1941

*Feb. 26, 27.
*April 22.

THE PROVINCIAL SECRETARY OF THE PROVINCE OF PRINCE EDWARD ISLAND ON BEHALF OF HIS MAJESTY THE KING..... APPELLANT;

AND

MICHAEL EGAN..... RESPONDENT;

AND

THE ATTORNEY-GENERAL OF PRINCE EDWARD ISLAND..... INTERVENANT.

ON APPEAL FROM THE SUPREME COURT OF PRINCE EDWARD ISLAND EN BANC

Motor vehicles — Appeal — Constitutional law — Criminal law — Highway Traffic Act, P.E.I., 1936, c. 2, ss. 84 (1) (a) (c), 8 (7)—Criminal Code (R.S.C., 1927, c. 36, as amended), s. 285 (4) (7)—Conviction under s. 285 (4), Cr. Code, of driving while intoxicated—Automatic suspension of driving licence under s. 84 (1) (a) of said provincial Act—Refusal to grant licence to convicted person during period fixed by said s. 84 (1) (a)—Appeal asserted under s. 8 (7) to County Court Judge from such refusal—Whether right to so appeal—Whether right of appeal from County Court Judge to Supreme Court, P.E.I.—Constitutional validity of s. 285 (7), Cr. Code—Constitutional validity of s. 84 (1) (a) (c) of said provincial Act, in view of s. 285 (7), Cr. Code.

By s. 84 (1) of *The Highway Traffic Act, 1936,* (c. 2), of Prince Edward Island, the licence (to operate a motor vehicle) of a person who is convicted of driving a motor vehicle while under the influence of intoxicating liquor or drugs, "shall forthwith upon, and automatically with such conviction, be suspended" for (*a*) 12 months for the first offence; and (s. 84 (1) (*c*)) "the Provincial Secretary shall not issue a licence to any person during the period for which his licence has been cancelled or suspended under this section."

s. 285 (7) of the *Criminal Code* of Canada (as amended by 3 Geo. VI, c. 30, s. 6), where a person is convicted, under s. 285 (4), of driving a motor vehicle while intoxicated, the court or justice may, in addition to any other punishment provided, prohibit him from driving a motor vehicle anywhere in Canada during any period not exceeding three years.

The respondent, who had a licence to operate a motor vehicle, good until February 28, 1940, was, on November 20, 1939, convicted under said s. 285 (4) of the *Cr. Code.* On May 28, 1940, he applied for an operator's licence. His application was refused pursuant to said s. 84 (1) (*c*) of the *Highway Traffic Act,* as the period of automatic cancellation, under s. 84 (1) (*a*) upon said conviction, had not expired. From such refusal, respondent, asserting a right of appeal under s. 8 (7) of said *Highway Traffic Act,* appealed to a County Court Judge, who allowed the appeal and ordered issuance of a licence. The Provincial Secretary appealed to the Supreme Court of

*PRESENT:—Duff C.J. and Rinfret, Crocket, Kerwin, Hudson and Taschereau JJ.

Prince Edward Island *en banc,* which (15 M.P.R. 271) dismissed the appeal, holding that the County Court Judge had jurisdiction to make the order and that there was no appeal therefrom, and holding further that, by reason of the enactment of said s. 285 (7) of the *Cr. Code,* s. 84 (1) of said provincial Act had become *ultra vires.* The Provincial Secretary appealed (leave to do so being granted by said Supreme Court *en banc*) to this Court.

Held: The appeal should be allowed and the order of the County Court Judge set aside.

There was no right of appeal to the County Court Judge from the refusal of the Provincial Secretary to grant a licence to respondent. Said s. 8 (7) of the *Highway Traffic Act* did not apply. The right of appeal given by s. 8 (7) is to a person aggrieved by refusal to grant a licence or by revocation of a licence under s. 8. The refusal in question was not a refusal under s. 8; nor was there revocation of licence under s. 8. The law itself, s. 84 (1) of the Act, said that respondent, in the premises, was not entitled to a licence. The Provincial Secretary was merely carrying out the law, and had no discretion. There was no provision authorizing an appeal to the County Court Judge under such circumstances; and his order was made without jurisdiction. The Supreme Court *en banc* should have so held, and set aside the order. It was not legally seized of the question whether s. 84 (1) of the *Highway Traffic Act* was *ultra vires.*

Upon said constitutional question, this Court expressed opinion as follows: The field of s. 285 (7) *Cr. Code,* and that of s. 84 (1) of said provincial Act are not co-extensive. The Dominion, in enacting s. 285 (4) (7), has not invaded the whole field in such a way as to exclude all provincial jurisdiction. It cannot have superseded the provincial enactment, which was obviously made from the provincial aspect of defining the right to use the highways in the province and intended to operate in a purely provincial field. The provincial enactment does not impose an additional penalty for a violation of, or interfere with, the criminal law; it provides, in the way of civil regulation of the use of highways and vehicles, for a civil disability arising out of a conviction for a criminal offence; and that does not make it legislation in relation to criminal law. The undisputed authority of the province to issue licences or permits for the right to drive motor vehicles on its highways, carries with it the authority to suspend or cancel them upon the happening of certain conditions. Said s. 84 (1) deals purely with certain civil rights in the province, and is not *ultra vires.* (*Bédard* v. *Dawson,* [1923] S.C.R. 681; *Lymburn* v. *Mayland,* [1932] A.C. 318, referred to).

