Legislative Expedients and Devices Adopted by the Dominion and the Provinces

A Study Prepared for the Royal Commission on Dominion-Provincial Relations

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PREFACE

The scope of government is constantly changing. Seventy years ago no one who had to do with Confederation anticipated social legislation and marketing schemes, any more than they anticipated aviation or radio. The enlargement of the field of government action has naturally been accompanied by an increase in the cost of government, leading in turn to increased demands for revenue. On the one hand, the Dominion could not find in the specified powers (to which in effect it became limited by judicial decision) the legislative authority to deal with many matters considered national in scope; while the provinces could not find in the limited resources open to them the power to raise the revenue they needed to meet increased demands for social and debt services. It became more and more difficult to work the ship of state while still retaining "the watertight compartments which are an essential part of her original structure,"[1] or to deal with the problems of an increasingly collectivist state in the age of the automobile and the aeroplane with a constitution which could only expressly envisage the rugged individualism of the horse-and-buggy days. Consequently, both Dominion and provinces were led to resort to various expedients and devices for the purposes of enabling them to do indirectly what they were precluded from doing directly.

But as was said by Lord Maugham:—

> "It is not competent either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other."[2]

It is the purpose of this study to consider the various expedients which have been or might be resorted to, firstly, by the Dominion, and secondly, by the provinces.

By reason of the novelty and complexity of the subject and the difficulty of examining and correctly appreciating the effect of the statutes of the Dominion and the nine provinces in Canada, as well as the cases relative thereto, the study is necessarily inconclusive; its main purpose has been to illustrate the fact that the constitution has led the Dominion and provinces to adopt expedients and devices and to show what some of these expedients and devices are. What constitutes an expedient or device is a matter of opinion, and the line is often hard to draw between a normal exercise of legislative authority and a device to escape the confines of the constitution. In many cases we have cited an act, not because its enactment constituted a device, but to demonstrate an application of some constitutional rule or to give a general picture of legislative activity.

While reference is occasionally made to more recent events of importance, for the most part we have only endeavoured to cover the field up to the autumn of

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[1] The words quoted are from Lord Atkin's widely criticized observations in *A.G. Ontario* v. *A.G. Canada*, (1937) A.C. 326, at p. 354.

[2] *A.G. Alta.* v. *A.G. Canada*, (1939) A.C. 117, at p. 130.

1938. It is a source of the greatest regret that the highly interesting and important Report to the Senate by its counsel, W. F. O'Connor, K.C.,[3] was not available to us at the time when the work was in preparation.

Our thanks, and those of the Commission, are due to the following lawyers in the provinces mentioned who were good enough to read over a draft of the study and to make numerous suggestions, though without being in any way responsible for what appears here:—

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[3] Report Pursuant to Resolution of the Senate to The Honourable the Speaker by the Parliamentary Counsel relating to the Enactment of the British North America Act, 1867, and lack of consonance between its terms and judicial construction of them and cognate matters, dated March 17, 1939, published at Ottawa by the King's Printer, hereafter cited as "Senate Report."

Part I—DOMINION EXPEDIENTS

CHAPTER I

INTRODUCTION

Scope of This Part

It is no part of this study to deal in a general way with the rules worked out by the Privy Council for the interpretation of the British North America Act, 1867. Suffice it to say that by the opening words of s. 91 the Dominion Parliament is given power " to make laws for the Peace, Order and Good Government of Canada in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces," and there is added the words " and for greater certainty, but not so as to restrict the generality of the foregoing Terms of this Section, it is hereby declared that notwithstanding anything in this Act the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated, that is to say . . ." Then follow twenty-nine enumerated heads followed by the words " And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a Local or Private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

Section 92 enumerates under sixteen heads the powers of the provinces. Of these No. 13 is " Property and Civil Rights in the Province," and No. 16 is " Generally all Matters of a merely Local or Private Nature in the Province."

Gradually the " peace, order and good government " power of the Dominion became by judicial interpretation emptied of practically all meaning,[4] except perhaps in the event of war or other national emergency.[5] Further, the Dominion Parliament's authority over " The Regulation of Trade and Commerce " conferred by the second head of s. 91, came to be equally almost useless as a source of legislative authority.[6] Consequently the Dominion was forced to try to find in one of the other enumerated heads of s. 91 the power to deal with any subject considered to be of national scope or importance. Legislation of this type was called " colourable " when it was found to be not a proper exercise of the Dominion's authority to legislate respecting the subject matter of the head of s. 91 in question, and it is this subject of what has been called " colourable " legislation with which we shall first deal in Chapter II. That is, we propose to describe the efforts made by the Dominion to endeavour to secure jurisdiction over a subject by passing legislation dealing with it in one or more of its aspects which it was claimed fell under one of the enumerated heads of s. 91.

In Chapter III we examine the efforts of the Dominion by means of grants-in-aid, to deal with objects not falling under one of the enumerated heads of s. 91.

In Chapter IV we discuss the power of the Dominion Parliament to bring works under its legislative authority by declaring them to be " for the general advantage of Canada."

Chapter V deals with the Dominion's ability to extend its authority by expropriation.

Chapter VI briefly mentions one or two further expedients that might be adopted by the Dominion to extend its legislative authority over matters which are national in scope.

Summary—Chapter II. Colourable Legislation

Efforts to legislate respecting insurance provide striking examples of what is called " colourable " legislation.

The general power given to the Dominion Parliament to legislate for the peace, order and good government of Canada has been reduced by judicial

[4] *A.G. Ontario* v. *A.G. Canada,* (1896) A.C. 348 at p. 361; *In re* Board of Commerce Act, 1919, (1922) 1 A.C. 191; *Toronto Electric Commissioners* v. *Snider,* (1925) A.C. 396 at p. 412; *A.G. Canada* v. *A.G. British Columbia,* (1929) A.C. 111 at p. 118, though some effect was momentarily given to these general words in the Aeronautics Case, (1932) A.C. 54 at p. 75, and Radio Case, (1932) A.C. 304 at p. 312; H. A. Smith, *The Residue of Power in Canada,* (1926) 4 Canadian Bar Review 432; Senate Report, Annex I, p. 52 *et seq.*

[5] Board of Commerce Case at p. 200; *Fort Frances Pulp and Paper Co. Ltd.* v. *Manitoba Free Press Ltd.,* (1923) A.C. 695 at p. 704; the Snider Case at p. 415.

[6] See the cases cited in notes 4 and 5 and *Citizens' Insurance Company* v. *Parsons,* (1881) 7 App. Cas. 96; *Great West Saddlery Co.* v. *The King,* (1921) 2 A.C. 91; *A.G. British Columbia* v. *A.G. Canada,* (1937) A.C. 377; Senate Report, Annex 1, p. 78 *et seq.*

interpretation until it is practically useless except in times of national emergency or war. This has led the Dominion Parliament to base its claims to jurisdiction on the enumerated heads of s. 91.[7] Its efforts to deal with insurance contracts and companies provides striking examples of this " colourable " legislation. Parliament's efforts to increase its legislative jurisdiction over matters not enumerated under s. 91 by the expedient of dealing with the subject matter of the legislation under one or more of its aspects which did fall under some head of s. 91 have not been generally successful. This is subject to one possible exception: the Dominion has used its power to legislate respecting criminal law for the purpose of creating new crimes and thereby indirectly regulating trade and commerce.

While it may still be possible for the Dominion Parliament to pass legislation respecting the majority of matters of general interest, there can be no doubt but that the constitution, or rather the interpretation put upon it by the courts, has often frustrated Parliament in its attempts to meet national needs. In other cases constitutional difficulty has been the excuse for legislative inaction. Frequently the efforts by Parliament to avoid the confines of the constitution, as determined by the Privy Council, have resulted in uncertainty and litigation. Whether or not the Dominion Parliament should exercise jurisdiction over matters of general importance is a matter upon which people may have differing opinions, but none can gainsay the unsatisfactory character of the present situation.

Summary—Chapter III. Grants-in-Aid

By grants-in-aid conditional on the provinces doing certain things, the Dominion has given money for unemployment relief and other social purposes which are unquestionably within the provinces' jurisdiction as matters of property and civil rights. Some of the legislation providing for these grants may conceivably be *ultra vires* of the Dominion but it has not been in anyone's interest to challenge its constitutionality. Quite apart from any question of the desirability of this type of procedure, the Dominion may, it is believed, make grants-in-aid to the provinces conditional upon the provinces satisfying certain requirements laid down in the Dominion legislation under which the grant is made, provided the Dominion act does not of itself deal with a matter falling within the provincial power.

[7] Senate Report, Annex I, p. 107.

Summary—Chapter IV. Declaration for General Advantage of Canada

The Dominion's power to bring works under its legislative jurisdiction by declaring them to be works for the general advantage of Canada has been used almost exclusively in connection with works which are unquestionably of the character contemplated by s. 92 (10) (*c*). This power of declaration has rarely, if ever, been used as a device to extend the Dominion jurisdiction over something else. The only notable exception is in the case of grain elevators which were declared to be for the general advantage of Canada in an effort to regulate the grain trade. Conceivably, the Dominion might by declaration still bring national highways under its jurisdiction.

Summary—Chapter V. Power of Expropriation

We do not see how the Dominion could exercise jurisdiction over any matter of importance by use of its power of expropriation and it has not to our knowledge tried to do so. It might use this power in connection with a national park or a housing scheme but in our view only to a limited extent.

Summary—Chapter VI. Further Possibilities

The largest gap in the Dominion's legislative jurisdiction occurs through its being unable under the cases to enact effective legislation to regulate trade and commerce or to deal with social questions. It is possible that the Dominion's constitutional authority to regulate trade and commerce, conferred by s. 91 (2), might be made useful by fresh legal interpretation giving the words more meaning. It is also possible that the Dominion might be able to exercise its authority under this head by hitting on new legislative patterns, particularly by basing legislation on several powers pieced together. The use of the tariff might be extended as an expedient to exercise effective control over manufacturers, distributors and producers. There is even some possibility of using s. 94 respecting uniformity of legislation. Apart from these, however, we can think of no novel or additional ways in which the Dominion can extend its jurisdiction over these or other matters unless the British North America Act is amended or newly interpreted.

Conclusion—Part I

A consideration of the constitutional conflict, illustrated by the one hundred and sixty cases which have been brought to the Privy Council, shows both the Dominion and the provinces

insisting upon their rights, stretched to the ultimate limits allowed by the courts, and the failure of the Dominion and provinces to co-operate to deal with such matters as insurance and company legislation, having little or no political implications, shows how unlikely it would be for the Dominion and provinces to co-operate to deal with any important and controversial question.

Moreover, the cases on marketing legislation show that even where there is a desire of the Dominion and provinces to co-operate it is exceedingly difficult to "piece" together the powers of the Dominion and provinces so as to enable them to deal effectively with a matter such as company legislation, combines in restraint of trade, industrial disputes or marketing which in some aspects fall under the Dominion power and from others fall under the provincial power.

In order to clarify the jurisdiction of the Dominion and provinces and to avoid the continual recourse to expedients and devices to escape from the limits of the constitution, it is essential that the provisions of the British North America Act should either be freshly interpreted so as to get back to the undoubted intention of the Fathers of Confederation, or amended, so as to show clearly the limits of legislative and taxing authority and to make it clear that the provinces may collect, without device or expedient, the taxes which it is determined that they should have.

Chapter II

COLOURABLE LEGISLATION

Insurance a Typical Case—Legislation Respecting Contracts held Provincial

While the effort of the Dominion to legislate upon some matter, such as insurance, which does not fall under any one of the enumerated heads of s. 91, upon the footing that from some aspects the legislation might be valid as an exercise of a power conferred by one or more heads of s. 91, may not necessarily be an "expedient," several examples of this kind of legislation may usefully be examined as typical illustrations of the efforts of the legislators to avoid the strict confines of the constitution as interpreted by the courts.

The subject of insurance has been mentioned as one of these and it is a most striking example. It first came before the Privy Council in *Citizens* v. *Parsons,*[8] which was a case between private litigants raising the validity of an enactment of the province of Ontario with respect to contracts of insurance. The Judicial Committee held that the province had power to prescribe conditions which are to form part of contracts of insurance as the words "property and civil rights in the province" in s. 92 (13) include rights arising from contract and are not limited to such rights only as flow from the law.

Since the decision in *Citizens* v. *Parsons* it has not been seriously contended that the Dominion had power to legislate respecting insurance contracts. In subsequent legislation, however, the Dominion sought to make it unlawful for any company to transact insurance in Canada without a licence from the Minister[9] and it was even required that the contracts of life and fire insurance should contain certain provisions.[10]

Insurance—Regulation Under the General Power or as Trade and Commerce Denied

The validity of this legislation was questioned in the *Insurance Reference Case*[11] in which the Dominion sought to justify the legislation under its power to legislate for the peace, order and good government of Canada or the regulation of trade and commerce. This claim was rejected on both heads, but in answer to the further question, whether the Dominion Parliament has jurisdiction to require a foreign company to take out a licence from the Dominion Minister, even in a case where the company desires to carry on its business only within the limits of a single province, Lord Haldane, speaking for the Judicial Committee at p. 507 replied:—

> ". . . that in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads of s. 91 which refer to the regulation of trade and commerce and to aliens. This question also is therefore answered in the affirmative."

Insurance—Regulation as Criminal Law Denied

Encouraged by this answer, the Dominion Parliament passed another insurance act in 1917[12] permitting the Minister of Finance to license any company incorporated under the laws of Canada or any alien person or company to carry on the business of insurance. Sections 508C and 508D were also added to the Criminal Code, making it an indictable offence to carry on such business without the licence. The Dominion Parliament thereby sought to regulate insurance companies under its power to legislate respecting criminal law, as well as aliens and immigration. It also for the first time sought to legislate respecting insurance contracts by adopting the device of making it a condition of the grant of a licence that a copy of every policy form was to be first delivered to and approved by the Superintendent of Insurance, and that such policy must contain in substance the provisions set out in the act.[13]

In the *Reciprocal Insurers Case*[14] the validity of this legislation was challenged successfully on the ground that it dealt with insurance and not criminal law, but the power of the Dominion to deal with the subject of insurance under its power to legislate respecting aliens was not decided. Mr. Justice Duff, who gave the decision of the Judicial Committee,

[8] *Citizens' Insurance Company of Canada* v. *Parsons,* (1881) 7 App. Cas. 96.
[9] Insurance Act, 1910, c. 32, ss. 4 and 70.
[10] *Ibid,* ss. 91 and 134.
[11] *A.G. Canada* v. *A.G. Alberta, et al,* (1916) A.C. 588.
[12] 1917, c. 101.
[13] Particularly in ss. 91, 115, 123, 134 and 135.
[14] *A.G. Ontario* v. *Reciprocal Insurers, et al,* (1924) A.C. 328.

contented himself with a reference to the previous case as holding that the Dominion, by properly framed legislation, might require " aliens, whether natural persons or foreign companies, to become licensed, as a condition of carrying on the business of insurance in Canada."

Insurance—Regulation as Legislation on Aliens and Immigration denied

Whether or not the Dominion had, this time, on the third attempt, solved the riddle of finding " properly framed legislation " came up for decision in the second *Insurance Reference Case,*[15] in which Viscount Dunedin disposed of the effort to justify the licensing provisions as being within the Dominion's power to legislate respecting aliens and immigration. At p. 51 he said:—

> " Their Lordships have no doubt that the Dominion Parliament might pass an act forbidding aliens to enter Canada or forbidding them so to enter to engage in any business without a licence, and further they might furnish rules for their conduct while in Canada, requiring them, e.g., to report at stated intervals. But the sections here are not of that sort, they do not deal with the position of an alien as such; but under the guise of legislation as to aliens, they seek to intermeddle with the conduct of insurance business, a business which by the first branch of the 1916 case has been declared to be exclusively subject to Provincial law. Their Lordships have therefore no hesitation in declaring that this is not ' properly framed ' alien legislation."

The same reasoning was held to apply equally to the effort by the Dominion to control British companies under its power to legislate respecting immigration under s. 95.

Insurance—Regulation under the Power to Tax Denied

In the reference the further question was put as to whether ss. 16, 20 and 21 of the Special War Revenue Act were within the legislative competence of the Parliament of Canada. Section 16 provided that every resident of Canada who insured property in Canada with any British or foreign company or reciprocal insurer not licensed under the provisions of the Insurance Act, should pay in addition to any other tax payable, a tax of 5 per cent of the total net cost of such insurance for the preceding year. By this device the Dominion obviously sought to make it so unprofitable to insure with an unlicensed insurer that it would prevent unlicensed insurers from securing business and therefore doing business in Canada. Dealing with this Viscount Dunedin said at p. 62:—

> " Now as to the power of the Dominion Parliament to impose taxation there is no doubt. But if the tax as imposed is linked up with an object which is illegal the tax for that purpose must fall. Section 16 clearly assumes that a Dominion licence to prosecute insurance business is a valid licence all over Canada and carries with it the right to transact insurance business. But it has been already decided that this is not so; that a Dominion licence so far as authorizing transactions of insurance business in a province is concerned, is an idle piece of paper conferring no rights which the party transacting in accordance with Provincial legislation has not already got, if he has complied with Provincial requirements. It is really the same old attempt in another way.
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> " Their Lordships cannot do better than quote and then paraphrase a portion of the words of Duff J. in the Reciprocal Insurers' case. (At p. 342) He says: ' In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of Canada cannot, by purporting to create penal sanctions under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the provinces, it cannot be upheld as valid.' If instead of the words ' create penal sanctions under s. 91, head 27 ' you substitute the words ' exercise taxation powers under s. 91, head 3,' and for the word ' criminal ' substitute ' taxing ' the sentence expresses precisely their Lordships' views."

After this decision, there could be no doubt that the Dominion Parliament had no power to legislate respecting insurance contracts or companies (other than Dominion companies) as such. This means that the only Dominion legislation which could deal with insurance is legislation which has as its object to deal with some matter mentioned in one of the enumerated heads of s. 91 and which only incidentally and in the course of dealing with that matter in s. 91 touches upon insurance. If its object is to deal with the business of insurance, the act will be held invalid.

Insurance—Regulation under the Head of Bankruptcy and Insolvency

Despite the decisions, the Dominion has continued to license and regulate British and foreign insurance companies, as well as Canadian companies, and as a condition of their doing business in Canada it has exacted from them fulfilment of the conditions set out in the insurance act then in force. It is even asserted that the Dominion department uses every

[15] *In re* Insurance Act of Canada, (1932) A.C. 41.

possible means to persuade persons desiring to incorporate insurance companies to take out Dominion incorporation.

New legislation was passed in 1932,[16] and the preambles,[17] as well as the structure of the acts themselves, make it clear that without abandoning its claim to enact such legislation under other heads, the Dominion now relied on its power to legislate respecting "bankruptcy and insolvency" under s. 91 (21).

Insurance—Practical Considerations

The validity of this most recent legislation has not yet been challenged in the courts but it is by no means certain how long the present truce will keep up an appearance of peace on the insurance front. After seventy years of conflict and uncertainty, efforts are still being made to work out an arrangement whereby the Dominion Department of Insurance will continue to exercise its present powers, in order to ensure, as far as possible, the ability of insurance companies to meet their obligations in Canada. One arrangement proposed is that the Dominion department should virtually act as the agent for the provinces. But, even if the provinces could agree on a course of action which would be acceptable to the Dominion, there would still be practical and constitutional difficulties in the way which might perhaps be insuperable in the existing circumstances. There is, for instance, doubt as to whether the provinces and Dominion can delegate authority to each other.[18]

It has also been proposed that the provinces alone make an arrangement between themselves whereby each insurance company would have to satisfy the requirements of the province in which it had its chief place of business and all the provinces would accept each other's certificate of qualification.

Meanwhile, it is to be hoped that the Dominion and the provinces will not require insurance companies out of one set of assets to make two sets of deposits to guarantee their solvency in respect of the same liability on the same policy of insurance; once, because the policyholder lives in a certain province, and a second time because he also lives in the Dominion.

The regulation of insurance is of the utmost importance; and yet, despite its relative simplicity and freedom from political, economic or social complications, it has not to this date been found possible for the Dominion and the provinces, or the provinces alone, to arrive at an agreement as to how it is to be dealt with. That fact, that failure, points to the difficulty, if not the hopelessness, of trying to overcome constitutional limitations through voluntary co-operation.

The Employment and Social Insurance Reference

To complete to date the story of the Dominion's efforts to deal with insurance, as well as to illustrate further the rules by which the constitutional validity of these and similar efforts are to be tested, we should refer to the reference on *The Employment and Social Insurance Act, 1935.*[19] By this act the Dominion sought to institute a system of contributory unemployment insurance, and in the reference it sought to uphold the legislation on the ground, among others, that this was a valid exercise of its power to raise money by any mode or system of taxation under s. 91 (3) and to spend the money so raised under its power to deal with the public debt and property under s. 91 (1). In holding the act *ultra vires* the Judicial Committee decided that it was in pith and substance "an insurance act affecting the civil rights of employers and employed in each province."[20]

The Test of Validity of Such Legislation

This brings us to the test by which the validity of legislation by the Dominion Parliament purporting to come under one of the enumerated heads of s. 91 is to be determined. In the *Reciprocal Insurance Case*[21] Duff, J., described the correct way to examine an act of this kind as being to "ascertain the 'true nature and character' of the enactment;[22] its 'pith and substance';[23] and it is the result of this investigation, not the form alone, which the statute may have assumed under the hands of the draughtsman, that will determine within which of the categories of subject matters mentioned in ss. 91 and 92 the legislation falls; and for this purpose the legislation must be 'scrutinized in its entirety'."[24]

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[16] The Canadian and British Insurance Companies Act, 1932, c. 46; and The Foreign Insurance Companies Act, 1932, c. 47.

[17] By reason of their interest the preamble to c. 46 is attached as Appendix 1 and the preamble to c. 47 is attached as Appendix 2.

[18] See *Rex* v. *Zaslavsky,* (1935) 3 D.L.R. 788; *Rex* v. *Brodsky,* (1936) 1 W.W.R. 177; *Ouimet* v. *Bazin,* (1912) 46 S.C.R. 502 at p. 526; *In re* Natural Products Marketing Act, 1934, (1937) A.C. 377; Rt. Hon. R. B. Bennett, House of Commons Debates, May 15, 1936, p. 2847.

[19] 1935, c. 38.

[20] *A.G. Canada* v. *A.G. Ontario,* (1937) A.C. 355 at p. 367.

[21] *A.G. Ontario* v. *Reciprocal Insurers, et al,* (1924) A.C. 328 at p. 337.

[22] *Citizens' Insurance Company* v. *Parsons,* (1881) 7 App. Cas. 96.

[23] *Union Colliery Co.* v. *Bryden,* (1899) A.C. 580.

[24] *Great West Saddlery Co.* v. *The King,* (1921) 2 A.C. 91.

It becomes obvious from a consideration of the cases in which the "pith and substance" test has been applied, particularly in the reference as to whether the Parliament of Canada had legislative jurisdiction to enact s. 498A of The Criminal Code,[25] that it is the object of the legislation, rather than the subject matter of the legislation or the law itself, which determines its character. If, for instance, its object "is to deprive the citizen of the right to do that which apart from the amendment he could lawfully do"[26] then it is a valid enactment of criminal law, but this is always subject to the proviso "that Parliament shall not in the guise of enacting criminal legislation in truth and substance encroach on any of the classes of subjects enumerated in s. 92."[27] In short, if its object is to impose a penalty and not to regulate some matter which falls under s. 92, then it is a valid exercise of the Dominion's power to legislate respecting criminal law under head 27 of s. 91 and the same rule may be applied equally to the Dominion's power to legislate respecting any of the objects enumerated in s. 91.

We have traced at some length the story of the Dominion's efforts to deal with insurance, because that is the most typical illustration. We might have similarly treated the Dominion's efforts to deal with other subjects, such as for instance, combines in restraint of trade in the course of which the Dominion's power to enact the *Board of Commerce Act, 1919,* was denied[28] while its power to enact *The Combines Investigation Act* was upheld.[29] It will be convenient, however, to list in summary form under the appropriate heads of s. 91, various attempts by the Dominion to deal with matters which are not expressly mentioned in that section.

List of Various Efforts by the Dominion Classified under the Appropriate Heads of s. 91 to Legislate upon Subjects not Expressly Mentioned in s. 91

91 (1) "The Public Debt and Property"

The Employment and Social Insurance Act, 1935, establishing a system of contributory unemployment insurance held *ultra vires.*[30]

91 (2) "The Regulation of Trade and Commerce"

The Canada Temperance Act, 1878, prohibiting the sale of liquor, etc., held *intra vires.*[31]

The Canada Temperance Act, 1886, prohibiting transactions in liquor within every provincial area in which its enactments have been adopted by a majority of the local electors held *ultra vires.*[32]

The Railway Act (R.S.C. 1906, c. 37), s. 8 (b), subjecting local railways to the provisions respecting through traffic held *ultra vires.*[33]

The Companies Act (R.S.C. 1906, c. 79), prescribing the powers of Dominion companies incorporated under its residuary clause held by necessary implication *intra vires.*[34]

The Industrial Disputes Investigation Act, 1907 (the Lemieux Act) providing for the arbitration of industrial disputes held *ultra vires.*[35]

The Insurance Act, 1910, ss. 4 and 70, dealing with the business of insurance and licensing insurance companies held *ultra vires.*[36]

The Natural Products Marketing Act, 1934, c. 57, providing for the establishment of a board with power to regulate marketing held *ultra vires* as necessarily covering intra-provincial transactions.[37]

The Live Stock and Live Stock Products Act[38] laying down standards and grades for various products held *ultra vires.*[39]

The Dominion Trade and Industry Act, 1935, c. 59, ss. 18 and 19, creating a national trade mark in the words "Canada Standard" held *intra vires.*[40]

The Canada Grain Act, 1912,[41] which would regulate the business, local and otherwise, of terminal elevators through the device of regulating the

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[25] *A.G. British Columbia* v. *A.G. Canada,* (1937) A.C. 368.

[26] *Ibid.* at p. 376.

[27] *Ibid.* at p. 375. See also C.W. Jenks, "The Dominion's Jurisdiction in Respect of Criminal Law as a Basis for Social Legislation in Canada," (1935) 13 Canadian Bar Review 279.

[28] *In re* Board of Commerce Act, 1919, (1922) 1 A.C. 191.

[29] *Proprietary Articles Trade Association* v. *A.G. Canada,* (1931) A.C. 310.

[30] *A.G. Canada* v. *A.G. Ontario,* (1937) A.C. 355.

