1947

*May 26
*Jun. 18

LAURIER SAUMUR (PETITIONER).....APPELLANT;

AND

RECORDER'S COURT (QUEBEC) AND OTHERS (RESPONDENTS) .....} RESPONDENTS;

AND

THE ATTORNEY-GENERAL FOR QUEBEC (MIS-EN-CAUSE).

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Appeal—Jurisdiction—Habeas Corpus—Distribution of pamphlets in streets —Municipal by-law—Condemnation of fine or imprisonment— "Provincial crimes" are "criminal matters"—No distinction in case of a "municipal enactment"—Construction of the word "criminal" in section 36 of the Supreme Court Act.

The appellant was charged before the Recorder of the city of Quebec with having illegally distributed pamphlets without previously having obtained written permission of the chief of police, in violation of the provisions of a municipal by-law. The appellant pleaded that he was a minister of a religion (Witnesses of Jehovah) and was not bound by the by-law; but he was found guilty and condemned to pay a fine of $100, with an alternative of three months in jail. The appellant did not pay the fine, was committed to gaol and then applied for a writ of *habeas corpus*. The judgment of the Superior Court, dismissing the petition, was affirmed by a majority of the appellate court. Special leave to appeal to this Court was granted by the appellate court (1). The respondent, the city of Quebec, moved to quash the appeal for want of jurisdiction.

*PRESENT:—Rinfret C.J. and Kerwin, Taschereau, Kellock and Estey JJ.

Held: The motion should be allowed and the appeal quashed.

Jurisprudence is well settled that there are "provincial crimes", over which the various legislatures of the Dominion have jurisdiction, and that they are "criminal matters" within secton 36 of the *Supreme Court Act*.

In re McNutt (47 Can. S.R. 259); *Mitchell* v. *Tracey* (58 Can. S.C.R. 640); *The King* v. *Nat Bell* ([1922] 2 A.C. 128); *The King* v. *Charles Bell* ([1925] S.C.R. 59); *Chung Chuck* v. *The King* ([1930] A.C. 244) and *Nadan* v. *The King* [1926] A.C. 482) foll.

Quebec Railway Light and Power Co. v. *Recorder's Court of Quebec* (41 Can. S.C.R. 145) and *Segal* v. *City of Montreal* ([1931] S.C.R. 460) not applicable.

The appellant's contention, that these decisions do not apply because they refer to "provincial crimes" and that this case does not deal with any of them but with a "municipal enactment" imposing a fine or imprisonment, cannot be upheld.

The word "criminal" as used in section 36 of the *Supreme Court Act* cannot be considered as meaning "criminal law", as assigned to the Dominion by the B.N.A. Act, but must be considered in the sense that it is "not civil".

The characteristics of a civil process cannot be found in this case.—The proceedings in the courts below are of a "penal nature", that is to say, "criminal for the purposes of the *Supreme Court Act*", and no appeal lies to this Court, which is a statutory court and whose jurisdiction is therefore limited.

(1) Reporter's note:—See *Barry* v. *Recorder's Court* and *Attorney-General of Quebec* (Q.R. [1947] K.B. 308.)

MOTION to quash for want of jurisdiction an appeal from a decision of a majority of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Boulanger J. and dismissing a petition for a writ of *habeas corpus*.

E. Godbout for motion.

L. E. Beaulieu K.C. for Attorney-General for Quebec.

W. G. How contra.

The judgment of the Court was delivered by

TASCHEREAU J.—The respondent the city of Quebec moves to quash the appeal of the appellant for want of jurisdiction.

The appellant was charged before the Recorder of the city of Quebec with having illegally distributed pamphlets,

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without previously having obtained the written permission of the chief of police of the city, in violation of the provisions of by-law 184 of the said city.

This by-law reads as follows:—

> It is, by the present by-law, forbidden to distribute in the streets of the city of Quebec any book, pamphlet, booklet, circular, tract whatever without having previously obtained for so doing the written permission of the chief of police.

The defendant pleaded to the charge that he was a minister of a religion (Witnesses of Jehovah) and was not bound by the by-law. The Recorder however found the appellant guilty and condemned him to pay a fine of $100 and costs, with an alternative of three months in gaol, as provided by the by-law. The appellant did not pay the fine and was committed to gaol, but he then applied for a writ of *habeas corpus* with *certiorari* in aid. Mr. Justice Boulanger dismissed the petition for *habeas corpus,* and his judgment was confirmed by the Court of King's Bench, Mr. Justice Galipeault dissenting.