Per the Chief Justice: Primarily, responsibility for the regulation of highway traffic, including authority to prescribe the conditions and the manner of the use of motor vehicles on highways and the operation of a system of licences for the purpose of securing the observance of regulations respecting these matters in the interest of the public generally, is committed to the local legislatures. S. 84 (1) (*a*) (*c*) of said provincial Act is concerned with the subject of licensing, over which it is essential that the Province should primarily have control; and so long as the purpose of the provincial legislation and its immediate effect are exclusively to prescribe the conditions under which licences are granted, forfeited or suspended, it is not, speaking

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generally, necessarily impeachable as repugnant to s. 285 (7), *Cr. Code,* in the sense that it is so related to the substance of the Dominion enactment as to be brought within the scope of criminal law in the sense of s. 91 of the *B.N.A. Act* by force of the last paragraph of s. 91. There is no adequate ground for the conclusion that the provincial enactments in question are in their true character attempts to prescribe penalties for the offences dealt with by the *Cr. Code,* rather than enactments in regulation of licences.

S. 285 (7) *Cr. Code,* is *intra vires.*

S. 1 of c. 5, Acts of 1940, P.E.I., gives *prima facie* an appeal to the Supreme Court, P.E.I., from any decree, judgment, order or conviction by a Judge of a County Court who is acting in a judicial capacity, though *persona designata* and not as the County Court, under the authority of a Provincial Act. The fact that the Judge has acted without jurisdiction does not affect this right of appeal. Questions of jurisdiction are within the scope of the appeal.

APPEAL by the Provincial Secretary of the Province of Prince Edward Island, and also by the Attorney-General of that Province as intervenant, from the judgment of the Supreme Court of Prince Edward Island *en banc* (1) dismissing the appeal of the Provincial Secretary from the order made by His Honour, C. Gavan Duffy, Judge of the County Court for Queens County in said Province, ordering the Department of the Provincial Secretary, upon application by Michael Egan (the present respondent) in the ordinary way and upon payment of the usual fee and without any certificate of competency (the order recited an admission of competency), to issue to the said Egan a licence to operate motor vehicles in the said province.

The material facts of the case and the questions involved are sufficiently stated in the reasons for judgment in this Court now reported, and are indicated in the above headnote.

Special leave to appeal to this Court was granted by an order of the Supreme Court of Prince Edward Island *en banc;* the order reciting an undertaking by appellant to make no application for costs against respondent. The order also gave leave to the Attorney-General of Prince Edward Island to intervene.

The Attorney-General of Canada and the Attorney-General for Ontario were granted leave to appear before this Court and argue for or against the judgment appealed from, on the point of the constitutionality of the relevant provisions of the *Criminal Code* and of the Prince Edward Island *Highway Traffic Act.*

(1) 15 M.P.R. 271; [1941] 1 D.L.R. 291.

Hon. Thane A. Campbell K.C. for the appellant and for the intervenant.

Hon. Gordon D. Conant K.C. and *C. R. Magone K.C.* for the Attorney-General for Ontario.

F. P. Varcoe K.C. for the Attorney-General of Canada.

THE CHIEF JUSTICE—I think the contention of the appellant is well founded that section (1) of chap. 5 of the P.E.I. Statutes of 1940 gives *prima facie* an appeal to the Supreme Court (P.E.I.) from any decree, judgment, order, or conviction by a Judge of a County Court who is acting in a judicial capacity, though *persona designata* and not as the County Court, under the authority of a Provincial statute. This is not intended to be an exhaustive description, but in such circumstances I think an appeal lies.

The fact that the County Judge has acted without jurisdiction does not, in my opinion, affect this right of appeal. Once the conclusion is reached that the section intends to give an appeal to the Supreme Court, even where the County Court Judge is exercising a special jurisdiction and not as the County Court, I can see no reason for limiting the scope of the appeal in such a way as to exclude questions of jurisdiction. As the Attorney-General observed in the course of his argument, lawyers are more familiar with the practice of dealing with questions of jurisdiction raised by proceedings by way of *certiorari* and prohibition. A tribunal exercising a limited statutory jurisdiction has no authority to give a binding decision upon its own jurisdiction and where it wrongfully assumes jurisdiction it follows, as a general rule, that, since what he has done is null, there is nothing to appeal from. But here we have a statute and this is only pertinent on the point of the meaning and effect of the statute.

It has always seemed to me that the proceeding by way of appeal would be the most convenient way of questioning the judgment of any judicial tribunal whose judgment is alleged to be wrong, whether in point of wrongful assumption of jurisdiction, or otherwise. There is no appeal, of course, except by statute and, I repeat, the question arising upon this point is entirely a question of the scope and effect of this statute. Section 2 of the

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Statute, moreover, as the Attorney-General points out, imports the procedure under Part *XV* of the *Criminal Code.*

The point we have to consider is whether, by reason of the enactment of section 285 (7) of the *Criminal Code,* the jurisdiction *prima facie* given to the Province to enact the provisions of section 84 (1) (*a*) and (*c*) of the *Highway Traffic Act* of 1936 is suspended. This section of the *Criminal Code* provides that where a person is convicted of an offence under certain sub-sections of that section, the court or justice may, in addition to any other punishment provided for such offence, make an order prohibiting such person from driving a motor vehicle or automobile anywhere in Canada during any period not exceeding three years. The attack upon the provincial legislation may, perhaps, be put in this way: the effect of section 285 (7) is to bring the matters with which it deals within the subject of the criminal law, which is explicitly assigned to the Dominion as one of the enumerated subjects under section 91; then it is said that the matters so legislated upon are of such a scope that they extend to and include within their ambit the matters dealt with by section 84 (1) of the *Highway Traffic Act* of 1936 and that, consequently, the clause at the end of section 91 comes into play, and that these matters are excluded, so long as the Dominion legislation remains in force, from the jurisdiction of the Province.

As against this it is argued by the Attorney-General of Prince Edward Island that section 285 (7) is *ultra vires;* that the legislative prohibition which is there imposed upon convicted persons against driving a motor vehicle or automobile is not within the ambit of section 91 (27).

I may say at once I cannot agree with this view. I do not think anything is to be gained by discussing the point at large. It appears to me to be quite clear that such prohibitions may be imposed as punishment in exercise of the authority vested in the Dominion to legislate in relation to criminal law and procedure.