[31] *Russell* v. *The Queen,* (1882) 7 App. Cas. 829, but see on this *A.G. Ontario* v. *A.G. Canada,* (1896) A.C. 348 and *Toronto Electric Commissioners* v. *Snider,* (1925) A.C. 396 which indicate that the decision could not be justified under this head.

[32] *A.G. Ontario* v. *A.G. Canada,* (1896) A.C. 348.

[33] *Montreal* v. *Montreal Street Railway,* (1912) A.C. 333 at p. 344.

[34] *John Deere Plow Co.* v. *Wharton,* (1915) A.C. 330.

[35] *Toronto Electric Commissioners* v. *Snider,* (1925) A.C. 396 at p. 409.

[36] *A.G. Ontario* v. *A.G. Canada,* (1916) 1 A.C. 598.

[37] *A.G. British Columbia* v. *A.G. Canada,* (1937) A.C. 377.

[38] R.S.C. 1927, c. 120.

[39] *The King* v. *Collins,* (1926) 59 O.L.R. 453; (1926) 4 D.L.R. 548 which held provisions for the grading of eggs *ultra vires.*

[40] *A.G. Ontario* v. *A.G. Canada,* (1937) A.C. 405.

[41] C. 27, s. 95 as added by 1919, c. 40, s. 3, and amended by 1920, c. 6. The Act was replaced by 1925, c. 33 and became c. 86 of R.S.C. 1927. The whole Act, except s. 233 and the second schedule declaring grain elevators and warehouses listed in the schedule to be works for the general advantage of Canada, was replaced by 1930, c. 5 which was in turn amended by 1932-33, cc. 9 and 24 and 1934, c. 26. As to the effort to secure jurisdiction by such declaration see below at pp. 23-4.

operation of grain elevators, was held *ultra vires.*[42] The grain trade in Canada is in some respects regulated by means of the device by which under s. 79 *et seq* of the Act only licensed traders are permitted to trade on the basis of Dominion grading standards established by the Act. An unlicensed trader can only sell on sample. Licensees may only trade in the prescribed forms.

The Canadian Wheat Board Act, 1935, c. 53, set up a board to "undertake the marketing of wheat in inter-provincial and export trade." By s. 9, not yet proclaimed, it is provided that every elevator shall be operated for and on behalf of the Board and not otherwise, and by s. 2 (1) (*b*) "elevator means a grain elevator or warehouse declared by s. 233 of the Canada Grain Act (R.S.C. 1927, c. 86) to be a work for the general advantage of Canada."[43]

The Board of Commerce Act, 1919, c. 37, and *The Combines and Fair Prices Act, 1919, c. 45,* authorizing the Board of Commerce to restrain and prohibit the formation and operation of trade combinations found detrimental to the public interest were held *ultra vires.*[44]

91 (3) "The Raising of Money by Any Mode or System of Taxation"

An Act Respecting Fisheries and Fishing (R.S.C., 1886, c. 95), exacting a tax by way of licence to fish held *intra vires.*[45]

The Special War Revenue Act (R.S.C., 1927, c. 179), s. 16, imposing a special tax on insurance premiums paid to unlicensed insurers and by this device forcing insurers to obtain a licence held *ultra vires.*[46]

The Employment and Social Insurance Act, 1935, establishing a system of contributory unemployment insurance held *ultra vires.*[47]

The Combines Investigation Act (R.S.C., 1927, c. 26), in s. 29 gives the Governor in Council power to direct that an article be admitted into Canada free of duty, or that the duty be reduced, if as a result of an investigation under the provisions of the Act it appears to his satisfaction that there exists a combine to promote unduly the advantage of manufacturers or dealers at the expense of the public and that such advantage is facilitated by the customs duty imposed on the article. In this way the threat of reducing the tariff is used as a sanction against combines in restraint of trade.

91 (10) "Navigation and Shipping"

The Canada Shipping Act (R.S.C., 1906, c. 113), Part 6 dealing with pilotage held *intra vires.*[48]

91 (12) "Sea Coast and Inland Fisheries"

The Fisheries Act (R.S.C., 1886, c. 95), exacting a tax by way of licence to fish is *intra vires* but the same Act was held *ultra vires* in so far as it empowers the grant of exclusive fishing rights over provincial property.[49]

The Fisheries Act, 1914, c. 8, requiring a person to have a licence from the Minister to operate a salmon cannery for commercial purposes in British Columbia held *ultra vires.*[50]

91 (15) "Banking, Incorporation of Banks and the Issue of Paper Money"

The Bank Act (R.S.C., 1886, c. 120), validating certain warehouse receipts held *intra vires.*[51]

91 (19) "Interest"

The Money-lenders Act (R.S.C., 1927, c. 135), and the *Loan Companies Act (R.S.C., 1927, c. 28, as amended by 1932, c. 45, s. 10, and 1934, c. 56),* deal with the lending of money under the Dominion's power to legislate respecting interest. The subject of small loan companies was under consideration before the Standing Committee on Banking and Commerce of the House of Commons during the session of 1938. In the Minutes of Proceedings and Evidence Respecting Small Loan Companies will be found numerous discussions of the constitutional position incidentally indicating the difficulty of dealing with the subject by the Dominion or provinces or by both together.

91 (21) "Bankruptcy and Insolvency"

The Insolvency Act, 1875, c. 16, abolishing appeals in insolvency matters was held *intra vires.*[52]

The Companies' Creditors Arrangement Act, 1933, c. 36, enables a company to arrange a binding compromise with either its secured or unsecured

[42] *The King* v. *Eastern Terminal Elevator Co.,* (1925) S.C.R. 434; *The King* v. *Manitoba Grain Co.,* (1922) 66 D.L.R. 406; *Trimble* v. *Capling,* (1927) 1 D.L.R. 717.

[43] See note 41.

[44] *In re* The Board of Commerce Act, 1919, (1922) 1 A.C. 919, see p. 13.

[45] *A.G. Canada v. A.G. Ontario,* (1898) A.C. 700 (Fisheries Case).

[46] *In re* Insurance Act of Canada, (1932) A.C. 41.

[47] *A.G. Canada* v. *A.G. Ontario,* (1937) A.C. 355.

[48] *Paquet* v. *Corp. of Pilots,* (1920) A.C. 1029 at p. 1031.

[49] *A.G. Canada* v. *A.G. Ontario,* (1898) A.C. 700 (Fisheries Case).

[50] *A.G. Canada* v. *A.G. British Columbia,* (1930) A.C. 111.

[51] *Tennant* v. *Union Bank of Canada,* (1894) A.C. 31.

[52] *Cushing* v. *Dupuy,* (1880) 5 App. Cas. 409.

creditors. It cannot be supported as company legislation as it is stated to be applicable to companies incorporated otherwise than by the Dominion as well as to Dominion companies. It applies to a company which is bankrupt or insolvent whether or not proceedings have been instituted under the Bankruptcy Act or the Winding-Up Act. The Act was held *intra vires* by the Supreme Court.[53]

The Farmers' Creditors Arrangement Act, 1934,[54] provides for compromises or arrangements between a farmer and his creditors either before or after an assignment has been made. The preamble to the Act provides:—

> "WHEREAS in view of the depressed state of agriculture the present indebtedness of many farmers is beyond their capacity to pay; and WHEREAS it is essential in the interest of the Dominion to retain the farmers on the land as efficient producers and for such purpose it is necessary to provide means whereby compromises or rearrangements may be effected of debts of farmers who are unable to pay."

The Act was held *intra vires.*[55]

The Canadian and British Ins. Com. Act, 1932, c. 46, and *The Foreign Insurance Cos. Act, 1932, c. 47,* seek to require British and foreign insurance companies to take out licences and to insure their solvency by satisfying the Dominion's requirements as to deposits, etc. This legislation has not come before the courts but its validity is open to question as legislation respecting insurance and, therefore, a provincial matter, rather than legislation respecting bankruptcy and insolvency.[56]

91 (25) "Naturalization and Aliens"

The Alien Labour Act, 1897, c. 11, s. 6, permitting the Attorney-General to deport an alien at the expense of the person responsible for bringing him in in violation of the Act was held *intra vires.*[57]

The Insurance Act (R.S.C., 1927, c. 101), requiring British and foreign insurance companies to take out a licence as a condition of their doing business in Canada, held *ultra vires.*[58]

91 (27) "The Criminal Law . . ."

The Industrial Disputes Investigation Act, 1907 (the Lemieux Act), declaring certain lockouts or strikes to be unlawful, held *ultra vires.*[59]

The Combines Investigation Act (R.S.C., 1927, c. 26) and *s. 498 of the Criminal Code* prohibiting combines under penalty held *intra vires,*[60] though *The Combines and Fair Prices Act, 1919,* authorizing the Board of Commerce created by *The Board of Commerce Act, 1919,* to restrain the formation of trade combinations and permitting prices to be fixed on transactions which might be purely local, held *ultra vires.*[61]

Sections 508C and 508D of the Criminal Code, penalizing the carrying on of insurance without a licence, held *ultra vires.*[62]

Section 498A of the Criminal Code, making it an offence to cut prices unfairly, held *intra vires.*[63]

91 (29) "Lines of Steam or Other Ships, Railways, Canals, Telegraphs and Other Works and Undertakings Connecting the Province with Other or Others of the Provinces, or Extending Beyond the Limits of the Province," under 92 (10)

An Act to amend the Railway Act, (1904), c. 31, s. 1, prohibiting a railway from contracting out of liability towards an employee, was held *intra vires.*[64]

The Radiotelegraph Act (R.S.C., 1927, c. 195), and general jurisdiction over radio, is apparently now justified under this head.[65]

In addition to the cases above mentioned as falling under one or other of the heads of s. 91, we may mention two other categories of Dominion legislation which can be most conveniently considered here.

The first of these is the use by the Dominion of the so-called emergency powers conferred by the general words at the beginning of s. 91, or at least by the very restricted meaning placed on such words in certain decisions of the Privy Council.[66]

The Unemployment Relief Act, 1930, c. 1, was the first of a series of acts whereby the Dominion granted aid for unemployment relief although this was primarily a matter of provincial concern. As was said in the preamble:—

> "WHEREAS unemployment, which is primarily a provincial and municipal responsibility, has become

[53] *In re* Companies' Creditors Arrangement Act, (1934) S.C.R. 659.
[54] 1934, c. 53 as amended by 1935, c. 20.
[55] *A.G. British Columbia* v. *A.G. Canada,* (1937) A.C. 391.
[56] See above at p. 12.
[57] *A.G. Canada v. Cain,* (1906) A.C. 542; *Croft* v. *Dunphy,* (1933) A.C. 156.
[58] *In re* Insurance Act of Canada, (1932) A.C. 41.
[59] *Toronto Electric Commissioners* v. *Snider,* (1935) A.C. 396 at p. 406.
[60] *Proprietary Articles Trade Association* v. *A.G. Canada,* (1931) A.C. 310.
[61] *In re* Board of Commerce Act, 1919, (1922) 1 A.C. 191.
[62] *A.G. Ontario* v. *Reciprocal Insurers,* (1924) A.C. 328.
[63] *A.G. British Columbia v. A.G. Canada,* (1937) A.C. 368.
[64] *Grand Trunk Railway* v. *A.G. Canada,* (1907) A.C. 65.
[65] *In re* Regulation and Control of Radio Communication in Canada, (1932) A.C. 304 at p. 314 as explained by Lord Atkin in *A.G. Ontario* v. *A.G. Canada,* (1937) A.C. 326 at p. 351.
[66] See notes 4 and 5 above.

so general throughout Canada as to constitute a matter of national concern . . ."

The legislation adopted at the next session of Parliament was *The Unemployment and Farm Relief Act, 1931, c. 58,* which in the preamble actually stated that the Act was aimed to ensure the "maintenance of peace, order and good government in Canada," and s. 4 gave the force of law to all orders and regulations made by the Governor in Council "for relieving distress, providing employment and, within the competence of Parliament, maintaining peace, order and good government throughout Canada."

The National Employment Commission Act, 1936, c. 7, stated in its preamble that "unemployment has been for several years Canada's most urgent national problem. . . ."

The second category referred to was the effort by the Dominion to justify legislation dealing with social questions under the power to enact legislation to implement treaties conferred by s. 132 of the British North America Act.[67] That section reads:—

> "The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries arising under Treaties between the Empire and such Foreign Countries."

In order to find a footing for purely domestic reforms, the government rather belatedly secured the approval by Parliament of several International Labour Conventions and then introduced legislation to discharge the obligations imposed in Canada to carry out the provisions of the Conventions. This, it was urged, could be done under the Dominion's power to implement treaties given by s. 132.

The legislation based on this power included *The Weekly Rest in Industrial Undertakings Act, 1935, c. 14.* Its preamble read:—

> "WHEREAS the Dominion of Canada is a signatory, as Part of the British Empire, to the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles, on the 28th day of June, 1919; and whereas the said Treaty of Peace was confirmed by the Treaty of Peace Act, 1919; and whereas by Article 23 of the said Treaty the signatories thereto each agreed that they would endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and by Article 427 of the said Treaty it was declared that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme importance, and whereas a Draft Convention respecting the application of the weekly rest in industrial undertakings was agreed upon at a General Conference of the International Labour Organization of the League of Nations, in accordance with the relevant Articles of the said Treaty, which said Convention has been ratified by Canada; and whereas it is advisable to enact the necessary legislation to enable Canada to discharge the obligations assumed under the provisions of the said Treaty and the said Convention, and to provide for the application of the weekly rest in industrial undertakings, in accordance with the general provisions of the said Convention, and to assist in the maintenance on equitable terms of interprovincial and international trade."

The Fair Wages and Hours of Labour Act, 1935, c. 39, did not have a preamble.

The Minimum Wages Act, 1935, c. 44, had a preamble similar to that of The Weekly Rest in Industrial Undertakings Act.

These three Acts were held *ultra vires.*[68]

The Employment and Social Insurance Act, 1935, c. 38, had a preamble reading:—

> "WHEREAS the Dominion of Canada was a signatory, as Part of the British Empire, to the Treaty of Peace, made between the Allied and Associated Powers and Germany, signed at Versailles, on the 28th of June, 1919; and whereas the said Treaty of Peace was confirmed by The Treaties of Peace Act 1919; and whereas by Article 23 of the said Treaty, each of the signatories thereto agreed that they would endeavour to secure and maintain fair and humane conditions of labour for men, women and children, both in their own countries and in all countries to which their commercial and industrial relations extend, and by Article 427 of the said Treaty declared that the well-being, physical, moral and intellectual, of industrial wage-earners is of supreme international importance; and whereas it is desirable to discharge the obligations to Canadian Labour assumed under the provisions of the said Treaty; and whereas it is essential for the peace, order and good government of Canada to provide for a National Employment Service and Insurance against unemployment, and for other forms of Social Insurance and for the purpose of maintaining on equitable terms, interprovincial and international trade, and to authorize the creation of a National Fund out of which benefits to unemployed persons throughout Canada will be payable and to provide for levying contributions from employers and workers for the maintaining of the said Fund and for contributions thereto by the Dominion:"

This Act was also held *ultra vires.*[69]

[67] For a discussion of the use of this power see a series of articles in (1937) 15 Canadian Bar Review, pp. 393 to 507; Brooke Claxton, "Social Reform and the Constitution," 1 Can. J. Ec. and P.S. 409 and the authorities cited.

[68] (1937) A.C. 326.

[69] (1937) A.C. 355.

CHAPTER III

GRANTS IN AID FOR OBJECTS NOT UNDER DOMINION JURISDICTION

INTRODUCTION

Section 118 of the British North America Act and several amendments to the Act provide for subsidies being paid to the provinces, and the Dominion has further paid substantial subsidies not expressly authorized by the Act. These are all unconditional subsidies which when paid to the provinces may be expended by them as they choose like any other part of their revenue.[70]

But in addition, beginning in 1913, the Dominion has made conditional grants in aid for provincial purposes, such as public health, highways, technical education and agriculture. And more recently the Dominion has expended very large sums upon unemployment relief and old age pensions and thereby extended continuing social services throughout the Dominion or at least throughout such provinces as have co-operated. Grants of this type amount to-day to four times as much as the unconditional provincial subsidies. For the most part these grants are made by legislation authorizing money to be spent provided the provinces agree to do something. They are conditional; the condition may touch on a matter of provincial concern; and the question has been raised as to whether such conditional grants are valid exercises of Dominion legislative authority.

Prior to the decision of the Judicial Committee in the Employment and Social Insurance Act Reference,[71] the validity of such grants had not been directly questioned.[72] But in that case Lord Atkin said at p. 366:—

> "But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.
>
> It may still be legislation affecting the classes of subjects enumerated in section 92, and, if so, would be *ultra vires*. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the province; or encroach upon the classes of subjects which are reserved to provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise would afford the Dominion an easy passage into the provincial domain."

Speaking in the House of Commons, Mr. Cahan said that the passage quoted:—

> ". . . raises grave doubts as to the validity of appropriations by this Dominion Parliament of current revenues for such objects as old age pensions, unemployment relief, or for giving assistance to provincial undertakings of any description."[73]

A grant-in-aid may be justified constitutionally as ancillary to some specific power of the Dominion. Thus, it might be legal for the Dominion to make a grant for the better enforcement of law and order or civil liberty as ancillary to its power to legislate respecting the criminal law,[74] and this although the enforcement of the law is a matter of provincial responsibility.

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[70] For a very complete consideration of this subject, to which we are greatly indebted, see J. A. Maxwell, ***Federal Subsidies to the Provincial Governments in Canada***, Harvard Economic Studies, vol. LVI, Cambridge, Harvard University Press, 1937, referred to after as Maxwell; same author, "The Adjustment of Federal-Provincial Relations," Canadian Journal of Economics and Political Science, vol. 2, p. 374; W. A. Carrothers, "Problems of the Canadian Federation," Canadian Journal of Economics and Political Science, vol. 1, p. 26; V. W. Bladen, "The Economics of Federalism," Canadian Journal of Economics and Political Science, vol. 1, p. 348; R. McQueen, Economic Aspects of Federalism; A Prairie View," Canadian Journal of Economics and Political Science, vol. 1, p. 352; W. C. Keirstead, "The Bases of Federal Subsidies," Proceedings Canadian Political Science Association, 1934, p. 134; Luella Gettys, ***The Administration of Canadian Conditional Grants***, Public Administration Service, 1937, reviewed in Canadian Journal of Economics and Political Science, vol. 4, p. 277. To compare the situation in the United States see V. O. Key, Jr., ***The Administration of Federal Grants to States***, Public Administration Service, 1937, reviewed in Canadian Journal of Economics and Political Science, vol. 4, p. 273 and ***United States*** v. ***Butler***, (1936) 56 Sup. Ct. 312 annotated in 49 Harvard Law Review, 828.

[71] (1937) A.C. 355.

[72] In *Caron* v. *The King*, (1924) A.C. 999 at p. 1004, the question was raised as to whether it would be *ultra vires* of the Dominion to raise money for provincial purposes by indirect taxation, but this was not in issue in the case and there is nothing in the decision to show what the view of the Privy Council was on it.

[73] April 5, 1937, House of Commons, Debates, p. 2576. See also Mr. Cahan's remarks to the same effect on March 1, 1937, House of Commons Debates, p. 1345.

[74] Duff, C. J., *in re* The Adoption Act, (1938) S.C.R. 398 at p. 403.

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Legislation making a grant may also be based upon the Dominion's concurrent power over agriculture under s. 95 of the British North America Act.

The Agricultural Act,[75] provides that over a period of ten years from 1914 an aggregate of $10 million should be appropriated and paid out of the Consolidated Revenue Fund for instruction in agriculture, payments to be made to the Government of each province conditional upon agreement between the Dominion and the province as to the application thereof. This Act is in our view *intra vires of* the Dominion Parliament under its concurrent powers. The instructional aspect is an incidental means to the end in view, viz., the advancement of agriculture, and is not in our opinion sufficient to bring the legislation into conflict with the province's exclusive control over education under s. 93.[76]

Here we are not concerned either with Dominion grants for Dominion purposes or with cases where the Dominion's *raising* of the money has been challenged, as in the case of the *Unemployment Insurance Reference.* That question falls to be dealt with under the previous heading when we considered the question of taxation legislation.

Here we are concerned primarily with the spending of the money, and this may conveniently be dealt with by examining the several ways in which the Dominion may expend the money it has raised, upon what we may call provincial objects, that is, upon objects which could only be dealt with by provincial legislation. We must also consider how far, if at all, the Dominion can in effect deal with a provincial matter by making a grant-in-aid.

Grants of this type may be treated as falling into four classes which will be considered in turn.

(a) Grants Which Expend Money for a Provincial Object Without Special Statutory Authority

An example is the aid for the eradication of venereal diseases, included annually from 1919 to 1931 in the vote for the Department of Health without a special statute, but made in pursuance of agreements with the provinces calling for the establishment of clinics, etc. All the provinces entered agreements except Prince Edward Island. Public health is not a subject covered by one of the enumerated heads of s. 91, and almost all votes for the Department of Health and for numerous other purposes, such as the relief of sufferers in a disaster fall outside the heads of s. 91. Since there can be little doubt but that the Dominion under its general power to deal with the public debt and property conferred by s. 91 (1), can expend its own money how it wills, even upon provincial objects, it is submitted that all such grants made without special statutory authority are *intra vires* of the Dominion.[77]

(b) Grants Authorized by Statute to be Made in Accordance with an Agreement Between the Dominion and a Province or the Dominion and Some Person

Here we are dealing with the case where the Dominion statute authorizes the government or a minister to make an agreement with a province for the payment of money, either with or without conditions. The money is to be given for the furtherance of a provincial purpose, but the Dominion Parliament does not in any way purport to legislate operatively in respect to that provincial purpose. All that it does is to make the money available, subject to an agreement as to joint participation, distribution, accounting, or the like. The Dominion legislation only deals with the matter as between the Dominion and the province. If the province does nothing, the Dominion pays nothing. The statute authorizing the agreement or grant will disclose no substantive legislation dealing with property and civil rights in the province. All it does is to make it possible for a province to deal with property and civil rights in a province. It is submitted that legislation of this general character is *intra vires* of the Dominion.

A typical act of this character is *The Employment Offices Co-ordination Act, 1918, c. 21,* under which grants up to $150,000 per year were to be appropriated and paid out of the Consolidated Revenue Fund to the provincial governments for aiding the organization and co-ordination of provincial employment offices conditional upon agreement between the Dominion and the province as to the

[75] 1913, c. 5, which replaced The Agricultural Aid Act, 1912, c. 3.

[76] But see view of Mignault, J., at p. 457 in *The King* v. *Eastern Terminal Elevator Co.,* (1925) S.C.R. 434, where the effort to support the Canada Grain Act as an exercise of Dominion jurisdiction over agriculture under s. 95 was rejected. He said: "It suffices to answer that the subject matter of the Act is not agriculture but a product of agriculture considered as an article of trade. The regulation of a particular trade, and that is what this statute is in substance, cannot be attempted by the Dominion on the ground that it is a trade in natural products. What we have here is trade legislation and not a law for the encouragement or support of agriculture, however wide a meaning may be given to the latter term."

[77] Mr. Bennett on May 15, 1936, said: "It does not require a parliament at Westminster to pass a statute to confer upon this Parliament the jurisdiction to deal with its own revenues" (House of Commons Debates, p. 2848). Duff, C. J., at p. 403 *In re* the Adoption Act, (1938) S.C.R. 398.

application of the money and subject to the proviso that no province was to receive more than half its expenditures. All the provinces came under the Act except Prince Edward Island. The Act is still in force, but under s. 46 of *The Employment and Social Insurance Act,* it may be repealed by proclamation. *The Employment and Social Insurance Act Reference Case*[78] leaves no room for doubt that the provision of employment offices is within the exclusive jurisdiction of the provinces, and it might be that if the Dominion enacted legislation to provide for the opening of an office for the supply of local employment, such legislation would be held *ultra vires.* In the Act under review, however, it has done nothing of the kind. What it has done is to enable the Dominion to aid in the organization of provincial employment offices. Those offices, moreover, have facilitated the rehabilitation of returned soldiers, the collection of statistics, and the handling of relief, as well as the movement of labour from province to province. It is submitted that the Act is not *ultra vires.*

Other statutes may be mentioned as in our opinion falling within the same class. These are:—

The Canada Highways Act, 1919,[79] provided for the expenditure of $20 million during the period of nine years from 1919, for the purpose of constructing and improving highways, providing the work was done subject to an agreement between the Dominion and the province in which the highway is situated. The work was to be done under provincial supervision subject to Dominion inspection. Here, again, the Dominion did not legislate operatively for a provincial purpose. It made available money which could be spent if the province agreed and agreements were made with every province.

The Technical Education Act, 1919,[80] appropriated $10 million for grants over a period of ten years to provincial governments " for the purpose of promoting and assisting technical education in Canada," payments being subject to agreement betweeen the two governments and contingent upon equal expenditure by the provinces. Not more than one-quarter of any annual grant was to be expended on land, buildings and equipment and each province receiving the grant was to furnish an annual progress report. Section 3 of the Act provided: " This Act shall not apply to any province until the government thereof has by Order in Council signified its desire to take advantage thereof." All the provinces signed agreements.

The Vocational Education Act, 1931, c. 59, under which $750,000 per annum over a period of fifteen years may be paid to provincial governments for vocational education, such payments to be conditional upon agreement as to their disposition. So far as known no agreements have been made under this Act.

The Domestic Fuel Act, 1927, c. 52, authorizes payments to encourage the production of domestic fuel from coal mined in Canada, subject to an agreement of which some of the conditions are specified in the Act. The agreement may be with a person.

When we come to acts providing for loans by the Dominion, the power to lend would appear to be at least co-extensive with the power to spend. Moreover, in the case of a loan there is no final expenditure of the money as in the case of a grant. Two examples of Dominion acts providing for loans are given here.

The Canadian Farm Loan Act, 1927, c. 43[81] provided for long term loans to farmers on the security of first mortgages on farm lands and set up a Board to administer and finance the loans. Section 8, as originally enacted, provided that loans should not be made in any province until such province had enacted certain specified legislation, *e.g.,* that farm loan bonds issued by the Board should be a legal investment for trust funds within that province. The Act was amended in 1935 to provide that the moneys lent under the Act were moneys of the Crown and that any loan made under its terms was to take priority over any mechanics' liens, taxation liens or other privileges created under any provincial law. It was even stated that such liens, etc., would not apply to the property securing a loan unless the consent of the Board was obtained.

The Canadian Fishermen's Loan Act, 1935, c. 52 provides for long term loans to fishermen, on the security of first mortgages on fishermen's lands, to be made by the Board established under *The Canadian Farm Loan Act.* Like that Act, it provides that, notwithstanding any law in any province,

[78] *A.G. Canada* v. *A.G. Ontario,* (1937) A.C. 355.

