even though such Court might not be a Court of Error: this followed a recital that by the laws in force in certain of Her Majesty's Colonies no appeal could be brought save only from Courts of Error or of Appeal and that it was expedient to provide that Her Majesty in Council should be authorised to admit such appeals. In effect, therefore, Her Majesty in Council was thus empowered to override a Colonial law limiting or excluding appeals to Her Majesty in Council from any Colonial Court.

In this way the functions of the Judicial Committee as a court of law were established. The practice had grown up

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that the colonies under the authority either of Orders in Council or of Acts of Parliament should provide for appeals as of right from their courts to the King in Council and should fix the conditions on which such appeals should be permitted. But outside these limits there had always been reserved a discretion to the King in Council to grant special leave to appeal from a colonial

court irrespective of the limitations fixed by the colonial law: this discretion to grant special leave to appeal was in practice described as the prerogative right: it was indeed a residuum of the Royal Prerogative of the Sovereign as the fountain of justice. In early days it was to the King that any subject who had failed to get justice in the King's Court brought his petition for redress. As time went on, such petitions were brought to the King in Parliament (which was the origin of the modern judicial functions of the House of Lords) or to the King in his Chancery (from which flowed the jurisdiction of the Court of Chancery). But this was so only in causes which had been dealt with in English Courts: from the Courts of the Channel Islands and later from the Courts of the Plantations or Colonies the petition went to the King in Council, and this continued to be the practice after the jurisdiction of the Privy Council in English common law cases had been abolished. It was this appellate jurisdiction (along with other jurisdictions such as in Admiralty or Ecclesiastical Causes) which was affirmed and regulated by Parliament in the Privy Council Acts of 1833 and 1844. Although in form the appeal was still to the King in Council, it was so in form only and became in truth an appeal to the Judicial Committee which as such exercised as a Court of Law in reality though not in name, the residual prerogative of the King in Council. No doubt it was the order of the King in Council which gave effect to their reports but that order was in no sense other than in form either the King's personal order or the order of the general body of the Privy Council.

In 1865 the Colonial Laws Validity Act was passed. It was described as an Act to remove doubts as to the validity of Colonial Laws: for this context it is enough to say that it was an Act which declared that a colonial law should be deemed to be and to have been void to the extent that it was repugnant to any Act of the Imperial Parliament extending to the colony or any order or regulation made under such Act.

In 1867 the British North America Act (hereinafter called the Act) was passed. It was an Act to provide for the establishment in Canada of one Dominion and for the Legislative Authority in the Dominion and to declare the nature of the executive government therein. It was declared that the executive government of and over Canada should be vested

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in the Queen, and that there should be a Council (the Queen's Privy Council in Canada) to aid and advise in the government of Canada. The legislative power was vested in the Parliament for Canada, which by sect 91 was to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects assigned by a sect 92 exclusively to the Legislatures of the Provinces: without restricting the generality of that provision, certain matters were specifically enumerated as falling within the exclusive legislative authority of the Parliament of Canada: of these it is sufficient here to mention No 27, which was “The Criminal Law, except the constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters.” On the other hand, among the matters assigned by sect 92 exclusively to the provincial authority there fell No 14, “The Administration of Justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including procedure in Civil Matters in those Courts.” By sect 101 of the Act it was provided “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 and for the establishment of any additional Courts for the better administration of the laws of Canada.” Under the last mentioned section the Parliament of Canada by an Act of 1875 established (along with the Exchequer Court) “The Supreme Court of Canada” which was to exercise an appellate civil and criminal jurisdiction within and throughout

the Dominion of Canada: it was provided by sect 47 that “the judgment of the Supreme Court should be in all cases final and conclusive … Saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative.”

In 1880 in the case of *Cushing v Dupuy* (1), which was an appeal from the Court of Queen's Bench for Quebec, the Judicial Committee had to consider the effect of a Dominion Act dealing with insolvency, which contained a clause providing that “the judgment of the Court to which under this section the appeal can be made shall be final.” That Court in the case in question was the Court of Queen's Bench for Quebec. The Judicial Committee decided that as the Act in question “contains no words which purport to derogate from the prerogative of the Queen to allow as an act of grace appeals from the Court of Queen's Bench in matters of insolvency, her authority in that respect is unaffected by it.” But they added that they did not consider it necessary

(1) 5 App Cas 409.

“to consider what powers may be possessed by the Parliament of Canada to interfere with the royal prerogative.”