A very different question, however, is raised by the contention that the matters legislated upon by the enactments of the Provincial *Highway Traffic Act* in question have, by force of section 285 (7) of the *Criminal Code,* been brought exclusively within the scope of the Dominion

authority in relation to criminal law. We are here on rather delicate ground. We have to consider the effect of legislation by the Dominion creating a crime and imposing punishment for it in effecting the suspension of provincial legislative authority in relation to matters *prima facie* within the provincial jurisdiction. I say we are on delicate ground because the subject of criminal law entrusted to the Parliament of Canada is necessarily an expanding field by reason of the authority of the Parliament to create crimes, impose punishment for such crimes, and to deal with criminal procedure. If there is a conflict between Dominion legislation and Provincial legislation, then nobody doubts that the Dominion legislation prevails. But even where there is no actual conflict, the question often arises as to the effect of Dominion legislation in excluding matters from provincial jurisdiction which would otherwise fall within it. I doubt if any test can be stated with accuracy in general terms for the resolution of such questions. It is important to remember that matters which, from one point of view and for one purpose, fall exclusively within the Dominion authority, may, nevertheless, be proper subjects for legislation by the Province from a different point of view, although this is a principle that must be "applied only with great caution." (*Attorney-General for Canada* v. *Attorney-General for Alberta* (1)).

By section 91 of the *British North America Act*,—

* * * it is * * * 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,— * * * 27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters. * * * 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.

The effect of the concluding part of section 91 is that the Parliament of Canada may legislate upon matters which are *prima facie* committed exclusively to the Provincial Legislatures by section 92, where such legislation is necessarily incidental to the exercise of the powers conferred upon Parliament in relation to the specified subject

(1) [1916] 1 A.C. 588, at 596.

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"The Criminal Law * * * including the Procedure in Criminal Matters." To the extent, at least, to which matters *prima facie* provincial are regulated by Dominion legislation in exercise of this authority, such matters are excepted from those committed to the provincial legislatures by section 92; and, accordingly, the legislative authority of the provinces in relation to these matters is suspended. The subject is discussed in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1).

In every case where a dispute arises, the precise question must be whether or not the matter of the provincial legislation that is challenged is so related to the substance of the Dominion criminal legislation as to be brought within the scope of criminal law in the sense of section 91. If there is repugnancy between the provincial enactment and the Dominion enactment, the provincial enactment is, of course, inoperative. It would be most unwise, I think, to attempt to lay down any rules for determining repugnancy in this sense. The task of applying the general principles is not made less difficult by reason of the jurisdiction of the provincial legislatures under the fifteenth paragraph of section 92 to create penal offences which may be truly criminal in their essential character. (*The King* v. *Nat. Bell Liquors Ld.* (2), and *Nadan* v. *The King* (3)).

I do not find any difficulty in dealing with the present case. Primarily, responsibility for the regulation of highway traffic, including authority to prescribe the conditions and the manner of the use of motor vehicles on highways and the operation of a system of licences for the purpose of securing the observance of regulations respecting these matters in the interest of the public generally, is committed to the local legislatures.

Sections 84 (1) (*a*) and (*c*) are enactments dealing with licences. The legislature has thought fit to regard convictions of the classes specified as a proper ground for suspending the licence of the convict. Such legislation, I think, is concerned with the subject of licensing, over which it is essential that the Province should primarily have control. In exercising such control it must, of course, abstain from legislating on matters within the enumerated subjects of section 91. Suspension of a driving licence

(1) [1896] A.C. 348, at 359, 365, 366.

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

(3) [1926] A.C. 482.

does involve a prohibition against driving; but so long as the purpose of the provincial legislation and its immediate effect are exclusively to prescribe the conditions under which licences are granted, forfeited, or suspended, I do not think, speaking generally, it is necessarily impeachable as repugnant to section 285 (7) of the *Criminal Code* in the sense above mentioned.

It is, of course, beyond dispute that where an offence is created by competent Dominion legislation in exercise of the authority under section 91 (27), the penalty or penalties attached to that offence, as well as the offence itself, become matters within that paragraph of section 91 which are excluded from provincial jurisdiction.

There is, however, no adequate ground for the conclusion that these particular enactments (section 84 (1) (*a*) and (*c*)) are in their true character attempts to prescribe penalties for the offences mentioned, rather than enactments in regulation of licences.

It remains only to add that what I have said is strictly directed to cases in which the controversy is whether or not a given competent enactment of the Parliament of Canada creating a criminal offence has the effect of excluding a given subject-matter from the legislative authority of the province.

I have only to add that I concur with my brother Rinfret.

The judgment of Rinfret, Crocket and Kerwin JJ. was delivered by

RINFRET J.—On November 20th, 1939, the respondent was convicted by the Stipendiary Magistrate for Queens County, in the Province of Prince Edward Island, for that he "unlawfully did operate a motor vehicle on the public highway whilst intoxicated, contrary to section 285, subsection 4, paragraph (*b*), of the Criminal Code of Canada."

As a result of that conviction, in virtue of section 84 (1) of *The Highway Traffic Act* of Prince Edward Island, 1936, the respondent's licence to operate a motor vehicle, otherwise valid until February 28th, 1940, was automatically cancelled for a period of twelve months.

The relevant part of section 84 reads as follows:

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84. (1) The licence of a person who is convicted of driving a motor vehicle while under the influence of intoxicating liquor or drugs, shall forthwith upon, and automatically with such conviction, be suspended for a period:

(*a*) of twelve months for the first offence;

* * *

(*c*) The Provincial Secretary shall not issue a licence to any person during the period for which his licence has been cancelled or suspended under this section.

On May 28th, 1940, the respondent applied for an operator's licence. The application was in the statutory form and contained the following questions and answers, amongst others:—

Has your licence ever been cancelled for any cause; if so in what year? On November 20th, 1939.

