1910

*May 16.
*June 15.

IN RE CRIMINAL CODE.

IN THE MATTER OF AN ORDER IN COUNCIL RESPECTING SECTION 873 (A) OF THE CRIMINAL CODE AND SECTION 17 OF THE LORD'S DAY ACT.

REFERENCE BY THE GOVERNOR-GENERAL IN COUNCIL.

Criminal Code—6 & 7 Edw. VII. c. 8—Procedure—Alberta and Saskatchewan—Indictable offence—Preliminary inquiry—Preferring charge—Consent of Attorney-General—Powers of deputy—"Lord's Day Act," s. 17.

Section 873 (*a*) of the Criminal Code (6 & 7 Edw. VII. ch. 8) provides that, "In the Provinces of Alberta and Saskatchewan it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence shall be commenced by a formal charge in writing setting forth as an indictment the offence with which he is charged.

2. "Such charge may be preferred by the Attorney-General or an agent of the Attorney-General or by any person with the written consent of the judge of the court or of the Attorney-General or by order of the court."

Held, Idington J. dissenting, that a preliminary inquiry before a magistrate is not necessary before a charge can be preferred under this section.

Held, also, that the deputy of the Attorney-General for either of said provinces has no authority to prefer a charge thereunder without the written consent of the judge or of the Attorney-General or an order of the court.

Section 17 of the "Lord's Day Act" provides that "no action or prosecution for a violation of this Act shall be commenced without the leave of the Attorney-General for the province in which the offence is alleged to have been committed * * * ."

Held, that the deputy of the Attorney-General of a province has no authority to grant such leave.

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*PRESENT:—Girouard, Davies, Idington, Duff and Anglin JJ.

SPECIAL QUESTIONS OF LAW referred by the Governor in Council to the Supreme Court of Canada for hearing and consideration.

The following are the questions so submitted on the report of His Majesty's Privy Council for Canada, dated 6th April, 1910.

"The Committee of the Privy Council, on the recommendation of the Minister of Justice, advise that, pursuant to section 60 of the 'Supreme Court Act,' the following questions be referred to the Supreme Court of Canada, for hearing and consideration, viz.:

"1. Is a preliminary inquiry before a magistrate necessary before a charge can be preferred under section 873(*a*) of the Criminal Code ?

"2. Has the lawful deputy of the Attorney-General, appointed by competent provincial authority in the Province of Alberta, authority to prefer a charge under section 873(*a*) of the Criminal Code of Canada, without the written consent of the judge of the court or of the Attorney-General in person and without an order of the court ?

"3. Has the lawful deputy of the Attorney-General, appointed by competent provincial authority in the Province of Saskatchewan, authority to prefer a charge under section 873(*a*) of the Criminal Code of Canada, without the written consent of the judge of the court or of the Attorney-General in person, and without an order of the court ?

"4. Has the lawful deputy of the Attorney-General, of a province of the Dominion of Canada, appointed by competent provincial authority, authority to grant the leave of the Attorney-General of his province, under section 17 of the 'Lord's Day Act' ?"

"F. K. BENNETTS,
"Asst. Clerk of the Privy Council."

1910

IN RE CRIMINAL CODE.

The above mentioned sections of the Criminal Code and "Lord's Day Act" are set out in the head-note.

Newcombe K.C., Deputy Minister of Justice, appeared for the Government of Canada.

Forde K.C., Deputy Attorney-General, for the Province of Saskatchewan.

C. A. Grant for the Province of Alberta.

The court answered the first question in the negative, Idington J. dissenting. The other three questions were unanimously answered in the negative. Their Lordships delivered the following reasons to support their answers.

GIROUARD J.—I think that the observations made by this court in *Re Legislation respecting Abstention from Labour on Sunday* (1), applies more strongly in a case like this. I have serious objection to sit in a case which looks very much as if it were an appeal from provincial courts in a criminal matter where the statute says there is no appeal to this court. However, as our advice has no legal effect, does not affect the rights of parties, nor the provincial decisions, and is not even binding upon us, I have no objection to express my concurrence in the answers prepared by this court.

DAVIES J.—The questions one, two and three referred to this court respecting section 873(*a*) of the Criminal Code practically ask us to sit as a court of appeal on the judgment delivered by the Supreme

(1) 35 Can. S.C.R. 581.

Court of the Province of Saskatchewan, in the case of *The King* v. *Duff* (1). As no such appeal is allowed in criminal cases where the judgment of the provincial court is adverse to the Crown, I felt strongly that the better course would be for this court to refer the questions back to His Excellency in Council, pointing out the fact that the questions substantially though indirectly involved such an appeal and ought not to be answered by us.