In 1888 a section identical in terms with the section now in question was enacted as sect 1025 of the Criminal Code of Canada. Between that year and 1926 appeals came before the Board in which the question of the validity of that section might have been raised but was not or, if it was raised, was not the subject of decision. To take one instance, in *Attorney-General for Ontario v Reciprocal Insurers* (1), the Judicial Committee said that their order “involved no decision as to the power of the Parliament of Canada to enact sect 1025 of the Criminal Code.”

But in 1926 in the case of *Nadan v The King* (2) a decision was for the first time given on the question whether the section was valid. It was held that the section was *ultra vires* and invalid. It is essential, however, to determine the *ratio decidendi* on which this judgment was based. The *ratio decidendi* is, in their Lordships' opinion, to be found in a comparatively short passage which follows a citation of the Privy Council Acts of 1833 and 1844, and which is of so vital an import that it must be here quoted in full (pp 492, 493):

> “Under what authority, then, can a right so established and confirmed be abrogated by the Parliament of Canada? The British North America Act, by section 91, empowered the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects by that Act assigned exclusively to the Legislatures of the Provinces; and in particular it gave to the Canadian Parliament exclusive legislative authority in respect of 'the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters.' But however widely these powers are construed they are confined to action to be taken in the Dominion; and they do not appear to their Lordships to authorise the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal. Further, by section 2 of the Colonial Laws Validity Act, 1865, it is enacted that 'any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament or having in the Colony the force and effect of such Act, shall be read

(1) [1924] AC 328, at p 348.

(2) [1926] AC 482.

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subject to such Act, order or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative.' In their Lordships' opinion section 1025 of the Canadian Criminal Code, if and so far as it is intended to prevent the Sovereign in Council from giving effective leave to appeal against an order of a Canadian Court, is repugnant to the Acts of 1833 and 1844 which have been cited, and is therefore void and inoperative by virtue of the Act of 1865. It is true that the Code has received the royal assent, but that assent cannot give validity to an enactment which is void by Imperial statute. If the prerogative is to be excluded, this must be accomplished by an Imperial statute; and in fact the modifications which were deemed necessary in respect of Australia and South Africa were effected in that way: see Commonwealth of Australia Act, 1900, section 74, and Union of South Africa Act, 1909, section 106."

The judgment then goes on to review a number of authorities and thus concludes (p 495): "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."

On a careful consideration of the judgment of the Board in *Nadan's Case* (1), their Lordships are of opinion that the judgment was based on two grounds only: (1) that sect 1025 was repugnant to the Privy Council Acts of 1933 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: the Australian and South African Acts were cited as illustrations of Imperial Statutes containing clauses apt to define or limit this prerogative. Such, their Lordships think, is the meaning of the decision in *Nadan's Case* (1): they do not find in it any clear or precise determination of what, if these two fundamental difficulties had been removed, would have been held to have been the true effect of the Act, nor can their Lordships say how, apart from these objections, the Judicial Committee would have decided the issue whether or not the Act had given the Canadian Legislature power to enact sect 1025.

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(1) [1926] AC 482.

Their Lordships have now to decide that very same question and to decide it, as they conceive, without any direct help or guidance from earlier decisions of the Judicial Committee, now that the Statute has removed the two difficulties which were decisive in *Nadan's Case* (1). The relevant s clauses of the Statute which have this effect are as follows:

"2.—(1) The Colonial Laws Validity Act, 1865, shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.

"(2) No law and no provision of any law made after the commencement of this 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.

"3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

"7.—(1) Nothing in this 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.

"(2) The provisions of section 2 of this Act shall extend to the laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces.

"(3) The powers conferred by this 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."

What is the extent of the legislative competence in the relevant regard conferred on the Canadian Parliament, putting out of question the limitations which are now removed, must be ascertained from the words of the Constituent Act. In construing the words of that Act, it must be remembered what the nature and scope of the Act are. They are indicated in the words used by Lord Loreburn LC in delivering the judgment of the Judicial Committee in *Attorney-General for Ontario v Attorney-General for Canada* (2).

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(1) [1926] AC 482.

(2) [1912] AC 571, at p 581.

[1935] IR 487 at 495

"In 1867 the desire of Canada for a definite Constitution embracing the entire Dominion was embodied in the British North America Act. 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."