On the 21st of April, 1947, the Court of King's Bench granted special leave to appeal, but in the formal judgment we read the following "considérant":—

> Considering that in view of said decisions, although there may be some doubt as to the jurisdiction of the Supreme Court of Canada to hear the appeal asked for by appellant, it is not within the province of this Court to determine the jurisdiction of the Supreme Court of Canada.

In its motion to quash, the respondent, the city of Quebec (supported by the Attorney General of the province of Quebec), alleges that the matter in controversy is criminal, quasi criminal or penal, and that under section 36 of the *Supreme Court Act,* there is no appeal to this Court in proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a "criminal charge". The point that falls to be determined by this Court is whether the *habeas corpus,* which has been dismissed by Mr. Justice Boulanger, is the result of a civil or criminal process.

It is now well settled that there are "provincial crimes", over which the various legislatures of the Dominion have jurisdiction, and that they are "*criminal matters*" within section 36 of the Act.

In *In re McNutt* (1), it was held by three of the six judges (Sir Chs. Fitzpatrick, Davies and Anglin) that a trial and conviction for keeping liquor for sale contrary to the provisions of the *Nova Scotia Temperance Act* are proceedings on a "criminal charge", and no appeal lies to the Supreme Court of Canada from the refusal of a writ of *habeas corpus* to discharge the accused from imprisonment on such conviction.

At page 261, Sir Charles Fitzpatrick C.J. said:—

It was on the appellant to shew that we have jurisdiction, and he referred us to section 39 (c) of the *Supreme Court Act* which provides for an appeal "from the judgment in any case of proceedings for or upon a writ of *habeas corpus* * * * not arising out of a criminal charge". In other words, the statute gives an appeal when the petitioner for the writ is detained in custody on a process issued in a *civil matter.*

In *Mitchell* v. *Tracey* (2), it was held by this Court that the opinions of the three above mentioned justices in the *McNutt* case (1) should be followed, and this Court refused to hear an appeal on a writ of prohibition to restrain a magistrate from proceeding on a prosecution for violation of the provisions of the *Nova Scotia Temperance Act,* because it did arise out of a *criminal charge* and was not a *civil matter.*

In *The King* v. *Nat Bell* (3), it was said by Lord Sumner speaking for the Judicial Committee:—

Their Lordships are of opinion that the word "criminal" in the section and in the context in question is used in contradistinction to "civil" and "connotes a proceeding which *is not civil in its character*". *Certiorari* and prohibition are matters of procedure, and all the procedural incidents of this charge are the same whether or not it was one falling exclusively within the legislative competence of the Dominion Legislature, under section 91, head 27.

In *The King* v. *Charles Bell* (4), it was held:—

The proceeding in this case does not fall within the civil jurisdiction of this Court under section 41 (*b*) of the *Supreme Court Act,* but it is a *"criminal cause"* within the meaning of the exception in section 36 of the Act.

At page 66 of the same case, Anglin C.J. said:—

Whenever a statute imposes a penalty by way of punishment for non-observance of a behest which it enacts in the public interest and the prescribed penalty is made enforceable by criminal procedure, these proceedings fulfil the two conditions connoted by the word "criminal" as used in s. 36 of the *Supreme Court Act. Clifford* v. *O'Sullivan* (5).

(1) (1912) 47 Can. S.C.R. 259.
(2) (1019) 58 Can. S.C.R. 640.
(3) [1922] 2 A.C. 128, at 168.
(4) [1925] S.C.R. 59.
(5) [1921] 2 A.C. 570, at 580.

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That the question to be determined in such a case as this is merely as to whether the original proceedings are civil or criminal in form is shown by the following at page 64:—

> But, although a civil liability might be imposed, if Parliament provides for its enforcement by a proceeding in its nature criminal, that that proceeding would be a criminal cause within the purview of s. 36 of the *Supreme Court Act* would seem to follow from the judgment of the English Court of Appeal in *Seaman* v. *Burley* (1). Lord Esher, in holding that a judgment on a case stated by justices on an application to enforce payment of a poor-rate by warrant of distress was a judgment in a criminal cause or matter within s. 47 of the *Judicature Act*, said, at page 346:
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> "It seems to me that the question is really one of procedure. The question is whether the proceeding which was going on was a criminal cause. That it is a question of procedure may be easily seen by taking the case of an assault. An assault may be made the subject of civil procedure by action, in which case there may be an appeal to this court; or it may be made the subject of criminal procedure by indictment, in which case there cannot be such an appeal. This seems to me to be contrary to the argument employed by the counsel for the appellant to the effect that the question depends upon whether the origin of the proceeding, i.e., the matter complained of, is in its nature criminal or not. In each case the thing complained of is the same, namely, the assault; but there is or is not an appeal to this court according as the procedure to which recourse is had is civil or criminal. Therefore, assuming the contention that the rate is a debt to be well founded, which I do not admit, nevertheless, if the legislature have enacted that it may be recovered or enforced by criminal procedure, there can be no appeal to this court."