In addition I may add that we have not had the benefit of an argument on both sides of the questions. Counsel representing the Crown alone submitted their contentions. In giving my answers to the questions I do so with reluctance and solely in obedience to the imperative provisions of the statute, "Supreme Court Act," section 60, and out of deference to the order of His Excellency in Council. At the same time I do not think this court or its members would feel bound in any concrete case which might arise hereafter by any expression of opinion we may now give on these questions.

I am strongly inclined to the opinion that the sub-sections (*l*) and (*m*) of section 31 of the general "Interpretation Act" of the Dominion, which were strongly relied upon by Mr. Forde as clearly settling questions two, three and four in the affirmative, do not apply to them at all. The expression "Minister of the Crown," in sub-section (*e*) refers, I think, to a Minister of the Crown of the Dominion of Canada only, and not to the ministers of the several provinces. It is difficult to imagine the Parliament of Canada "directing" a provincial minister to do a specific act

(1) 2 Sask. L.R. 388.

1910

IN RE CRIMINAL CODE.

Davies J.

or thing. They might "empower" as it is put in the alternative in the sub-section. But it seems to me Parliament never intended that a "lawful deputy" of a provincial minister, whose duties as such are limited and defined by the several provincial legislatures as they respectively may from time to time determine, and may and probably are in many cases very far from co-ordinate with those of the provincial minister, should have and exercise all the powers conferred from time to time by Dominion statute upon the minister himself. These considerations would not apply to the cases of Dominion Ministers of the Crown and their deputies the relative powers and duties of whom are defined by Dominion statutes, and are subject, of course, to its directions and supposed to be well known to Parliament when legislating. Following this reasoning sub-section (*m*) when it refers to "any other public officer or functionary" means, on my construction, any other public officer or functionary of the Dominion, and does not relate to provincial officials.

This construction, if correct, would effectually dispose of questions two, three and four, in the negative. Even if not correct, I would still be of the opinion that the Deputy-Attorney-General of the Provinces of Saskatchewan and Alberta are not entitled as such to prefer a formal charge in writing against any person under section 873(*a*) of the Criminal Code, as enacted by the "Criminal Code Amendment Act" of 1907, ch. 8. That section permits the charge to be preferred by "the Attorney-General or an agent of the Attorney-General." I agree with Chief Justice Wetmore that the Deputy Attorney-General is not *ex officio* such an agent, and this quite apart from the special limitation upon his powers placed by section 10 of "The Act re-

specting the Public Service of Saskatchewan," 6 Edw. VII. (1906) ch. 5, and the similar statute of the Province of Alberta. At the time when section 873(*a*) of the Code was passed, there were persons in each of these Provinces of Albert and Saskatchewan appointed by the Departments of the Attorneys-General respectively to act for the Crown law officers at the respective courts to which they were appointed and who were styled "agents of the Attorney-General." These were, in my opinion, clearly the persons and the only persons referred to by the section in question as "an agent of the Attorney-General," and their special mention would, even if sub-sections (*l*) and (*m*) of section 31 were held applicable to the construction of section 873(*a*) of the Code, exclude Deputy Attorneys-General. These sub-sections of section 31 are only to be invoked when (as the section says) a contrary intention does not appear. Here by specifically naming a special well-known class of persons as "agents of the Attorney-General" for the performance of a special judicial function or duty, the general deputy head of the department, not being within the class, is excluded. "The contrary intention" does appear and excludes the application of the sub-sections.

The 10th section of the provincial Act, 1906, to which I have above referred, limits and defines the powers of the deputy heads of the several departments as follows:

> In the absence of any head the deputy head of the department shall perform the duties of such head unless an acting head of the department is appointed or the performance of such duties is otherwise provided for by the Lieutenant-Governor in Council; and the deputy head so acting during such absence shall exercise all the powers vested in the head as to the control of the other employees of the department.

1910

IN RE CRIMINAL CODE.

Davies J.

In the *ex parte* argument addressed to us this section (no doubt inadvertently) was not called to our attention, but it seems to me conclusive, even if the sub-sections of section 31 of the general "Interpretation Act" did apply, against the contention submitted that the Deputy Attorney-General was *ex officio* an agent of the Attorney-General within the meaning of the terms in section 873 (*a*) of the Criminal Code.