The same principle was recognised in the following language used in *Hodge v The Queen* (1) in respect of the powers of Provincial Legislatures:

"When the British North America Act enacted that there should be a Legislature for Ontario, and that its legislative assembly should have exclusive authority to make laws for the Province and for provincial purposes in relation to the matters enumerated in section 92, it conferred powers not in any sense to be exercised by delegation from or as agents of the Imperial Parliament, but authority as plenary and as ample within the limits prescribed by section 92 as the Imperial Parliament in the plenitude of its power possessed and could bestow. Within these limits of subjects and area the local Legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances to confide to a municipal institution or body of its own creation authority to make by-laws or resolutions as to subjects specified in the enactment, and with the object of carrying the enactment into operation and effect."

The same language can properly be used in regard to the Dominion Parliament, to which indeed the passage just quoted was applied in *Attorney-General for Canada v Cain*, (2). That was a case in which it was held that the power to make laws for the peace, order and good government were wide enough to enable the Dominion Parliament to pass a statute vesting in the Dominion Executive the prerogative power to expel and deport aliens. Indeed, in interpreting

a constituent or organic statute such as the Act, that construction most beneficial to the widest possible amplitude of its powers must be adopted. This principle has been again clearly laid down by the Judicial Committee in *Edwards v Attorney-General for Canada*, (3):

(1) 9 App Cas 117, at p 132.

(2) [1906] AC 542.

(3) [1930] AC 124, at p 136.

[1935] IR 487 at 496

> "Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire—to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the Provinces to a great extent, but within certain fixed limits, are mistresses in theirs. 'The Privy Council, indeed, has laid down that Courts of Law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony': see Clement's Canadian Constitution, 3rd ed, p 347."

No doubt the principle is clearly established that the King's prerogative cannot be restricted or qualified save by express words or by necessary intendment. In connection with Dominion or Colonial matters that principle involves that if the limitation of the prerogative is by a Dominion or Colonial Act, not only must that Act itself deal with the prerogative either by express terms, or by necessary intendment, but it must be the Act of a Dominion or Colonial Legislature which has been endowed with the requisite power by an Imperial Act likewise giving the power either by express terms or by necessary intendment. In the matter now in question it is beyond question that section 17 of the Canadian Act is expressed in precise terms. The next question is whether section 91 of the Act invests the Dominion Parliament, in cases within its jurisdiction, with the power to regulate or prohibit the appeal to the King in Council. Their Lordships are of opinion that the Act does invest the Dominion Parliament with these powers. It does not indeed do so by express terms, but it does so by necessary intendment. Section 91 of the Act, read along with the rest of the Act, is, according to its true construction in their Lordships' opinion, apart from the limitations already referred to, intended to make, and is apt to make, the Dominion Legislature supreme and endow it with the same authority as the Imperial Parliament, within the assigned limits of subject and area, just as it was said in *Hodge v The Queen*, (1) that section 92 of the Act had that effect in regard to

(1) 9 App Cas 117.

[1935] IR 487 at 497

the Provincial Legislatures. It is true that before the Statute, the Dominion Legislature was subject to the limitations imposed by the Colonial Laws Validity Act and by section 129 of the

Act, and also by the principle or rule that its powers were limited by the doctrine forbidding extra-territorial legislation, though that is a doctrine of somewhat obscure extent. But these limitations have now been abrogated by the Statute. There now remain only such limitations as flow from the Act itself, the operation of which as affecting 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. But it is well known that section 7 was inserted at the request of Canada and for reasons which are familiar. It is doubtless true that the power of the Imperial Parliament to pass on its own initiative any legislation that it thought fit extending to Canada remains in theory unimpaired: indeed, the Imperial Parliament could, as a matter of abstract law, repeal or disregard section 4 of the Statute. But that is theory and has no relation to realities. In truth Canada is in enjoyment of the full scope of self-government: its Legislature was invested with all necessary powers for that purpose by the Act, and what the Statute did was to remove the two fetters which have already been discussed.

Among the powers which go to constitute self-government there are necessarily included powers to constitute the Law Courts and to regulate their procedure and to appoint their Judges: save for the provisions of the Act, these powers in regard to the then newly constituted Dominion would have all belonged to the King as the fountain of Justice: but by the Act these powers are vested in the Dominion Legislature, and thus *pro tanto* the prerogative is merged in the statutory powers. A most essential part of the administration of justice consists of the system of appeals. It is not doubted that with the single exception of what is called the prerogative appeal, that is, the appeal by special leave given in the Privy Council in London, matters of appeal from Canadian Courts are within the legislative control of Canada, that is of the Dominion or the Provinces as the case may be. Even conditions of the appeal “as of right” to the Privy Council, have been dealt with by the Parliaments of Quebec and Ontario, acting under the powers vested in them under the Constitutional Act, 1791.

