CONSTITUTIONAL ASPECTS OF REX v. NADAN.

([1926] 2 D.L.R. 177).

The appellant was arrested while engaged in driving a car loaded with intoxicating liquors from Fernie through the Province of Alberta. The liquors were being carried to Montana. 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 (Chapter 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.C. Chapter 152) as amended by Chapter 8 of 10, George V.

The appellant was convicted and sentenced upon both charges. An appeal was taken to the Appellate Division of the Supreme Court of Alberta by way of stated case on the first decision, and by motion by way of *certiorari* to quash the conviction on the second. Subsequently the Appellate Division granted leave to appeal to his Majesty in Council. Petitions by respondent to dismiss the appeal on the ground that it was barred by section 1025 of the Criminal Code, and by appellant for special leave to appeal, were adjourned to be dealt with on the hearing of the appeals.

Section 1025 of the Criminal Code is as follows:

"Notwithstanding any royal prerogative or anything contained in the Interpretation Act (R.S.C. 1906, c. 1) or in the Supreme Court Act (R.S.C. 1906, c. 139), 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."

The case thus raises the following points:

First—Whether "criminal case" as used in section 1025 is limited to appeals in causes that are technically criminal or whether it extends to penal offences created by Dominion legislation under powers other than those given by section 91 (27) of the B.N.A. Act and to Provincial Penal offences.

Their lordships treat this question as settled by the decision in *Rex* v. *Nat. Bell Liquors Ltd.*[1] With due deference, it is submitted that their lordships have misunderstood the decision in the *Nat. Bell* case. In that case Dominion Parliament had enacted legislation, excepting from the appellate jurisdiction of the Supreme Court of Canada " proceedings for or upon a writ of *certiorari* arising out of a criminal charge" (Supreme Court Act , R.S. Can., 1906, c. 139, s. 36, as amended by 10 and 11, Geo. V., c. 32). It is true that the legislation was procedural in its character, but the Dominion derived its power to enact the statute from section 101 of the B.N.A. Act and not from section 91 (27). Dominion Parliament had power to prescribe the right of appeal to the Supreme Court, not only in criminal matters under section 91 (27), but also in matters arising under the civil law or provincial penal law. The effect of construing "criminal" as meaning criminal in its widest sense and including appeals from offences under the provincial penal law was to carry out the obvious intention of the legislature, and to avoid an irrational gap in the law governing appeals to the Supreme Court. On the other hand such construction did not render the Act plainly ultra vires and it did not involve a flagrant invasion of a provincial legislation field.

On the other hand, section 1025 of the Criminal Code can only be justified if at all by section 91 (27) of the B.N.A. Act, or as legislation ancillary to the other clauses of section 91. The plain and simple meaning of the words "criminal case" (reading the section in its context) is criminal case within the purview of the code. To interpret the word "criminal" in its widest sense and thus to include offences under the provincial penal law involves an irrational and irrelevant excresence upon an otherwise symmetrical and complete code. It renders the section plainly *ultra vires* and an unwarranted and unnecessary invasion of the provincial legislative field.

Second—Another point is suggested, but not decided by the Lord Chancellor's statement:[2]

"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

[1] 65 D.L.R. 1; [1922] 2 A.C. 128.
[2] (1926) 2 D.L.R. p. 179.

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 purpose 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 is perfectly clear that the Dominion Parliament has legislative authority in respect to procedure in criminal matters, but it is equally clear that Dominion Parliament has no legislative authority in respect to procedure in offences under the provincial penal law. The assumption might have been made that leave to appeal the conviction under the second offence was ineffective, but, apart from appeals to the Supreme Court of Canada, Dominion Parliament could not legislate in respect to appeals from convictions under the Alberta Act.

Further, even in respect to the second charge, the assumption may be questioned. Presumably, the Appellate Division of the Supreme Court of Alberta based its grant of leave to appeal upon the Imperial Order in Council (Jan. 10, 1910). This Order in Council is authorized in express terms by section 1 of 7 and 8 Vict. c. 69, and it is generally construed as applying equally to civil and criminal appeals. It is true that two restrictive interpretations of Rule 2 (b) of the Privy Council Rules of July 5, 1911 (which correspond precisely with the Rules in the Order in Council relating to Alberta) have been proposed. It has been contended that the powers given to the Provincial Court are limited to cases arising in matters within the competency of the Provincial Legislatures and it has also been contended that the section should be interpreted, in accordance with the principle of the *ejusdem generis* rule, as limited to judgments in purely civil causes. These contentions were not accepted by the Supreme Court of Nova Scotia in *Rex* v. *McLachlan*.[3] Thus, section 1025 of the Code, inasmuch as it prevents a Provincial Court from granting leave to appeal in a criminal cause, contravenes an Imperial Order in Council based upon a Pre-Confederation Imperial Statute expressly applicable to Canada. The section could only be upheld by overruling *Smiles* v. *Belford et al* (1 O.A.R. 436) and accepting the view

