HIS MAJESTY THE KING.....APPELLANT;

v.

CHARLES BELL .....RESPONDENT.

1924

*Nov. 5.
*Dec. 1.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Appeal—Jurisdiction—Income War Tax—Penalty—Criminal matter—Income War Tax Act, (D.) 7-8 Geo. V, c. 28, ss. 8, 9; 9-10 Geo. V, c. 55, s. 7; 10-11 Geo. V, c. 49, ss. 11, 13; 11-12 Geo. V, c. 33, s. 4—Supreme Court Act, R.S.C. (1906), c. 139, ss. 36, 41 (b)—Criminal Code, ss. 706, 761, 1024 (a), 1029.

Section 9 (1) of The Income War Tax enacts that for every default in complying with certain sections persons in default "shall be liable on summary conviction to a penalty of $25 for each day during which default continues." The respondent, having pleaded guilty on an information laid for a breach of section 8 of the Act, was fined $3 per day, the magistrate holding that he could, in his discretion, impose a lesser penalty; and the decision was affirmed by the Appellate Division. The appellant moved for special leave to appeal to this court.

Held, that special leave to appeal to this court could not be granted.

Per Anglin C.J.C. and Mignault, Newcombe and Rinfret JJ.—The proceeding in this case does not fall within the civil jurisdiction of this court under s. 41 (*b*) of the Supreme Court Act, but is a "criminal cause" within the meaning of the exception in s. 36 of that Act.

Per Duff J.—The proceeding being in form a criminal proceeding and the judgment not being a mere order for the payment of money, the right of appeal to this court, if any, must be found in the provisions of the Criminal Code.

MOTION for special leave to appeal from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the decision of a police magistrate imposing, under s. 9 (1) of The Income War Tax Act a less penalty than $25 for each day's default by the respondent in complying with s. 8 of said Act.

The material facts of the case are fully stated in the judgments now reported.

C. F. Elliott for the motion.

D'Arcy Scott contra.

The judgment of the majority of the court (Anglin C.J.C. and Mignault, Newcombe and Rinfret JJ.) was delivered by

THE CHIEF JUSTICE.—By s. 8 of the Income War Tax Act, 1917, as enacted in 1920 (10-11 Geo. V, c. 49, s. 11),

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

(1) 20 Alta. L.R. 438; [1924] 2 W.W.R. 616.

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the duty is imposed upon any person who has not made a return, or a complete return as directed by that statute, of delivering to the Minister of Finance, upon demand by him, such information, additional information or return as he may require. For default in complying with the Minister's demand such person by s.s. 1 of s. 9 of the statute (as amended by s. 7 of c. 55 of the statutes of 1919, s. 13 of c. 49 of the statutes of 1920, and s. 4 of c. 33 of the statutes of 1921), is made liable on summary conviction to a penalty of $25 for each day during which such default shall continue.

Admittedly in default under s. 8, the respondent on conviction was fined $3 per day, the magistrate taking the view that s. 1029 of the Criminal Code applied and gave him discretion to impose a pecuniary penalty not exceeding $25 a day. The informant insisting that only the fine nominated in the statute of $25 a day could be imposed, at his instance a case was stated by the magistrate under s. 761 of the Criminal Code for the opinion of the Appellate Division of the Supreme Court of Alberta. That court upheld the magistrate's decision and supported its conclusion by reference to *Rex* v. *Thompson Mfg. Co.* (1). The contrary view was taken by the Supreme Court of Nova Scotia in *The King* v. *Smith* (2). This conflict might have presented matter for an appeal by leave of a judge of this court under s. 1024 (*a*) of the Criminal Code, had the case been otherwise proper for the application of that provision. But the proposed appeal is not by a provincial Attorney General, or by a person convicted, from a judgment of a court of appeal setting aside or affirming a conviction. Section 1024 (*a*), therefore, does not apply.

In its present application the Crown would treat the case not as falling under the sections of the Criminal Code providing for appeals, but rather as coming within the civil jurisdiction of this court, and, having been refused leave to appeal by the Supreme Court of Alberta, now moves for leave under clause (*b*) of the provisions of s. 41 of the Supreme Court Act. The applicability of s. 41 is expressly restricted to cases within sec. 36 and by that section jurisdiction to entertain appeals "in criminal causes" is ex-

(1) [1920] 47 Ont. L.R. 103. (2) [1923] 56 N.S. Rep. 72.

cluded. We are thus confronted with the question whether the proceeding under the summary conviction provisions of the Criminal Code, made applicable by s. 706 of the code and s. 9 of *The Income War Tax Act*, to enforce the penalty imposed by s. 9 for a violation of s. 8 of the latter statute in which the defendant was convicted and fined, is a "criminal cause" within the meaning of the exception in s. 36 of the Supreme Court Act.