It may now be considered whether there is since the Statute any sufficient reason why this matter of the special or prerogative appeal to the King in Council should be treated, as according to the contentions on behalf of the petitioners, it should be 2I

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treated, as being something quite special and as being a matter standing as it were on a pedestal by itself. Ought it not to be treated as simply one element in the general system of appeals in the Dominion? The appeal, if special leave is granted, is from the decision of a Canadian Court, and is to secure a reversal or alteration of an order of a Canadian Court: if it is successful, its effect will be that the order of the Canadian Court will be reformed accordingly. Rights in Canada and law in Canada will thus be affected. The appellant and respondent in any such appeal must be either Canadian citizens or persons who have submitted to the jurisdiction of the Canadian Courts. Such appeals seem to be essentially matters of Canadian concern and the regulation and control of such appeals would thus seem to be a prime element in Canadian sovereignty as appertaining to matters of justice. But it is said that this class of appeal is a matter external to Canada: emphasis is laid particularly on the fact that the Privy Council sits in London, and that in form the appeal by special leave is not to the Judicial Committee as a Court of Law, but to the King in Council exercising a prerogative right outside and apart from any statute. As already explained this latter proposition is true only in form, not in substance. But, even so, the reception and the hearing of the appeal in London is only one step in a composite procedure which starts from the Canadian Court and which concludes and reaches its

consummation in the Canadian Court. What takes place outside Canada is only ancillary to practical results which become effective in Canada. And the appeal to the King in Council is an appeal to an Imperial, not a merely British, tribunal.

Their Lordships can see no valid reason since the Statute why the power to regulate or prohibit this type of appeal should not be held to be vested in the Dominion Parliament by the Act, with the consequence that it was validly exercised by the impugned section of the Act to amend the Criminal Code. Their Lordships do not construe the decision in *Nadan's Case* (1) as involving the negation of that general power: the view there stated that the prerogative power to admit appeals could only be abrogated by an Imperial Statute was in their Lordships' opinion based on the special grounds that it would affect matters not confined locally to Canada and would contravene an Imperial Act. Before 1867, it had been held in *Cuvillier v Aylwin* (2) that the Constitution Act of 1791 had conferred power on the Canadian Legislature to take away the prerogative right of appeal: that decision was indeed

(1) [1926] AC 482.

(2) 2 Knapp, 72.

criticised in the case of *Louis Marois* (1), but the ground of actual criticism or perhaps dissent was not based on the general limits of power of the Canadian Legislature, but on the view that the relevant enactment of that Legislature was not sufficiently express in its terms: after 1867 the same ground for denying the validity of the enactment there in question was taken in *Gushing v Dupuy* (2) as already explained.

It was further contended on behalf of the petitioners that if the Imperial Parliament desired to regulate in a constitutional enactment the prerogative right of petitioning for leave to appeal to the King in Council, an entirely different method of dealing with the problem was adopted, as was done in section 74 of the Commonwealth of Australia Act, 1900, and in the South African Act. It is difficult to see how light can be thrown on the construction of the Act of 1867 by comparing an entirely different Act of 1900. But in any case the contrary argument may be drawn from the Commonwealth Act: the truer view may well be that the express limitation inserted in the Act of 1900 was so inserted because the general powers conferred on the Commonwealth by that Act would have included the abrogation of the prerogative appeal if the specific limitation had not been expressed. But it is to be noted also that the Commonwealth was invested with power to alter or amend the provisions of the Commonwealth Act relating to the prerogative appeals. A similar power is given in the South African Constitution. In the Report of the Imperial Conference, 1926, at p 19, it is stated that “it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals *(ie,* to the Judicial Committee of the Privy Council) should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected.”

Their Lordships have in this judgment been dealing only with the legal position in Canada in

regard to this type of appeal in criminal matters. It is here neither necessary nor desirable to touch on the position as regards civil cases.

For all these reasons their Lordships are of opinion that the petition should be dismissed. As they are of this opinion on the sole ground that the petition is barred by section 17 of the amended Criminal Code, it is not necessary to discuss the merits of the petition.

In the result their Lordships, being of opinion that the petition should be dismissed, will humbly so advise His Majesty.

(1) 15 Moo PC 189.

(2) 5 App Cas 409.

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