[79] 1919, c. 54, as extended by 1923, c. 4 and 1925, c. 4. The Dominion Parliament did not declare this work to be a work for the general advantage of Canada under s. 92 (10). The Liberals opposed the Act as unconstitutional (Senate Debates, 1911, p. 517). See Maxwell, *op. cit. p.* 214 *et seq.* in which he spoke highly of the results of this legislation, obtained largely in consequence of the concrete nature of the subject and of the adequacy of the Dominion's administration.

[80] 1919, c. 73 as extended by 1929, c. 8, and 1924, c. 9. The Act was passed as part of a program of reconstruction (Maxwell, *op. cit.* p. 206).

[81] Amended 1934, c. 46 and 1935, c. 16.

mechanics' liens, taxation liens or other similar privileges, shall rank after any loan made under the Act. It does not provide, as did the original s. 8 of *The Canadian Farm Loan Act,* that loans should not be made in any province until such province enacted certain specified legislation; but it does provide, by s. 11, that, if any province should enact legislation which would prejudicially affect the security for present or future loans, then no further loans should be made in that province.

The Home Improvement Loans Guarantee Act, 1937, c. 11, permitted the Governor in Council to guarantee approved lenders against loss sustained as a result of home improvement loans made by them.

By far the greatest sums expended by the Dominion by way of grants-in-aid have been on unemployment relief and agricultural assistance. At first these grants could be made without condition, but they are now subject to agreement with the provinces, and therefore fall under the class we are here considering.

The Unemployment Relief Act, 1930 (2nd Session), c. 1, authorized the expenditure of $20 million for the relief of unemployment. The purposes of the grant were stated generally without any conditions attached and included reimbursement of sums spent by provinces and municipalities. The Act contained a recital as follows:—

> "WHEREAS unemployment, which is primarily a provincial and municipal responsibility, has become so general throughout Canada as to constitute a matter of national concern, and whereas it is desirable that assistance should be rendered by the Government of Canada towards the relief of such unemployment."

A similar act, *The Unemployment and Farm Relief Act,* was passed in 1931, c. 58. The recital was expanded to incorporate a reference to "peace, order and good government" and it was provided that any orders and regulations of the Governor in Council "for relieving distress, providing employment and, within the competence of Parliament, maintaining peace, order and good government throughout Canada" should have the force of law.

The Unemployment Relief and Assistance Act, 1936, c. 15, and *The Unemployment and Agricultural Assistance Act, 1937, c. 44,* authorized grants subject to an agreement between the Dominion and the province, and the 1937 Act expressly provided that no assistance should be granted to any province unless it furnished certified statements as to its financial position.

(c) Grants for Provincial Purposes Under Legislation Which Expressly States the Terms Upon Which Money May be Distributed to the Provinces Desiring to Take Advantage of the Legislation

The typical case here is *The Old Age Pensions Act, 1926,*[82] which authorizes the Governor in Council to make an agreement with a province for the payment to such province of seventy-five per cent of the net sum paid by such province "for pensions pursuant to a provincial statute authorizing and providing for the payment of such pensions to the persons and under the conditions specified in this Act and the regulations made hereunder."[83] Agreements made under the Act are to continue in force so long as the provincial statute remains in operation or until after the expiration of ten years from the date upon which notice of an intention to determine the agreement is given by the Dominion to the province (s. 4). Before an agreement comes into operation the Governor in Council has to approve the scheme for the administration of pensions proposed to be adopted by the province (s. 5). The sums payable to any province are to be paid out of the Consolidated Revenue Fund (s. 7). Provision has to be made for the payment of a pension to the persons described in this section (s. 8), and the maximum pension payable shall be $240 yearly, subject to reductions (s. 9). Where a pensioner has lived in more than one province within twenty years the burden is to be distributed among the provinces in which he has lived (s. 10), but if a pensioner has lived during part of the previous twenty years in a province where he would not be pensionable, his pension may be reduced (s. 11).

All the provinces have now made agreements with the Dominion and have enacted legislation in substantially the same terms.[84] Thus, by the Ontario Old Age Pensions Act,[85] the Lieutenant-Governor in Council is authorized to enter into an agreement with the Governor General in Council pursuant to the provision of any Act of the Dominion and the regulations made thereunder (s. 2) and to provide for payment of pensions to the persons and under the conditions specified in any Act of the Dominion and the regulations made thereunder (s. 3). While the Act does not repeat

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[82] 1926-27, c. 35 as amended by 1931, c. 42 and 1937, c. 13.

[83] S. 3 as replaced by 1931, c. 42, s. 1.

[84] *e.g.* Quebec, Old Age Pensions Act, 1936 (1), c. 1 as amended by 1936 (2), c. 5.

[85] Ontario, The Old Age Pensions Act, (R.S.O., 1937, c. 314).

the provisions of the Dominion Act contained in ss. 8 and 9, these are set out in regulations made under the Ontario Act.

It can hardly be doubted that the subject of old age pensions falls under the provincial jurisdiction to legislate respecting property and civil rights. That was the opinion given by the Department of Justice[86] and it does not seem to have been challenged.

The question then remains: Is the Dominion Act to be regarded merely as an exercise of its power to spend its money how it pleases? Or is it to be regarded as legislation providing for a scheme of old age pensions which properly falls under provincial jurisdiction? In other words, does the Dominion Act *in itself* deal operatively with a matter within the jurisdiction of the provinces?

On the one hand it may be argued, from the summary of the provisions of the Dominion Act given above, that no pension is payable in consequence of the Dominion legislation. Without an agreement with a province, in accordance with the condition laid down in the Act, the Dominion Act remains so many words upon the pages of the statutes.

On the other hand, it may be urged that the Dominion Act sets up a scheme of old age pensions and even states who is to receive a pension, and that if it does so it is *ultra vires*.

In this connection we should cite again the passage from the *Employment and Social Insurance Reference*[87] to which Mr. Cahan referred. In that case Lord Atkin said, at p. 366:—

> "That the Dominion may impose taxation for the purpose of creating a fund for special purposes and may apply that fund for making contributions in the public interest to individuals, corporations or public authorities could not as a general proposition be denied. . . . But assuming that the Dominion has collected by means of taxation a fund, it by no means follows that any legislation which disposes of it is necessarily within Dominion competence.
>
> It may still be legislation affecting the classes of subjects enumerated in s. 92, and, if so, would be *ultra vires*. In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade civil rights within the Province: or encroach upon the classes of subjects which are reserved to provincial competence. It is not necessary that it should be a colourable device, or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the Province or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid. To hold otherwise, would afford the Dominion an easy passage into the provincial domain."

If this is a correct statement of the law,[88] the Dominion Old Age Pensions Act will be invalid if that Act is in itself legislation "affecting the classes of subjects enumerated in s. 92" or if the Act is "so framed as to invade civil rights within the Province: or encroach upon the classes of subjects which are reserved to provincial competence."

In the case of the *Old Age Pensions Act*, it might be held that it is not the Dominion legislation which directly affects property and civil rights and that this is only accomplished by the act of the province itself. The two acts might further be distinguished on the ground that the Employment Act provided for the raising of the necessary money by levy on the employers in respect of employment, a provincial matter, while the Pensions Act provided for payment out of the Consolidated Revenue Fund. Despite these points of difference, the Board which decided the recent references might find that the Old Age Pensions Act was "so framed as to invade civil rights" by setting up a scheme for old age pensions. For this reason, the holding in the reference justifies Mr. Cahan's apprehension with respect to this act at least, and the act and any similar legislation might be held *ultra vires* if the question is ever raised.

We should call attention to a statement made by Mr. Bennett in the House on July 20, 1931, when he expressed the view that the Act was constitutional, but indicated that another scheme might be worked out. Mr. King agreed that the Act was constitutional and asked Mr. Bennett if he had in mind a contributory scheme under federal administration. In replying, Mr. Bennett said:—

> "This and allied social insurance matters might be administered by a commission that would have the powers of a body corporate, but that would administer the act as a federal undertaking. My own view is that there is a constitutional difficulty in the way of administering such an act as a federal undertaking on a contributory basis."[89]

It should be added that this was before the decision in the recent references. We can see no advantage in having a corporation of the type proposed except for a scheme on a completely voluntary basis.

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[86] A letter of the Deputy Minister of Justice is quoted by Sir Henry Drayton on March 26, 1926, House of Commons Debates, p. 1944.

[87] *A.G. Canada* v. *A.G. Ontario*, (1937) A.C. 355.

[88] The passage quoted goes much further than was necessary for the decision of the case and so may be disregarded as *obiter*.

[89] House of Commons Debates, 1931, p. 3945; Maxwell *op. cit.* p. 232.

(d) Grants made under Dominion Legislation which Operatively deals with a Provincial matter

Here we have in mind, to give an extreme example, a Dominion act which, say, provided Dominion money to set up a system of national schools. Such an act would in our opinion be *ultra vires*. No instances of this kind have come to our attention. The Dominion's maintenance of the Royal Military College at Kingston is no doubt justified as an expenditure upon militia and defence while the support of the National Research Council could if necessary be justified under the heads of Trade and Commerce or Weights and Measures.

Conclusion as to Grants-in-Aid

It will be seen from the foregoing that it is our view that the Dominion may grant money for any provincial purpose and that it is only when the statute providing for the grant deals operatively with a provincial matter, that is, deals with property and civil rights in the province, that it is *ultra vires*.

If this view is correct it would seem to us that the Dominion could make grants for old age pensions and other similar social questions within the provincial sphere by legislation framed slightly differently from The Old Age Pensions Act. The Dominion legislation should go no further than to authorize a minister to agree to make a grant to any province which enacted a statute in certain specified terms. The Dominion act would not then be operative Dominion legislation upon a provincial matter; it would be merely a Dominion act to authorize the spending of Dominion money and therefore valid under s. 91 (1). At the worst, even if the Dominion act was declared *ultra vires* the Dominion could continue to make the grant for just so long as the province continued to fulfil the condition to which the grant was originally subject.

It should be noted that it has only been the intention of the writers to discuss the subject of Dominion grants-in-aid and loans from the legal point of view without reference to the many criticisms that may be directed against this manner of providing essential services such as, for instance, the difficulty of achieving effective control and uniform practice, the practical as well as theoretical disadvantage of having one authority spend money raised by another and the obstacles in the way of withdrawing a grant once made.

Speaking during the present session of Parliament, Mr. Dunning said:—

> "I say again, as I have said before, that there is no better illustration of the long term unwisdom of attempting to evade the constitution by means of agreements between the Dominion, on the one hand, and each separate one of the nine provinces, on the other, than the very old age pension scheme we are now discussing. I have had experience in endeavouring to get a degree of provincial unanimity which would make possible improvements in administration in the interests of the old age pensioners, many thousands of whom are within the intent of the law bona fide entitled to old age pensions. At the same time I endeavoured, and I believe the provinces endeavoured, to reach an agreement on regulations which would prevent thousands who were not bona fide entitled to old age pensions under this law from getting them. In spite of the appeals to prejudice made from some quarters of the house to-night, I conceive it to be my duty to endeavour to carry out the law as it was placed upon the statute books of this Dominion.
>
> But there are difficulties. One of the real difficulties of abridging the constitution in this matter—because it is really an abridgement by agreement of the plain intent of the constitution that this particular form of activity should be under the provinces and within their sole jurisdiction—is that having entered into agreements with each of the nine provinces, which agreements could not in the very nature of things in connection with experimental legislation foresee all of the thousand and one points which would arise, once the provinces commenced operating the scheme in co-operation with the Dominion, minister of finance after minister of finance—not merely myself—had to endeavour time after time to secure that degree of agreement between the nine provinces separately and the Dominion which would make it possible to bring this scheme more into harmony with the original intent of the law as we understood the law.
>
> It was not until a little more than a year ago that finally, at a conference, a substantial agreement was reached on many points, not by any means on all the points of difference. The provinces insist that it is their constitutional right to administer this system, that they have an absolute right to veto of any change in the regulations. Please mark that. Each province says: We have an agreement with the Dominion under the terms of which ten years' notice of termination is required. The province says: We have an agreement with you and that agreement cannot be changed except by mutual consent between the Dominion and each individual province."[90]

The kind of difficulty to which Mr. Dunning refers has led one authority on this subject to suggest that assistance by the federal government be given by way of subvention.[91]

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[90] House of Commons Debates March 6, 1939, p. 1742.

[91] B. P. Adarkar, *The Principles and Problems of Federal Finance*, p. 234. See also to the same effect Maxwell, *op. cit.* p. 244 *et seq.*, and by the same author, *"The Adjustment of Federal-Provincial Relations," Canadian Journal of Economics and Political Science*, vol. 2, p. 374 to p. 387. On March 9, 1938, Mr. Boulanger moved a resolution in the House of Commons that the federal government should cease making contributions towards the execution of projects which are entirely within the jurisdiction of the provinces (p. 1270). The motion was withdrawn.

Chapter IV

THE POWER OF THE DOMINION TO DECLARE WORKS "FOR THE GENERAL ADVANTAGE OF CANADA"

Section 92 (10) reads:—

> "Local works and undertakings other than such as are of the following classes,—
>
> (*a*) Lines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province;
>
> (*b*) Lines of steamships between the province and any British or foreign country;
>
> (*c*) Such works as, although wholly situate within the province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more of the provinces."

These subjects are brought into s. 91 by 91 (29) which reads:—

> "Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to the Legislature of the Provinces."

Effect of a Declaration

The article just quoted makes it clear beyond question that a declaration made under s. 92 (10) (*c*) transfers a work from provincial to Dominion jurisdiction just as if the work in question was expressly covered by an enumerated head of s. 91. This was held in *Montreal* v. *Montreal Street Railway*[92] in which Lord Atkinson said at p. 342:—

> "Now the effect of sub-sec. 10 of sec. 92 of the British North America Act is, their Lordships think, to transfer the excepted works mentioned in sub-heads (*a*), (*b*) and (*c*) of it into sec. 91, and thus to place them under the exclusive jurisdiction and control of the Dominion Parliament."

Consequently, when a declaration has been made, Dominion legislation with respect to the work will override provincial legislation. Thus, it has been held that where the Dominion Parliament has brought a public utility (The Bell Telephone Company of Canada) under its jurisdiction, the Company has power to enter the streets of a municipality and carry its wires over them without the consent of the municipality;[93] and a provincial act imposing a civil liability in respect of cattle killed on a railway declared to be for the advantage of Canada was held to be *ultra vires*.[94]

But a railway subject to Dominion jurisdiction does not cease to be part of the province in which it is situated or exempt from the jurisdiction of the provincial legislature and it must comply with municipal regulations of general application respecting the clearing of ditches and it may be taxed by the province.[95]

What Works May Be Declared

It will be noted that the word "works" is used and it has been said that "these works are physical things and not services."[96] Thus a provincial railway or street railway may be declared to be a work for the advantage of Canada[97] as also a power plant,[98] and a telephone system,[99] or grain elevators.[100]

In fact it is partly by means of the device of declaring grain elevators to be works for the advantage of Canada that the Dominion has sought to exercise jurisdiction over the grain trade. The

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[92] (1912) A.C. 333, also to same effect *In re* Regulation and Control of Radio Communication in Canada, (1932) A.C. 304 at p. 314.

[93] *City of Toronto* v. *Bell Telephone Co.*, (1905) A.C. 52; *Toronto & Niagara Power Co.* v. *North Toronto*, (1912) A.C. 834.

[94] *Madden* v. *The Nelson & Fort Sheppard Railway Company*, (1899) A.C. 626. See also *Canadian Pacific Railway* v. *The King*, (1907) 39 S.C.R. 476.

[95] *Canadian Pacific Railway* v. *Corporation of Bonsecours*, (1899) A.C. 367.

[96] *Montreal* v. *Montreal Street Railway*, (1912) A.C. 333; *In re* Aerial Navigation per Cannon, J., in the Supreme Court, (1930) S.C.R. 716. See also the Radio Case, (1932) A.C. 304, at p. 315.

[97] *Montreal* v. *Montreal Street Railway*, (1912) A.C. 333 at p. 339.

[98] *Toronto and Niagara Power Co.* v. *North Toronto*, (1912) A.C. 834.

[99] *City of Toronto* v. *Bell Telephone Co.*, (1905) A.C. 52.

[100] The Canada Grain Act, 1925, c .33, s. 234 became s. 233 of c. 86 of R.S.C. 1927 which declared all grain elevators throughout the country to be for the general advantage of Canada, and, for greater certainty, some 1,750 elevators are specifically identified in a schedule as being subject to the declaration. Although the rest of the Act was replaced in 1930 by c. 5 the section and schedule were not repealed. So far as the writers know the validity of this declaration has not been tested in the courts. Correlated with this section is s. 2 (1) (b) of The Canadian Wheat Board Act, 1935, c. 53, which provides that the word "elevator" as used in that Act means any grain elevator declared to be for the general advantage of Canada by The Canada Grain Act. The Canadian Wheat Board Act provides, *inter alia*, that no person other than the Board or an agent of the Board shall operate any elevator in Canada.

expedient was suggested by Duff, J., in *The King* v. *Eastern Terminal Elevator Co.*[101] in which he said at p. 44:—

> "There is one way in which the Dominion may acquire authority to regulate a local work such as an elevator; and that is, by a declaration properly framed under section 92 (10) of the B.N.A. Act."

It is further clear from the wording of s. 92 (10) (*c*) that a work need not be actually in existence to be a valid subject for declarations as the section speaks of "works before or after their execution."[102]

But it still remains to be decided as to whether the word "works" in paragraph (*c*) of s. 92 (10) is to be read *ejusdem generis* with the classes of subjects described in paragraphs (*a*) and (*b*), which it will be noted are all lines or works to provide means of transportation or communication. Such an interpretation would probably exclude grain elevators.

Nature of Declaration

As to the nature of a declaration, it has been held that when the Dominion assumes jurisdiction by means of a declaration it "must assume jurisdiction of the work or undertaking as a whole."[103]

The declaration should be by way of express enactment rather than merely by recital.[104]

A question of considerable practical importance is whether a general or "blanket" declaration is good. In *Luscar Colleries Co.* v. *McDonald*[105] the question was raised as to the constitutionality of s. 6 (*c*) of the *Railway Act, 1919,* which contained a general declaration that every railway of "a company wholly or partly within the legislative authority of the Parliament of Canada" should be deemed for the general advantage of Canada. In argument, objection was made that a declaration under s. 92 (10) (*e*) must be as to a specific work, either existing or contemplated, and this was the view taken by the majority of the Supreme Court; but in the Privy Council the case was decided on another ground.

It is to be noted that in *The Canada Grain Act,*[106] assented to just after the Supreme Court decisions, the draughtsman did not rely solely on the general declaration covering all elevators in Canada but "for greater certainty" added a schedule to the act specifically naming some 1,750 elevators and warehouses.

It should be noted that a declaration "can be repealed or varied by a subsequent Act of that Parliament, and thereupon the work or undertaking ceases to be under Dominion authority, or ceases to be so save to the extent then declared."[107]

Test of Declaration

In the *Companies Reference Case*[108] Duff J., said at p. 426:—

> "Again everybody knows that the assumption by the Dominion of jurisdiction over works obviously of only local interest by declaring them to be for the 'general advantage of Canada' became a few years ago a grave scandal.[109] Is it suggested that there is any power in any court in the Empire to nullify . . . such an Act of the Dominion Parliament on the ground that there had been an absence of the Dominion Power? In the case of enactments of the Dominion Parliament (which are subject to no power of disallowance such as that which exists in respect of provincial legislation) there might be some possible reason for investing the courts with such a power. The constitution, however, has not done so."

From this it would appear that the courts will not substitute their judgment for that of Parliament as to what is or is not a work "for the general advantage of Canada." On the other hand they will not hesitate to state that the legislation is bad because its subject matter is not a "work" and (apart from the validity of a general declaration which may still be open to question) the only test of a declaration, and consequently the only limit upon the power of the Dominion Parliament to declare a work to be for the advantage of Canada so far laid down by the courts, is whether or not the declaration is made with respect to a "work"; but as suggested below other tests might be worked out if the power of declaration was abused.

Declaration as an Expedient

If the only limitation upon the Dominion's power to bring a matter under its jurisdiction by declaration that it is for the general advantage of Canada is the dictum that the subject matter must be "physical things not services," we can see that the Dominion might use the device of declaration as a means to acquire jurisdiction over numerous subjects of legislation. One example has already been mentioned. That is the doubtful use made by

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[101] (1925) S.C.R. 434. The case held The Canada Grain Act, 1912, *ultra vires.*

[102] *City of Toronto* v. *Bell Telephone Co.,* (1905) A.C. 52 at p. 58.

[103] Per Duff, J., in the *British Columbia Electric Railway Co.* v. *The Vancouver, Victoria & Eastern Railway Co.,* (1913) 48 S.C.R. 98.

[104] *Hewson* v. *Ontario Power Co.,* (1905) 36 S.C.R. 596; *St. John & Quebec Railway Co.* v. *Jones,* (1921) 62 S.C.R. 92.

[105] (1927) A.C. 925.

[106] R.S.C. 1927, c. 86, s. 233.

[107] *Hamilton, Grimsby & Beamsville Railway Company* v. *A.G. Ontario,* (1916) 2 A.C. 583.

[108] (1913) 48 S.C.R. 331.

[109] *Kerley* v. *London & Lake Erie Railway & Transportation Company,* (1913) 13 D.L.R. 365 at p. 374; 28 O.L.R. 606.

the Dominion of its power of declaration as an expedient by which to regulate the grain trade. Pursuing this further we may assume that if aeronautics and broadcasting were not under the Dominion jurisdiction, under s. 91 or s. 92 (10) (*a*), the Dominion could acquire jurisdiction over a large part of the subject by declaring that all aerodromes and broadcasting stations[110] were works for the advantage of Canada. Could it also declare aeroplanes and receiving sets to be "works"? The question as to whether things of this character fall under the head of works has not yet been decided.[111]

What of motor highways or motor transport lines which are today under provincial jurisdiction[112]? Can they be brought by declaration under Dominion authority? A transportation line or service may not be a work but it does seem that a national highway should be covered by the terms of the Act. In these days of rapidly developing road transport for defence and other purposes a highway itself is a work of precisely the character which might be declared to be of general advantage to Canada. The competence of the Dominion to control highway transportation may be rested as well upon (1) its power to incorporate companies authorized to engage in transportation beyond the limits of a province, as upon (2) its power to regulate trade and commerce in its interprovincial or external trade aspects.

[110] See Newcombe, J., at p. 489 in *Luscar Colleries Ltd.* v. *McDonald,* (1925) S.C.R. 460.

[111] In the Aeronautics Case, (1930) S.C.R. 663, Cannon, J., at p. 716, but Anglin, C.J., holds out the possibility in the same case where he at p. 682 says: ". . . . it is possible that although lines of air transportation are not physical works, the construction, maintenance and operation of flying machines may be regarded as 'works' within the meaning of clause (c) of subs. 10 of s. 92".

[112] *O'Brien* v. *Allen,* (1900) 30 S.C.R. 340 at p. 342.

Finally, could the Dominion exercise a control over a manufactory by declaring it to be a work for the advantage of Canada? Here we are on difficult and completely uncharted ground. Despite the normal reluctance of the courts to substitute their judgment for that of the legislature by stating what is or is not of advantage to Canada, it is possible that here the court would not only look at the " works " to see if they were physical things, but it would also see if the declaration was made " for the advantage of Canada " and not just to bring a provincial matter under Dominion jurisdiction. For instance, we can quite conceive of the Privy Council holding that a cotton mill could not be the subject of a declaration, while a munition works could.[113] In this, the court would be applying the " pith and substance " test to s. 92 (10) (*c*), and a board of the Judicial Committee having the same outlook on the Canadian constitution as that which gave the decisions in the "New Deal" cases decided in 1937 might easily invoke this or a similar rule to defeat any effort by the Dominion to extend its present legislative scope by any general use of the power conferred by s. 92 (10) (*c*).

Whether or not the Dominion could put into effect a national housing scheme by declaration under s. 92 (10) is equally uncertain; though the subject could probably be dealt with by the incorporation of a Dominion housing authority with power to buy and sell and to build and hold.[114]

[113] Per Newcombe, J., at p. 488 in *Luscar Colleries Ltd.* v. *McDonald,* (1925) S.C.R. 460.

[114] In Senate Report, Annex 1, p. 145 and at p. 151 Mr. O'Connor suggests that the Dominion Government may engage in any business.

Chapter V

POWER OF EXPROPRIATION

The Dominion Parliament may pass laws to provide for the expropriation of private property for one of the purposes set out in s. 91 as necessarily ancillary to its powers under that section and it has enacted numerous laws giving wide powers of expropriation.[115] No doubt the Dominion could expropriate private property by an exercise of its powers under one of these laws and subsequently deal with such property under s. 91 (1). But it is not seen how this means could be used effectively to enlarge the Dominion's jurisdiction in any general way. Certainly if the expropriation was tied to a statute which was, in pith and substance, legislation upon a provincial matter, the statute would be declared *ultra vires*. We have not been able to find any case in which the Dominion has sought to enlarge its jurisdiction by this means.

Conceivably, the power of expropriation might be used in connection with a housing scheme.

Under the provisions of the British North America Act, 1930, c. 26 (Imp.) and the agreements with the provinces of Manitoba, Saskatchewan, Alberta and British Columbia it was confirmed that the Parliament of Canada was given "exclusive legislative jurisdiction" within the areas of certain national parks.

[115] *e.g.* Expropriation Act, (R.S.C. 1927) c. 64; Railway Act, (R.S.C. 1927) c. 170; Canadian National Railways Act, (R.S.C. 1927) c. 172, s. 17 and 1928, c. 13; The Canadian Broadcasting Act, 1936, c. 24, s. 11; The Canadian National Terminals Act, 1929, c. 12, s. 9, etc.

Chapter VI

FURTHER POSSIBILITIES

Obviously the biggest gaps in the Dominion's legislative jurisdiction as it stands today occur through its being unable to enact effective legislation to regulate trade and commerce or to deal with social questions. Without entering into any discussion as to whether the Dominion should have exclusive jurisdiction over matters like marketing, combines in restraint of trade, the sale of shares, to mention one class of subject, or over hours and conditions of labour, unemployment insurance, old age pensions, unemployment relief, settlement of industrial disputes and the like, it is quite apparent that it is with respect to the subjects which fall under these two general classes of regulation of trade, and social questions, that the Dominion would principally want to see its jurisdiction extended.