[3] 56 N.S.R. 549; (1924) 1 D.L.R. 1109, and in *Rex* v. *Scott* (No. 2), 57 N.S.R. 201; (1924) 2 D.L.R. 277.

suggested by Sedgewick, J., in *Imperial Book Co.* v. *Black et al*[4], or by adopting either of the restrictive interpretations of the Privy Council Rules referred to above.

Third—Section 1025 of the Code is clearly inconsistent with the express terms of 7 & 8 Vict., c. 69. If it is construed as barring the right to apply to the Judicial Committee for special leave to appeal and as preventing His Majesty in Council from granting such leave, it is clearly repugnant to section one of Chapter 69, the operative part of which reads as follows:

"That it shall be competent to Her Majesty, by any Order or Orders to be from Time to Time for that Purpose made with the Advice of Her Privy 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, although such Court shall not be a Court of Errors or a Court of Appeal within such Colony or Possession; and it shall also be competent to Her Majesty, by any such Order or Orders as aforesaid, to make all such Provisions as to Her Majesty in Council shall seem meet for the instituting and prosecuting any such Appeals, and for carrying into effect any such Decisions or Sentences as Her Majesty in Council shall pronounce thereon: Provided always, that it shall be competent to Her Majesty in Council to revoke, alter, and amend any such Order or Orders as aforesaid, as to Her Majesty in Council shall seem meet: Provided also, that any such Order as aforesaid may be either general and extending to all Appeals to be brought from any such Court of Justice as aforesaid, or special and extending only to any Appeal to be brought in any particular Case: Provided also, that every such general Order in Council as aforesaid shall be published in the *London Gazette* within One Calendar Month next after the making thereof: Provided also, that nothing herein contained shall be construed to extend to take away or diminish any Power now by Law vested in Her Majesty for regulating Appeals to Her Majesty in Council from the Judgments, Sentences, Decrees, or Orders of any Courts of Justice within any of Her Majesty's Colonies or Possessions abroad."

It is submitted that this is the most satisfactory basis for the decision.

Fourth—Perhaps the most important problem suggested by the case is the extent to which the Royal Prerogative can be effected by Colonial legislation. The reasoning of their Lordships is complicated by the specific problem with which they were dealing. They

[4] 35 S.C.R. 488.

were deciding a case in which Dominion legislation was repugnant to a right of appeal that might have been justified either by the Imperial legislation referred to above or by the Royal Prerogative. We may pass by the question whether the right to apply for special leave to appeal can strictly be called a prerogative right since it has been reinforced by effective legislation, although the statute expressly preserves the prerogative. (*In re De Keyser's Royal Hotel Limited*, cf., views of Swinfen Eady, M.R., in the Court of Appeal,[5] and of Lords Dunedin and Parmoor in the House of Lords, with the views of Lord Atkinson in the House of Lords). In dealing with the problem before them their Lordships stated (Viscount Cave, L.C.), (1926) 2 D.L.R. p. 191:

"Under what authority, then, can a right so established be abrogated by the Parliament of Canada? The B.N.A. Act, 1867, 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 Legislature 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 (Imp.), c. 63, 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 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 Royal assent, but that assent cannot give validity to an enactment

[5] [1919] 2 Ch. 197; [1920] A.C. 508.

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 (Imp.), c. 12, The Constitution, s. 74, and Union of South Africa Act, 1909 (Imp.), c. 9, s. 106."

Two points are thus indicated:

It is suggested that the power to enact laws for the Peace, Order and Good Government of Canada in relation to Criminal Procedure is limited to action to be taken in the Dominion. This seems to be a reversion to the extreme doctrine of territorial limitation upon Colonial legislative power. It is true that it is made a part of the *ratio decidendi* of this case, but the point does not seem to have been considered and it is certainly not necessary for the decision. It is submitted that the more rational and liberal doctrine illustrated by recent cases [6] is not disturbed by the decision in this case.