And for what reason? For conviction under Criminal Code for driving motor car while intoxicated.

The Acting Deputy Provincial Secretary, in notifying the respondent that his application was refused, wrote to him:

* * * the Provincial Secretary has no alternative but to refuse the same, pursuant to paragraph (*c*) of sub-section 84 (1) of the said Highway Traffic Act, owing to the fact that on the 20th day of November, A.D. 1939, you were convicted before George J. Tweedy, Esq., K.C., Stipendiary Magistrate for Queens County, on a charge of operating a motor vehicle on the 19th day of November, 1939, while intoxicated, and the period of cancellation fixed by the said section has not yet expired.

From this refusal, the respondent appealed to the Judge of the County Court of Queens County.

His appeal professed to be asserted under sec. 8 (7) of the *Highway Traffic Act,* which reads as follows:

8. (7) If any person is aggrieved by the refusal of the Department to grant a licence or by the revocation of a licence under this section, he may, after giving to the Department notice of his intention to do so, appeal to the County Court Judge of the County Court of the County in which any office where the business of the Department with respect to the granting of licences is carried on is situate and on such appeal the Judge may make such order as he thinks fit and any order so made shall be binding on the Department for the year in which it was made.

The Judge of the County Court of Queens County, after having heard counsel on behalf of the present respondent, as well as for the Provincial Secretary—and counsel for the Provincial Secretary "having admitted the competency of the [respondent] to operate and drive motor vehicles"—allowed the appeal and ordered

that the Department of the Provincial Secretary shall, upon his [the respondent's] application in the ordinary way and upon payment of the

usual fee and without any certificate of competency, issue to the [said] Michael Egan a licence to operate motor vehicles in the Province of Prince Edward Island.

From this order, the appellant appealed to the Supreme Court of Prince Edward Island (sitting *en banc*), which Court dismissed the appeal, but afterwards granted leave to appeal from such dismissal to the Supreme Court of Canada. Leave to intervene was granted the Attorney-General of Prince Edward Island.

The reasons for judgment of the Supreme Court of Prince Edward Island were delivered by Mr. Justice Arsenault. He stated that, under the provisions of the *Criminal Code,* " the Stipendiary Magistrate could have made a further order prohibiting the accused from driving a motor vehicle for a period not exceeding three years." He pointed, however, to the fact that the Magistrate had not done so, but that he certified to the Provincial Secretary that the present respondent had been convicted; that the conviction was made on November 20, 1939, and that, had the licence not been cancelled in pursuance of section 84 of *The Highway Traffic Act* of 1936, the respondent's operator's licence would have expired on February 28, 1940; that the respondent took no further step to have his licence restored but that, six months afterwards, to wit, on 28th May, 1940, he made application on the regular form for an operator's licence. The learned Judge then mentioned what I have already stated: that the Provincial Secretary refused to issue the licence on account of the conviction, that upon appeal to the Judge of the County Court of Queens County, the Department of the Provincial Secretary had been ordered to issue a licence to the respondent as aforesaid, and that the Provincial Secretary now appealed to the Supreme Court (*en banc*) chiefly on the following grounds:

1st. That the County Court Judge had no jurisdiction to make the order;

2nd. That notwithstanding the provisions of sec. 285, subs. 7 of the Code, the Provincial Secretary had a right to refuse to issue the said licence.

The respondent, the judgment appealed from proceeds to say, contended that as the *Criminal Code,* by sec. 285, subs. 7,

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has now made due provisions for the punishment of such an offence and has empowered the convicting magistrate to impose a further penalty by suspension of the offending party's licence, section 84 (1) of the Highway Traffic Act, 1936, has *ipso facto* become *ultra vires*.

Dealing first with the question of the jurisdiction of the Judge of the County Court to make the order complained of, the judgment states the appellant's contention that section 8 (7) of the *Highway Traffic Act*, under which the Judge of the County Court purported to act, did not give him jurisdiction to make the order. The judgment notes

> that the appeal to the Judge of the County Court was not from the order of the Provincial Secretary cancelling the respondent's licence but from the refusal of the Provincial Secretary to issue an operator's licence after the old licence had expired by effluxion of time.

The decision is that the appeal was properly taken under section 8 and subsections of the *Highway Traffic Act* and that the Judge of the County Court had jurisdiction to make the order. It adds that:

> There are no provisions in the Act for any appeal from the County Court Judge's decision. He is *persona designata* under the Act and as such his order is final and not appealable. Sec. 8 (7) seems [so it is stated] to make this clear when it says—"The Judge may make such order as he thinks fit and any order so made shall be binding on the Department for the year in which it was made."

It was accordingly adjudged that the appeal should be dismissed with costs.

But although, in view of the above decision, it was not necessary to consider "the question of the *ultra vires* of sec. 84 (1) of the Highway Traffic Act," it was thought advisable to deal with it and to say

> that since the Criminal Code has invaded the field by enacting sec. 285, subsec. 7, amended by 3 George VI, 1939, ch. 30, sec. 6, it follows that the provisions of the Highway Traffic Act as to cancellation of a licence on a conviction for driving a motor car whilst intoxicated, have become *ultra vires*.

It is from the above judgment that the Provincial Secretary of the Province of Prince Edward Island now appeals, with the intervention of the Attorney-General of the same province, by leave of the Supreme Court (*en banc*). The Attorney-General of Canada and the Attorney-General for Ontario were granted leave to appear before this Court and to argue for or against the judgment appealed from,

on the point of the constitutionality of the relevant sections of the *Criminal Code* and of the *Highway Traffic Act* of Prince Edward Island.

The first question to be examined is whether, as contended by the appellant and the intervenant, the Judge of the County Court of Queens County had no jurisdiction, on appeal from the refusal of the Provincial Secretary of the Province of Prince Edward Island to issue, for the year 1940, a driver's licence to the respondent.