It is easy to see that a great number of the subjects which might fall under both classes might have been dealt with by the Dominion Parliament if a sufficiently wide interpretation had been given to its power to regulate trade and commerce conferred by s. 91 (2). Despite the cases which have so narrowly restricted that power, it may well be that the Dominion might succeed in enacting legislation which was " properly framed " so as to enable some future board of the Judicial Committee to decide that it fell within the limits of the second head of s. 91.

But if a realistic view is taken, one could hardly express any great confidence that any given piece of legislation framed so as to depend exclusively on the Dominion's power to regulate trade and commerce would be held to be *intra vires* of the Dominion.

The possibilities of success might be considerably increased if the Dominion relied on several powers, each of which applied to some aspect of the subject. This would have the effect of cutting down the aspects of the subject which might be held to fall within property and civil rights and which might be the cause of taking the matter out of s. 91 into s. 92.

The Dominion might be able to support Dominion marketing legislation if the legislation was designed to hang on several heads of s. 91 as well as on the Dominion concurrent power over agriculture under s. 95. Thus there could be little doubt but that the Dominion could enact legislation to provide for the regulation of the disposition of commodities through export licences or bounties. This would be justified under s. 91 (2). Further use might be made of the Dominion's power to enact legislation under s. 91 (17), " Weights and Measures."

We have already noted the use of a tariff as a means by which to restrain combines.[116] This device might be extended as a means whereby the Dominion could exercise effective control over manufacturers, distributors and producers, who in any way depend upon the tariff.[117]

By expedients such as these the Dominion's power to regulate trade and commerce might to a considerable extent be restored to it. When we turn however to the subject of social legislation, we are faced with greater difficulties. Some of such legislation, for instance, that dealing with the settlement of labour disputes, might be dealt with in certain aspects under the Dominion's power to enact criminal law, and other social questions might be dealt with as at present by means of conditional grants-in-aid, which have been discussed above. We can see no means, however, for dealing with social questions in general unless perhaps some use might be made of s. 94. That section reads:—

> " Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof."

[116] P. 14 above.

[117] For a discussion of similar expedients in the United States see Henry M. Hart, Jr., "Processing Taxes and Protective Tariffs," (1935) 49 *Harvard Law Review*.

So far as we know no serious proposal has ever been made for using the power conferred by the section. Nor has the possibility been discussed by any constitutional authority till it was raised by Professor F. R. Scott before the Commission. Whether or not the provision applies to the provinces which entered Confederation after 1867 and the practical use that might be made of this means are both open to doubt. Limited and unused as the power given here may be, it does appear to be the only way under the existing constitution for the provinces to transfer power to the Dominion. But it should not be more difficult to secure the assent of the provinces to a provision being put in the constitution whereby legislative authority might be transferred from the provinces to the Dominion than it would be to secure the enactment of the legislation necessary to bring s. 94 into operation.

PART II

PROVINCIAL EXPEDIENTS

Part II—PROVINCIAL EXPEDIENTS

Chapter VII

INTRODUCTION

Scope of this Part

This is the second part of a study of devices and expedients adopted by the Dominion and provinces to escape the confines of the constitution. In the first part, it was pointed out that whereas the Dominion had adopted expedients solely with a view to the exercise or extension of Dominion authority, particularly with respect to the regulation of trade and commerce and social legislation, the provinces had for the most part adopted expedients in order to add to the provincial revenue. But this was done in order to provide the means necessary to extend the provincial services to meet the increasing demands upon government. And as it happened, a considerable part of these demands arose out of matters which had not been thought of in 1867. The provinces fought vigorously to see that the new functions of government fell within the provincial jurisdiction and it was not surprising that their tax resources should prove inadequate to meet the new needs.

In 1867 the main source of provincial income was Dominion subsidies and the main source of municipal income was the tax on real estate. The provincial power conferred by s. 92 (2) of the British North America Act to impose "Direct Taxation within the Province in order to the Raising of a Revenue for Provincial Purposes," was more than sufficient. In the 1890's succession duties were first introduced as provincial taxes. At about the same time several of the provinces introduced corporation taxes. Income and profits taxes came very much later. It was only after the War of 1914-1918 that it became apparent that the revenue from all available sources allowed to the provinces by the constitution was not adequate to meet provincial obligations and carry on what are now regarded as normal services.

This has resulted in the provinces seeking to extend their jurisdiction to tax by means of various devices. A typical illustration of this is the device by which all the provinces collect taxes from the vendors of gasoline, etc., who in turn add the taxes paid to the purchase price received from the consumer. Such a tax is essentially "indirect" and therefore unlawful because it is not collected from the very person who has to pay it. But the provinces have endeavoured to validate such taxes by charging them upon the consumer and they have collected the taxes by means of making the vendor, who pays the province the tax, the agent of the province for its collection. So the consumer is held to pay the tax to the province when he pays the vendor, and by reason of the device of appointing the vendor its agent for collection, the province does indirectly what it could not do directly.

Most devices of this character have been designed to escape the constitutional restriction that the province may only impose a direct tax within the province. We have found it convenient to group such cases together in Chapter VIII.

In Chapter IX we have considered typical examples of legislation in which the provinces have attempted to exercise jurisdiction over matters which from some aspects fall under the Dominion's authority as conferred by the enumerated heads of s. 91 of the British North America Act. Here it has been found most convenient to classify these under various headings of s. 91, particularly s. 91 (2)—"The Regulation of Trade and Commerce," and s. 91 (27)—dealing with Criminal Law—which the provincial legislation might be said to have invaded. While these are perhaps not all true cases of "devices or expedients," they correspond to the category of "colourable legislation" by the Dominion Parliament, which has been considered in Part I of this study relating to Dominion Expedients. To this we have added a summary of the *Alberta Social Credit* legislation.

In Chapter X we have grouped instances of legislative or executive action by the provinces which have had the effect of putting obstacles in the way of the subject taking action in the courts to have a law declared unconstitutional or to secure some other redress.

It has been impossible to enumerate all the instances of legislation by the nine provinces which come under one or other of these categories and

what we have listed here are intended to be considered as illustrations rather than as an exhaustive enumeration. The difficulty of subjecting the statutes of all the provinces to critical analysis can be easily understood.

Summary—Chapter VIII. Taxing Devices

In their search for additional revenue all the provinces have endeavoured to avoid the constitutional restriction to direct taxation by the device of imposing the tax on the consumer and making the person who pays the tax to the province the agent of the province for collecting it. So, by this means, we have taxes on gasoline, liquor, fuel-oil, amusements, sales and meals. The amendment to the British North America Act proposed by the Dominion Government to validate indirect taxes of this type was not proceeded with.

The substantial sums collected by all the provinces from the taxes payable by insurance companies in respect of insurance premiums are not validated in this way, but notwithstanding their doubtful validity the insurance companies have acquiesced in paying these taxes.

The restriction that taxes must be " within the province " has led the provinces to endeavour to tax corporations and sales by legislative definitions extending the ordinary meaning of the words " carrying on business " and to impose succession duties in respect of property outside the province by various expedients, some legislative, some executive.

The result is almost annual amendments to the taxing laws, a steady increase in the executive power, almost endless litigation and a rapidly growing sense of insecurity and uncertainty.

Summary—Chapter IX. Trespass upon Dominion Powers

The virtual cancellation by judicial decision of the Dominion's power to regulate trade and commerce taken with the frequent denial of the same power to the provinces, has produced a kind of no-man's land where neither the Dominion nor provinces can legislate effectively to regulate trade and commerce.

The provinces have passed laws to regulate trade in liquor, milk, gasoline, fuel-oil and other commodities, in addition to extensive legislation on marketing. Several provinces license trades, some restrict the export, production or sale of various commodities. All the provinces have laws which directly or indirectly interfere with the status of Dominion companies and all have securities acts regulating the sales of shares.

Moreover, all the provinces use their taxing powers as a means to regulate interprovincial trade for the purpose of protecting home industry. Discriminatory taxation imposed by municipalities or provinces upon chain-stores offers a striking example. The Alberta legislation is in a class by itself.

In addition to the provinces enacting laws respecting trade and commerce all of them have trespassed on the Dominion field of criminal law. Illustrative of this type of legislation are the slot machine and gambling acts, the famous Quebec " Padlock Law " and legislation dealing with labour questions.

All the provinces have passed legislation on insolvency and interest of doubtful validity.

Summary—Chapter X. Denial of Right

In their desire to extend the fields of taxation and of legislative authority, the provinces (like the Dominion) have enacted many laws of doubtful validity. To prevent that invalidity being declared by the courts, the provinces have enacted further provisions to prevent the subject ever getting to the courts. It is as if they said: "We know that this law is illegal and therefore we propose to take away your rights as a subject in order to prevent your having the illegality of the law proclaimed."

In addition, the executive has arbitrarily used its power to compel the payment of taxes which may not be rightfully due.

Summary—Conclusion

The difficulty inherent in any effort to examine the statutes of nine different provinces upon numerous points has been vastly increased by the absence of anything like uniformity in the form and content of most of the statutes, by the frequency with which legislation of general application has been hastily drawn to meet some special case, by the absence of anything in the nature of a legislative policy or program and by the innumerable amendments to the public statutes made each year. The difficulty we have had is multiplied tenfold when so much substantive legislation is today to be found, not in the statutes, but in the orders and regulations and departmental rulings, some of which are not even available in

the Official Gazettes. The hardship upon the citizen, for whom the laws are made, easily becomes translated into a contempt for law and government itself. The constitution and Confederation depend upon respect for law, and the law cannot be respected unless it is certain and ascertainable.

It is our considered opinion that the use of devices mentioned in the following pages has contributed to the present situation. There is today an uncertainty and a sense of frustration comparable to the conditions which Confederation was intended to improve. It is no part of our duty to recommend what course should be followed; but we believe that the picture of legislative confusion outlined in the pages which follow shows that constructive steps must now be taken if the needs of the Canadian people are to be properly met and if the integrity of Canada is to be preserved.

Chapter VIII

TAXING DEVICES OF THE PROVINCES

Introduction

It will be sufficient here to make the following general observations upon the respective powers of the Dominion and provinces to impose taxation.[118]

Subject only to the limitation imposed by s. 125 of the British North America Act "No lands or property belonging to Canada or any province shall be liable to taxation,"[119] the Dominion's power to impose taxation conferred by s. 91 (2) of the British North America Act "The raising of money by any mode or system of taxation" is unlimited, and the Dominion may impose taxes by direct or indirect taxation.[120]

The provincial power is, however, restricted by the language of s. 92 (2) to "Direct Taxation within the province in order to the raising of a Revenue for Provincial Purposes,"[121] and it is now clear beyond question that the provinces' power to tax is subject to several limitations. The tax must be:—

(*a*) "direct" according to John Stuart Mill's definition, that is, demanded from the very person who is intended or desired should pay it;[122] and

(*b*) "within the province," that is, upon a person or property within the province.

It may also be added that a provincial tax

(*c*) must be for "raising of a revenue for provincial purposes"; and

(*d*) must not contravene s. 121 (and perhaps s. 122) of the British North America Act.

All the provinces of Canada have been virtually forced by their need of revenue to adopt devices intended to avoid these limitations and it will be convenient to consider illustrations of such provincial legislation, classified under the heading of the limitation intended to be avoided.

(*a*) Devices Intended to Make a Tax "Direct"

General Principles—Mill's Definition

To be "direct" a tax must come within John Stuart Mill's definition, *i.e.*, a tax

> "demanded from the very person who is intended or desired should pay it."[123]

The definition is clear enough but the difficulty of applying it has been well illustrated in numerous judgments. Suffice it to say here that the tax must be considered in its general and ordinary incidence at the moment of its payment,[124] and if, at the time of payment, the incidence is uncertain, the tax must be considered as indirect;[125] but even though the payer might possibly recoup himself, that would not necessarily make the tax indirect if the way was obscure and the amount recovered bore no relation to the amount of the tax.[126] The declaration by the provincial legislature that the tax is direct and to be paid by the person entering into the contract will not save the tax if in fact the tax is really passed on and is thus indirect.[127] Nor will the fact that the parties have agreed that the burden of the tax shall fall upon the person who pays it affect its character.[128] Lastly, the rule that the ultimate incidence is to be looked to

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[118] See Kennedy and Wells, *The law of the Taxing Power in Canada* (Toronto, 1931) at p. 15.

[119] But the interests of the subject in the Dominion or provincial lands may be taxed. *Smith* v. *Rural Municipality of Vermillion Hills*, (1916) 2 A.C. 569. See also *Minister of Justice* v. *City of Levis*, (1919) A.C. 505, and *City of Halifax* v. *Fairbanks*, (1928) A.C. 117.

[120] *Caron* v. *The King*, (1924) A.C. 999. The Dominion's power to tax is subject to the further limitation imposed by s. 121, that it could not exact a tariff from interprovincial trade. It has been argued that the Dominion may not impose a tax for a provincial purpose.

[121] We shall refer below to the provinces' power to legislate respecting "Shop, Saloon, Tavern, Auctioneer and other licences, in order to the raising of a Revenue for Provincial, Local or Municipal Purposes" conferred by s. 92 (9) of the British North America Act.

[122] This, however, may be subject to qualification in view of *Shannon* v. *Lower Mainland Dairy Products Board*, (1938) A.C. 721.

[123] J.S. Mill, *Principles of Political Economy*, Book V, c. 2. The definition was first applied in *A.G. Quebec* v. *Reed*, (1884) 10 App. Cas. 141 and *Bank of Toronto* v. *Lambe*, (1887) 12 App. Cas. 575. See also *Cotton* v. *The King*, (1914) A.C. 176 at p. 193 and the cases cited below.

[124] *City of Halifax* v. *Fairbanks' Estate*, (1928) A.C. 117 at p. 126.

[125] *A.G. Quebec* v. *Reed*, (1884) 10 App. Cas. 141 at p. 144; *A.G. British Columbia* v. *A.G. Canada*, (1927) A.C. 934.

[126] *Bank of Toronto* v. *Lambe*, (1887) 12 App. Cas. 575; *Brewers' and Maltsters' Association of Ontario* v. *A.G. Ontario*, (1897) A.C. 231; *City of Charlottetown* v. *Foundation Maritime Co.*, (1932) S.C.R. 589.

[127] *The King v. Caledonian Collieries Ltd.*, (1928) A.C. 358; *A.G. Manitoba* v. *A.G. Canada*, (1925) A.C. 561 at p. 566.

[128] *City of Halifax* v. *Fairbanks' Estate*, (1928) A.C. 117, noted (1928) 6 Canadian Bar Review 640.

is not to be used "in the sense of the political economists, but refers to the ultimate incidence among the parties to the transaction in respect of which the tax is imposed" and if the tax is neither upon the vendor, nor upon the commodity, and is charged upon the consumer, it will be held to be direct;[129] but if the tax is "an element in the fixing of prices" it will be held to be indirect.[130]

All that we have said above may have to be subject to some qualification as it now seems possible that a provincial licence fee may be enacted with a view to revenue and without the necessity of compliance with s. 92 (2).[131]

Examples of Provincial Legislation held "Direct"

Against this background of general principles we may now consider the kind of legislation to which the test of Mill's definition has been applied. We first cite cases in which the tax has been held direct and the legislation was consequently held to be *intra vires* of the province.

Held "direct": a Quebec tax on every bank carrying on the business of banking in this province, varying with the paid-up capital, with an additional sum for each office or place of business;[132] a British Columbia tax on mortgages even though the mortgagor covenanted to pay the tax;[133] an Ontario licence fee payable by every person selling liquors at wholesale or retail; [134] a British Columbia assessment for workmen's compensation;[135] a business tax payable to the city of Halifax by every occupant of real property for the purpose of a trade;[136] a British Columbia tax on land and its owner even though the act also gave the taxing authority power to tax persons other than the owner, the part of the legislation giving power to impose indirect taxation being severable from the rest;[137] a British Columbia tax on every consumer of fuel-oil;[138] a tax payable to the city of Montreal by ferrymen;[139] a tax on non-resident traders;[140] a licence fee payable by hawkers and pedlars;[141] a tax on gross premiums paid to an insurer;[142] an amusement tax imposed by the province of Saskatchewan and collected by the theatre as agent for the province;[143] succession duty on property in Ontario but exigible from any person permitting the transfer of the tax without right of recovery from anyone else;[144] succession duty imposed on legacies even though the will of the deceased provided that the legatee should receive the legacy free of duty and succession duty was therefore payable out of the estate.[145]

Examples of Provincial Legislation held "Indirect"

The provincial tax was held to be "indirect" and the legislation imposing it to be *ultra vires* in the following cases: on policies of insurance payable by means of a stamp;[146] a duty of ten cents on every exhibit filed in court;[147] a succession duty imposed on executors, etc.;[148] a tax on every contract or sale of grain for future delivery made in Manitoba payable by the seller or his agent on the gross quantities of grain to be sold;[149] a tax imposed by British Columbia of half a cent per gallon exigible from every person who purchased within the province fuel-oil sold for the first time after its manufacture in or importation into the province despite the fact that the tax was collected by the vendor as agent for the province;[150] a percentage tax on a sliding scale on the gross revenue of miles in Alberta as being a tax on sales, the general tendency of which would be to pass on the tax to the purchaser;[151] a tax upon exports

[129] *A.G. British Columbia* v. *Kingcome Navigation Co.*, (1934) A.C. 45 at p. 52 and 57, noted (1934) 12 Canadian Bar Review 303.

[130] *A.G. British Columbia* v. *McDonald Murphy Lumber Co. Ltd.*, (1930) A.C. 357 and *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Ltd.*, (1933) A.C. 168 at p. 176.

[131] *Shannon* v. *Lower Mainland Dairy Products*, (1938) A.C. 721 and Duff, J., in *Lawson* v. *Interior Tree Fruit*, (1931) S.C.R. 357 at p. 363.

[132] *Bank of Toronto* v. *Lambe*, (1887) 12 App. Cas. 575.

[133] *In re* Yorkshire Guarantee Co., (1895) 4 B.C.R. 258. See also *Hastings County* v. *Ponton*, (1881) 5 A.R. 543 (tax on property); *Bratts Lake* v. *Hudson's Bay Co.*, (1919) 44 D.L.R. 445, 11 Saskatchewan L.R. 357 (surtax on lands).

[134] *Brewers' and Maltsters' Association* v. *A.G. Ontario*, (1897) A.C. 231. See also *Fortier* v. *Lambe*, (1894) 25 S.C.R. 422 (licence fee payable by wholesale or retail merchants).

[135] *Workmen's Compensation Board v. Canadian Pacific Railway*, (1920) A.C. 184 at p. 190. Also *Workmen's Compensation Board* v. *Bathurst Lumber Co.*, (1923) 4 D.L.R. 84 (New Brunswick C. A.). The question is left open in *Royal Bank* v. *Workmen's Compensation Board of Nova Scotia*, (1936) S.C.R. 560.

[136] *City of Halifax* v. *Fairbanks' Estate*, (1928) A.C. 117 at p. 125.

[137] *Rattenbury* v. *Land Settlement Board*, (1929) S.C.R. 52.

[138] *A.G. British Columbia* v. *Kingcome Navigation Co.*, (1934) A.C. 45. See the critical annotation of this decision by F. R. Scott in 12 Canadian Bar Review 303.

[139] *Longueuil Navigation Co.* v. *City of Montreal*, (1888) 15 S.C.R. 566.

[140] *Poole* v. *Victoria City*, (1892) 2 B.C.R. 271. See also *The King* v. *Howarth*, (1920) 53 D.L.R. 325 (tax on hawkers).

[141] *The King* v. *Gebhardt*, (1926) 20 Saskatchewan L.R. 485.

[142] *Treasurer of Ontario* v. *Canada Life Assurance Co.*, (1915) 22 D.L.R. 428.

[143] *Clarke* v. *City of Moose Jaw*, (1923) 2 D.L.R. 216.

[144] *Erie Beach Co.* v. *A.G. Ontario*, (1930) A.C. 161.

[145] *Canada Permanent Trust Co.* v. *McAdam*, (1928) 22 Saskatchewan L.R. 610.

[146] *A.G. Canada* v. *Queen Insurance Co.*, (1878) 3 App. Cas. 1090. See also *Dulmage* v. *Douglas*, (1886) 4 Manitoba L.R. 495; *Crawford* v. *Duffield*, (1888) 5 Manitoba L.R. 121.

[147] *A.G. Quebec* v. *Reed*, (1884) 10 App. Cas. 141.

[148] *Cotton* v. *The King*, (1914) A.C. 176. See also *City of Windsor* v. *McLeod*, (1926) S.C.R. 450 (trustee in respect of income in his hands) and *Provincial Treasurer of Alberta* v. *Kerr*, (1933) A.C. 710 (executor in respect of estate).

[149] *A.G. Manitoba* v. *A.G. Canada*, (1925) A.C. 561.

[150] *A.G. British Columbia* v. *Canadian Pacific Railway*, (1927) A.C. 934; noted at (1928) 6 Canadian Bar Review 640.

[151] *The King* v. *Caledonian Collieries Ltd.*, (1928) A.C. 358.

of timber;[152] a levy under the Produce Marketing Act of British Columbia on products marketed;[153] a percentage tax on non-resident building contractors;[154] a tax on the production of oil.[155]

Conclusion as to "Direct" and "Indirect" Taxes

While it is impossible to reconcile all the cases to which reference has been made above, or to lay down general tests, it may be gathered that "The imposition of taxes on property and income, of death duties and of municipal and local rates"[156] as well as licence fees, taxes upon the capitalization of companies, and the like, is direct taxation.

On the other hand, the exaction of "customs or excise duty on commodities or of a percentage duty on services"[157] as well as all taxes upon sales, or imposed by means of stamps, would be illegal because, although exigible from the vendor, they would tend to be passed on to the purchaser and therefore would not be "demanded from the very person who is intended or desired should pay it."[158]

The Kingcome Case

Considerable difficulty arises in applying these rules and in knowing where to draw the line, particularly in the case of taxes like sales taxes. This difficulty is well illustrated in the *Kingcome Case*[159] from which passages in the preceding paragraphs have been quoted. That decision is relied on as authority for the proposition that if the tax is imposed, neither on the vendor nor on the commodity but on the consumer, it will be valid.

The fineness of the distinctions that must be drawn in these cases is brought out by comparing the headnotes, taxing provisions and leading passages in the *Kingcome Case* and in the earlier decision in *A.G. British Columbia* v. *Canadian Pacific Railway*,[160] which for convenience we have put in adjacent columns.

A.G. British Columbia v. *Canadian Pacific Railway (1927)*	*A.G. British Columbia* v. *Kingcome Navigation Company (1934)*
". . . an Act of the legislature of B.C. requiring that every person who shall purchase within the Province fuel-oil for the first time after its manufacture in, or importation into, the Province is invalid under s. 92, head 2 . . . a tax imposed by a provincial legislature, in respect of a commodity, is an indirect tax."	"The Fuel-Oil Tax Act, 1930, of B.C., which imposes a tax upon every consumer of fuel-oil he has consumed, is valid under s. 92, head 2, the tax is direct taxation, because it is demanded from the very persons who it is intended or desired should pay it."

The taxing provisions in question in the two cases were as follows:—

R.S. British Columbia 1924, c. 251, in A.G. British Columbia v. *Canadian Pacific Railway*	*The Act of 1930 in the Kingcome Case*
"S. 3. Every purchaser shall pay to His Majesty for the raising of a revenue for provincial purposes a tax equal to one-half cent per gallon of all fuel-oil purchased by him, which tax shall be levied and collected in the manner provided in this Act." "4. Every vendor at the time of the sale of any fuel-oil to a purchaser shall levy and collect the tax. . . ." "Purchaser" is defined by s. 2 as meaning "any person who within the Province purchases fuel-oil when sold for the first time after its manufacture in or importation into the Province."	"S. 2. For the raising of a revenue for provincial purposes every person who consumes any fuel-oil shall pay to the Minister of Finance a tax in respect of that fuel-oil at the rate of one-half cent a gallon." "3. The tax imposed by this Act shall be paid and collected at such times and in such manner as the regulations may prescribe."[161]

The leading passages of the two decisions read almost as if they were dealing with different subjects. In *A.G. British Columbia* v. *Canadian Pacific Railway,* Lord Haldane said at p. 938:—

> "Taking the principle so laid down as the guide to the solution of the present question, the result does not seem doubtful. There are two fuel-oil companies which are associated in business in a close fashion. The Union Oil Company of California sells its oil to the Union Company of Canada, which has large storage tanks at Vancouver, which the former company keeps replenished according to directions from the Canadian Company. The respondents purchase oil in British Columbia from the latter company. It is sought to tax them as first purchasers under s. 3, and as holders of the oil for consumption under s. 6, which has to be read with reference to s. 3. It may be true that, having regard to the practice of the respondents, the oil they purchase is used by themselves alone and is not at present resold. But the respondents might develop their business so as to

[152] *A.G. British Columbia* v. *McDonald Murphy Lumber Co. Limited,* (1930) A.C. 357, but see in *In re* The Grain Marketing Act, (1931) 25 Saskatchewan, L.R. 273 where Turgeon, J.A., said at p. 281 that deductions from the selling price of grain made by the Board are direct taxes as intended to be paid by the grower out of whose money they are retained.

[153] *Lawson v. Interior Tree Fruit,* etc., (1931) S.C.R. 357 at p. 364 and 372. See also *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy Limited,* (1933) A.C. 168 (similar levy on milk).

[154] *Charlottetown* v. *Foundation Maritime Ltd.,* (1932) S.C.R. 589.

[155] *Spooner Oils Ltd.* v. *Turner Valley Gas Conservation Board,* (1932) 4 D.L.R. 758 (Alberta C.A.) not raised in appeal, (1933) S.C.R. 629, which reversed the judgment on other points.

[156] *A.G. British Columbia* v. *Kingcome Navigation Co.,* (1934) A.C. 45, at p. 56, noted (1934) 12 Canadian Bar Review 303.

[157] *Ibid.*

[158] See note by J. E. McMullin, (1928) 6 Canadian Bar Review 640.

[159] *A.G. British Columbia* v. *Kingcome Navigation Co.,* (1934) A.C. 45 at p. 56, noted by F. R. Scott (1934) 12 Canadian Bar Review 303.

[160] (1927) A.C. 934.

[161] At the time when the Kingcome Case was heard, the province required the consumer to declare the amount of fuel-oil consumed in the preceding month and to pay the tax. After the Act was declared valid, the Lieutenant-Governor in Council adopted regulations providing for collection by the oil company.

include resale of the oil they have bought. The principle of construction as established is satisfied if this is practicable, and does not for its application depend on the special circumstances of individual cases. Fuel-oil is a marketable commodity, and those who purchase it, even for their own use, acquire the right to take it into the market. It therefore comes within the general principle which determines that the tax is an indirect one."