After examining the criminal legislation of the Dominion with respect to the North-West Territories, and the Provinces of Alberta and Saskatchewan carved out of them, and also the section of the Code (873 (*a*)) applicable to those provinces alone, I am of opinion that the true construction of that section does not require that there should have been any preliminary examination before a magistrate before a charge could be preferred under that section. For the reasons I have given I would therefore answer questions one, two and three in the negative.

Section 17 of the "Lord's Day Act," to which question No. 4 relates reads as follows:

> No action or prosecution for a violation of this Act shall be commenced without the leave of the Attorney-General for the province in which the offence is alleged to have been committed, nor after the expiration of sixty days from the time of the commission of the alleged offence.

Here there is no mention of "an agent of the Attorney-General" exercising the functions and powers conferred on the latter officer. The leave of the Attorney-General himself must be obtained. In my view of the construction of sub-sections (*l*) and (*m*) of section 31 of the general "Interpretation Act," there can be but one answer and that in the negative. Even if the sub-sections are applicable, I would greatly doubt whether the "leave of the Attorney-General" required by sec-

tion 17 could be given by the Deputy Attorney-General. The high official named is called upon to exercise a judicial or at the very least a quasi judicial function in granting or refusing leave to commence an action or prosecution under the Act, and I think the case of *Abraham* v. *The Queen* (1) a strong authority for the position that it is a function which he must personally discharge and which he cannot delegate, and which is of a character and nature not covered by sub-sections (*l*) and (*m*) even if applicable.

I answer that fourth question in the negative.

IDINGTON J.—The creation of this court has been generally supposed to have been intended as an exercise of the powers given by the "British North America Act," section 101, which is as follows:

> The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organization of a general court of appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

It was constituted as a court of law and equity. It was given an appellate and other jurisdiction.

In consequence of doubts expressed in *In re Legislation respecting Abstention from Labour on Sunday* (2) the "Supreme Court Act" was amended by 6 Edw. VII. ch. 50, now section 60 of the Act.

I must be permitted to doubt if it can as such be made a court or commission of general inquiry, as the amendment seems to read.

The words used in section 101, *i.e.*, "the better administration of the laws of Canada," may, however,

(1) 6 Can. S.C.R. 10.

(2) 35 Can. S.C.R. 581.

1910

IN RE CRIMINAL CODE.

Idington J.

cover a pretty wide field. If this inquiry extends beyond that field it probably is *ultra vires*.

Assuming but doubting if, in some such way the inquiry falls properly within the second part of the above section 101, it becomes pertinent thereto at the threshold to try to understand what Parliament was about when amending the Criminal Code, by section 873(*a*).

It is to be observed that though procedure falls within the power of Parliament subject to that

> the administration of justice in the province including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction and including procedure in civil matters in these courts

is assigned by section 92, sub-section 14, to the authority of the legislature.

Parliament saw fit to amend the Criminal Code by enacting as follows:

> 873(*a*). In the Provinces of Saskatchewan and Alberta, it shall not be necessary to prefer any bill of indictment before a grand jury, but it shall be sufficient that the trial of any person charged with a criminal offence be commenced by a formal charge in writing setting forth as in an indictment the offence with which he is charged.
>
> 2. Such charge may be preferred by the Attorney-General or any agent of the Attorney-General, or by order of the court.

The question raised thereupon is: Has either the lawful Deputy Attorney-General of Saskatchewan or of Alberta within his province the power of the Attorney-General thereof under this section ?

The creation of a Deputy Attorney-General and the definition of his powers are entirely within the power of the legislature and may be so regulated as to vary as directed from day to day. Certainly Parliament is not to be supposed to have intended to meddle therewith.

Nor can I imagine it was intended to entrust the duty to one whose power to execute it varied from day to day.

The question of what power Parliament has to assign to and enforce the performance of a given duty by any one holding a particular office created by and under another autonomous power suggests an interesting inquiry not easy of definite solution.

For that, if no other reason, its nominee by such a method of designation ought in reason to be holding an office that has some relation to the subject-matter being dealt with; and the more intimate the better.

Though the authority of the Attorney-General of a province is also subject to legislative limitations, custom, tradition and constitutional usage, having charged him with the administration of justice within the province as his primary duty, also pointed him out as the proper one to have assigned to him such a duty as this section assigns.

Parliament was constituting in a new country an authority to discharge the duties which the ancient institution of the grand jury had elsewhere so long performed.

I would assume that Parliament had regard to the history of that body and to such conditions of law and custom as governed and guided it and in confiding to any officer the delicate duty of placing a man on trial without the slightest notice beforehand as contended for here it might be supposed to have had some regard to the responsible character of his position as well as to the kind of person it was entrusting with such duties.