Subsection 7 of section 8 of the *Highway Traffic Act*, under which the respondent contended that his appeal was competently asserted, has already been reproduced. That subsection gives a right of appeal to the County Court Judge to "any person aggrieved by the refusal of the Department to grant a licence or by the revocation of a licence under this section." To my mind, the words "under this section" qualify both the refusal of the Department to grant a licence and the revocation of a licence. It must have been a refusal or a revocation "under this section," to wit, under section 8 of the *Highway Traffic Act*.

Section 8 deals with chauffeurs' and drivers' licences. It enacts that every person shall, before driving a motor vehicle on a highway, in any year, pay a certain fee to the Department and obtain a licence for that year. It states what the licence shall contain, provides for the changes of address and then, in subsections 4, 5 and 6, stipulates that

(4) Every owner of a registered motor vehicle shall be entitled to receive an Operator's Licence free of charge, and shall produce a certificate of qualification to operate a motor vehicle or such other evidence of qualification as shall be satisfactory to the Secretary.

(5) If, from the application or otherwise, it appears that the applicant is not competent to drive or is suffering from any disease or disability, the Department shall refuse to grant the license;

Provided that the applicant, except in the case of diseases and disabilities as may be prescribed, may claim to be subjected to a test as to his competency or as to his fitness or ability to drive a motor vehicle and if he passes the prescribed test and is not otherwise disqualified the licence shall not be refused by reason only of the provisions of this subsection.

(6) If it appears to the Department that there is reason to believe that any person who holds a licence granted by it, is not competent to drive or is suffering from a disease or physical disability likely to cause the driving by him of a motor vehicle to be a source of danger to the public and on inquiry into the matter the Department is satisfied that he is not competent to drive or is suffering from such a disease or dis-

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ability, then whether or not such licensee has previously passed a test under this section, the Department may, after giving him notice of its intention so to do, revoke the licence.

Provided that the licensee may, except in the case of such diseases and disabilities as may be prescribed, claim to be subjected to a test as to his competency or his fitness or ability to drive a motor vehicle and if he passes the prescribed test the licence shall not be revoked.

It is after the above transcribed subsections 4, 5 and 6 that subsection 7 appears in section 8.

It is clear, therefore, that the two cases in which a person aggrieved may appeal to the County Court Judge under section 8 are:

(1) When there has been a refusal of the Department to grant a licence to the owner of a registered motor vehicle, either without being or after he has been subjected to a test as to his competency, his fitness, or his ability to drive such a vehicle;

(2) When there has been a revocation of the licence under subsection 6, where it appeared to the Department that there was reason to believe that the person holding a licence was not competent to drive, or was suffering from a disease or physical disability likely to cause the driving by him to be a source of danger to the public, etc.

Section 8 of the *Highway Traffic Act* contains fifteen other subsections; but they are not material for the purposes of this appeal and they do not affect the application of subsections 4, 5, 6 and 7.

In this case, there was no refusal of the Department to grant a licence, neither was there revocation of a licence, under section 8.

It was not the Department, or the Provincial Secretary of the Province, who refused to grant a licence within the meaning of subsections 4 and 5 of section 8. The licence of the respondent was automatically suspended for a period of twelve months under section 84 (subsection (1) (*a*)) of the *Highway Traffic Act,* on account of the fact that the respondent had been convicted of driving a vehicle while under the influence of intoxicating liquor, and the Act itself prescribes that, in such a case, " the Provincial Secretary shall not issue a licence to any person during the period for which his licence has been cancelled or suspended under this section," i.e., under section 84.

It follows that it was not the Provincial Secretary who refused the issue of a licence to the respondent, within the meaning of section 8; but the law itself said that the

respondent, in the premises, was not entitled to a licence. The Provincial Secretary was not exercising any discretion in withholding a licence from the respondent; he was merely carrying out the provisions of the law, and he had no discretion to exercise. There is no provision in the *Highway Traffic Act* authorizing an appeal to a County Court Judge under such circumstances. Subsection 7 of section 8, invoked by the respondent, has no application in such a case.

There was, therefore, no such right of appeal by the respondent as the latter professed to assert to the Judge of the County Court of Queens County. The order made by the said Judge to the Department of the Provincial Secretary that it should "upon his application in the ordinary way and upon payment of the usual fee and without any certificate of competency issue to the [respondent], Michael Egan, a licence to operate motor vehicles in the Province of Prince Edward Island" was issued without jurisdiction and was absolutely ineffective to compel the Provincial Secretary to issue the licence.

I am, therefore, of the opinion that the Provincial Secretary was right in contending before the Supreme Court of Prince Edward Island that the County Court Judge had no jurisdiction to make the order and that, on that ground, his appeal should have been maintained by the Supreme Court *en banc.*

I agree with the Attorney-General of Prince Edward Island that it would be inconceivable that the Legislature would have intended to grant an appeal from a refusal by the Provincial Secretary in cases where the cancellation is automatic and the refusal of a reissue is imperative.

I must now proceed to state the consequences which flow from the conclusion just reached.

There being no jurisdiction in the County Court Judge of Queens County to hear the appeal of the respondent and to make any order as a result of such appeal, there was no right of appeal, if any, to the Supreme Court *en banc,* except on the question of the jurisdiction of the County Court Judge.

The Supreme Court *en banc* could decide, and in this case should have decided, that the County Court Judge of Queens County was without jurisdiction and that his order was not competently made, but nothing else.

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The appeal of the Provincial Secretary should have been allowed by the Supreme Court *en banc* and the order of the County Court Judge should have been set aside. That would have been the end of the matter; and not only do I agree with the Supreme Court that, in view of the decision, "it was not necessary to consider the question of the *ultra vires* of section 84 (1) of the *Highway Traffic Act*"; but, with respect, my view is that the Supreme Court was not legally seized of that question and it had no jurisdiction to pass upon it in the present case.