In the *Kingcome Case* the contrasting passage from the judgment delivered by Lord Thankerton is found at p. 59:—

"Turning then to the provisions of the Fuel-Oil Act here in question, it is clear that the Act purports to exact the tax from a person who has consumed fuel-oil, the amount of the tax being computed broadly according to the amount consumed. The Act does not relate to any commercial transaction in the commodity between the taxpayer and someone else. Their Lordships are unable to find, on examination of the Act, any justification for the suggestion that the tax is truly imposed in respect of the transaction by which the taxpayer acquires the property in the fuel-oil nor in respect of any contract or arrangement under which the oil is consumed, though it is, of course, possible that individual taxpayers may recoup themselves by such a contract or arrangement; but this cannot affect the nature of the tax. Accordingly their Lordships are of opinion that the tax is direct taxation within the meaning of s. **92**, head **2**, of the British North America Act."

The cases may be distinguishable in that the tax in the earlier *Canadian Pacific Railway Case* was imposed on the first purchaser of fuel-oil, while in the *Kingcome Case* the tax was imposed on the consumer. But the earlier case is not so much as referred to in the Privy Council's opinion in the *Kingcome Case* and it cannot be regarded as satisfactory that there should be two recent decisions of the Privy Council upon a matter of such importance without even a word of reference to the earlier decision, particularly when the other leading cases are referred to at some length.[162] The decision is moreover difficult to reconcile with *Cotton* v. *The King*[163] and *A.G. Manitoba* v. *A.G. Canada.*[164]

Device of Imposing Tax on the Consumer and Appointing Payer of the Tax agent of the Province to Collect it

It is, of course, obvious that a tax imposed on a consumer, and therefore valid, will be useless unless the province can collect the tax, and the only possibility the province has of collecting the tax is to collect it from the vendor.[165] If the vendor is asked to pay the tax with the intention that he will pass it on, the tax will be indirect, but if the vendor is appointed agent for the province to collect and remit the tax paid by the purchaser, the tax may be held direct and valid.

The only case in which this device of appointing the vendor agent has been expressly considered is *Clarke* v. *City of Moose Jaw*[166] in which the Saskatchewan Court of Appeal upheld a statute empowering a city council to enact a by-law requiring persons attending places of amusement to pay an amusement tax which would be collected and remitted by the proprietor. Speaking for the court, at p. 218, Turgeon, J. A., said:—

". . . The fact that the legislation casts upon the owners of places of amusement the duty of collecting the tax for the city does not affect in any manner the character of the tax itself."

Examples of Provincial Legislation using the Agency Device

Numerous examples of provincial legislation in which the province has used the device of appointing the person immediately paying the tax as the agent of the province to collect the tax are given on the following pages. In many of these acts the government is given power to designate the persons authorized to receive the tax in its behalf, while in others it is simply provided that the vendor shall collect and remit the tax.

Gasoline, Liquor, Fuel-oil and Amusement Taxes

All the provinces have adopted taxes on gasoline and several have taxes on liquor, fuel-oil or amusements as set out in the following table. In the case of most, if not all, of these statutes, the province has used the device of naming the vendor its agent for purposes of collection.

Sales Taxes

The device of making the vendor the agent of the province is also used in legislation imposing a tax of 2 per cent on practically all retail sales in the province of Alberta.[167] There is similar legis-

[162] See note by F. R. Scott in (1934) 12 Canadian Bar Review 303.

[163] (1914) A.C. 176.

[164] (1925) A.C. 561.

[165] In the *Kingcome Case* referred to above, there was no question of collection from anyone other than the consumer, but after the Act was held valid, the province adopted regulations under the Act providing for collection from the vendor.

[166] **(1923) 2 D.L.R. 216.**

[167] The Ultimate Purchasers Tax Act, 1936, c. 7, is in force until repealed and replaced upon proclamation of the Retail Sales Tax Act, 1936, c. 8. The two acts are interesting. The first is designed to meet existing constitutional conditions, while the second to be brought into force by proclamation is apparently designed to meet the situation if the provinces are given power to exact indirect taxation by the constitutional amendment referred to **below at p. 39.** The tax is not now being collected.

Table of Statutes Imposing Taxes in Respect of Sales of Gasoline, Fuel-oil, Beer and Amusements Where the Tax-remitter is Named Agent of the Province

Province	Gasoline	Beer	Amusements	Fuel-Oil
Alberta	1929, c. 23	1924, c. 14.	R.S. 1922, c. 37, am. 1932, c. 47.	1936, c. 9 and 68.
British Columbia	R.S. 1936, c. 279	.....	R.S. 1936, c. 277.	R.S. 1936, c. 278.
Manitoba	Cons. Amdts. c. 79.	1928, c. 31, s. 111.	Cons. Amdts., c. 3.	.....
New Brunswick	1935, c. 17.	R.S. 1927, c. 28.	R.S. 1927, c. 20.	.....
Nova Scotia	1926, c. 2; 1927, c. 54; 1929, c. 60; 1932, c. 46; 1934, c. 2, s. 49; 1934, c. 43; 1938, c. 36.	1930, c. 2.	R.S. 1923, c. 162, s. 8.	1934, c. 3; 1936, c. 50
Ontario	R.S. 1937, c. 32	R.S. 1937, c. 294	.....	1932, c. 12.
Prince Edward Island	1937, c. 15.	.....	1933, c. 4	.....
Quebec	R.S. 1925, c. 36	R.S. 1925, c. 37.	R.S. 1925, c. 125.	.....
Saskatchewan	1936, c. 14.	.....	1934, c. 17, s. 458; 1937, c. 28, s. 446.	.....

lation in Saskatchewan which while purporting to impose a tax on consumption or use really imposes a tax on sales.[168] There is also a tax of 2 per cent on retail sales in the city of Montreal.[169] The charging provision of the Montreal tax is ss. 2, which reads:—

> "The city may impose by by-law and levy, from the first of May, 1935, inclusive, in addition to any other tax, a special tax called 'sales tax' not exceeding two per cent of the sale or purchase price, retail, except the exemptions hereinafter enumerated, of any moveables, any moveable effects, any merchandise and any article of trade whatsoever, including gas and electricity."

Subsection 4 reads:—

> "The tax shall be paid by the purchaser at the time of the sale, whether the price is stipulated payable cash, on terms or by instalments, and shall be collected by the seller who is constituted by this act the agent of the city of Montreal for the collection of the same."

The city is also authorized by s. 11 to levy on any person a tax not exceeding 2 per cent

> "... of the sum payable and paid by any such person, firm, company or corporation to The Bell Telephone Company of Canada for local exchange telephone service.... The amount of the tax so imposed shall be added by the Company on its invoices and the Company, which is hereby constituted the agent for the city of Montreal, must collect such tax and hand it over to the city of Montreal."

Restaurant Taxes

In addition, there is in the province of Quebec the so-called hospital tax of 5 per cent on the price of all meals costing over 35 cents,[170] as well as the stamp tax collected by the Quebec Liquor Commission on all spirituous liquor sold.[171]

Succession Duties

In some of the succession duties acts the executor is virtually made the agent of the province for purpose of collection.[172]

Tax on Insurance Premiums

For several years past all the provinces have imposed an annual tax on the premium income of insurance companies. Thus in the province of Quebec this tax is imposed "upon the gross amount of premiums, whether received or become due for insurance or reinsurance effected or renewed by such company, in the province during the preceding

[168] The Education Tax Act, 1937, c. 9, proclaimed on August 2, 1937, imposing a tax of 2 per cent payable by "every consumer of tangible personal property purchased at a retail sale" and collected by the vendor.

[169] (Quebec) An Act to amend the charter of the City of Montreal, 1935, c. 112, s. 10.

[170] An Act to amend the Quebec Public Charities Act, 1926, c. 55, amended by 1933, c. 77. The tax appears to be levied on the meal, rather than the consumer, and consequently it is possible that it might be held *ultra vires*.

[171] Imposed in virtue of the Alcoholic Liquor Act, R.S. 1925, c. 37, s. 43A as enacted by 1932, c. 32, s. 1.

[172] *e.g.* Alberta, 1934, c. 17, s. 59.

calendar year."[173] A list of the statutes under which these taxes on premiums are imposed follows:—

TABLE OF TAXES ON PREMIUM INCOME OF INSURANCE COMPANIES

Province	Rate[174] Per Cent.	Citation
Alberta	3·3	The Corporations Taxation Act, R.S. 1922, c. 29, s. 10, am. 1937, c. 57, s. 3; The Corporations Temporary Additional Taxation Act, 1932, c. 62, s. 2; 1934, c. 5; 1935, c. 77; 1936, c. 10; 1937, c. 56.
British Columbia	2¼	The Income Tax Act, R.S. 1936, c. 280, s. 32; 1938, c. 57 adding s. 32A.
Manitoba	3	The Corporation Taxation Act, Cons. Am. 1924, c. 191, s. 3(d); 1932, c. 49, s. 17(c).
New Brunswick	2½	The Corporations Taxation Act, 1938, c. 18.
Nova Scotia	2½	Provincial Revenue (Corporations) Act, R.S. 1923, c. 16, s. 6; 1929, c. 20; 1934, c. 16, s. 10.
Ontario	1¼	The Corporations Tax Act, R.S.O. 1937, c. 29.
Prince Edward Island	2	The Personal Property and Special Companies' Taxation Act, 1938, c. 18, s. 45(1) (p).
Quebec	1¾	Corporation Tax Act, R.S.Q. 1925, c. 26, s. 5, Div. III,[175]
Saskatchewan	1½ to 3	The Corporations Taxation Act, R.S. 1930, c. 38, s. 6; 1932, c. 12, s. 6; 1933, c. 12; 1934, c. 7; 1934-35, c. 13, s. 3; 1936, c. 12; 1937, c. 6, s. 13; 1938, c. 12, s. 3.

Legality of Tax on Premiums

The right of the provinces to tax insurance premiums was directly challenged in *Treasurer of Ontario* v. *Canada Life Assurance Company*,[176] described as a test case by Middleton, J. The case was apparently raised because the province had increased the rate. It was argued for the insurance company that the tax was indirect because the legislature must have contemplated that it would not be borne by the insurance companies but would be cast upon the policyholders, the insurance companies are dealers in insurance as a commodity and a tax like this on the cost of the commodity must inevitably be paid by the purchaser. Middleton, J., rejected this argument and held the tax to be direct, apparently being considerably influenced by the fact that the tax would not tend to be paid by the policyholders as an addition to the premiums but would rather have the effect of reducing the amount of profits available for distribution among the shareholders and the participating policyholders.

[173] Corporation Tax Act, R.S. 1925, c. 26, s. 5, div. 3, as amended by 1936, c. 61, s. 12.

[174] The rates given are for life insurance companies and are taken from the brief of the Canadian Life Insurance Officers Association.

[175] In addition, in Montreal there is a 1% tax on premium income imposed by 1937, c. 103, s. 43 (c) replacing paragraph (o) of Article 364 of the City charter.

[176] (1915) 22 D.L.R. 428.

Despite the holding in this, the other authorities give good ground for belief that these taxes are *ultra vires* of the province.[177]

The matter was left there, presumably because the insurance companies recognized that even if the tax was unconstitutional the provinces could secure equivalent amounts of revenue from insurance companies by taxes made on their net income or determined by the amount of their paid up capital, and to change the form of the tax would not improve matters and might make them worse.

In effect, the provinces are collecting taxes on insurance premiums, not by reason of any expedient, but because of their undoubted power to exact similar sums by means which, however legal they might be, could hardly fail to prove even more painful than the present tax of doubtful validity.

Proposed Amendment to the Constitution

The situation with respect to taxes of the type under consideration, whether they be direct or indirect, is far from satisfactory and this was recognized by the present Dominion government when the Hon. Mr. Lapointe, Minister of Justice, introduced a resolution for an address to amend the British North America Act by adding a new clause, 2A, to s. 92 of the British North America Act to give the provinces legislative jurisdiction over

> "Indirect taxation within the province in respect of:—
>
> (i) retail sales, other than of all alcoholic beverages, spirits, malts, tobacco, cigarettes and cigars which are subject to customs and excise duty or tax in Canada or other than of all goods and articles for delivery without the province:
>
> (ii) the patronage of hotels, restaurants and places of amusement or entertainment.
>
> in order to the raising of a revenue for provincial purposes."[178]

It was also provided that the new clause would have retroactive effect with respect to provincial legislation in force at the passing of the act.

In moving the resolution, Mr. Lapointe said that its purpose was:—

> ". . . to widen to some extent the field of taxation allocated to the province, or rather to remove doubts as to the validity of taxes which have been actually levied by the provinces and have been in force since."[179]

[177] Particularly *A.G. Canada* v. *The Queen Insurance Company*, (1878) 3 App. Cas. 1090; *A.G. Manitoba* v. *A.G. Canada*, (1925) A.C. 561; *The King* v. *The Caledonian Collieries Limited*, (1928) A.C. 358.

[178] House of Commons Debates, May 14, 1936, p. 2795.

[179] *Ibid* p. 2796.

In the debate on the resolution, Mr. Bennett said:—

". . . This is an amendment to our constitution which will confer upon the provincial legislatures a power not heretofore enjoyed."[180]

But he went on to indicate that in view of the *Kingcome Case*[181] a tax on sales would be valid if it was imposed on the consumer. Speaking the following day, Mr. Dunning said:—

". . . each province in Canada has been endeavouring to collect what are in reality retail sales taxes. The provinces have been assisted by legal minds to devise ways and means whereby an apparent prohibition is in some manner evaded; legally evaded, of course. Those things must be done legally. So we have at the present time a variety of what I might call pseudo-indirect taxes . . . gasoline tax, the fuel-oil tax, the meals tax . . . the gasoline vendor is made by statute a tax collector for the government. . . ."

"Mr. Bennett: That is direct."

"Mr. Dunning: I admit at once that this has been a fruitful subject for litigation, and as lawyers sometimes say, the privy council has the last guess. The Minister of Justice says what I, of course, could not say without disrespect, that the privy council sometimes changes its guess. . . ."[182]

On May 15, 1936, the House of Commons agreed to the motion on division. The resolution was introduced in the Senate on May 19, where it was referred to the Committee on Banking and Commerce, and on June 3, 1936, the Senate agreed to the report of that Committee recommending that the portion of the motion relating to indirect taxation be not concurred in. Since then the government has taken no further steps in this connection.

(b) Devices Intended to Bring the Tax "Within the Province"

General Principles

To be valid a provincial tax must not only be "direct," it must be "within the province," that is, "the subject of taxation must be within the province."[183] The subject of taxation being either a person or property, a tax may be imposed by the province in which the person or the property is found.[184] No great difficulty arises in ascertaining the situs of the subject of a tax in the case of living persons or tangible property.

Thus, a tax upon a non-resident might be held valid as a tax on income, *i.e.*, property in the province, if imposed on the net profit or gain from the business in the province,[185] and a tax upon a resident extends to income earned outside the province and not received or remaining in the province in which the tax is sought to be imposed.[186]

Moreover the rate of tax payable by a person can even be determined according to the value of property outside the jurisdiction if it is the person within the province and not the property outside the province which is the subject of the tax.[187]

But considerable difficulty arises in determining the incidence of taxes upon corporations, as well as of succession duties, and the provinces have adopted devices to bring corporations and property within the province to permit the exaction of taxes which, without the device, they could not collect, and it is to the provincial legislation respecting these that our attention must be directed.

Corporations

There can be no doubt but that any corporation exercising any of its corporate powers in a province may be taxed there,[188] subject to the qualification that the province cannot destroy the status and capacity of a Dominion company[189] and to the further qualification made in a recently decided case that a province cannot, under the guise of taxation, impair or render wholly nugatory the exclusive legislative authority of the Dominion over a number of the classes of subjects specifically mentioned in s. 91 by making them valueless.[190]

All the provinces impose taxes on corporations, and while the terms of no two taxing statutes are identical, it is generally true to say that under such statutes a corporation renders itself liable to tax when it "carries on business" or "transacts business" within the province.

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[180] *Ibid* p. 2836.
[181] (1934) A.C. 34.
[182] House of Commons Debates, May 15, 1936, p. 2856.
[183] Anglin, J., in *The King* v. *Cotton,* (1912) 45 S.C.R. 469 quoted in *Provincial Treasurer of Alberta* v. *Kerr,* (1933) A.C. 710 at p. 718.
[184] *Bank of Toronto* v. *Lambe,* (1887) 12 App. Cas. 575 at p. 584.
[185] (Saskatchewan). The Income Tax Act, 1936, c. 15, s. 23.
[186] *Kerr* v. *Superintendent of Income Tax for Alberta,* (1938) 3 W.W.R. 740. It is understood that this case is being appealed to the Privy Council.
[187] *Blackwood* v. *The Queen,* (1882) 8 App. Cas. 82 at p. 96 quoted in the Kerr Case at p. 717; *Bank of Toronto* v. *Lambe,* (1887) 12 App. Cas. 575 at p. 585; *Royal Trust Company* v. *Minister of Finance,* (1922) 1 A.C. 87 at p. 93; *Receiver-General of New Brunswick* v. *Rosborough,* (1915) 24 D.L.R. 354 at p, 368; Samuel Quigg, *Succession Duties in Canada,* 2nd Ed. 1937, p. 83. For example see the Quebec Succession Duties Act, R.S. 1925, c. 29, s. 4; "The value of that part of the estate situated outside the Province shall be included for the purposes of fixing the rate of duty under this division".
[188] *Bank of Toronto* v. *Lambe,* (1887) 12 App. Cas. 575.
[189] *John Deere Plow Co.* v. *Wharton,* (1915) A.C. 330; *Great West Saddlery Co.* v. *The King,* (1921) 2 A.C. 91; *A. G. Manitoba* v. *A.G. Canada,* (1929) A.C. 260.
[190] *A.G. Alberta* v. *A.G. Canada,* (1939) A.C. 117 at p. 128 which held the Alberta Act taxing banks to be *ultra vires.*

Some of the provinces have defined "carrying on business" in corporation tax acts as meaning "exercising any of its corporate rights, powers or objects in the province."[191] In Alberta the definition in the part of the Companies Act relating to extra-provincial companies goes further. It says:—

> "133 (*b*), 'Carry on business' means transacting any of the ordinary business of a foreign company whether by means of an employee or an agent and whether the company has a resident agent or representative or a warehouse, office or place of business in the province."[192]

In practice this definition appears to have been construed as meaning that a company is considered to be carrying on business in the province and therefore required to register if an order for goods is given to an outside company by any means other than correspondence, which would not ordinarily be regarded by the courts as carrying on business.[193]

A province cannot by enactment of its own legislature extend its jurisdiction beyond the limits set out in the constitution.[194] Otherwise the British North America Act could be made a dead letter by the action of a single provincial legislature. Consequently, a province cannot by a definition of "carrying on business" bring into the province a company which does not in any accepted sense exercise any of its corporate powers there.

An ingenuous effort has been made by Alberta to force an insurance company to do something within the province which would constitute carrying on business there. This was the requirement that every policy of insurance to be valid must be approved by a resident agent.[195]

Whether or not a company is "within the province" in any given case will fall to be determined as a question of fact in accordance with the principles of law,[196] irrespective of the terms of the statute. Having been found to be within the province, the company will be liable to tax if it comes within the terms of a valid taxing statute.

[191] *e.g.* New Brunswick, 1938, c. 18, s. 2 (1) (c), and Quebec, R.S.Q. 1925, c. 26, s. 4 (9). For other examples see amendments to the charters of Drummondville made by (Quebec) 1938, c. 113, s. 16; Joliette, 1935, c. 124, s. 73, and Valleyfield, 1932, c. 111, s. 117.

[192] Alberta Companies Act, 1929, c. 14, s. 133 (b) as replaced by 1934, c. 10, s. 2.

[193] See such cases as *Erichsen* v. *Last*, (1882) 8 Q.B.D. 414; *Grainger & Son* v. *Gough*, (1896) A.C. 325; *City of Halifax* v. *McLaughlin Carriage Co.*, (1907) 39 S.C.R. 174; *Kirkwood* v. *Gadd*, (1910) A.C. 422; *Hadsley* v. *Boyer-Smith*, (1914) A.C. 979; *Smidth & Co.* v. *Greenwood*, (1921) 3 K.B. 583; *Maclaine & Co.* v. *Eccott*, (1926) A.C. 424.

[194] *The King* v. *National Trust Co.*, (1933) S.C.R. 670; 54 K.B. 351, per St. Jacques, J., at p. 355, Tellier, C.J., at p. 361 and Walsh, J., at p. 376.

[195] Alberta Insurance Act., R.S.A., c. 171, s. 181 and s. 191 (3). The effect of this has not yet been passed upon by the courts.

[196] Kennedy & Wells, *op. cit.*, p. 93; *Royal Trust Co.* v. *A.G. Alberta*, (1930) A.C. 144; *The King* v. *National Trust Co.* cited above.

In addition to the illustrations just noted of a province endeavouring to bring a company within the province to be taxed there, several of the provinces impose taxes on corporations in respect of their capital or profits outside the province,[197] or rather impose taxes on capital or profits and do not give full allowance for the capital used or profits earned outside the province, so that the company may be subject to double taxation in respect of the same capital or profits. Such taxes are not *ultra vires*[198] but they are in a sense expedients by which the provincial revenue is augmented from extra-provincial sources.

There follows a list of the provincial statutes imposing taxes on corporations, either as a fee for registration or as a tax on capital or income. The references are to the last revised statutes unless otherwise noted.

TAXING STATUTES ON CORPORATIONS

Province	Requiring registration or filing by extra-provincial corporations	Corporation tax
Alberta	The Companies' Act, 1929, c. 14, s. 134.	The Corporations Taxation Act, c. 29; 1939, 13; The Corporations Temporary Additional Taxation Act, 1932, c. 62; The Income Tax Act, c. 5.
British Columbia	The Companies' Act, c. 42, s. 179.	The Taxation Act, c. 282; The Income Tax Act, c. 280.
Manitoba	The Companies' Act, 1932, s. 386, as replaced by 1937-38, c. 8, s. 6.	The Corporation Taxation Act, c. 191; The Income Taxation Act, 1937, c. 43.
New Brunswick	The Companies' Act, c. 88, s. 117[199].	The Corporations Taxation Act, 1938, c. 18.
Nova Scotia	The Domestic, Dominion and Foreign Corporation Act. c. 173.	The Provincial Revenue (Corporations) Act, c. 16.
Ontario	The Extra-Provincial Corporations Act, c. 252.[199]	The Corporations Tax Act, c. 29.
Prince Edward Island	.....	The Personal Property and Special Companies' Taxation Act, 1938, c. 18.
Quebec	Extra-Provincial Companies, c. 226.[199]	Corporation Tax Act, c. 26.
Saskatchewan	The Companies Act, 1933, c. 21, s. 186 and 239.[200]	The Corporations Taxation Act, 1930, c. 38; The Income Tax Act, 1936, c. 15.

Succession Duties

It is in the field of succession duties that the requirements that taxation must both be "direct" and "within the province" have created the greatest difficulty.[201]

[197] *e.g.* Ontario, Quebec (subject to reduction by Order in Council) and Saskatchewan.

[198] *Bank of Toronto* v. *Lambe*, (1887) 12 App. Cas. 575.

[199] Dominion companies are not required to register.

[200] The fee payable by corporations is fixed by Order in Council and it is based on the total paid up capital.

[201] One need only refer to an article by Samuel Quigg, "Constitutionality of Succession Duties," (1938) 16 *Canadian Bar Review* 344, to appreciate how confusing the present position is.

Since the decision in the case of *Provincial Treasurer of Alberta* v. *Kerr*[202] it can be taken as settled that a province cannot tax property outside the province and it can only impose taxation in the nature of succession duty, probate duty, or the like, upon

(1) property in the province;
(2) a transmission within the province, that is the transfer to a beneficiary in the province on the death of a person domiciled in the province of property outside the province;

and possibly

(3) a person (whether within the province or not) succeeding to property outside the province passing on the death of a person domiciled in the province. This is a tax on the person in respect of the succession, or perhaps more strictly, the tax is on the benefits, not the property. It is commonly known as a tax upon "the succession."[203]

This is not the place to deal in detail with the succession duties acts of the various provinces.[204] All of them differ in detail and some appear to be founded on quite different principles. But we may note that:—

(1) All the provinces impose taxes upon property in the province;
(2) Most of the provinces impose duties on transmissions;
(3) Only Saskatchewan appears to have endeavoured to impose a tax on a "succession" to property outside the province passing to a non-resident beneficiary on the death of a person domiciled within the province.[205]

Transmission Taxes—Expedients

Taxes on "transmissions" and "successions" (as opposed to taxes upon persons or property) are obvious expedients designed by the provinces to impose a tax in respect of property outside the province without imposing the tax on the property outside the province—that would be illegal—and each of the leading cases[206] has been followed by amendments to the statutes of most of the provinces designed to add to the length and strength of the arm of the provincial tax collector, always with the intention of taxing property outside the province.

In consequence, whenever property is in one province and the transmission takes place in another, the property has been subject to tax in both places and the tax has been calculated at the rate applicable if the entire estate were situated in both provinces.

Intangible Property

Double (or even triple) taxation like this seldom arises in the case of tangible property which can only be regarded as situated in one place but it is frequent enough in the case of shares, debts and insurance policies. This has been particularly profitable for Ontario and Quebec as the head offices or transfer registers of most large companies in Canada are in either Toronto or Montreal.

Since the decision in *The King* v. *National Trust Co.*[207] it is settled that a provincial legislature is not competent to prescribe the conditions fixing the situs of intangible property and the situs must be determined according to the general principles of the law. There is, however, still some disagreement as to what they are, and, despite the considerable body of litigation decided in the last few years, there is still enough room for uncertainty to leave the door open for arbitrary rulings and further litigation.

This uncertainty has been hard on the provinces; but it has been much harder upon individual taxpayers, because the provinces have frequently in case of uncertainty insisted on payment of the sum in dispute before they will permit the assets of the estate to be transferred. This procedure leaves the taxpayer with a possible claim for repayment which he may be able to assert by petition of right, if the provincial authorities permit him, but even then he must be sufficiently confident in the outcome to run the risk of seeing the case taken to the Judicial Committee.

Insurance

Normally the proceeds of insurance policies are taxable in the province where they are payable[208] but Alberta,[209] Manitoba[210] and New Brunswick[211] have provisions purporting to tax as well

[202] (1933) A.C. 710.