It might well be observed that the Attorney-General is a person generally known to the public and

1910

IN RE CRIMINAL CODE.

Idington J.

so much in the public eye as to be probably responsive to such just criticism for neglect of duty as his deputy clearly might not be.

An admirable deputy attorney-general within the sphere of duties the legislature had assigned him might be quite unfitted to discharge such functions as this new condition of affairs required.

The evident purpose of the whole enactment was to throw the responsibility directly upon one man.

He might if he saw fit name his agents for discharging, indeed, for the special purpose of discharging, such onerous duties. Yet he should remain the responsible head for such delegations of power to enable the duty to be properly discharged.

The express power of delegation thus given seems to exclude the idea of any other being substituted.

A deputy attorney-general is not necessarily the agent of the Attorney-General in any sense. He fills, as said already, whether nominated or removable by the Attorney-General, an office generally created by local statute and discharges duties thereby assigned.

Much less can it be the case that he can be said to fall within the special description given in the Act.

On the other hand the deputy might be merely the nominee of the Attorney-General. In such case, inasmuch as the Act implies clearly that the Attorney-General should select special agents for this purpose, it on this assumption excludes any one else and thus also the strained meaning sought to be placed on the "Interpretation Act."

That meaning is not only inconsistent with the purview of the amended Code and the very words of the section in question, but with the interpretation clause of the Code assigning the meaning to be given the words "Attorney-General" in the Code.

How could Parliament more pointedly shew the inconsistency that the "Interpretation Act" recognizes as possible and fully provides against than this?

Are we *primâ facie* to assume Parliament had the intention in every case wherein it assigns a power to a provincial officer and implies a duty to execute it that it must of necessity mean thereby as of course to include any and every kind of deputy he may have? The clause relied on in the "Interpretation Act" is hardly to be stretched so far.

But in principle, as it seemed to me from the very first, this case is within the case of *Abrahams* v. *The Queen*(1). It also is almost within the very language of the statute there in question.

A Crown counsel is but the deputy of the Attorney-General and the lawful deputy for the time and place named.

This was a case where an indictment had been preferred for an offence within the meaning of the "Vexatious Indictments Act" as it stood in section 28 of "An Act respecting Procedure in Criminal Cases," etc., 32 & 33 Vict. ch. 29.

It prohibited the grand jury unless certain preliminary steps described had been taken from finding any bill of indictment

> unless the indictment for such offence is preferred by the Attorney-General or the Solicitor-General for the province or of a judge of a court having jurisdiction to give such direction or try the offence.

No special efficacy can be attached to the word "bill" as suggested in the factum herein to distinguish it from this case especially in view of the new meanings given contemporaneously with the enactment of

(1) 6 Can. S.C.R. 10.

1910

IN RE CRIMINAL CODE.

Idington J.

section 873(*a*) to the word "indictment." See section 2, sub-section 16, of the Code.

The substance of the thing was looked at by this court following the English courts. And the power of any one, save and except him specially and specifically designated by his office to perform the judicial act of giving legal sanction to the proceeding of putting a man on his trial, was properly repudiated.

The second sub-section of the section of the "Interpretation Act" now relied upon stood then just as it does now. No one seems to have had the courage to try it on the court. In a sense the Crown officers might have been urged there as deputies and even lawful deputies.

In substance and in language it is seldom we can get cases so nearly alike. Substitute the word "charge" now included in the word "indictment" and the cases seem almost on all fours.

It was the judicial quality of the act required to be done that was held to render substitution impossible. It is that which renders it inconsistent here with the meaning in the "Interpretation Act."

Moreover, in this case the question involved is not the comparatively trifling one there as to half a dozen or so specified crimes, but it is the operation of the whole Code.

The deputies attorney-general not only claim that the right and duty of putting any man on his trial has devolved upon each of them, but also that of doing so without any need of a preliminary proceeding of any kind.

If such be the import of the amendment so much more significant is the designation by Parliament of one man and his agent specifically delegated to discharge his appointor's duty in that regard.

But is that the case ? At first blush it seemed so. However, when I find the interpretation section of the Code amended to make the Act as amended by this section 873(*a*) workable, it is evident it is not intended this new section should be as it were an entirely new code of procedure in itself.

If we interpret section 871, sub-section 2, in light of these amendments, we find some curious results possible.

It seems to imply that where a man has been prosecuted and some one bound over to prosecute him the charge may have to be confined within the limits of the original prosecution.