The above reasons are sufficient to allow the appeal of the appellant, the Provincial Secretary of the Province of Prince Edward Island, and of the intervenant, the Attorney-General of Prince Edward Island. I have no doubt, so far, that the Supreme Court of Canada has jurisdiction to entertain the appeal on the grounds just mentioned, and that is to say: on the question of the respective jurisdiction of the Supreme Court *en banc* and of the County Court of Queens County.

The present situation is somewhat similar to that which obtained in the case of *The Grand Council of the Canadian Order of Chosen Friends* v. *The Local Government Board and the Town of Humboldt,* which was submitted to this Court (1). In that case, the Grand Council contended that an order of The Local Government Board of Saskatchewan was made by the Board in excess of its powers, and sought to have the order reversed and declared inoperative or set aside. The order had been made by the Local Board pursuant to *The Local Government Board (Special Powers) Act, 1922,* of Saskatchewan. The Grand Council, being dissatisfied with the order, applied to Embury J., one of the learned judges of the Court of King's Bench, for leave to appeal; and, upon the hearing of the application, it was objected by the respondents, the Local Government Board and the Town of Humboldt, that no appeal lay from any order of the Local Government Board and that, consequently, there was no jurisdiction to grant leave in the case. The objection was overruled and leave to appeal was granted. The Grand Council asserted its appeal in pursuance of the leave so granted; but the Local Government Board and the Town of Humboldt also appealed to the Court of Appeal

(1) [1924] S.C.R. 654.

from the order of Embury J. Before the hearing of these appeals, the Grand Council gave notice to the Attorney-General of Saskatchewan that it would bring into question the constitutional validity of the sections of the *Local Government (Special Powers) Act, 1922,* upon which was thought to depend the absence of the right of appeal invoked by the Grand Council of the Order. The two appeals came on for hearing at the same time and the appeal of the Town of Humbolt was allowed upon the ground that the statute gave no right of appeal from the order of the Local Board. The Court held, moreover, that the appeal of the Grand Council from the said order should be dismissed. Thus, both appeals were disposed of unfavourably to the Grand Council. The latter then appealed to the Supreme Court of Canada by leave of the Court of Appeal of Saskatchewan. The conclusion of this Court was in agreement with that reached by the Court of Appeal of Saskatchewan; and, seeing that the latter court had no jurisdiction in the premises, the appeal was dismissed with costs.

In the *Grand Council* case (1), as will have been noticed, leave to appeal to this Court had been granted by the Court of Appeal of Saskatchewan in the same way as, in the present case, leave to appeal has been granted by the Supreme Court *en banc* of Prince Edward Island. It would seem that, even if there was not a right of appeal to this Court upon the question of the jurisdiction of the two courts below, the granting of special leave to appeal would, in itself, be sufficient to establish jurisdiction in this Court, as was asserted in *Grand Council of the Canadian Order of Chosen Friends* v. *The Local Government Board and the Town of Humboldt* (1).

The reasons already stated are sufficient to dispose of the appeal; and, following a wise and well defined tradition, this Court should, no doubt, refrain from expressing an opinion upon any other point not necessary for the decision of the case.

The Supreme Court *en banc,* however, thought it advisable to deal with the question of the constitutionality of section 84 (1) of the *Highway Traffic Act, 1936,* since the *Criminal Code* has enacted sec. 285, subs. 7, amended by sec. 6 of ch. 30 of the Statutes of Canada, 3 Geo. VI

(1) [1924] S.C.R. 654.

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(1939). And that Court declared *ultra vires* the provision of the *Highway Traffic Act* "as to cancellation of a licence on a conviction for driving a motor car whilst intoxicated."

It is because of the declaration on that point that the Attorney-General of Prince Edward Island has carried his appeal to this Court and that the Attorney-General of Canada and the Attorney-General for Ontario have been allowed to intervene. It was represented to us that this declaration has an important and wide consequence and that, while only an *obiter dictum,* it might affect the jurisprudence not only in Prince Edward Island but also in other provinces. It appears desirable, therefore, that this Court should express its opinion upon the matter.

The Criminal Code Amendment Act, 1939, c. 30, s. 6, contains an amendment whereby subs. 7 of sec. 285, as enacted by sec. 16, c. 44, of the Statutes of Canada of 1938, is repealed and the following substituted therefor:

> (7) Where any person is convicted of an offence under the provisions of subsections one, two, four or six of this section the court or justice may, in addition to any other punishment provided for such offence, make an order prohibiting such person from driving a motor vehicle or automobile anywhere in Canada during any period not exceeding three years. In the event of such an order being made the court or justice shall forward a copy thereof to the registrar of motor vehicles for the province wherein a permit or licence to drive a motor vehicle or automobile was issued to such person. Such copy shall be certified under the seal of such court or justice or, if there be no such seal, under the hand of a judge or presiding magistrate of such court or of such justice.

Subsection 4 of section 285, referred to in subsection 7 above reproduced, contains the enactment of the *Criminal Code* covering the case of driving while intoxicated.

It follows that, under subsection 7 as now amended, a person convicted of driving while intoxicated may be prohibited "from driving a motor vehicle or automobile anywhere in Canada during any period not exceeding three years"; while, under section 84 (1) of the *Highway Traffic Act* of Prince Edward Island, the licence of a person so convicted "shall forthwith upon, and automatically with such conviction, be suspended for a period of twelve months for the first offence" and "not less than twelve months and not exceeding two years for the second offence"; and for the third offence he shall be prohibited from holding a licence.