[203] The Quebec Beneficiaries Seizin Act, R.S. 1925, c. 30, which was held *ultra vires* by Cannon, J., in *Gary* v. *The King*, (1938) 76 S.C. 66 and repealed by 1938, c. 30, was not quite in this class. In the article cited in note (201) above Mr. Quigg strongly urges the view that the succession (class 3) may be taxed as well as the transmission but the contrary view is taken by other authorities.

[204] See Quigg, *Succession Duties in Canada.*

[205] Quigg, *Succession Duties in Canada*, p. 40; Quigg, "Constitutionality of Succession Duties," (1938) 16 *Canadian Bar Review* 344; Manitoba and Ontario had this but eliminated it after the Kerr Case. See the Saskatchewan case of *The King* v. *Meilicke*, (1938) 2 W.W.R. 97.

[206] *Cotton* v. *The King*, (1914) A.C. 176; *Allwyn-Sharples* v. *Barthe*, (1922) 1 A.C. 215; *Provincial Treasurer of Alberta* v. *Kerr*, (1933) A.C. 710.

[207] (1933) S.C.R. 670.

[208] Alberta, 1934, c. 17; British Columbia, R.S.B.C., 1936, c. 270; Nova Scotia, 1932, c. 221; Ontario, R.S., 1937, c. 26, s. 10 (c); Prince Edward Island, 1925, c. 5; Saskatchewan, 1934-35, c. 12.

[209] 1934, c. 17, s. 14.

[210] 1934, c. 42, s. 11 (1).

[211] 1934, c. 12, s. 12.

the resident beneficiary of the proceeds of insurance policies payable on the death of a person who resided in the province. Quebec has gone so far as to claim that duty is payable on the transmission of insurance by reason of the mere fact that the policy was taken out in the province, and irrespective of the domicile of the deceased at the date of death or the location of the insurer's head office.[212] If collected these taxes would result in double and conceivably triple taxation. In the extreme case a tax might be collected on the same insurance money in three provinces: where the insurance money was payable, where the deceased and the beneficiary resided, and, in the case of Quebec, where the policy was issued.

Transfers of Stocks

Irrespective of the place of transfer or the *situs* of the shares, Nova Scotia declares that all shares and securities of companies incorporated in the province shall be subject to duty[213] and Ontario is understood to have taken the same view in practice upon the claim that the shares in Ontario companies are situated in Ontario which is the only place where they can be transferred. This is expressly declared in the British Columbia Companies Act, which reads:—[214]

> "On the death of a member registered in a branch register of members, the shares of the deceased member shall be transferable on the principal register or the duplicate of the branch register, as the case may be, at the place in the province where the principal register is kept and not elsewhere. . . ."

Sales Taxes

The city of Montreal sales tax[215] purports to be exigible in respect of all sales coming within its terms and these are broad enough to include sales made to a purchaser in another province. Since the tax appears to be intended to be a tax upon the purchaser, the province cannot enlarge its jurisdiction so as to exact a tax from a purchaser in another province.

[212] This is in virtue of s. 213 of the Quebec Insurance Act, R.S. 1925, c. 243, which states that all contracts issued, etc., in the province shall be deemed to evidence contracts in the province. Section 213 was of course never intended to operate in this way at all. It was designed to prevent uncertainty as to the law applicable to insurance by declaring that contracts issued, etc., in the province shall be deemed to evidence contracts payable in the province and be governed by its law. Being payable in the province under s. 213 of the Insurance Act, the proceeds of insurance policies are, it is argued, debts payable in the province and as such taxable under s. 5 of the Succession Duties Act unless coming under the exception to that section or as mentioned in s. 10 of the Act.

[213] R.S.N.S., 1923. c. 18, s. 7 (c).

[214] British Columbia Companies Act, R.S., 1936, c. 42, s. 84 as amended by 1937, c. 10, s. 2 and 1938, c. 7, s. 2.

[215] Referred to above, p. 38.

(c) Raising of a Revenue for Provincial Purposes

We have seen that provincial taxation to be valid must come within the concluding words of s. 92 (2) "in order to the Raising of a Revenue for Provincial Purposes." These words describe the purpose of provincial taxation but they do not in any way restrict the incidence of that taxation. Consequently there has been no need for the provinces to adopt expedients to overcome any limitation imposed by the words. Later we may consider how far the words restrict provincial taxation to the purpose of raising a revenue.[216]

It may be noted here, however, that the provinces appear to be able to charge for services[217] and this may be used as an expedient to regulate trade or to raise money.

(d) Customs and Excise

A final limitation upon the provinces' power to tax is imposed by s. 121 of the British North America Act, reading:—

> "All Articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

And by s. 122:—

> "The Customs and Excise Laws of each Province shall subject to the provisions of this Act, continue in force until altered by the Parliament of Canada."

These provisions have been before the courts on few occasions.

In *A.G. British Columbia* v. *Canadian Pacific Railway*[218] the *Fuel-Oil Tax Act*[219] which required that every person who purchased within the province fuel-oil for the first time after its manufacture in, or importation into, the province should pay a tax of one-half cent per gallon on the oil so purchased was held *ultra vires* on the ground that the tax was indirect and the Judicial Committee refused to deal with the question raised as to excise.

In *A.G. British Columbia* v. *McDonald Murphy Co.*[220] where a tax was imposed on all lumber cut but a rebate was provided when the lumber was used in the province and export was prohibited unless the tax was paid. It was held that the tax

[216] P. 51.

[217] *Shannon* v. *Lower Mainland Dairy Products Board,* (1938) A.C. 721; *A.G.* v. *Registrar, etc.,* (1934) 3 W.W.R. 165; Ref. *re* Natural Products, (1937) 3 W.W.R. 284; *Lawson* v. *Interior Tree Fruit, etc.,* (1931) S.C.R. 357 at p. 363; *Spooner Oil Ltd.* v. *Turner Valley, etc.,* (1932) 4 D.L.R. 750 at p. 765.

[218] (1927) A.C. 934 referred to above at p. 36, *et seq.*

[219] R.S.B.C., 1924, c. 251.

[220] (1930) A.C. 357.

was in the nature of customs and excise duties and in addition it was indirect and therefore *ultra vires*.

In a third case, *A.G. British Columbia* v. *Kingcome Navigation Co.*[221] a tax on consumers of fuel-oil in the province was held valid and s. 122 was practically treated as "spent."

It is apparent from even these few cases that the difficulty of a province collecting a tax in the nature of a customs or excise tax from the very person who has to bear the tax makes it practically impossible for such a provincial tax to be both efficient and valid.

We have noted below several instances of legislation adopted by the provinces to protect local products and local trade, notwithstanding the provisions of s. 121,[222] but neither s. 121 nor 122 has led the provinces to adopt expedients in order to add to their powers to raise money.[223]

[221] (1934) A.C. 45 referred to above at p. 36, *et seq.*

[222] P. 48, *et seq.*

[223] Other references to s. 121 and 122 are found at pp. 45, 46, 52.

Chapter IX

TRESPASS UPON DOMINION POWERS

Introduction

In this chapter we propose to deal with cases where the provinces have endeavoured to escape from the limits of the constitution by legislating upon a subject which, from some aspects, falls under an enumerated head of s. 91 of the British North America Act. Similar legislation by the Dominion has been considered under the heading of "Colourable Legislation."[224] Although the use of that term has been usually restricted to Dominion acts which have been found in "pith and substance" to deal with "property and civil rights" rather than with the subject of one of the enumerated heads of s. 91, there is no reason why the same expression should not be applied to a provincial act: for example, an act purporting to deal with property and civil rights, but in reality dealing with criminal law or trade and commerce and therefore subject to the jurisdiction of the Dominion.[225]

The most frequent source of difficulty under this head occurs in cases where the provinces have endeavoured to regulate trade, either in the course of dealing with property and civil rights, or under the guise of imposing a tax. It is not our task to comment upon such legislation, but it may be noted that while a great deal of the considerable number of acts of this class have been adopted with the intention of assisting industry, or protecting the consumer, a number of these acts have been adopted with the principal object of giving advantages to local activity and placing disadvantages in the way of enterprise from other provinces. So there have been numerous infringements of the spirit, and letter too, of s. 121 of the British North America Act. That article was fundamental to Confederation. It read:—

> "All Articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

As noted above, s. 121 has not been frequently before the courts,[226] but it will be seen that a liberal application of its terms could lead to the invalidation of much of the legislation mentioned below.

(a) Provincial Regulation of Trade and Commerce

General Principles

Although no such restriction can be found in the words of s. 91, there is no doubt but that under the cases the power of the Dominion to legislate respecting the regulation of trade and commerce is limited to "political arrangements in regard to trade requiring the sanction of parliament, regulation in matters of interprovincial concern, and, it may be, general regulation of trade affecting the whole Dominion."[227] Since power to legislate must reside somewhere, it follows from the fact that the Dominion may not exercise this jurisdiction that the provinces can alone legislate to regulate trade and commerce which is limited to the provincial area,[228] though "the circumstance that the statute operates only within the boundaries of the province is . . . immaterial."[229] Both authorities, Dominion and provincial, have been faced with the task of dividing jurisdiction over trade and commerce to suit the "watertight compartments" which the constitution has been given by judicial interpretation. The most striking

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[224] P. 10.

[225] *The King* v. *Arcadia Coal Co.*, (1932) 2 D.L.R. 475 at p. 487; *A.G. Alberta* v. *A.G. Canada*, (1928) A.C. 475 at p. 486; *Union Colliery Co.* v. *Brydon*, (1899) A.C. 580; *A.G. Alberta* v. *A.G. Canada*, (1939) A.C. 117.

[226] At p. 43. See the *King* v. *Nat. Bell Liquors Ltd.*, (1922) 2 A.C. at p. 138; *Gold Seal Ltd.* v. *A.G. Alberta*, (1921) 62 S.C.R. 424 at pp. 426, 466 and 469; Cannon, J., in *Lawson v. Interior Tree Fruit, etc.*, (1931) S.C.R. 357 at p. 373; *Spooner Oils Ltd.* v. *Turner Valley*, (1932) 4 D.L.R. 750 at p. 758; (1933) S.C.R. 629. See also the Australian cases of *James* v. *Commonwealth*, (1936) A.C. 578 and *James* v. *Cowan*, (1932) A.C. 542.

[227] *Citizens' Insurance Company* v. *Parsons*, (1881) 7 App. Cas. 96; Lord Atkin in *A.G. British Columbia* v. *A.G. Canada*, (1937) A.C. 377 at p. 387: ". . . . the regulation of trade and commerce does not permit the regulation of individual forms of trade or commerce confined to the province".

[228] *In re* Insurance Act of Canada, (1932) A.C. 41 at p. 45, where Lord Dunedin said: ". . . . but none the less the provinces can, by legislation, prescribe the way in which insurance business or any other business shall be carried on in the provinces"; *Shannon* v. *Lower Mainland Dairy Products Board*, (1938) A.C. 721.

[229] Duff, C.J., *In re* Alberta Legislation, (1938) 2 D.L.R. 81 at p. 97.

example of this is the effort by the Dominion and the provinces, and by both together, to enact marketing legislation. We shall mention this at some length by reason of its importance in the economy of Canada and as a case where the complexities of the constitutional position have so far prevented both the Dominion and provinces, separately and together, from exercising effective jurisdiction.

Marketing Legislation

Marketing legislation is usually designed for the protection and advancement of the interests of producers rather than of consumers. In a country like Canada, which exports a large part of its produce to be sold on a world market, the purpose of marketing legislation may vary all the way from the provision of means to develop markets by publicity or the standardization of products by grading, to a rigid control of the volume of production and even the complete pooling of an entire crop for sale through a single agency. In fact, legislation has been enacted by both the Dominion and the provinces running the whole gamut from the mere development of markets through publicity, to the complete control and sale of an entire crop.

It is not for us here to comment upon the social or economic justification or effect of such legislation; that has been done elsewhere.[230] We may note, however, that the need of legislation of the general character under discussion seems to be universal in that every country of the world appears to have adopted it in some form or another. The federations, the United States,[231] Australia[232] and Canada, have all enacted legislation of this character, which has been frequently challenged in the courts; but it is more than interesting to note that in no one of the three countries has the jurisdiction of the legislature enacting the legislation been challenged by the other state authority. The challenge has come from some private interest which has objected to the regimentation imposed in consequence of the enactment.

Claims to Jurisdiction to Enact Marketing Legislation in Canada

The Dominion has rested its claim to jurisdiction upon the power conferred by s. 91 (2) of the Act, " The Regulation of Trade and Commerce "; while the provinces have claimed that the matter falls under their power to deal with " Property and Civil Rights in the Province " conferred by s. 92 (13) or " Generally all Matters of a merely local or private Nature in the Province " under s. 92 (16).

Obstacles in the Way of Provincial Legislation

It is obvious at the outset that practically no legislation of the type under discussion could be enacted by a province which would not from some aspects affect interprovincial or international trade and therefore fall under the Dominion's power to regulate trade and commerce, if indeed that power does mean " political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of interprovincial concern, and, it may be, general regulation of trade affecting the whole Dominion " as held in *Parsons' Case*.[233]

Also standing in the way of provincial legislation respecting marketing, there are the provisions of s. 121 of the British North America Act, which read:—

> " All articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

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[230] Royal Institute of International Affairs, *World Agriculture and International Survey*, 1932; J. E. Lattimer, "The Natural Products Marketing Act," *Canadian Journal of Economics and Political Science*, vol. 1, p. 101, (1935); T. G. Norris, "The Natural Products Marketing Act, 1934, Constitutional Validity," and W. C. Hopper, "Administration of the Act," *Canadian Journal of Economics and Political Science*, vol. 1, p. 465; W. M. Drummond, "Price Raising in the Dairy Industry"; *Canadian Journal of Economics and Political Science*, vol. 1, p. 551; F. R. Scott, "Note on Marketing Legislation" for *Canadian Journal of Economics and Political Science*, vol. 3, p. 240; J. Coke, "Efforts to Control Marketing by Government Boards or Organizations acting with Government Support", Proceedings Canadian Political Science Association, 1933, p. 90; C. B. Davidson, "Recent Legislation Affecting International Trade in Farm Products," Proceedings of the Canadian Political Science Association, 1933, p. 106; W. M. Drummond, "The Functions and Responsibilities of Governments in Agricultural Marketing," Proceedings of the Canadian Political Science Association, 1933, p. 127.

[231] T. R. Powell, "Commerce, Pensions and Codes," 49 Harvard Law Review. 1 and 193, (1935) "Agricultural Adjustment and Marketing Control," Yale L.J., vol. 46, p. 130-142, (1936) where the relevant statutes and decisions are noted; *Schechter Poultry Corporation* v. *United States*, (1935) 295 U.S. 495; *United States* v. *Butler*, (1936) 56 Sup. Ct. 312.

[232] K. H. Bailey and L. F. Giblin, *Marketing and the Constitution, Melbourne Univ. Press*, 1937; *James v. Cowan*, (1932) A.C. 542; *James* v. *Commonwealth of Australia*, (1936) A.C. 578; *A.G. New South Wales* v. *Homebush Flour Mills*, (1937) 56 C.L.R. 390; *Hardey* v. *Walsh*, (1937) 57 C.L.R. 372. The debate in Australian House of Representatives and Senate on the Constitution Alteration (Marketing) Bill, 1936, Australian Parliamentary Debates on 14th October to 2nd December, 1936, has a full discussion of the constitutional position respecting Marketing in Australia.

[233] *The Citizens' Insurance Company* v. *Parsons*, (1881) 7 App. Cas. 96. In *Toronto Electric Commissioners* v. *Snider*, (1925) A.C. 396, it was said by Lord Haldane, at p. 410: "It is, in their Lordships' opinion, now clear that, excepting so far as the power can be invoked in aid of capacity conferred independently under other words in s. 91, the power to regulate trade and commerce cannot be relied on as enabling the Dominion Parliament to regulate civil rights in the Provinces". Taken at its face value, this comment would empty the words "trade and commerce" of all meaning whatever. But in *Proprietary Articles Trade Association* v. *Attorney-General for Canada*, (1931) A.C. 310, Lord Atkin said at p. 326, that "the words of the statute (The Regulation of Trade and Commerce) must receive their proper construction where they stand as giving an independent authority to Parliament over the particular subject-matter". It may be noted, however, that in hardly a single case has the Judicial Committee upheld a Dominion statute on the sole ground that it was a valid exercise of the Dominion's power to regulate trade and commerce alone. For an article of unusual interest showing the use made of the commerce clause in the United States see: T. R. Powell, "Commerce, Pensions and Codes," 49 Harvard Law Review 1 and 193. (1935).

Provincial legislation respecting marketing has almost invariably been held to be *ultra vires* of the provinces, as in conflict with either s. 91 (2) or s. 121.[234]

Obstacles in the Way of Dominion Legislation

While the provinces have met with little success in drafting legislation which avoided conflict with the Dominion's power to legislate respecting trade and commerce or with s. 121, the Dominion on its side has had equal difficulty; for if it is obvious that no such provincial legislation can be devised which does not affect trade and commerce, it is at least equally obvious that no legislation of any kind which affects marketing, and therefore property and contracts, can fail to deal with a matter of property and civil rights in a province and so give rise to the possibility that it invades the provincial sphere as found in s. 92 (13). And in point of fact Dominion acts in the character of marketing legislation upon challenge in the courts have been invalidated as entering upon the provincial sphere of property and civil rights.[235]

Concurrent Legislation

As noted above, it is not the competitive jurisdiction which has sought and succeeded in having the other's legislation set aside. The Dominion has not challenged the provinces' marketing legislation, nor have the provinces challenged the Dominion's. The questions have been raised either in a reference or by private litigants whose immediate interests were affected by the legislation. To meet these attacks the provinces joined the Dominion in enacting concurrent or enabling legislation in terms generally similar to the terms of the Saskatchewan Act.[236] The possibility of this being done had been held out in the *Montreal Street Railway Case*.[237]

But it has often been held that the Imperial Parliament in the British North America Act distributed all legislative powers between the Dominion and the provinces and consequently neither the Dominion nor the provinces may delegate power to each other.[238] Applying these rules, the courts have so far refused to validate doubtful legislation merely because the Dominion and provincial statutes purported in general terms to deal with the entire subject in so far as it fell within their respective legislative fields.[239]

To have effective marketing legislation in Canada it becomes necessary to devise Dominion legislation which does not by so much as a hair's breadth invade the provincial field, and to supplement this by concurrent provincial legislation, enacted by all the provinces, which would deal with the matter in so far as it was in the provincial field. Each must deal with its own; neither can deal with both or with the other. But to be effective both would have to be pieced together so as to leave no gap between them. While to be effective the legislation must neatly occupy the whole field, it may not overlap, for following the cases it now seems that the mere possibility of an overlap will infect the whole enactment.

While therefore it is still theoretically possible for either the Dominion or the provinces to enact marketing legislation which would apply within their respective spheres, the difficulty of piecing together this legislation by concurrent enactments, each strictly restricted to the part of the subject coming within the legislative jurisdiction of each authority, makes it so uncertain that the desired result has been successfully accomplished, that even if the provinces could agree with each other and with the Dominion there would be no certainty that the whole body of legislation had been "properly framed" until one and probably several cases had been brought to the Privy Council.

If interprovincial trade is to keep pace with the immense and constantly increasing improvements

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[234] *Lawson* v. *Interior Tree Fruit Committee*, (1931) S.C.R. 357, holding the Produce Marketing Act, 1926-27, c. 54 and 1928, c. 39 of British Columbia *ultra vires*. But see the decision of the British Columbia Court of Appeal *In re* Natural Products Marketing Act, (1937) 4 D.L.R. 298 holding a later British Columbia act *intra vires* upheld in *Shannon* v. *Lower Mainland Dairy Products Board*, (1938) A.C. 721, further noted below at p. 52. Another British Columbia Act, The Dairy Products Sales Adjustment Act, 1929, c. 20, 1930, c. 13 and 1931, c. 14 was held *ultra vires* in *Lower Mainland Dairy Sales Adjustment Committee* v. *Crystal Dairy, Ltd.*, (1933) A.C. 168. The Dairy Products Act, 1933, c. 24 of Quebec was held *intra vires* in *The King* v. *Simoneau*, (1936) 1 D.L.R. 143. *In re* Grain Marketing Act, (1931) 2 W.W.R. 146 held The Grain Marketing Act, 1931, c. 87 *ultra vires*.

[235] *The King* v. *Collins*, (1926) 4 D.L.R. 548, holding The Live Stock and Live Stock Products Act, (R.S.C., 1927, c. 120) in part *ultra vires; The King* v. *Eastern Terminal Elevator Co.*, (1925) S.C.R. 434; *The King* v. *Manitoba Grain Co.* (1922) 66 D.L.R. 406; *Trimble* v. *Capling*, (1927) 1 D.L.R. 717; and *Saskatchewan Wheat Growers* v. *Zurowski*, (1926) 1 D.L.R. 770, holding The Canada Grain Act *ultra vires; A.G. Canada* v. *A.G. British Columbia*, (1929) A.C. 111.

[236] R.S. Saskatchewan, 1930, c. 151, s. 2, declared *ultra vires* in *The King* v. *Zaslavsky*, (1935) 3 D.L.R. 788.

[237] *Montreal* v. *Montreal Street Railway Co.*, (1912) A.C. 333; See also Duff, J., at p. 381 in *The King* v. *Eastern Terminal Elevator Co.*, (1925) S.C.R. 434; per Turgeon, J.A., in *In re* The Grain Marketing Act, (1931) 2 W.W.R. 146 at p. 160.

[238] *Canadian Pacific Railway* v. *N.D. de Bonsecours*, (1899) A.C. 367; Rt. Hon. R. B. Bennett, House of Commons Debates, May 15, 1936, p. 2847; *The King* v. *Zaslavsky*, (1935) 3 D.L.R. 788; *The King* v. *Thorsby*, (1935) 3 W.W.R. 475; also the Manitoba Act in *The King* v. *Brodsky*, (1936) 1 W.W.R. 177.

[239] The Dominion Natural Products Act, 1934, c. 57; 1935, c. 64, held *ultra vires* in *A.G. British Columbia* v. *A.G. Canada*, (1937) A.C. 377.

in communication, some machinery must be worked out whereby preferably one authority or at worst a number of authorities can effectively impose the regulations which are essential to promote the free flow of goods from one province to another as well as into the markets of the world.

Provincial Regulation of Trade as such

Without going into it in detail all of the provinces have passed laws to regulate trade in liquor,[240] milk, gasoline and other commodities, several of which are listed on the attached table or mentioned in the following pages. All of these laws interfere almost of necessity with interprovincial trade,[241] and many of them authorize authorities created under the legislation to fix prices.[242] Though it does not follow that a law is beyond the power of the province just because it interferes with interprovincial trade or business outside the province,[243] a considerable portion of the legislation mentioned below goes so far that it is unquestionably *ultra vires* of the provinces as encroaching upon the Dominion's authority under s. 91 (2), even as that authority has been restricted by the cases.

In the table which follows the references are to the last revision of the provincial statutes unless otherwise stated.

EXAMPLES OF PROVINCIAL LEGISLATION DEALING WITH TRADE AND COMMERCE

—	Milk[244]	Liquor[245]	Gasoline[246]
Alberta	c. 162[247]	1924, c. 14.[248]	1929, c. 23.
British Columbia	c. 70; c. 5.	c. 160.	1937, c. 8, 1938, c. 5.
Manitoba	1935, c. 10; 1937, c.29; 1937-38, c. 25.	1928, c. 31, s. 289; c. 32[248]; 1931, c. 20; 1933, c. 22; 1934, c. 24; 1936, c. 23; 1937-38, c. 23.	Cons. Amdts. c.79.
New Brunswick	1935, c. 16; 1936, c. 40; 1938, c. 57.	c. 28, s. 56.[249]	1935, c. 17.
Nova Scotia	1938, c. 6.	1930, c. 2.	1934, c. 2.[250]
Ontario	c. 76; 1938, c. 7.	c. 294.[251]	c. 32.
Prince Edward Island	1937, c. 7; 1938, c.17.	1937, c. 27.	1937, c. 15.
Quebec	Dairy Products Act, R.S., c. 63, replaced by 1933, c. 24; Am. 1934, c. 27; 1935, c. 29.	c. 37.	c. 36A as enacted by 1932, c. 31.[252]
Saskatchewan	1934-35, c. 58.[253]	c. 232.	1938, c. 13.

[240] The division of the field of legislation between Dominion and provinces nowhere presents greater difficulties than in the case of liquor legislation. See J. F. Davison, "Liquor Legislation in Canada," (1929) 7 *Canadian Bar Review* 468.

[241] Cf. *Lawson* v. *Interior Tree Fruit and Vegetable Committee*, (1931) S.C.R. 357; *In re* Grain Marketing Act, (1931) 2 W.W.R. 146; 25 Saskatchewan L.R. 273. *Hudson's Bay Co.* v. *Heffernan*, (1917) 3 W.W.R. 167.

[242] See two cases recently decided in British Columbia and Quebec, respectively, both holding price-fixing by provincial instrumentalities to be *ultra vires; Home Oil Distributors Ltd.* v. *A.G. British Columbia*, (1939) 1 W.W.R. 49, and *La Patrie Shoe Repairing* v. *The Joint Committee of the Shoe Repairing Industry*, Gibsone, J., February 9, 1939, still unreported.

[243] *Manitoba* v. *Liquor License Holders*, (1902) A.C. 73 at p. 78.

[244] These acts provide for the creation of a milk control board with power to grant licences, fix prices and supervise the industry for the purpose of enforcing the orders and regulations of the board.

[245] These acts usually provide for the creation of a commission with power to buy and sell spirits, beer and wine, and to license their manufacture and sale.

[246] These acts provide for the licence of the sale of gasoline.

[247] *Board of Utility Commissioners* v. *Model Dairies*, (1937) 1 D.L.R. 95.

[248] The application of this Act is expressly limited to transactions within the province. The effect of such a disclaimer was discussed in *A.G. Manitoba* v. *Manitoba License Holders' Association*, (1902) A.C. 73 at p. 79; *The King* v. *Nat. Bell Liquors Ltd.*, (1922) 2 A.C. 128; *A.G. British Columbia* v. *A.G. Canada*, (1937) A.C. 377 at p. 388; *In re* Alberta Legislation, (1938) 2 D.L.R. 81 at p. 131.

[249] New Brunswick's regulations provide for a tax of 5 per cent on the sale tax of beer brewed and exported but the tax is not collected.