Of course all this, it may be said, is to be discarded and a new prosecution, as it were, instituted by the Attorney-General within section 873(*a*).

On the other hand is section 872 entirely inoperative ? Are all the provisions relative to preliminary examination and inquiry and need therefor in the Code as it stood up to this amendment 873(*a*) revoked ?

Or is the said section only intended to substitute the Attorney-General or agent or judge for the grand jury ?

It is necessary in order to properly appreciate all this and answer the first question submitted to bear in mind the history of legal development relative to criminal prosecutions.

Originally the grand jury had the right to entertain any complaint and present any offender without any preliminary inquiry. In practice I think this was in later times not always or unrestrictedly adopted.

In the old Province of Canada the law was changed

1910

IN RE CRIMINAL CODE.

Idington J.

in 1861 by the "Vexatious Indictments Act" expressly taking away the power in seven named cases of misdemeanour unless with the consent of certain designated officers or judges.

With some changes in 1869 the law stood as above indicated till the Criminal Code was enacted in 1892.

Section 641 thereof expressly prohibited indictments being preferred unless there had been the preliminary examination followed by a prosecutor being bound over or a committal; or the Attorney-General or any one by his direction or a judge permitted.

This was again amended by 63 & 64 Vict. ch. 46, and again by the Revised Statutes of Canada and stood as it now stands in the Criminal Code sections 870 to 873 inclusive.

These sections are plain. They require, except in specified cases left to the discretion of an Attorney-General or a judge of a court of record or of criminal jurisdiction, preliminary proceedings.

The amendment section 873(*a*) does not in the slightest degree imply any intention to repeal them beyond the obvious necessity arising from the substitution of the officers above named for the discharge of the functions of the grand jury relative to placing a man on his trial.

It deals only with the case of "the trial of any person charged with a criminal offence." How charged ? Is it confined to those who have been judicially so charged, by virtue of the provisions of the law for committing the accused for trial ?

How can it mean aught else ? The word "charged" is the apt one to designate a person accused and in charge. Doubtless it has another meaning, but it

may well be argued that it is in this restricted sense that the Act applies it.

It is true the Attorney-General by this interpretation may either have the power given him under the Code in two ways, or deprived of that he had already been given by section 872 of the Code.

It is equally true and significant that in one place he alone is given the power and in the other place he or his agent, and in reading these sections and giving each its full force the object is fully accomplished of substituting some one else for the grand jury without bringing about a revolution in the later principles upon which the administration of criminal justice proceeded.

I am sure such a thing never was intended. I am sure it would end in evil. The principle acted upon of not permitting any one to be put on trial without preliminary examination had been carried so far as to discard a coroner's inquisition. See section 940.

It may be said that merely rendered going before a grand jury necessary.

I am satisfied from the practice of such a thing, though possible in law, never having been attempted, it was of set purpose to bring about a definite preliminary examination, as the key-note of criminal prosecution save where an Attorney-General or judge directed otherwise.

The result was in the plainest possible case the hearing had to be repeated before a magistrate to ensure committal for trial.

The policy of the law that there should be a preliminary examination was thus clearly settled and so settled in order that on grounds of humanity and justice that examination might, as so often happens, en-

1910

IN RE CRIMINAL CODE.

Idington J.

able one accused, without perhaps the slightest foundation, by cross-examination of his accusers or by his own explanations to dispel the false appearances against him and save him the pain and indignity of being improperly placed on his trial.

The differences between that and the system of placing a man on his trial without being given such opportunity is most radical. The tendency in the one method is towards a humane administration of justice and in the other towards the vicious reverse thereof.

There are cases arise as, for example, prosecutions of municipal or other corporations in respect of such nuisance as the maintenance of unwholesome jails or court houses or for non-repair of roads where such considerations might not operate; but where the Attorney-General might properly, if inconvenience unlikely to arise, authorize on his official responsibility the trial of what after all savours of the trial of a civil proceeding.

It seems to me the question cannot be answered as if beyond doubt, and when answered here and thus *ex parte* can bind no one.

But I am quite sure of one thing relative to the administration of justice, and that is that no one entrusted therewith or any part thereof should ever jeopardize or prejudice by the adoption of a doubtful course of procedure, when a safer one was at hand, either the administration of justice or the standing, reputation or freedom of another for a single hour.

I therefore answer the first question, "yes," and each of the others, "no."

These answers are relative to the acts to be done under 873(*a*) for obviously the answer must be so qualified.

1910

IN RE CRIMINAL CODE.

Duff J.