A difference of opinion in regard to the purview of the word "criminal" in s. 36 in *Re McNutt* (1), was settled by the judgment of the majority of this court, as then constituted, in *Mitchell* v. *Tracey* (2), where it was determined that

> an application for a writ of prohibition to restrain a magistrate from proceeding on a prosecution for violating the provisions of the Nova Scotia Temperance Act arose out of a criminal charge

and could not be made the subject of an appeal under the Supreme Court Act. In 1921 this court, following its decision in the case last mentioned, unanimously declined to entertain an appeal in the case of *The King* v. *Nat Bell Liquors Ltd.* (3); and, on appeal by special leave, their Lordships of the Judicial Committee (4) affirmed our lack of jurisdiction. The importance of this decision is that it finally determined that the word "criminal" in s. 36 of the Supreme Court Act is employed in the broad sense ascribed to it in *Mitchell* v. *Tracey* (2). Compare *Ex parte Wood-Hall* (5); *Ex parte Schofield* (6), and *Provincial Cinematograph Theatre* v. *Newcastle Profiteering Committee* (7). Lord Sumner, quoting the language of one of the judgments delivered in *Re McNutt* (1), said, at page 186 (4):—

> 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."

His Lordship added:

> After all, the Supreme Court Act is concerned not with the authority, which is the source of the "criminal" law under which the proceedings are taken, but with the proceedings themselves.

(1) [1912] 47 Can. S.C.R. 259.
(2) [1919] 58 Can. S.C.R. 640.
(3) [1921] 62 Can. S.C.R. 118.
(4) [1922] 2 A.C. 128, at p. 167.
(5) [1888] 20 Q.B.D. 832.
(6) [1891] 2 Q.B.D. 428.
(7) [1921] 125 L.T. 651.

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We have, therefore, to inquire whether the proceeding against the respondent was in its character civil or was criminal in the sense indicated.

There has been some difference of opinion in England as to whether a proceeding to enforce by summary conviction penalties imposed for contraventions of statutory law not ordinarily regarded as criminal should be deemed criminal in determining the admissibility of the evidence of the accused, the right of appeal to the court of criminal appeal and similar questions. Reference may be made to *Attorney General* v. *Radloff* (1); *Osborne* v. *Milman* (2); *Attorney General* v. *Bradlaugh* (3); *Re Douglas* (4); *Cattell* v. *Ireson* (5); *The King* v. *Hausmann et al* (6). But none of these cases appears to be at all so closely in point as the decision of the Court of Appeal (Bowen and Kay, L.JJ.) in *The Queen* v. *Tyler & The International Commercial Coy., Ltd.* (7).

Section 47 of the English Judicature Act (1873) excludes from the jurisdiction of the Court of Appeal an appeal from a judgment of the High Court in any criminal cause or matter. By s. 26 of the Companies' Act, 1862, every company under the Act having a capital divided into shares was required at least once a year to make within a prescribed period a list of shareholders with certain particulars and to forward a copy thereof to the registrar of joint stock companies. By s. 27 it was provided that for default the company should incur a penalty not exceeding £5 for every day during which such default continued and that every director and manager knowingly and wilfully authorizing such default should incur a like penalty. On information laid before him charging the co-defendant company with default under s. 26, Alderman Tyler, a city magistrate, refused a summons. The appellant obtained a rule nisi for a mandamus. The Queen's Bench Division discharged the rule. The applicant appealed to the Court of Appeal and its jurisdiction was challenged under s. 47. The court held that the judgment of the Queen's Bench

(1) [1854] 10 Ex. 84.
(2) [1887] 18 Q.B.D. 471.
(3) [1885] 14 Q.B.D. 667.
(4) [1842] 3 Q.B. 825.
(5) [1858] 27 L.J.M.C. 167.
(6) [1909] W.N. 198.
(7) [1891] 2 Q.B. 588.

Division was a judgment in a criminal cause or matter and rejected the appeal.

Bowen L.J. said that s. 26 created a duty breach of which would be disobedience of the law, and, therefore, an offence, which, unless the statute otherwise provided, would be indictable. The company might not escape the duty by paying the penalty; the duty imposed was positive, and the penalty provided was punishment for the offence committed by a breach of it.

Kay L.J. regarded the duty imposed under s. 26 as very important in the interest of the public as well as of the shareholders; the penalty was not intended to be an equivalent for the omission to perform the duty since it was "£5 a day during which the default continues"; the penalty was of such a character that it clearly was intended as a punishment such as would compel the company to fulfil the duty. It was inflicted by way of punishment and not as a compensation for the breach.

The appeal was rejected on the ground

that the Court of Appeal has no jurisdiction to hear matters which belong to the criminal jurisdiction of the courts of the country, the intention of the Judicature Act being to keep that class of case beyond the scope and reach of the Court of Appeal.