[250] Vests the control of the sale of gasoline in Nova Scotia in the Board of Commissioners of Public Utilities. Every seller at wholesale or retail must obtain a licence from the Board. Noted in Canadian Journal of Economics and Political Science, vol. 1, p. 287. The preamble to the Act reads: "Whereas the use of gasoline within Nova Scotia having become a daily necessity to its people, it is therefore desirable in the interests of the sellers and users alike that the distribution and sale thereof should be regulated."

[251] See note 248 above.

[252] Sections 5 and 6 of the Act may apply to extra-provincial sales. See however s. 13.

[253] The *King* v. *Cherry*, (1938) 1 W.W.R. 12 in which the Saskatchewan Court of Appeal held this Act *intra vires* as dealing with property and civil rights.

Other Trade Legislation

Alberta has in addition to the legislation mentioned below, the *Fuel-Oil Licensing Act*, giving power to license sales and fix prices;[254] and *The Licensing of Trades and Business Act, 1936, c. 67*, providing for the licensing of trades, businesses, etc.[255]

British Columbia has the *Coal and Petroleum Products Control Board Act* giving power to the board to license sales and fix prices.[256] In imposing a tax on fuel-oil, which is imported, and not imposing a tax on coal produced locally, the province gives protection to its home product. Upon the validity of this act being challenged in the courts[257] the provincial legislature passed an act[258] attempting to prevent the challenge succeeding by declaring that the Board should only deal with the commodities in their "provincial aspect"

[254] 1936, c. 68, also c. 9.

[255] Acts which merely require a licence to be taken out in consideration of the payment of a fee are generally accepted as *intra vires* of the provinces (*The King* v. *Haworth*, (1920) 53 D.L.R. 329—a Saskatchewan tax on pedlars).

[256] R.S., 1936, c. 278; 1937, c. 8.

[257] In the still pending case of *Home Oil Distributors Ltd.* v. *A.G. British Columbia*, (1939) 1 W.W.R. 49 in which Manson, J., on March 9, 1939, held the parts of the act permitting the fixing of prices to be *ultra vires*. The case has been appealed by the province. It is understood that since the action was taken the order fixing prices made by the Board appointed under the act has been abandoned. It may be noted that Hon. Mr. Justice Macdonald has made extensive reports upon the coal and petroleum industries in British Columbia as a Royal Commission under the Enquiries Act.

[258] 1938, c. 5, s. 4 adding s. 42 to 1937, c. 8.

and by making this declaration retroactive. Sections 4 and 5 of the 1938 Act follow:—

"4. Said chapter 8 (of the statutes of 1937) is amended by adding thereto the following as section 42:—

"42. This Act is not intended to implement or carry into effect the recommendations or findings of any report made or to be made by the Commissioner appointed by the Lieutenant-Governor in Council under the 'Public Inquiries Act' on the twenty-ninth day of November, 1934; and in construing this Act and in ascertaining its purpose, intention, scope, and effect no reference shall be made to any such reports; and the Board shall regulate and control the coal and petroleum industries in their Provincial aspects only; and in fixing the price of any product or commodity the Board shall consider only matters that relate to that product or commodity in its Provincial aspect and shall not fix the price of any product or commodity for the purpose of affording protection or assistance to any other product, commodity, or industry, and this Act shall not apply to the importation into or export from the Province of any product or commodity.

5. Section 42 of said chapter 8, as enacted by this Act, shall be retroactive and shall be construed as if originally contained in the "Coal and Petroleum Products Control Board Act," passed on the tenth day of December, 1937, and shall be deemed always to have had effect from that date and shall affect litigation pending at the time of its enactment, and the "Coal and Petroleum Products Control Act" as retrospectively amended by this Act is ratified and confirmed."

British Columbia also enacted the *Commodities Retail Sales Act, 1937, c. 9,* providing that commodities shall not be sold by retail in the province at a price less than the cost of manufacture and sale; the *Closing-out Sales Act, 1937, c. 7,* requiring a licence for a closing-out sale; the *Trade Licences Act* providing for the licensing of trades, businesses, etc., outside the boundaries of municipalities.[259]

Manitoba has, by the *Government Liquor Control Act,* arbitrarily fixed the price of beer sold but not brewed in the province at a price above that of locally brewed beer under authority conferred by the Act.[260]

New Brunswick has by amendments to *The Public Utilities Act*[261] given the Public Utilities Board practically unlimited powers with regard to the regulation of commercial practices and marketing conditions in any trade or industry. The provisions are of such widespread importance that we quote them at length:—

"(2) The board shall also have power to investigate in a manner to be determined by it the commercial practices and marketing conditions in any trade or industry; and if in its opinion any such practices are unfair or unreasonable or any such conditions are resulting in wasteful and demoralizing competition, the board shall have power with the approval of the Governor in Council, to prohibit such practices and to prescribe such marketing conditions as it deems to be in the interest of such trade or industry and the general public.

(3) Subject to approval by the Governor in Council, the board shall have power to prescribe that the persons engaged in any such trade or industry in respect to which the Board shall make any such orders, rules or regulations shall be required to apply to the board annually for registration and to pay therefor a fee not to exceed the sum of Five Dollars, and that such registration may be made on such terms and conditions as the board with the approval of the Governor in Council, shall by regulation determine."

Under these provisions the Board has divided the province into different zones and imposed conditions to regulate the baking industry in the province.

This province also has *The Natural Products Control Act.*[262]

Nova Scotia has *The Instalment Payment Contracts Act* requiring all those who sell by the instalment plan to take out a licence which may be suspended at any time at the absolute discretion of the Attorney-General.[263] Nova Scotia also has *The Nova Scotia Money-Lenders' Act* which permits the court to reopen a lending transaction when the inclusive rate charged exceeds the amount permitted by the Dominion.[264]

Ontario has *The Farm Products Control Act* which creates a board with power to investigate, appoint local boards and to make orders and regulations controlling the marketing of farm products and the licensing of persons engaged in the production or marketing of farm products.[265] Ontario also has *The Bread Sales Act* licensing the baking and sale of bread.[266]

Quebec has *"An Act respecting the shipping of wood to places outside of the Province," 1937, c. 29.* The third paragraph of the preamble reads:—

"Whereas it is accordingly expedient to regulate and supervise the shipping to places outside the province of wood coming from our forests."

Section 1 provides that any person shipping to places outside of the province any unfabricated

[259] R.S., 1936, c. 158.
[260] 1928, c. 31, s. 97, c. 32; 1931, c. 20; 1933, c. 22; 1934, c. 24; 1936, c. 23; 1937-38, c. 23. Section 97 of the act of 1928 governs the price of beer sold in parlours.
[261] R.S. New Brunswick, 1927, c. 127, s. 5, ss. 2 and 3 as enacted by 1936, c. 28.
[262] 1937, c. 52; 1938, c. 66, proclaimed April 21, 1937. For regulations see The Royal Gazette for September 21, 1938.
[263] 1938, c. 8.
[264] 1938, c. 7.
[265] R.S., 1937, c. 75.
[266] R.S., 1937, c. 305.

wood produced from public or private lands in the province must previously obtain a shipping permit issued by the Department of Lands and Forests for which he must pay the fee fixed by Order in Council.[267]

Quebec now has a Department of Municipal Affairs, Trade and Commerce.[268]

A collective labour agreement, approved and made binding upon the entire trade in accordance with the provisions of the *Quebec Collective Labour Agreements Act*,[269] purporting to fix prices to be charged on the repair of shoes, was held to be *ultra vires*,[270] apparently as an encroachment on s. 91 (2).

Saskatchewan has *The Fuel Petroleum Products Act*, which deals with petroleum products.[271]

Dominion Companies

Dominion companies "cannot be interfered with by any provincial law in such a fashion as to derogate from their status and consequent capacities, or, as the result of this restriction to prevent them from exercising the powers conferred on them by Dominion law."[272] So it has been held that a province cannot prohibit a Dominion company from carrying on business without a licence[273] or from selling shares without the consent of a provincial commissioner,[274] but a Dominion company for dealing in securities must conform to a provincial law of general application.[275]

In the illustrations which follow, it has not been possible to consider separately all the legislation affecting the status of Dominion companies, but several instances are picked out to show how such legislation may interfere with extra-provincial trade.

The *Nova Scotia Collecting Agencies Act, 1937, c. 35*, in giving the Attorney-General power "in his absolute discretion" to suspend or cancel the licence of a collecting agency is probably valid as provincial legislation of general application, even though it might prevent a Dominion company from carrying on business. Much the same is *The Inspection of Certain Loan Companies Act, 1936, c. 6*, giving the government drastic powers of regulation.

Quebec legislation which in spirit clearly violates the rule that the provinces may not destroy the status or capacity of a Dominion company is "*An Act Respecting the Turning to Account of the Natural Resources of the Province," 1937, c. 28.* It reads:—

> "No corporation unless it be solely constituted under a law of the Province may acquire any right in any hydraulic power or force, waterfall, rapid, land, forest or mine forming part of the public domain of the Province on the 15th of March, 1937, or which may form part thereof at any time after such date."

Section 92 (5) gives the provinces power to legislate in relation to:—

> "The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon."

This power, taken together with the province's power to legislate respecting property and civil rights in the province, gives the province jurisdiction to regulate the sale of the natural resources of the province. On the other hand, the Act destroys the capacity of a Dominion company to acquire lands, mining claims or power rights from the province of Quebec. The Act may not technically be unconstitutional,[276] yet the adoption and extension of legislation upon the same principle by all the provinces would indeed tend to divide Canada into a series of "watertight compartments."

An illustration of the way in which legislation upon the subject of property and civil rights within the province may affect interprovincial trade or the status of Dominion companies is given by an act of the Quebec Legislature entitled "*An Act to protect people's savings and prevent over-capitalization," 1936, c. 31.*

Section 1 of the Act reads:—

> "Notwithstanding any general law or special act to the contrary, every issue of bonds, debentures or debenture stock, for industrial or commercial purposes, must be limited to the amount representing the real value of the immovable property existing and affected by the hypothec given to guarantee the issue.
>
> The boats, vessels and ships of a navigation company are considered as immovable property for the purposes of this act."

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[267] *The King* v. *Boscowity*, (1895) 4 B.C.R. 132 held a provincial statute prohibiting export of game *intra vires* as incidental to the general scheme of game protection and in *A.G. Ontario* v. *A.G. Canada*, (1896) A.C. 348 and *A.G. Manitoba* v. *Manitoba Licence Holders' Association*, (1902) A.C. 73 it was held that the provinces could prohibit the sale of liquor in the province.

[268] 1935, c. 45.

[269] 1937, c. 49 as amended by 1938, c. 52.

[270] By Gibsone, J., in *La Patrie Shoe Repairing* v. *The Joint Committee of the Shoe Repairing Industry* in a judgment still unreported which was given on February 9, 1939.

[271] 1938, c. 13.

[272] *Great West Saddlery Co.* v. *The King*, (1921) 2 A.C. 91 at p. 100.

[273] *John Deere Plow Co.* v. *Wharton*, (1915) A.C. 330; *Great West Saddlery Co.* v. *The King*, (1921) 2 A.C. 91.

[274] *A.G. Manitoba* v. *A.G. Canada*, (1929) A.C. 260; *Lukey* v. *Ruthenian Farmers' Elevator Co.*, (1924) S.C.R. 56.

[275] *Lymburn* v. *Mayland*, (1932) A.C. 318.

[276] See *Colonial Building and Investment Association* v. *A.G. Quebec*, (1883) 9 App. Cas. 157, and *Chaudiere Gold Mining Company* v. *Desbarats*, (1873) 5 P.C. 277; *Brooks-Bidlake* v. *A.G. British Columbia*, (1923) A.C. 450; *Great West Saddlery Co. Ltd.* v. *The King*, (1921) 2 A.C. 91 at p. 105.

The only other section deals with refunding issues.

By reason of the vague terms of the statute, numerous questions of considerable difficulty have arisen in connection with its interpretation. Does the Act limit the status and capacity of a Dominion company? Does it interfere with interprovincial commerce in the sale of securities if (i) the company making the issue, or (ii) the property securing the issue, or (iii) the issue, or (iv) the sale, is outside the province of Quebec?

Sales of Shares

The difficulty of piecing together powers to deal adequately with a complex subject is well illustrated by the efforts to protect the investing public by regulating the sale of shares. It seems to be generally agreed that the Dominion cannot do this effectively even in the case of Dominion companies once the shares have got in the hands of a purchaser, since what happens after that is a matter of contract and within provincial jurisdiction.[277] It is equally clear that the provinces may not prevent the original sale of shares by a Dominion company,[278] but the provinces may require even a Dominion company to register under pain of fine;[279] and the provinces have now adopted securities acts requiring the licensing of brokers and the filing of information, as well as conferring wide powers of investigation.[280] While most of the acts stop short of saying that no security shall be sold unless the authority appointed is satisfied with the information supplied, the existing legislation does in effect give some authority the power to stop a broker from selling shares against the wish of that authority.[281] Uncertainty as to the constitutional position has permitted the provinces to do things by executive act which could hardly be justified if spelled out in the legislation.

Taxation as a Device

The provinces have freely used their power to tax as a device by which to endeavour to regulate trade.

[277] R. G. H. Smails, "The Dominion Companies' Act, 1934: An Appraisal," 1 Canadian Journal of Economics and Political Science 52 at p. 60. *Lymburn* v. *Mayland*, (1932) A.C. 318.

[278] *A.G. Manitoba* v. *A.G. Canada*, (1929) A.C. 260.

[279] *Lymburn* v. *Mayland*, (1932) A.C. 318.

[280] All the acts are similar. In *The King* v. *Hazzard*, (1932) 1 D.L.R. 575 it was held that the Ontario Act applied to a Dominion company.

[281] Prince Edward Island requires the consent of the Registrar (1937) c. 34, s. 6, which added s. 8A. Nova Scotia requires that a statement must be filed and "in effect" (s. 9A as added by 1936, c. 41, s. 10). Quebec, British Columbia and Manitoba achieve much the same result with their power to issue "stop orders". See below at p. 66.

We have already considered the power of the province to impose direct taxation within the province for the raising of a revenue for provincial purposes[282] and we have mentioned the two limitations that the tax must be direct[283] and that it must be within the province.[284]

There is, however, we submit, a third limitation, namely, that the purpose of the tax can only be to raise a revenue.

This question came up squarely in *A.G. Alberta* v. *A.G. Canada*[285] in which the validity of Alberta legislation imposing a virtually prohibitive tax upon banks was challenged and denied. Speaking for the Board at p. 128, Lord Maugham said:—

> " It may be stated at the outset, if indeed it is not self-evident, that the mere fact that revenue to a greater or smaller amount would be raised in the Province by a highly selective measure of this unusual character is not sufficient to justify it as coming within s. 92. Under the guise of discriminatory taxation in the Province it would be easy not only to impair, but even to render wholly nugatory the exclusive legislative authority of the Dominion over a number of the classes of subjects specifically mentioned in s. 91 by making them valueless."

Further, if it is apparent that a taxing statute is not " in relation to " taxation or that its object is not to raise a revenue but to regulate extra-provincial trade, then the tax will be held to be *ultra vires*.[286] But what has just been said must be qualified by the recent decision in the *Shannon Case* which is referred to when we deal with the provinces' licensing power which is the next heading of this study.

A tax may further be held to be *ultra vires* for the additional reason that it destroys the status and capacity of Dominion companies. It could not, we submit, be pretended that a province could impose a tax upon a Dominion company which effectively prevented it operating within the province.[287]

[282] Above p. 34, *et seq.*

[283] Above p. 34.

[284] Above pp. 34 and 40.

[285] (1939) A.C. 117 at p. 128 and 130. See also in the Supreme Court, (1938) S.C.R. 100 at pp. 129, 147, 151.

[286] *A.G. Manitoba* v. *A.G. Canada* (1929) A.C. 260.

[287] *Great West Saddlery Co.* v. *The King*, (1921) 2 A.C. 91 at p. 100; *In re* Alberta Legislation, (1938) 2 D.L.R. 81; but under *Bank of Toronto* v. *Lambe*, (1887) 12 App. Cas. 575 there is no doubt whatever of the provinces' power to tax Dominion companies but in view of the explanation of this judgment in *A.G. Alberta* v. *A.G. Canada*, (1939) A.C. 117 at p. 133, not out of existence. Under *Forbes* v. *A.G. Manitoba*, (1937) A.C. 260, the provinces may tax Dominion government employees. *The Royal Bank* v. *Workmen's Compensation Board of Nova Scotia*, (1936) S.C.R. 560, held that the province had power to impose assessments on property given to a bank as security under s. 88 of The Bank Act.

The Provinces' Licensing Power

Similar to the provinces' power to tax is their power, conferred by s. 92 (9), to legislate in relation to:—

> "Shop, Saloon, Tavern, Auctioneer and other Licences in order to the raising of a Revenue for Provincial, Local or Municipal Purposes."

This power, it has been held, is not assigned to the provincial legislature for the purpose of regulating trade, but "in order to the raising of a revenue for provincial, local or municipal purposes."[288]

But a view almost exactly contrary to that just stated was taken by the Privy Council in the recent case of *Shannon* v. *Lower Mainland Dairy Products Board.*[289] In speaking for the Board, Lord Atkin said, at p. 721:—

> "If regulation of trade within the Province has to be held valid, the ordinary method of regulating trade, i.e., by a system of licences, must also be admissible. A licence itself merely involves a permission to trade subject to compliance with specified conditions. A licence fee, though usual, does not appear to be essential. But, if licences are granted, it appears to be no objection that fees should be charged in order either to defray the costs of administering the local regulation or to increase the general funds of the Province, or for both purposes. The object would appear to be in such a case to raise a revenue for either local or Provincial purposes. On this part of the case their Lordships, with great respect, think that the present Chief Justice, then Duff J., took a somewhat narrow view of the Provincial powers under s. 92 (9) in *Lawson* v. *Interior Tree Fruit and Vegetable Committee of Direction,*[290] where he says:[291] 'on the other hand, the last-mentioned head authorizes licences for the purpose of raising a revenue, and does not, I think, contemplate licences which, in their primary function, are instrumentalities for the control of trade—even local or provincial trade.' It cannot, as their Lordships think, be an objection to a licence plus a fee that it is directed both to the regulation of trade and to the provision of revenue. It would be difficult in the case of saloon and tavern licences to say that the regulation of the trade was not at least as important as the provision of revenue. And, if licences for the specified trades are valid, their Lordships see no reason why the words 'other licences' in s. 92 (9) should not be sufficient to support the enactment in question. The impugned provisions can also, in their Lordships' opinion, be supported on the ground accepted by Martin C.J. in his judgment on the reference—namely, that they are fees for services rendered by the Province, or by its authorized instrumentalities, under the powers given by s. 92 (13) and (16). The Chief Justice refers to fees on land registration, and mining and prospecting certificates. Another example might be the exaction of market tolls on the establishment of a new market. On these grounds the attack upon the Act based on the powers to exact licence fees must be held to fail."

The passage has been quoted at length because of its importance. It should be added that the Privy Council expressly refrained from supporting the legislation in question by reference to s. 92 (2). At p. 271 it was said:—

> "Without deciding the matter either way, they (their Lordships) can see difficulties in holding this to be direct taxation within the Province. But on the other grounds the legislation can be supported . . ."

i.e., on the ground that the Act in question was an act to regulate by licence a particular business entirely within the Province.

Provincial Taxation as a Means to Regulate

Many examples can be cited of provincial taxation which, directly or indirectly, favours local trade and industry or puts obstacles in the trade or industry of other provinces, and therefore contravenes in letter or in spirit s. 121 of the British North America Act.

Alberta and *British Columbia* in imposing taxes on imported fuel-oil and none on locally produced coal give a substantial advantage to the latter.[292]

Nova Scotia has its *Transient Photographers Act, 1937, c. 9,* requiring non-resident photographers to be licensed at a fee of $200, understood to be aimed at a single firm.

New Brunswick did impose taxes upon insurance premiums, bank deposits, deposits with loan and trust companies, loans by finance corporations, in the province, less certain deductions allowed under the act in respect of disbursements made in the province.[293] A tax was also imposed on companies whose stock was owned outside the province and on persons, etc., carrying on a business outside the province, on gross sales by retail of goods and on gross receipts from the business of amusement or entertainment. The rate of tax was fixed by the Governor in Council[294] and was in fact graduated in proportion to the amount of the gross sales and the class of company. In arriving at the amount of gross sales deduction was to be made of the amount paid for goods produced in the province.

[288] *Russell* v. *The Queen,* (1882) 7 App. Cas. 829 at p. 837; *Great West Saddlery Co.* v. *The King,* (1921) 2 A.C. 91; *John Deere Plow Co.* v. *Wharton,* (1915) A.C. 330; *Lawson* v. *Interior Tree Fruit and Vegetable Committee,* (1931) S.C.R. 357 at p. 364.

[289] (1938) A.C. 708 at p. 721.

[290] (1931) Canada S.C.R. 357.

[291] *Ibid.* 364.

[292] See p. 48.

[293] The Corporations Tax Act, R.S., 1927, c. 16 as amended by 1936, c. 12. See p. 54 below.

[294] Order in Council dated 20th October, 1937.

These provisions were, however, replaced in 1938 by legislation taxing corporations in the same manner as in the other provinces.[295]

In addition to the acts mentioned here as illustrations of provincial efforts to interfere with the free flow of products and goods across provincial boundaries, there is the Alberta legislation referred to below.

Municipal Taxation as a Means to Regulate

There is also municipal taxation, particularly in Quebec, which, if allowed to develop, would divide Canada into walled towns. Though hardly of national importance in itself, this municipal legislation is important as indicating what might happen if narrow-minded local feeling forced economic nationalism to its ultimate conclusion. Since it has not been treated anywhere before, we deal with it at some length.

Under s. 92 (8) the provinces are given exclusive jurisdiction over municipal institutions and may endow the municipalities within their jurisdiction with their own taxing powers.[296] Consequently, we may expect to find municipalities exercising an indirect control over trade and commerce through their powers of taxation.

Discriminatory Municipal Taxation

In the province of Quebec, under the general acts applicable to them, municipalities have the power to exact a licence fee not exceeding $200, in addition to other taxes, on persons carrying on trades, businesses, etc., and to discriminate against non-residents carrying on such business, etc., to the extent of 50 per cent,[297] but the general taxing powers given do not enable the municipalities to tax wholesalers.[298] Such taxes are no doubt valid exercises of the province's power under s. 92 (9).

In recent years the practice has grown up of municipalities seeking and obtaining the enactment of special acts amending their charters so as to give them special powers of taxation, additional to those given by the general law. There are now over one hundred municipalities in the province whose powers to tax have been specially added to by special legislation. Of recent years this special taxation has been particularly designed to protect home industry rather than to serve any purpose of raising a revenue, and the taxes have discriminated both as to the residence of the trader and as to the character of his business.

Chain Store Taxes

A striking illustration of this kind of discrimination is given by taxes on chain stores as illustrative of a tendency to regulate trade in the local municipality without regard to the national interest.

In Quebec numerous municipalities have been given power to impose taxes against stores, either on a sliding scale increasing with the number of stores, or a fixed rate per store, greatly in excess of any tax imposed on single unit stores, and, it has been established, greatly in excess of the average net profit per store. The stated purpose of this taxation is to put chain stores out of existence. Already the number of stores has been greatly decreased and despite large increases in the rate of the tax recently the revenue from the taxes upon such stores has gone down.

Examples of Municipal Chain Store Taxes

Because of its being the most striking example of local regulation of trade, we cite at length several of the Quebec acts granting special powers to tax chain stores.

By an amendment made to the charter of the *city of Montreal* in 1938 the tax imposed on chain-butchers was increased to $50 for the first store, $100 for the second to fifth, $500 for the sixth to tenth and $1,000 for each over the tenth;[299] while in the case of grocers or hardware stores the tax was fixed at $100 for each store from the second to fifth, $500 from the sixth to tenth and $1,000 for each store over the tenth, with similarly graduated taxes on 5, 10, 15 or more cent stores,[300] and also on tobacco shops and drug stores,[301] while the tax on cleaning establishments rises from $100 for the first five stores to $200 for the sixth to the tenth and $300 for each over the tenth.[302]

The *city of Verdun*, a city adjoining Montreal and having some 60,000 people, was given power to impose a tax on chain grocers, hardware, butchers, tobacco, 5, 10, 15 or more cent stores ("bazaars") on a graduated scale rising up to $300

[295] 1938 c. 18.

[296] *Dow* v. *Black*, (1875) 6 P.C. 272.

[297] Cities and Towns Act, R.S., 1925, c. 102, s. 469 (12) s. 526; Municipal Code, articles 697, *et seq.*

[298] Municipal Tax Exemption Act, R.S., 1925, c. 117, s. 6 as replaced by 1934, c. 38, s. 1.

[299] 1938, c. 105, s. 8 (a) replacing sub-paragraph 2 of paragraph h of Article 364 of the city charter. The validity of this tax has been challenged in a case pending before the Superior Court at Montreal.

[300] 1938, c. 105, s. 8 (c) replacing paragraph aaa of Article 364 of the City charter, as enacted by 1933, c. 123, s. 25, and replaced by 1935, c. 112, s. 5 and (d) of s. 8 replacing paragraph jjj of Article 364 as enacted by 1935, c. 112, s. 5 and 1936, c. 103, s. 43.

[301] 1935, c. 112, s. 5 (c) which added iii to Article 364.

[302] 1937, c. 103, s. 43 (h), adding paragraph kkk to Article 364.

for each store, over and above the tenth, and $1,000 for each cleaning establishment over and above the twenty-fifth.[303]

The *city of Quebec* has been given power:—

"To levy on every merchant, merchant partnership or merchant company (commonly called chain-stores) who or which has a place of business and sells by retail in the city, but whose main office is outside of the city, an additional tax of five hundred dollars on each store, such tax being in addition to all taxes imposed on such stores."[304]

The *city of Granby* was given power to impose:—

"In addition to any other tax, an annual tax by way of a licence, on every person, firm, company or corporation carrying on one or more chain-stores in the city, whose chief place of business is situated outside of the city, not to exceed two hundred and fifty dollars for each store.