DUFF J.—To all the questions submitted I answer "no." For my reasons I refer to the opinion of my brother Davies. I desire, however, to add one or two observations upon the legal quality and effect of these answers and the opinions upon which they rest. The practice of asking the extra judicial advice of the judges upon questions of law is an ancient practice. Seemingly the last recorded instance in England in which without statutory authority such advice was sought by the Crown occurred in 1760, when a question arising out of the proceedings against Lord Geo. Sackville was submitted through Lord Mansfield and answered. In that case, as in many previous cases, the judges expressly declared that if the question should afterwards be brought before them judicially they should be ready "without difficulty to change" their opinion(1). It has long been settled that the House of Lords is entitled to require the answers of the common law judges upon questions as to the existing state of law whether arising out of litigation pending before the House or not. But in such cases the opinions of the judges have not in themselves the authority of judicial precedent. In *Head* v. *Head*(2), at page 140, Lord Eldon said:

> The answers given by the judges, therefore, although entitled to the greatest respect as being their opinions communicated to the highest tribunal in the kingdom, are not to be considered as judicial decisions.

Lord Eldon is here speaking of opinions given in answer to questions arising out of contentious litigation actually pending before the House and given after full argument. The view of a very able and experi-

(1) 2 Eden (Appendix), pages 371-372.

(2) T. & R. 138.

1910

IN RE CRIMINAL CODE.

Duff J.

enced judge touching the value of such opinions where there is no cause and no argument may be gathered from the following passage in the opinion by Maule J. in *McNaghten's Case*(1), at page 204:

> I feel great difficulty in answering the questions put by your Lordships on this occasion: First, because they do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts, not inconsistent with those assumed in the questions; this difficulty is the greater, from the practical experience both of the bar and the court being confined to questions arising out of the facts of particular cases; Secondly, because I have heard no argument at your Lordships' bar or elsewhere, on the subject of these questions; the want of which I feel the more, the greater are the number and extent of questions which might be raised in argument; Thirdly, from a fear of which I cannot divest myself, that as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice, when they are cited in criminal trials.

In more recent times it has been held that the jurisdiction of the High Court of Justice upon questions submitted to it under section 29 of the "Local Government Act" is consultative only and not judicial. *Ex parte County Council of Kent and Council of the Borough of Dover*(2).

With regard to questions submitted under the Dominion statute the course of the Judicial Committee has, I think, been very instructive. The authority conferred by the statute has been sometimes used for the submission of specific points in controversy between the Dominion and the provinces upon the construction of the "British North America Act" which, as bearing upon the validity of specific statutes, it was thought desirable to have determined; both sides to

(1) 10 Cl. & F. 200.

(2) [1891] 1 Q.B. 725.

the controversy having accepted the issue and the tribunals having the benefit of the fullest argument upon it. Even in such cases the Board has usually refused to pass upon questions touching private interests not represented [the question relating to the rights of riparian proprietors for example(1)], or to answer questions the replies to which might properly be influenced by the circumstances in which the questions should arise for actual judicial decision. *Attorney-General for Ontario* v. *Hamilton Street Railway Co.* (2), at page 529.

The questions submitted in this case relate to the construction of statutes governing criminal procedure and the answers to them could not well be affected by the circumstances of any particular case in which they might arise; and they are therefore not open to the same objections as may be taken to purely hypothetical questions. But the court is called upon to answer them, having heard argument from one point of view only; and in these circumstances it is clear that the opinions expressed in the answers given cannot have the weight attached either to a judicial deliverance or to an extra-judicial opinion pronounced after hearing the possible diverse views of the question presented in argument. Indeed, there is not a little danger that such answers may, as Maule J. said in the passage already quoted, tend "to embarrass the administration of justice," (not only in this court, if, as is most likely we should hereafter be called upon to answer the same questions when raised litigiously), but in

(1) *Attorney-General of Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia;* [1898] A.C. 700, at p. 717.

(2) [1903] A.C. 524.

30

1910

IN RE CRIMINAL CODE.

Duff J.

other courts also, which may naturally feel greater delicacy than this court on a proper occasion would feel in treating the questions passed upon as *res novæ*, notwithstanding such opinions.

