1921
May 10.

HIS MAJESTY THE KING.....APPELLANT;

AND

NAT BELL LIQUORS, LIMITED.RESPONDENT.

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

Appeal—Certiorari—"Criminal charge"—"Supreme Court Act," s. 36, as enacted by 10-11 *Geo. V., c.* 32.

A judgment quashing a conviction for an infraction of a provincial liquor act is a judgment in a proceeding arising out of a criminal charge within the exception to section 36 of the "Supreme Court Act" as enacted by 10-11 Geo. V., c. 32. *Mitchell* v. *Tracey* (58 Can. S.C.R. 640) applied.

APPEAL by the intending appellant from an order of the Registrar refusing to affirm the jurisdiction of the court and approve the security.

The intended respondent was convicted before a magistrate in the Province of Alberta after the 1st of July, 1920, for unlawfully selling liquor in contravention of the "Alberta Liquor Act." The liquor, which was seized and was of considerable value, was also declared forfeited to His Majesty. The conviction having been brought before Mr. Justice Hyndman of the Supreme Court of Alberta on *certiorari* was quashed and the order of forfeiture set aside. On appeal, the Appellate Division sustained that judgment, the Chief Justice dissenting. From this latter judgment it is now sought to appeal to this court.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

THE REGISTRAR.—This is an application to affirm the jurisdiction of the court.

The facts shortly are: That an information was laid on the 7th day of October, 1920, against the respondent before Geo. B. McLeod, a magistrate in the Province of Alberta, charging that he did "unlawfully sell a quantity of liquor contrary to the Liquor Act and amendments thereto." After trial the respondent was convicted in the language of the information and was adjudged to pay $200 and costs and at the same time an order was made declaring that the liquor seized, of very considerable quantity and value, should be forfeited to His Majesty to be sold or otherwise disposed of as the Attorney-General might direct. Thereupon a motion by way of *certiorari* was made before the Honourable Mr. Justice Hyndman to have the conviction quashed which was granted on the 21st of December, 1920, and at the same time an order forfeiting the goods seized was set aside and quashed. From these orders of Mr. Justice Hyndman an appeal was taken to the Appellate Division of the Supreme Court of Alberta, where his judgment, by a judgment dated Feb. 21st, 1921, was sustained, the Chief Justice dissenting.

The contention on behalf of the Crown is that this is not a criminal appeal and that the amount involved exceeds $2,000. The case is one falling under the amendment to the "Supreme Court Act" by 10-11 Geo. V, ch. 32. I will assume for the purposes of my judgment that the amount involved exceeds $2,000, there being evidence to that effect in the appeal book, as I am of the opinion that this case is one of *certiorari* arising out of a criminal charge which is excepted from the court's jurisdiction by section 36.

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The Registrar

Previous to the decisions of *Re McNutt* (1) and *Mitchell* v. *Tracey* (2), a strong argument might have been presented to the Court that an order for *certiorari* to set aside a conviction under a "Liquor License Act" was a civil and not a criminal proceeding. Apparently the case of *Bigelow* v. *the Queen* (3), was one of this kind and the court assumed there was jurisdiction and dismissed the appeal. By the recent decisions above mentioned I am of the opinion that the question of the jurisdiction of this court is now settled and that a proceeding by way of prohibition, *certiorari* or *habeas corpus* arising out of a conviction made pursuant to the "Liquor Act" of Alberta or the "Nova Scotia Temperance Act" are proceedings "on a criminal charge" within the meaning of the "Supreme Court Act" and that a judgment in such case of the Appellate Division of the Supreme Court of Alberta is not the subject of a further appeal to the Supreme Court of Canada. If the conviction falls the order for a forfeiture necessarily accompanies it.

S. B. Woods K.C., for the intended appellant.—Since the adoption of the new section 36 of the "Supreme Court Act," enacted by 10 & 11 Geo. V, c. 32, *Mitchell* v. *Tracey* (2) is no longer an authority upon the interpretation of the words "arising out of a criminal charge." Those words closely follow the words "except in criminal causes." The adjective "criminal" must be given the same meaning throughout the section. The words "in criminal causes" replaced the former provision contained in clause (b) of s. 36, "there shall be no appeal in a criminal case except as provided in the Criminal Code." It is therefore

(1) 47 Can. S.C.R. 259. (2) 58 Can. S.C.R. 640.
(3) 31 Can. S.C.R. 128.

quite clear that "criminal causes" in the new section 36 relates to crimes cognizable under the criminal code. The distinction made between "criminal case" in clause (b) and "criminal charge" in clause (a) of the former section chiefly depended upon the fact that these terms were found in different contexts and in separate sub-clauses of the section. It being clear that "criminal causes" means proceedings instituted under the criminal code, "proceedings * * arising out of a criminal charge" should be given the same construction.

C. C. McCaul K.C., for the intended respondent.—While it is clear that the exception of "criminal causes" in the new section replaced clause (b) of the old s. 36, it is equally clear that the exception of proceedings for or upon a writ of *habeas corpus, certiorari* or prohibition arising out of a "criminal charge" replaces the corresponding provision of clause (a) of the former section. The words "except as provided in the criminal code" were dropped as tautologous because covered by the provision of new s. 43. In construing it the history of the new section cannot be ignored. There is nothing to indicate that parliament intended to change the law. On the contrary, everything points to consolidation and abbreviation having been the purposes of the change made. Had parliament intended the construction contended for on behalf of the Crown, we should have found the words "arising thereout" instead of "arising out of a criminal charge." The fact that the latter words, which had received judicial construction, are re-enacted, cannot be ignored.

At the conclusion of the argument the judgment of the court was delivered by:—

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The Chief Justice.

THE CHIEF JUSTICE.—Notwithstanding the ingenious and able argument advanced by Mr. Woods, we are unanimously of the opinion that we are without jurisdiction to entertain this appeal and that our decision in *Mitchell* v. *Tracey* (1), governs the construction of the words "arising out of a criminal charge" in s. 36 of the "Supreme Court Act," as enacted by 10-11 Geo. V, c. 32.

Appeal dismissed with costs.

(1) 58 Can. S.C.R. 640.