Almost equally in point is *The Mayor etc. of Southport* v. *The Birkdale Urban District Council* (1), heard by Lord Esher M.R., and Lopes and Chitty L.JJ. A local Act provided

that if it shall at any time be proved to the satisfaction of any two justices * * * that the illuminating power of the gas supplied by the corporation did not when tested * * * equal the illuminating power by this Act prescribed

the corporation shall forfeit such sum, not exceeding £20, as such justices shall determine, to be paid to the local board. Upon information, and after hearing, the justices convicted the corporation and fined it £10, and then stated a case for the opinion of the High Court which reversed the decision of the justices and set aside the conviction. The informant appealed and a preliminary question was as to the jurisdiction of the Court of Appeal under s. 47 of the Judicature Act. The court unanimously held that the judgment appealed against was a judgment in a criminal cause or matter and as such non-appealable. Lord Esher said:

(1) [1897] 76 L.T. 318.

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There were an information, a summons, and a conviction. It is contended that what was asked for was the payment of a debt. It is impossible to maintain that contention. Nothing was due to any one from the corporation for which an action could be brought * * * It is impossible to say that they did not determine that the corporation must pay £10 by way of penalty for disobedience to the Act of Parliament.

Lopes L.J. said:

There is every element and incident of a criminal matter. The proceedings were commenced by information; a summons was issued; there was an appearance before justices who would adjudicate under the provisions of Jervis's Act (11-12 Vict., c. 43); and the proceedings end in a conviction and the imposition of a penalty under s. 40 of the local Act. Can anything be more like a criminal matter than that? The proceedings were before a criminal tribunal, and commenced and ended in the same way as ordinary criminal proceedings. * * * Putting aside the procedure, and looking only at the provisions of s. 40 of the local Act, by which a duty is imposed on the corporation, disobedience to that duty by the corporation is a misdemeanour at common law and is indictable. Looking at the case from that point of view, it is impossible to say that disobedience to the provisions of s. 40 is not a criminal offence. It has been argued that imprisonment could not follow, and that therefore this is not a criminal matter. That is so in this case, because the proceedings are against a corporation. But if the proceedings had been against an individual, it would be impossible to say that in this case imprisonment might not follow. That contention is dealt with in *The Queen* v. *Tyler* (1) and altogether fails.

Chitty L.J. added:

Both in form and substance these proceedings were criminal. They were commenced by information and summons; there was a conviction, and the imposition of a penalty. A case was stated for the opinion of the High Court and the appellants entered into recognizance to prosecute the appeal. As to the form, there cannot be any doubt. As to the substance, the conclusion is the same.

We think it clear that s. 8 of the *Income War Tax Act* imposed a duty in the public interest; that default in performing that duty constituted an offence against the public law; and that Parliament provided for the infliction of a prescribed punishment by a tribunal which ordinarily exercises criminal jurisdiction and by procedure enacted by the Criminal Code. *Clifford* v. *O'Sullivan* (2).

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* (3). Lord Esher, in

(1) [1891] 2 Q.B. 588. (2) [1921] 2 App. Cas. 570, at p. 580.
(3) [1896] 2 Q.B. 344.

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:

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.

Lord Justice Kay said, at page 349:

If I followed the argument correctly, it was that, where non-fulfilment of a liability is a criminal act, the proceeding to enforce it may be treated as criminal, but that where it is not a criminal act, the proceeding cannot be so treated. It appears to me that, if there be a provision in a statute that that which is merely a civil liability may be enforced by a proceeding in its nature criminal, that proceeding is none the less criminal for the purpose of s. 47 of the Judicature Act, 1873, because it is applied to a civil liability. If the proceedings intended by a statute to enforce a civil obligation are in the nature of criminal proceedings, then there cannot I think, under s. 47, be an appeal to this court. I think that this distinction is admirably dealt with by Cotton L.J. in *The Queen* v. *Barnardo* (1). He there said: "Section 47 does not mean that no appeal shall lie when the act which originates the proceedings in which the order was made is a crime, but it means that no appeal shall lie when the cause or matter in which the order was made is in the nature of a criminal proceeding. In *Ex parte Bell Cox* (2), it was held that an appeal lay from the granting of a habeas corpus, because the proceeding in which it was granted was a civil proceeding. In *Ex parte Alice Woodhall* (3), it was held that the refusal of a habeas corpus could not be appealed from, because the refusal was in a criminal proceeding. This shews the distinction. In my opinion the question is, not whether the act which is said to have been done by Dr. Barnardo is one for which he was liable to be indicted, but whether the proceeding in which the order was made was a criminal cause or matter." I take that to be the true distinction. Therefore it does not matter whether the non-payment of the rate is a criminal act or not. If the proceeding against the person who does not pay the rate is in its nature criminal, there cannot be an appeal to this court in it. I think the

(1) [1889] 23 Q.B.D. 305 at p. 308. (2) [1887] 20 Q.B.D. 1.
(3) 20 Q.B.D. 832.