ANGLIN J.—Parliament has advisedly denied to the Crown the right of appeal to this court in criminal cases from judgments of provincial courts in favour of defendants. Because a review of the judgment of the Supreme Court of Saskatchewan in *The King* v. *Duff* (1), is unavoidably involved in the disposition of the present case and also because of the strong disapprobation expressed by the Judicial Committee of the Privy Council of the practice of procuring judicial opinions upon abstract questions (*Attorney-General for Ontario* v. *Hamilton Street Railway Co.*(2); *The Brewers' Case*(3)) the court answers the questions now submitted with reluctance and diffidence, solely in obedience to the imperative provisions of the statute ("Supreme Court Act," section 60), and in deference to the order of the Governor-General in Council. It must be understood that as this opinion is given without the advantage of argument except on behalf of the provincial Attorney-General, it would not be proper that it should be deemed binding in any case which may hereafter arise, whether in this court, or in any provincial court.

In the absence of any provision in the Criminal Code that there should be a preliminary magisterial inquiry before a charge is preferred under section

(1) 2 Sask. L.R. 388.
(2) [1903] A.C. 524.
(3) *Attorney-General for Ontario* v. *Attorney-General for Canada;* [1896] A.C. 348.

873(*a*), the right to commence proceedings in the Provinces of Saskatchewan and Alberta against persons accused of offences by preferring charges as provided in that section would appear to be unqualified.

Under sub-section 1, of section 873, of the Criminal Code, applicable to the other provinces, a bill of indictment may be preferred in respect of a charge as to which there has been no preliminary inquiry. This section is the legitimate successor of part of section 28 of 32 & 33 Vict. ch. 29 — other parts of which are replaced in a modified form by sections 871 and 872. Under section 28 the preferring of an indictment by the Attorney-General or Solicitor-General was in certain cases an alternative to its being preferred by a person who had been bound over to prosecute (section 871 of the Code) or to its being preferred by a Crown prosecutor (section 872 of the Code), or by the grand jury *suâ sponte* against a person who had been committed for trial. Section 28 provided that "no bill of indictment" for certain specified offences

> shall be presented to or found by any grand jury unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless the indictment for such offence is preferred by the Attorney-General or Solicitor-General for the province.

Under this section it cannot, I think, be questioned that a preliminary investigation before a magistrate was not a pre-requisite to the preferring of an indictment by the Attorney-General or the Solicitor-General. It must not be forgotten that these provisions were restrictive of the former absolute and unqualified right

1910

IN RE CRIMINAL CODE.

Anglin J.

of grand juries *proprio motû* to present indictments against any person whomsoever.

While the territory now included in the Provinces of Alberta and Saskatchewan was, as part of the North-West Territories, subject in all matters to the legislative jurisdiction of the Dominion Parliament, the statute in force provided that "no grand jury shall be summoned or sit in the Territories." R.S.C. (1886) ch. 50, sec. 65. The courts of criminal jurisdiction of the Territories were constituted without grand juries. The provincial legislatures of these two provinces have seen fit to continue this constitution of their courts.

Having to deal with courts so constituted, Parliament found itself obliged to provide some substitute for the methods of commencing criminal trials prescribed for other parts of Canada in which grand juries form part of the criminal courts as constituted by the provincial legislatures. In the North-West Territories trials were begun

> by a formal charge in writing setting forth as in an indictment the offence * * * charged (54 & 55 Vict. ch. 22, sec. 11).

When the Provinces of Alberta and Saskatchewan were created Parliament thought proper to make a more formal and definite provision, and for this purpose enacted in 1907 what is now clause 873(*a*) of the Criminal Code. This provision is a re-enactment of section 11 of chapter 22 of 54 & 55 Vict. and an application of sub-section 1, of section 873, of the Criminal Code to the criminal courts as constituted in these provinces. Parliament does not assume to deal with the constitution of these courts; it merely provides, as it is its duty to do, a procedure suited to the courts as it finds them constituted. Parliament having for that purpose adapted to the existing local conditions the

provisions of sub-section 1, of section 873, of the Code, I see no sufficient reason for holding that a preliminary proceeding, not requisite when a charge is preferred by bill of indictment under section 873(1), should be deemed necessary when a similar charge is preferred under section 873(*a*). In the former case, with or without preliminary investigation by a magistrate the grand jury may present a bill of indictment preferred by the Attorney-General or by any one by his direction or by any one with his written consent. In the latter the proceedings are commenced by a formal charge in writing setting forth as in an indictment the offence charged, which is preferred not before a grand jury, but directly to the court and petty jury by the Attorney-General or an agent of the Attorney-General or by any person with the written consent of the Attorney-General.

For these reasons I am of the opinion that the answer to the first question propounded should be, "no."