It is also suggested that Imperial legislation is necessary to affect or exclude the Prerogative. In considering the extent of the implications of such a view, it is again necessary to remember that their Lordships were dealing with the prerogative right of the Crown to grant special leave to appeal and that this particular prerogative was embodied in Imperial legislation. It does not follow as of course that section 1025 would have been held *ultra vires* had the right of appeal thereby affected been based upon the prerogative alone without the reinforcement of the Imperial Statutes. Further, it certainly does not follow that prerogative rights generally require Imperial legislation for their amendment. It is still settled law that the prerogative in relation to the local government of the colony can readily be altered or even excluded by Colonial legislation.[7] It also seems to be settled law that there are prerogatives of the Crown in relation to the general and not the local government of the Empire that are beyond the ambit of Dominion or Provincial legislation. These will be found to be fields of governmental action which under our British polity are in practice controlled by convention and usage rather than by law. They are in a state of rapid development, but the moulding of the new relations is being accomplished without legislation, Imperial or Colonial. Even in these sacrosanct fields, Colonial legislation is probably necessary to affect private rights in the colonies.[8]

[6] *The Ship North v. The King*, 37 S.C.R. 385; *In re Criminal Code—Bigamy Section*, 27 S.C.R. 461; *Atty.-Gen. Can. v. Cain* [1906] A.C. 542.

[7] *The Queen* v. *Bank of Nova Scotia*, 11 S.C.R. 1; *Exchange Bank* v. *The Queen*, 11 App. Cas. 157.

[8] *Walker v. Baird* [1892] A.C. 491; note also Japanese Treaty Act, 1913.

It is possible that the prerogative right of appeal would have been placed in this second category if the matter had not been settled by relevant legislation. The Judicial Committee of the Privy Council may be considered in two aspects. The Crown is the final court of appeal for the Dominion of Canada. In this respect, the right of appeal appears to be a part of the prerogative in relation to the local government of Canada, and consequently capable of amendment or exclusion by Canadian legislation. In this aspect, their Lordships' evident opinion, that the prerogative right of appeal is beyond the reach of Colonial legislation, appears to be a humiliating survival of the obsolete colonial status and serious detraction from our modern Dominion autonomy.

The right of appeal may, however, be viewed in another aspect. The prerogative right is not only a privilege of a suitor, it is also a privilege of the Crown and it is exercised as a definitive link of Empire. By the existence of this prerogative, the residuary judicial functions of the Crown are preserved and a systematic, symmetrical and uniform development of the Common Law is insured. A common factor is thus given to the administration of the King's justice throughout his domains. The elimination of the right of appeal in a particular dominion would indirectly affect the rest of the Empire. Accordingly, a consideration of this aspect might well lead us to place this prerogative in the second category, namely, prerogative in relation to the general government of the Empire.

Further, the Judicial Committee exercises another function. A federal state, from its very nature, requires some independent tribunal for the adjudication of disputes between its component parts. At the date of Confederation the right of appeal to the Privy Council was well known. It is true that the B.N.A. Act provided the power to create and contemplated a Dominion Court of Appeal, but both the Fathers of Confederation and the Imperial Parliament enacting the constitutional pact must be presumed to have had in mind an ultimate appeal to the Privy Council, a tribunal beyond the control, direct or indirect, of either the Dominion or Provincial Governments. Whether the right of appeal was regarded as based upon Royal Prerogative or upon the then existing Imperial legislation, it must then have been relied upon as a means of protecting provincial rights and minorities.[9] Under these circumstances it would indeed be unfortunate if the Dominion Parliament could eliminate the right of appeal without the consent of the Provinces.

[9] See speech of Sir John A. Macdonald at Quebec Conference,—Pope, Confederation Documents, p. 55.

A consideration of these last two phases of the problem may well remove the possible stigma from the decision. Whether we believe in the retention of the right of appeal or not, the denial to the Dominion of the right to exclude no longer appears as an arbitrary deprivation. It becomes a reasonable and convenient re-affirmation of the principle that a component part of our complex political organization cannot legislate to the prejudice of its fellow members. It does, however, emphasize the necessity for the development and enactment of adequate constitutional machinery for effecting necessary changes in our federal constitution and for enabling legislative progress even when such progress involves a nice re-adjustment of Dominion and Provincial interests.

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