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result of the decisions is that the question whether there is such an appeal does not depend on the nature of the obligation, but on the nature of the proceedings.

Lord Justice Smith delivered judgment to the same effect.

In *The Queen* v. *Whitchurch* (1), Brett L.J. said, at p. 537:

> I am of the opinion that we have no jurisdiction to entertain this appeal, because the legislature has treated the matter as criminal. By the Public Health Act, 1875, certain things are prohibited, and certain other things are directed to be done by the owners or occupiers; and it has been enacted that if a default occurs, the person in default shall be subject to a penalty recoverable before justices by Jervis's Acts. The legislature has decreed that a penalty shall be imposed on a person offending against the provisions of the Public Health Act, 1875; and it has been decided in *Mellor* v. *Denham* (2) that to treat the matter in that manner is to treat it as a criminal matter.

The observation of Lord Sumner in the *Nat Bell Liquors Case* (3), at p. 168, that:

> the Supreme Court Act is concerned * * * with the proceedings themselves,

indicates that the words "criminal cause" in s. 36 of that Act have the same purview and effect as was given to the words "criminal cause or matter" in s. 47 of the English Judicature Act in the two cases last cited. But see *Rex* v. *Governor of Brixton Prison* (4).

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). A decision by a judicial tribunal of any question raised in or with regard to them, at whatever stage it arises, is a decision in a criminal cause; *Ex parte Woodhall* (6); and, as such, is within the exception in s. 36; and the existence of an alternative remedy of a civil nature would not affect that conclusion. *Queen* v. *Whitchurch* (1).

Leave to appeal must, therefore, be refused with costs.

IDINGTON J. concurred in the result.

(1) [1881] 7 Q.B.D. 534.
(2) [1880] 5 Q.B.D. 467.
(3) [1922] 2 A.C. 128.
(4) [1910] 2 K.B. 1056, at pp. 1064-5.
(5) [1921] 2 A.C. 570, at p. 580.
(6) 20 Q.B.D. 832, at p. 838.

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DUFF J.—It is rather important to notice that the sole point for consideration is whether or not the proceeding out of which this appeal arises falls within the description " criminal cause " in the sense in which those words are used in s. 36 of the Supreme Court Act. Happily, in my view, it is unnecessary to discuss the scope of such words as " crime " and " criminal cause " in the abstract; an enticing subject, perhaps, for logomachy, but, in my view of the effect of s. 36, of little importance here. Nor, according to the opinion I have formed, is it necessary to consider whether default in making a return or supplying information pursuant to ss. 7 and 8 of the Income War Tax Act is for all purposes a criminal offence. The penalty imposed by s. 9 is recoverable in the Exchequer Court; and besides the consideration that proceedings on the Revenue Side of the Exchequer Court, now on the Revenue Side of the King's Bench, for the recovery of penalties for smuggling have been definitely held not to fall within the category of criminal proceedings, *In re Hausmann* (1), there is the circumstance that the Exchequer Court of Canada is not and probably cannot be a court of criminal jurisdiction. These considerations suggest, perhaps, that proceedings under the Income War Tax Act for the recovery of penalties for such defaults as are here in question, if considered from the point of view of that Act alone, lie in very debatable ground; on

the boundary line which divides civil from criminal matters

to use the phrase of Lindley L.J., in *Attorney General* v. *Bradlaugh* (2).

We are here, however, concerned only with the proper application of a particular phrase in a particular statute; and that question is capable, in my view, of being decided upon a ground that can be stated very briefly. For the purpose of determining the scope of the proviso to s. 36 of the Supreme Court Act, under which appeals in criminal causes are limited to the appeals provided for by the Criminal Code, it is necessary, I think, to read that section in light of the enactments of the Criminal Code. The subject of appeals, as affecting summary convictions under Part 14, as well as other convictions, where the proceeding leading

(1) [1909] 3 Cr. App. Cas. 3. (2) 14 Q.B.D. 667 at p. 714.

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to the conviction is in form a criminal proceeding, and the judgment is not a mere order for the payment of money (including appeals to the Supreme Court of Canada, as well as to the Privy Council), is a subject dealt with in the Criminal Code as a branch of Criminal Law and Procedure; and there, I think, the Supreme Court Act leaves that subject. Consequently, the right of appeal to this court, if any, in this and in similar cases, must be found in the provisions of the Criminal Code.

I am dealing, of course, it is perhaps advisable to say, solely with cases in which the proceeding is a proceeding authorized by a statute of the Parliament of Canada. What I have said is in no way inconsistent with either the decision or the judgment in *The King* v. *Nat Bell* (1).

Leave to appeal should be refused.

Motion dismissed with costs.