The power and duty of the Attorney-General under sub-section 2, of section 873(*a*), is statutory and quasi-judicial. Action by him is substituted for that of the grand jury under section 873. It is well established that such statutory powers and duties can be delegated only under, and in strict conformity with statutory authority. In *Abrahams* v. *The Queen*(1) this court so determined in regard to the functions of the Attorney-General under section 28 of 32 & 33 Vict. ch. 29, the prototype in part of section 873(*a*), sub-sec. (2). *The Queen* v. *Hamilton*(2); *The Queen* v. *Townsend*(3).

(1) 6 Can. S.C.R. 10. (2) 2 Can. Cr. Cas. 178.
(3) 3 Can. Cr. Cas. 29.

1910

IN RE CRIMINAL CODE.

Anglin J.

Two sorts of delegation are expressly provided for in sub-section 2, of section 873(*a*), viz., to

> an agent of the Attorney-General — and by "the written consent of the Attorney-General."

Agents of the Attorney-General were well known in the North-West Territories before the constitution of the Provinces of Alberta and Saskatchewan. They were then agents of the Attorney-General of Canada. It was stated at bar by counsel for the provincial Attorneys-General that there are to-day in these provinces similar agents of the provincial Attorneys-General. These agents have no general authority to act for the Attorney-General. They carry out specific instructions given in particular cases. They probably correspond to persons acting by the direction of the Attorney-General in other provinces under section 873(1). The Deputy Attorney-General is not in my opinion an agent of the Attorney-General within the meaning of sub-section 2, of section 873(*a*). The form of the questions referred to us renders it unnecessary to consider delegation by "written consent." The fact that these two methods of delegation are specified in section 873(*a*) is in itself a cogent argument that Parliament did not intend that any other delegation should be permitted.

Looking for other statutory authority to support the delegation of the powers in question to the deputies of the provincial Attorneys-General, counsel invoke clauses (*l*) and (*m*) of section 31 of the "Interpretation Act." Although at first inclined to think that clause (*m*) might apply, I am now satisfied that it does not. In clause (*l*) the words "Minister of the Crown" mean a member of the Dominion Government — one of the ministers mentioned in R.S.C. ch. 4, sec.

4 — and not provincial ministers of the Crown. The scope and nature of the "Interpretation Act" and the purpose of clause (*l*) of section 31, seem to me to require that its application should be so restricted. Counsel seemed rather disposed to concede this idea of the purview of clause (*l*) to be correct. If it be so, the word *other* in clause (*m*) preceding the words "public functionary or officer" indicates that the application of this clause is likewise confined to Dominion appointees to the exclusion of provincial functionaries or officers. We would, I think, give to these clauses of the "Interpretation Act" a much wider and more sweeping effect than it is at all safe to assume Parliament contemplated were we to hold that by virtue of them such a quasi-judicial power as is by section 873(*a*) conferred on the Attorneys-General of Alberta and Saskatchewan is vested in their deputies. This power is of such a nature — so personal and so discretionary — that nothing but specific legislation unmistakably applicable can justify its delegation. If the deputies of the Attorneys-General of these two newer provinces are by virtue of the general provisions of the "Interpretation Act" clothed with this power, the deputies of the Attorneys-General in all the other provinces must have the like power under section 873(1). No one has yet been bold enough to prefer such a claim. The history of section 873(1) is wholly inconsistent with its existence. Having regard to the intimate connection between section 873(*a*) and section 873(1) already alluded to, and to the history of the latter in the courts and in Parliament, I think I am justified in saying that the language in which section 873(*a*) is couched affords sufficient evidence of that inconsistency in intent and object which suffices

1910

IN RE CRIMINAL CODE.

Anglin J.

to render the provisions of clauses (*l*) and (*m*) of section 31 of the "Interpretation Act" inapplicable to it. (R.S.C. ch. 1, sec. 2.)

I therefore conclude that for lack of statutory authority their deputies are not, as such, clothed with the powers conferred by section 873(*a*) on the Attorneys-General for the Provinces of Alberta and Saskatchewan.

Many of the same considerations apply with even greater force in the case of the powers conferred on provincial Attorneys-General by section 17 of the "Lord's Day Act."

The answer to each of the three questions referred, numbered respectively 2, 3, and 4, should, in my opinion, be "no."

If the powers in question should be held to be vested in a deputy attorney-general *virtute officii*, having regard to the provisions of section 10, of chapter 4, of 6 Edw. VII. (Alberta), and of section 10, of chapter 5, 6 Edw. VII. (Saskatchewan), the occasions on which the deputies of the Attorneys-General in those provinces could exercise them would probably be comparatively rare.