The Supreme Court *en banc* stated that the *Criminal Code* had "invaded the field" and that section 84 of the *Highway Traffic Act* had thereby become *ultra vires.*

In this Court, the Attorney-General of Canada submitted that the subsection of the *Criminal Code* in question was *intra vires,* as being an enactment in relation to the Criminal Law. He argued that this subsection provided an additional punishment for the various offences in connection with the driving of vehicles under the preceding subsections of section 285; that this was not legislation in relation to civil rights, although it may be legistion affecting civil rights, legislation for the punishment of crime being clearly legislation within the competency of the Parliament of Canada.

The Prince Edward Island legislation, it was submitted, was enacted as a punishment measure, rather than to provide for the safety on the highway. Section 84 bans individuals convicted of certain offences from the highways for short periods of time; and it is included in a group of sections under the heading: " Penalties."

It was submitted that, although the provincial provision might otherwise have been valid, since it conflicts with the *Criminal Code,* the latter must now prevail (See Lord Tomlin in *Attorney-General for Canada* v. *Attorney-General for British Columbia* (1)).

The Attorney-General for Ontario contended that, even though it be found that section 285 (7) of the *Criminal Code* is *intra vires* of the Parliament of Canada, it is not in conflict with provincial legislation providing that, upon conviction of a person for driving a motor vehicle while under the influence of intoxicating liquors or drugs, his licence, or permit, to drive shall be suspended. He relied upon *Grand Trunk Railway Company of Canada* v. *Attorney-General of Canada* (2).

He submitted that the control of the roads and highways and the regulation of the traffic thereon are matters within s. 92 of the *B.N.A. Act* assigned exclusively to the legislatures of the provinces: Head 9, " * * * and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes"; Head 13, " Property and Civil Rights in the Province"; Head 16, " Generally all Matters of a merely local or private Nature in the Province."

The words " and other licences " have been held not *ejusdem generis* with " shop, saloon, tavern, auctioneer,"

(1) [1930] A.C. 111, at 118. (2) [1907] A.C. 65, at 68.

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by which Head 9 is introduced. (*Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1); *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (2); *Shannon* v. *Lower Mainland Dairy Products Board* (3)). In the latter case, Lord Atkin said:

> It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue.

The Attorney-General of Prince Edward Island also contended that both sections of the *Criminal Code* and of the *Highway Traffic Act* could validly subsist together and that section 285 (7) of the *Criminal Code* had no effect whatever on the validity of the Provincial section 84.

I am respectfully of the opinion that the field of the two enactments is not co-extensive; and it is not, therefore, necessary to pronounce upon the validity of section 285 (7) of the *Criminal Code.*

The Dominion legislation would prevent the offender from operating a motor vehicle throughout Canada "during any period not exceeding three years." It would not prevent him from holding a licence or accompanying a beginner, as provided for by the Prince Edward Island legislation. The Provincial legislation in question in this case is, in pith and substance, within the classes of subjects assigned to the Provincial legislatures; it is licensing legislation confined to the territory of Prince Edward Island. The *Criminal Code* provides for an order prohibiting a person from driving, irrespective of whether a licence has been issued to him or not. The automatic cancellation of the Prince Edward Island licence would not, of itself, prevent the person affected by it from obtaining a driver's licence in other provinces.

It cannot be open to contention for a moment that the imposing of such a penalty for enforcing a law of the competency of Prince Edward Island is an interference with criminal law, under section 91, subs. 27. *Regina* v. *Watson* (4). It is not an additional penalty imposed for a violation of the criminal law. It provides for a civil disability arising out of a conviction for a criminal offence.

(1) (1897) A.C. 231.
(2) [1902] A.C. 73.
(3) [1938] A.C. 708, at 722.
(4) (1890) 17 Ont. A.R. 221, at 249.

The right of building highways and of operating them within a province, whether under direct authority of the Government, or by means of independent companies or municipalities, is wholly within the purview of the province (*O'Brien* v. *Allen* (1)), and so is the right to provide for the safety of circulation and traffic on such highways. The aspect of that field is wholly provincial, from the point of view both of the use of the highway and of the use of the vehicles. It has to do with the civil regulation of the use of highways and personal property, the protection of the persons and property of the citizens, the prevention of nuisances and the suppression of conditions calculated to make circulation and traffic dangerous. Such is, amongst others, the provincial aspect of section 84 of the *Highway Traffic Act*. It has nothing to do with the Dominion aspect of the creation of a crime and its punishment. And it cannot be said that the Dominion, while constituting the criminal offence of driving while intoxicated and providing for certain penalties therefor, has invaded the whole field in such a way as to exclude all provincial jurisdiction. It cannot have superseded section 84, which was obviously made from the provincial aspect of defining the right to use the highways in Prince Edward Island and intended to operate in a purely provincial field.

As to the contention that the Provincial legislation imposes an additional penalty for the punishment of an offence already punished by the *Criminal Code,* the answer, it seems to me, is simply that the Provincial legislation does not do so.

The offender found guilty under the *Criminal Code,* as already pointed out, may be prohibited from driving a motor vehicle or automobile anywhere in Canada during the period mentioned in the Code. The order, if made by the convicting magistrate, will operate quite independently of any licence granted by the Provincial authority. In that sense, it would be allowed to supersede the Provincial legislation. But section 84 of *The Highway Traffic Act* of Prince Edward Island, dealing with the case of its own licensees upon the territory of its own province, provides that a person convicted of driving while intoxicated loses his provincial licence, either for a time or forever (in the case of a third offence). It does not create an offence; it does not add to or vary the punishment already

(1) (1900) 30 Can. S.C.R. 340.

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declared by the *Criminal Code;* it does not change or vary the procedure to be followed in the enforcement of any provision of the *Criminal Code.* It deals purely and simply with certain civil rights in the Province of Prince Edward Island. Such legislation can rely upon the decision, in this Court, of *Bédard* v. *Dawson and the Attorney-General for Quebec* (1). As pointed out in that case by the present Chief Justice,

> The legislation impugned seems to be aimed at suppressing conditions calculated to favour the development of crime rather than at the punishment of crime. This is an aspect of the subject in respect of which the provinces seem to be free to legislate. I think the legislation is not invalid.

