

The Attorney-General of Ontario - - - - - *Appellant*

*v.*

Herbert J. Daly, since deceased, and others - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE  
PRIVY COUNCIL, DELIVERED THE 14TH JULY, 1924.

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*Present at the Hearing :*

VISCOUNT CAVE.

LORD DUNEDIN.

LORD CARSON.

LORD BLANESBURGH.

LORD DARLING.

[*Delivered by VISCOUNT CAVE.*]

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In this case the Attorney-General of Ontario appeals by special leave from an order of the Appellate Division of the Supreme Court of Ontario affirming (with a variation) an order made by Mr. Justice Middleton in Chambers. The learned Judge by his order directed that the County Court Judges Criminal Court of the County of York and the Judge of that Court should take the proceedings required to be taken under sec. 827 of the Criminal Code of Canada and should try the respondents Daly and others on the charges set out in certain indictments found against them by the grand jury at the assizes for that County ; and this order was affirmed by the Appellate Division with the addition of a proviso saving the right of the Attorney-General under sec. 825, subs. 5, of the Criminal Code to require that one of those charges (which alleged an offence punishable by imprisonment for seven years) should be tried by a jury.

The petition of the Attorney-General to His Majesty in Council upon which the special leave to appeal was granted was based upon two grounds, namely, first, that the Supreme Court had no power by mandamus to compel the Judge of the County Court Judges Criminal Court to try the respondents on the charges in question and that the civil jurisdiction of the Court had been wrongly invoked in a criminal matter; and secondly, that on the true construction of Part XVIII of the Criminal Code (which relates to speedy trials on indictable offences) the respondents, not having been sent to trial by a magistrate but having been charged only on indictments found by a grand jury, had no right to elect (as they had elected) to be tried by the Judge of the County Court Judges Criminal Court without a jury instead of being tried at the assizes with a jury, and accordingly that in this case no mandamus should have been granted. It is evident that the first of the two questions raised by the petition involved a consideration of the relation of the civil law and procedure of the Province of Ontario to the criminal law and procedure applicable throughout the Dominion of Canada, and that if this question arose in the case it was desirable that it should be considered and determined by the Board. On the other hand the second question raised by the petition, which related only to the construction and effect of certain sections of the Criminal Code, was more proper to be determined by the Canadian Courts; and as there was no question of a violation of the principles of natural justice or of the infliction of substantial injustice on an accused person, leave to appeal on this ground would, according to the settled practice of the Board, have been refused. Accordingly, in the arguments on the petition (which was heard *ex parte*) stress was laid on the former question: and it was on that ground (as clearly appears from the shorthand notes) that the Board advised His Majesty to grant special leave to appeal, a recommendation being added that the question as to whether under the circumstances of the case an appeal would lie should remain open for argument at the hearing. Leave was accordingly granted by His Majesty in Council on those terms.

Their Lordships have now been put in possession of all the circumstances of the case and have been informed of the arguments put before the Ontario Courts, and they are satisfied that in fact no serious question arises as to the jurisdiction of the Supreme Court to grant a mandamus in such a case as this. That Court is clothed by statute with all the powers formerly belonging to the Courts of Queen's Bench and Common Pleas of Upper Canada, which clearly included a power (as in England) to issue an order of mandamus to an inferior Court; and although it appears that no rules regulating the method in which that power is to be exercised have yet been made, that circumstance does not, in their Lordships' view, prevent the Supreme Court from making full use of its powers. It follows that, in their Lordships' opinion, there is no doubt whatever as to the power of the Supreme

Court to grant a mandamus, and no question of any irregular intrusion by a civil Court in a criminal matter ; and accordingly the first and effective ground of appeal put forward in the petition of appeal wholly fails.

In these circumstances their Lordships have considered whether they should permit the appeal to proceed upon the second ground, and they have come to the conclusion that this should not be allowed. The leave to appeal was granted on the first ground only ; and, that ground having proved to have no substance, the question reserved by the order giving leave to appeal, whether under the circumstances of the case an appeal should be entertained, arises for decision. In their Lordships' opinion this question should be answered in the negative. The sole question now remaining is one of procedure under the Criminal Code of Canada ; and upon that question, which is peculiarly within the province of the Judges who administer that law, their Lordships would not be disposed to entertain an appeal. They will, therefore, humbly advise His Majesty that this appeal should be dismissed with costs.

As sec. 1025 of the Criminal Code of Canada was mentioned in the course of the argument, their Lordships think it right to add that they have not considered the question of the validity or effect of that section.

Petitions have been presented by the respondents Daly and others, asking that the order giving leave to appeal be rescinded or that the variation made by the Appellate Division in the order of Mr. Justice Middleton be struck out, and also for the admission of a supplemental record. A petition has also been presented by His Majesty's Attorney-General asking leave to intervene in the case. It appears to their Lordships that no order should be made on these petitions as to costs or otherwise, and they will humbly advise His Majesty accordingly.

In the Privy Council.

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THE ATTORNEY-GENERAL OF ONTARIO

vs.

HERBERT J. DALY, SINCE DECEASED, AND  
OTHERS.

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DELIVERED BY VISCOUNT GAVIN.

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