In *Chung Chuck* v. *The King and the Attorney General for Canada,* (2), it was decided that a prosecution under a statute of British Columbia, whereby a person summarily convicted of the offence thereunder is liable to a penalty and imprisonment, and consequent proceedings by way of *habeas corpus, certiorari,* or stated case, raising the question whether the statute is *ultra vires,* are *criminal matters* for the above purpose. In that case, the Judicial Committee followed the decision of *Nadan* v. *The King* (3).

In this latter case, the Privy Council had said dealing with section 1025 of the Criminal Code of Canada:—

> Section 1025 is expressed to apply to an appeal in a criminal case from "any judgment or order of any court in Canada" and this expression is wide enough to cover a conviction in any Canadian court for breach of a statute, whether passed by the legislature of the Dominion or by the legislature of the province.

(1) [1896] 2 Q.B. 344.
(2) [1930] A.C. 244.
(3) [1926] A.C. 482.

In the same case, it was held:—

An appeal, in respect of a charge of violating a public law for which imprisonment could be imposed, is an appeal in a criminal case, although the statute violated is a *provincial one.*

It has been submitted by Mr. Howe, acting for the appellant, that these decisions do not apply because they refer to *"provincial crimes"*, and in the present instance, we have not to deal with one of those crimes, but with a *municipal enactment* imposing a fine and in default of payment an imprisonment. I cannot agree with this contention, and I am of opinion that the matter from which arises the *habeas corpus* is *not civil in its character,* and that, therefore, this Court has no jurisdiction. The word "criminal", as used in section 36 of the *Supreme Court Act,* cannot be considered as "criminal law", as assigned to the Dominion of Canada by the B.N.A. Act, but must be considered in the sense that it is *not civil.*

Two other cases have been cited. The first is the case of *Quebec Railway Light and Power Co.* v. *Recorder's Court of the city of Quebec* (1). In that case the Quebec Railway Company operating a tramway in the city of Quebec, was fined for having violated the following provisions of a city by-law:

The cars shall follow each other at intervals of not more than five minutes, except from eight o'clock at night to midnight, during which space of time they shall follow each other at intervals of not more than ten minutes.

The Company had a writ of prohibition issued which was quashed by the Superior Court and the appeal before this Court was dismissed.

The second case is the case of *Segal* v. *City of Montreal,* (2). In that case, Segal's petition for a writ of prohibition had been dismissed by the Court of King's Bench and the judgment was confirmed by this Court. Segal had been brought before the Recorder's Court on a complaint that he was unlawfully doing business as a canvasser without having previously obtained a licence and was fined.

In both cases this Court heard the appeals on writs of prohibition, but obviously the question of the jurisdiction of the Court was not raised by either party nor by the

(1) (1908) 41 Can. S.C.R. 145. (2) [1931] S.C.R. 460.

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Court itself, and therefore the question was not discussed, and these two cases cannot be cited as authorities in support of the appellant's contention.

It has been further argued that this Court should entertain the present appeal because it has been submitted, and the judgment of Mr. Justice Galipeault of the Court of King's Bench is based on that point, that the by-law upon which the appellant has been convicted is *ultra vires* of the powers of the provincial legislature and of the city of Quebec. I do not think that this submission may be allowed to prevail, because whether or not the by-law is *intra* or *ultra vires*, it remains that the original question raised before the Recorder, and of which the petition for *habeas corpus* is merely an incident of procedure, is not civil, and it is only in such a case that this Court has jurisdiction. (*Vide Chung Chuck* v. *The King*, (1), where the statute was attacked as being *ultra vires*).

I am forced, therefore, to come to the conclusion that the characteristics of a civil process cannot be found in the proceedings in the courts below, that they are of a "penal nature", that is to say, "criminal" for the purposes of the *Supreme Court Act*, and that no appeal lies to this Court, which is a statutory court and whose jurisdiction is therefore limited.

The motion should be allowed, and the appeal quashed.

Motion allowed and appeal quashed.