There may be added what was said by Lord Atkin, in *Lymburn* v. *Mayland* (2):

> It was contended on behalf of the Attorney-General for the Dominion that to impose a condition making the bond fall due upon conviction for a criminal offence was to encroach upon the sole right of the Dominion to legislate in respect of the criminal law. It indirectly imposed an additional punishment for a criminal offence. Their Lordships do not consider this objection well founded. If the legislation be otherwise *intra vires,* the imposition of such an ordinary condition in a bond taken to secure good conduct does not appear to invade in any degree the field of criminal law.

It would seem to me beyond doubt that provisions of a provincial statute for the cancellation of licences to carry on certain kinds of business, or creating a disability from holding public offices, or creating any kind of civil disabilities, as a result of a conviction under the *Criminal Code,* does not make such provisions legislation in relation to criminal law; and, hence, they are not *ultra vires* of the provincial legislatures. It never occurred to anybody to dispute the power of the provinces to issue licences, or permits, for the right to drive motor vehicles on the highways of their respective territories. Surely the authority to issue such licences, or permits, carries with it the authority to suspend or cancel them, upon the happening of certain conditions. The provision that a person convicted of driving while intoxicated will lose his licence for a time or forever is, in a certain sense, a condition upon which the licence, or permit, is granted by the province.

I would think, for these reasons, that section 84 of *The Highway Traffic Act* of Prince Edward Island is not unconstitutional.

(1) [1923] S.C.R. 681; 40 C.C.C. 404.

(2) [1932] A.C. 318, at 323.

However, on the ground that the County Court Judge of Queens County had no jurisdiction to make the order in respect of which the appeal has been asserted, I think the appeal should be allowed; but, in view of all the circumstances, there should be no costs to either party in this Court, although the judgment of the Supreme Court *en banc,* dismissing the appeal of the Provincial Secretary with costs, should be reversed, and the judgment of the Judge of the County Court of Queens County should be set aside, without costs to either party in the courts below.

HUDSON J.—The principal question involved here is the constitutional validity of section 84 of the *Highway Traffic Act, 1936,* of the Province of Prince Edward Island.

The Province undoubtedly has the right to regulate highway traffic and, for that purpose, to license persons to use highways. The right to license also involves a right to control and, when necessary, to revoke the licence.

The section in question does not create a new offence but makes provision in regard to the licence which has been issued under the provincial authority. I do not think that this can be regarded as an addition to any punishment or penalty provided for in section 285 of the *Criminal Code.* The situation seems to be analogous to that dealt with by the Judicial Committee in *Lymburn* v. *Mayland* (1).

In my opinion, there is no conflict and the Legislature had a perfect right to pass the section in question. For that reason, I concur in the disposition of this matter proposed by my brother Rinfret.

TASCHEREAU J.—I believe that the County Court Judge of Queens County had no jurisdiction to hear the appeal, and that no order should have been made by him to grant a licence to the respondent. By an imperative section of the law (s. 84 (1) (*c*) of the *Highway Traffic Act*), the Provincial Secretary has no discretion to exercise and he cannot issue a licence to any person during the period for which his licence has been cancelled or suspended under the Act.

In the present case, the respondent's licence had been cancelled under the authority of section 84 of the *High-*

(1) [1932] A.C. 318.

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way Traffic Act, because he had been found guilty of driving an automobile while under the influence of intoxicating liquor. The licence is automatically cancelled by the operation of the law, without the interference of the provincial authorities. In my opinion, the County Court Judge cannot order the Provincial Secretary to do an act which the law imperatively forbids him to do. The jurisdiction of the County Court Judge exists only when the cases mentioned in section 8 of the Act arise, and nowhere do we see that he may do what is complained of in the present case.

With respect, I think that the County Court Judge's order was not authorized by the statute, and that the Supreme Court of Prince Edward Island should have declared it inoperative, and allowed the appeal.

The Supreme Court has also dealt with the question of constitutionality of the section of the Provincial Act with respect to the cancellation of the licence and said:—

> Although in view of the above decision, it is not necessary to consider the question of the *ultra vires* of sec. 84 (1) of the Highway Traffic Act, I think it advisable to deal with it and to say that since the Criminal Code has invaded the field by enacting sec. 285, subsec. 7, amended by 3 George VI (1939), ch. 30, sec. 6, it follows that the provisions of the Highway Traffic Act as to cancellation of a licence on a conviction for driving a motor car whilst intoxicated, have become *ultra vires.*

Although a conclusion on this appeal can be reached without commenting on this pronouncement, I wish to state that I cannot agree with these views. Section 84 of the Provincial statute, which provides for the cancellation of the licence of any person found guilty of driving an automobile while under the influence of intoxicating liquor, is within the competence of the Provincial Legislature. This section merely provides for a civil disability arising out of a conviction for a criminal offence. The field of criminal law is in no degree invaded by this legislation which is aimed at the suppression of a nuisance on highways. There can be no doubt that the control of the roads and highways and the regulation of traffic thereon is assigned by the *B.N.A. Act* to the Legislatures of the Provinces.

This Court and the Judicial Committee of the Privy Council have already expressed their views on this matter, and a reference to *Bédard* v. *Dawson and the Attorney-*

General of the Province of Quebec (1) and *Lymburn* v. *Mayland* (2) will show that this legislation is *intra vires* of the Prince Edward Island Legislature.

I fully agree with what has been said by my brother Rinfret and I believe that the appeal should be allowed but without costs to either party here and in the Courts below.

Appeal allowed.

Attorney for the appellant: *C. St. Clair Trainor.*

Attorney for the respondent: *J. J. Johnston.*