For the purposes of this paragraph the words 'chain-store' mean a store forming part of a series of commercial establishments practically similar, belonging to the same proprietor."[305]

The *city of Salaberry-de-Valleyfield* had its charter amended by the following provision:—

"In addition to the taxes contemplated by sections 469 and 523 of the Cities and Towns' Act and of the foregoing section 117, the council may impose and levy on every person not residing in the municipality and on every corporation or company not having its principal place of business therein, and operating one or more shops for smokers' articles, candy, articles of domestic use, meat, groceries, dry goods or various goods, outside of the municipality and operating one or more of such establishments in the municipality, a special tax not exceeding five hundred dollars for each such establishment in the municipality.[306]

There are other special provisions for other municipalities. Thus, *Victoriaville* may tax chain-stores $250 per store,[307] *Magog* $250,[308] *Drummondville* $500,[309] *Asbestos* $250,[310] *Montmagny* $200.[311]

The *city of Lachine* was given the following power:—

"The city council may, in addition to the taxes contemplated by sections 469, 523 and 526 of the Cities and Towns' Act (Revised Statutes, 1925, chapter 102), impose and levy from the first of May, 1936, —on every person not residing within the municipality and on every corporation or company not having its chief place of business therein, operating one or more stores for smokers' supplies, candy, articles of domestic use, meat, groceries, dry goods or general merchandise, outside of the municipality and operating one or more of such establishments within the municipality,—an annual special tax not exceeding two hundred and fifty dollars for each of the years begun on the first of May, 1936, and the first of May, 1937, and not exceeding five hundred dollars for subsequent years for each such establishment within the municipality.

This section shall apply also to every company or corporation having its chief place of business in the municipality, when such company or corporation is merely a subsidiary or branch of a company or corporation carrying on the same kind of business outside of the municipality. In every action or claim within the purview of this last paragraph of this section the burden of proof shall be upon the company or corporation."[312]

The *city of Sherbrooke* was given a similar power,[313] and in *Three Rivers* the tax on each store was limited to $500 for the year beginning May 1, 1936 (it was therefore retroactive) and $2,000 per store in subsequent years.[314]

Chain-store Legislation in the Other Provinces

In *New Brunswick* the amount of tax payable by chain-stores is not stated in the taxing act but is left to the discretion of the Governor in Council. By Order in Council passed December 9, 1938, the tax was fixed at $1,500 for each chain-shop, store or other establishment, subject to a rebate of the amount by which such tax exceeds one-quarter of one per cent of the turnover of any shop taxed.[315]

The charter of the *city of Winnipeg* permits the city to impose a tax on the annual rental varying from 5 to 8 per cent in the case of ordinary retail stores but with a maximum of 11 per cent in the case of chain-stores.[316]

In *Nova Scotia* the tax is in addition to all other taxes and it applies to incorporated companies operating or maintaining two or more stores within the province.[317] The rate is $15 for each shop up to five, $40 from six to ten and $100 on each shop

[303] 1937, c. 109, s. 1, which amended the Cities and Towns' Act for the City by adding s. 526a thereto.

[304] 1937, c. 102, s. 67 (c). adding paragraph 195 to s. 336 of the City charter, 1929, c. 95. In *City of Quebec* v. *Sobie Silk Shops Ltd.*, decided on February 9, 1939, the City Recorder held that this tax could not be collected as 24 of the defendant's 25 stores were outside the province.

[305] 1937, c. 107, s. 11, which replaced for the city s. 523 of the Cities and Towns' Act.

[306] 1937, c. 112, s. 3.

[307] 1936, c. 8, s. 24.

[308] 1936, c. 7, s. 30.

[309] 1938, c. 113, s. 16, which imposed a tax of $250 per store at May 1, 1938, the legislation being therefore retroactive. The tax is $500 beginning May 1, 1939.

[310] 1938, c. 115, s. 8.

[311] 1938, c. 116, s. 3.

[312] 1937, c. 108, s. 4, replacing s. 8 of 1935, c. 120. The legislation, it will be noted, is retroactive .

[313] 1937, c. 105, s. 64 (c).

[314] 1937, c. 106, s. 12.

[315] The Corporation Tax Act, 1938, c. 18, s. 19 which replaced 1936, c. 12, s. 7. This Act and the Order in Council passed on October 20, 1937 (but since superseded) imposed a tax based on gross sales but allowed deduction to be made in respect of amounts paid for goods produced in the province, thereby giving a preference to the products of New Brunswick.

[316] 1918, c. 120, s. 282, as re-enacted by 1920, c. 155 and amended by 1926, c. 105, s. 7; 1936, c. 92, s. 6; 1938, c. 71, s. 2.

[317] The Provincial Revenue (Corporations) Act, 1937, c. 15, adding s. 16a and 16b to R.S. 1923, c. 16.

in excess of ten, but these rates are increased with the increase in the gross income of each store.

In *Prince Edward Island* a tax of $2,000 is imposed on each store (or 3 per cent of the gross turnover if that is less) in a chain of four or more, even if the three other stores are outside the province.[318] The tax discriminates against chain-stores in favour of the independent merchant and in favour of the locally owned chain-store.

Similarly, a tax of $500 is imposed on each theatre forming part of a chain of four or more whether or not the other theatres are in or out of the province.[319]

Saskatchewan, alone of all the provinces, enacted legislation on a sliding scale varying with the number of stores and the business done but this legislation has never been put into force.[320]

Constitutionality of Chain-Store and Other Similar Taxation

It is probable that if a taxation statute began with the words: "Whereas it is expedient to suppress chain-stores" the tax would be held *ultra vires* of the province, either as legislation upon a matter of trade and commerce or as interference with the status and capacity of Dominion companies. Statutes, however, do not carry such preambles and the only evidence available to the court in a normal case that the tax was not intended to raise a revenue would be the relative size of the tax and the fact that it was discriminatory.

Whether a tax is intended to raise a revenue or not is a question of degree.[321] A taxation statute imposing a tax of $50 per store could not be said to be discriminatory. On the other hand, there can be little doubt, but that the power given to the city of Three Rivers to impose a tax of $2,000 per store is a tax which is intended to prohibit trade rather than to raise a revenue. As was said by Lord Macmillan in *A.G. British Columbia* v. *McDonald Murphy Lumber Co.*:—[322]

> "The success of the tax, if this be its object, will then be measured inversely by the revenue it yields, which is not the normal characteristic of a tax imposed 'in order to the raising of a revenue for provincial purposes.'"

The kind of question raised here had not come before the courts until the recent decision of the Supreme Court of Canada in the reference *In re Alberta Legislation.*[323] Speaking of the Bank Taxation Act, noted below, Duff, C. J., said at p. 103:—

> "It requires no demonstration to show that such a rate of taxation must be prohibitive in fact. Such legislation is legislation 'directed to,' to quote the phrase of Lord Haldane in Wharton's Case (1915), 18 D.L.R. at p. 363, controlling the banks in the conduct of their business, by forcing upon them a discontinuance of business, or otherwise."

And he added at p. 106:—

> "It is not competent to the Provinces of Canada, by the exercise of their powers of taxation, to force banks which are carrying on business under the authority of the Bank Act to discontinue business; and taxation by one Province on a scale which, in a practical business sense, is manifestly prohibitive is not a valid exercise of provincial legislative authority under s. 92. Such legislation though in the form of a taxing statute, is 'directed to' the frustration of the system of banking established by the Bank Act, and to the controlling of banks in the conduct of their business."

In the same case, Cannon, J., said at p. 115:—

> "I reach the conclusion that the bill, despite its form, does not seek to raise revenue for provincial purposes but, in its true character, aims, by erecting a prohibitive barrier, to prevent the banks from conducting their legitimate business in Alberta."

At p. 124, Kerwin, J., said:—

> "Bill 1 is merely a part of a legislative plan to prevent the operation, within the Province of those banking institutions which have been called into existence and given the necessary powers to conduct their business by the only proper authority, the Parliament of Canada."

The views expressed here were affirmed by the Privy Council.[324]

It should be noted that in this case the court was concerned with the effect of the Alberta tax on banks and banking over which the Dominion had exclusive jurisdiction under s. 91 (15). Chain-stores clearly do not fall under any of the enumerated heads of s. 91 and the fact that a chain-store was operated by a Dominion company might be regarded as merely incidental in view of the legislation, in Quebec at least, being applicable to provincial companies as well as Dominion without discrimination between them. The acts of the Maritime Provinces more clearly interfere with

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[318] The Personal Property and Special Companies' Taxation Act, 1938, c. 18, s. 45 (i) (m).

[319] 1938, c. 18, s. 45 (i) (n).

[320] 1937, c. 6, s. 11 adding s. 17c to 1932, c. 12, but s. 17c has not yet been proclaimed.

[321] See *A.G. Alberta* v. *A.G. Canada,* (1939) A.C. 117. Is a tax of $1,000 on each "concert-cafe, singing-cafe or dancing-cafe," revenue raising or prohibitive? (Quebec, 1937, c. 103, s. 43 (d) amending the Montreal charter) or a like sum payable by everyone lending money upon security of wages or movables and charging 10% or more? (1937, c. 109, s. 1 (f)).

[322] (1930) A.C. 357 at p. 363.

[323] (1938) 2 D.L.R. 81; *Bank of Toronto v. Lambe,* (1887) 12 App. Cas. 575.

[324] *A.G. Alberta* v. *A.G. Canada,* (1939) A.C. 117 at p. 128.

interprovincial trade. While it is permissible in certain circumstances to use business done or capital employed outside the province as the yardstick of the tax payable as held in *Lambe's Case*,[325] the statutes here do far more than that. Obviously, they set up distinct barriers to interprovincial trade.

Other Municipal Taxes

In addition to the municipal taxes on chain-stores referred to above, there are in Quebec other municipal taxes which discriminate against non-residents. Thus, the *city of Granby* is given power:—

> " To prevent any person, residing outside the municipality, from carrying on any trade or business in the municipality or keeping a store therein without being previously authorized thereto by a licence, and without having paid for such licence an amount of not more than two hundred dollars a year, which may differ according to the kind of trade or business; such annual amount shall be payable in addition to any other tax imposed by this act and especially additional to the taxes imposed under sections 523 and 526 of this act."[326]

The following provision was made applicable to the *city of Lachine*:—

> " Dealers in oil, gasoline, soft drinks, candy, confectionery, pastry, tobacco or other merchandise, not residing in the city, who bring with them into the city merchandise not sold in advance, and deliver it to their customers or buyers in the city, shall be subject to the duties, taxes or licences which the city may impose under section 469, paragraph 12, and section 526 of the said Cities and Towns' Act."[327]

The *city of Verdun* was given power to impose:—

> " On every person, company or employee conveying goods with them offered for sale, a licence or permit not exceeding one hundred dollars."[328]

In consequence of these taxes, when a Montreal merchant crosses the line down the centre of a street dividing Montreal from Verdun to sell his merchandise at wholesale to a retailer in Verdun he has to pay a tax of $100.

The result has been to establish tariff walls around local municipalities, interfering with trade and in many cases reducing revenue and affecting the prosperity and the standard of living of everyone in Canada. On these accounts, while it may appear to be trivial in itself, legislation of this character is of definite importance, not only by reason of its immediate interference with trade and commerce but also by reason of its possible extension and development.

For instance, until recently, the city of Montreal has not imposed such discriminatory taxes, but after several applications to the Legislature for power to do so had been refused, the Legislature, in 1934 gave the city power to impose:—

> " An annual special tax not exceeding two hundred dollars upon every person, firm, company or corporation, not residing or having a place of business within the limits of the city, who or which shall come therein to carry on a retail trade, or the business of removing and transport, or who or which therein shall cause to be delivered or delivers by waggons or vehicles goods so sold in the city, in the case only where a municipality has passed or passes a by-law to impose a tax of this kind upon persons, firms or corporations of the city of Montreal going to do business or deliver goods in such municipality."[329]

Thus, we have something in the nature of countervailing duties as between local municipalities in one metropolitan area of Canada.

Perhaps the limit in discriminatory taxation (apart from the disallowed Alberta bills) has been reached in the province of Quebec where an amendment made to the charter of the city of Montreal declared that, during the fiscal year 1938-39, in addition to all other taxes payable, the Montreal Light, Heat & Power Consolidated would pay the city a sum of $350,000, the Bell Telephone Company of Canada a sum of $100,000, and the Montreal Tramways Company a sum of $250,000, to form part of the city's ordinary revenue.[330]

Alberta's Social Credit Legislation

This legislation consists of seventeen acts adopted in 1936 and 1937. The acts are interdependent to an unusual degree and almost everyone of them deals with matters which from some aspects fall under several of the heads of s. 91. We may mention heads:—

" 2. Regulation of Trade and Commerce.
14. Currency and Coinage.

[325] *Bank of Toronto* v. *Lambe*. (1887) 12 App. Cas. 575.

[326] 1937, c. 107, s. 9, which replaced paragraph 12 of s. 469 of the Cities and Towns' Act.

[327] 1937, c. 108, s. 7. See also Lasalle, 1937, c. 115, s. 3; Asbestos, 1938, c. 115, s. 7; Montmagny, 1938, c. 116, s. 4.

[328] 1937, c. 109, s. 1 (f).

[329] 1934, c. 88, s. 11 (b), replacing paragraph (dd) of Article 364 of the City charter.

[330] 1938, c. 105, s. 27. During the year 1937-38 it was provided by 1937, c. 103, s. 94 that the Montreal Light, Heat & Power would pay $300,000 and The Bell Telephone $150,000. When the 1938 bill of the City of Montreal was being considered by the Private Bills Committee of the Legislative Assembly, the bill was changed so that the Bell Telephone Company was relieved of $50,000 of the tax proposed by the City, and this was added to the burden of the Montreal Light, Heat & Power, at the suggestion of the Premier and apparently in consequence of a single speech in the committee. This tax was first imposed in 1935 by c. 112, s. 3, where it was referred to as "the contribution of $225,000 by the Montreal Light, Heat & Power and $125,000 by The Bell Telephone of Canada". It was for the two years 1935-36 and 1936-37 and was stated to be "agreed to for aiding the re-establishment of the finances of the City of Montreal".

15. Incorporation of Banks, Banking and the Issue of Paper Money.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
27. The Criminal Law."

This legislation cannot be said to exhibit any of the usual characteristics of device or expedient, at least any expedients adopted have not been very successful, for of the numerous acts adopted between 1936 and 1938 hardly a vestige remains in force. By reason of this and of the difficulty of classifying legislation which is at once so interdependent and at the same time apparently in conflict with, not one, but several heads of s. 91, we have found it preferable to group the legislation together.

Repealed.

Social Credit Measures Act, 1936, c. 5, authorized the Lieutenant-Governor in Council to appoint persons to formulate proposals to increase purchasing power by means of social dividends and empowered the Lieutenant-Governor in Council to adopt and put into operation any measures designed to facilitate the exchange of goods and services or any proposal calculated to bring about the equation of consumption to production.[331]

Prosperity Certificates Act, 1936 (2nd Sess.), c. 4, authorized the Provincial Treasurer to issue credit certificates to any persons who may be willing to accept the same:—

Dead.

(*a*) For goods supplied and services rendered in respect of any public work undertaken by the government in relation to unemployment relief;
(*b*) For any existing government services;
(*c*) Under any agreement between the government and a city, town or village for relief of unemployment under the provisions of Unemployment Relief Act, 1933, or otherwise; and
(*d*) For public expenditures specified by Order in Council.[332]

Repealed.

Alberta Credit House Act, 1936 (2nd Sess.), c. 1, established the Alberta Credit House, the principal function of which was to furnish to persons entitled to Alberta credit, facilities for the exchange of goods and services in the province in order to effect an equation between the purchasing power of such persons within the province and production within the province.[333]

Ultra vires.

Alberta Social Credit Act, 1937, c. 10 am. by 1937 (2nd Sess.), c. 3, created a board of five persons with power to appoint suitable persons as members of the Provincial Credit Commission, which was to provide for the issue of Treasury Credit Certificates to such extent as might be requisite for the purpose of increasing the purchasing power of the consumer of Alberta as to make such power conform to the productive capacity of the people of the province for the production and delivery of wanted goods and services.[334]

Disallowed and *ultra vires.*

The Credit of Alberta Regulation Act, 1937 (2nd Sess.), c. 1 (assented to August 6, 1937), provided for the annual licensing of bankers and bankers' employees, by the Provincial Credit Commission. The Act required that every application for a licence by a banker or banker's employee should be accompanied by an undertaking signed by the applicant to refrain from acting or assisting or encouraging any person or persons to act in any manner which restricted or interfered with the property and civil rights of any person or persons within the province. The Provincial Credit Commission was given the power at any time and without notice to suspend, revoke or cancel a licence for a breach of the foregoing undertaking. The Act further provided for the appointment of Local Directorates consisting of five persons, three of whom should be appointed by the Social Credit Board (constituted pursuant to s. 3 of the Alberta Social Credit Act) and two of whom should be appointed by the banker in respect of which the Local Directorate has been appointed. The function of the Local Directorate was to supervise, direct and control the policy of the business of the banker. Upon application for the renewal of a suspended,

[331] Repealed by the Alberta Social Credit Act, 1937, c. 10 referred to below and that in turn was repealed by 1938, c. 4.
[332] This Act came into force on September 1, 1936, but it has since become a dead letter.
[333] Repealed by the Alberta Social Credit Act, 1937, c. 10.
[334] Held *ultra vires* by the Supreme Court of Canada on March 4, 1938, *In re* Alberta Legislation, (1938) 2 D.L.R. 81, and repealed by 1938, c. 4, on April 8, 1938.

revoked or cancelled licence, the Provincial Credit Commission might fix a fee in excess of the former fee provided that the increased fee should not exceed one thousand times the amount of the former fee. An unlicensed banker was deprived of all recourse to the courts.[335]

The Bank Taxation Act, 1937 (3rd Sess.), Bill No. 1, was reserved for the signification of the Governor General's pleasure on October 5, 1937. It was
Ultra vires. designed to impose an annual tax of ½ of 1 per cent on the paid-up capital and a tax of 1 per cent on the reserve fund and undivided profits of every bank doing business in the province.[336]

The Bank Employees Civil Rights Act,
Disallowed. *1937 (2nd Sess.), c. 2,* deprives the unlicensed employee of a banker of all recourse to the courts.[337]

The Judicature Act Amendment Act, 1937 (2nd Sess.), c. 5, amended the Judicature Act (R.S.A., 1922, c. 72) by
Disallowed. inserting the following new section:—

> "No action or proceeding of any nature whatsoever concerning the constitutional validity of any enactment of the province shall be commenced, maintained, continued or defended, unless and until permission to bring or maintain or continue or defend such action has first been given by the Lieutenant-Governor in Council."[338]

The Reduction and Settlement of Debts Act, 1936 (2nd Sess.), c. 2, was to reduce
Ultra vires. principal and interest and otherwise provide for the settlement of legal obligations. Payments of interest and principal since 1932 were to be deducted from the debt as it stood on July 1, 1932, and the balance made payable in instalments over ten years without further interest. On new debts the maximum interest rate was set at 5 per cent and all interest paid in excess of 5 per cent applied to principal.[339]

The Credit of Alberta Regulation Act, 1937 (3rd Sess.), Bill No. 8 (reserved for the signification of the Governor General's
Ultra vires. pleasure on October 5, 1937). This bill was intended to repeal and replace the 1937 Act (2nd Sess.), c. 1, and required every credit institution as defined by the Act to apply for and obtain a licence from the Provincial Credit Commission in respect of the business of dealing in credit within the province.[340]

The Accurate News and Information Act, 1937 (3rd Sess.), Bill No. 9 (reserved for the signification of the Governor General's pleasure on October 5, 1937).
Ultra vires. This bill required newspapers published in Alberta, on the demand of "The Chairman" who was, by the interpretation clause, the chairman of "the board" constituted by s. 3 of the Alberta Social Credit Act, to publish any statement furnished by the chairman, and to supply the chairman with all sources of information as to statements published on request. Penalties of suspension of publication and fines were provided for contravention of the Act.[341]

The Home Owners' Security Act, 1938, Bill No. 74. Under this Act no mortgage creditor could foreclose on an urban home in city, town or village without making
Disallowed. a payment of two thousand dollars to the person whose home is foreclosed. This Act also exempted what is known as the "home quarter-section" of any farm from

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[335] This Act was disallowed by Order in Council No. 1986 dated August 17, 1937, as ancillary and dependent legislation and part of the general scheme of Social Credit. It was also held *ultra vires* on the ground that it was legislation in relation to banking and trade and commerce by the Supreme Court *In re* Alberta Legislation, (1938) 2 D.L.R. 81.

[336] This bill was declared *ultra vires* by the Supreme Court, (1938) 2 D.L.R. 81. An appeal to the Judicial Committee was dismissed on July 14, 1938. It is reported under the name *A.G. Alberta* v. *A.G. Canada,* (1939) A.C. 117.

[337] This Act was disallowed by Order in Council No. 1986 on August 17, 1937.

[338] This Act was disallowed by Order in Council No. 1986 on August 17, 1937. An attempt was made to amend the rules of court to effect the same purpose but this was held invalid in *Steen v. Wallace,* (1937) 3 W.W.R. 654.

[339] Held *ultra vires* by the Appellate Division in *Credit Foncier* v. *Ross,* (1937) 3 D.L.R. 365 on the grounds that the act made an unwarranted delegation of legislative authority, affected debts or civil rights outside the province and trenched upon the Dominion's powers with respect to bankruptcy and insolvency.

[340] This bill was held to be *ultra vires* by the Supreme Court on March 4, 1938, (1938) 2 D.L.R. 81. An appeal was taken to the Judicial Committee and dismissed on July 14, 1938, for the reason that the Social Credit Act, upon which this act depended, had been repealed. The case is reported, *A.G. Alberta* v. *A.G. Canada,* (1939) A.C. 117.

[341] This bill was declared *ultra vires* because ancillary to and dependent upon the Social Credit Act which is outside the powers conferred on the provinces by the Supreme Court on March 4, 1938, (1938) S.C.R. 128; 2 D.L.R. 81. An appeal was taken to the Judicial Committee and dismissed on July 14, 1938. The appeal is reported under the name *A.G. Alberta* v. *A.G. Canada,* (1939) A.C. 117. It was dismissed because the Social Credit Act, upon which this act depended, had been repealed.

foreclosure. This Act made no distinction between debtors who could pay and those who could not pay.[342]

The Securities Tax Act, 1938, Bill No. 84, imposed a tax of 2 per cent on the principal sum owing on mortgages, the tax being payable by the lender who could not pass it on to the mortgagor. The tax was payable on June 1, 1938. Failing payment by that time (six weeks from the adoption of the Bill) a penalty was provided of 5 per cent per month or 60 per cent per year. In addition, all owners of mortgages were required to file returns by June 1, 1938, giving elaborate particulars of the mortgages held, under the penalty of a fine of $10 a day in respect of each mortgage. The tax was payable regardless of the real value of the security, or the actual income derived from the mortgage.[343]

Disallowed.

The Limitation of Actions Act, 1935, Amendment Act, 1938, Bill No. 115 provides that action to realize on any debt incurred before July 1, 1936, must be taken before July 1, 1940. The aim and effect of the statute is to force creditors to seek renewals before 1940 arrives; and if the debtor has the inclination to refuse to make a renewal agreement, the creditor has no recourse except to go to the Debt Adjustment Board for a permit to commence proceedings prior to July 1, 1940.[344]

Disallowed

The Provincially Guaranteed Securities Proceedings Act, 1937, c. 11, prohibits actions or proceedings for the purpose of the recovery of any money payable in respect of any provincially guaranteed security, or for the purpose of enforcing any right or remedy whatsoever for the recovery of any such money without the consent of the Lieutenant-Governor in Council.[345]

Ultra vires insofar as this action is concerned.

The Provincial Guaranteed Securities Interest Act, 1937, c. 12, reduces interest rates on government guaranteed securities.[346]

Ultra vires.

The Provincial Securities Interest Act, 1937, c. 13, reduced interest rates on, from and after June 1, 1936, on all securities issued by the province, including debentures, stock, treasury bills and savings certificates issued by the province.[346]

Ultra vires.

The Agricultural Land Relief Act, 1938, c. 6, replaced some land taxes by a 7 per cent tax on production and provided crop insurance. The tax, *i.e.,* seven one-hundredths of agricultural produce, was declared to be vested in the Crown.[347]

Ultra vires.

The Debt Adjustment Act, 1937, Amendment Act, 1938, c. 27, permits a debtor unable to pay his debts to obtain from the Board a certificate and thereafter proceedings may not be taken to execute for debts incurred before July 1, 1936, and the assets of the debtor may be administered by the Board.[348]

The Banking Corporations Temporary Additional Taxation Act, 1938, c. 3, provides that taxes payable by banks are for the years 1938 and 1939 increased by 50 per cent.[348]

The Debt Proceedings Suspension Act, 1938, c. 25, prohibits the continuation of proceedings to enforce payment of debts upon contracts with certain exceptions. This Act has not yet been brought into force by proclamation.

The Tax Recovery Act, 1938, c. 82, permits the owner of mortgaged land to

[342] This Act was disallowed by the Dominion Government on June 15, 1938, on the ground that this legislation was injurious to the public interest of Canada and contrary to the clear intention of the Act of Confederation. P.C. 1368.

[343] This Act was disallowed by the Dominion Government on June 15, 1938, as having invaded the federal legislative field. P.C. 1368.

[344] This Act was disallowed by the Dominion Government on March 25, 1939. In recommending disallowance, the Minister of Justice said that the five Bills then under review "so-called moratory, prescriptive and taxing acts are in reality part of a general scheme of confiscation, debt clearance and prohibition designed to drive out banks and other Dominion institutions in order to make way for a new economic era."

[345] Held *ultra vires* in part by Ewing, J., in *Independent Order of Foresters* v. *Lethbridge Northern Irrigation District,* (1937) 4 D.L.R. 398, affirmed by the Court of Appeal, (1938) 3 D.L.R. 89.

[346] An earlier act (1936) repealed by the statute noted was held *ultra vires* by Ives, J., in *Independent Order of Foresters* v. *Lethbridge Northern Irrigation District,* (1937) 2 D.L.R. 109. The present act was held *ultra vires* by the Court of Appeal in *I.O.O.F.* v. *The King* on April 5, 1939, affirming the judgment of Shepherd, J., (1939) 2 D.L.R. 53.

[347] Held *ultra vires* as an indirect tax in *In re* Agricultural Land Relief Act, (1938) 3 W.W.R. 186.

[348] In his report to the government made on March 21, 1939, the Minister of Justice refused to recommend disallowance of this bill but expressed the view that it would be held *ultra vires* by the courts.

redeem the land free of encumbrances after it is brought to sale for taxes.

(b) Provincial Enactments in the Nature of Criminal Law

General Rule

By s. 91 (27) the Dominion is given "exclusive legislative authority" over

> "The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters."

The provinces under s. 92 (15) may make laws in relation to

> "The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section."

It will be at once seen how difficult it sometimes must be to ascertain if a statute, apparently penal in character, is really "in relation to any matter coming within any of the classes of subjects enumerated in this Section," and therefore within the legislative jurisdiction of the provinces; or does it in "pith and substance"[349] "create and define crimes"[350] and therefore fall under the Dominion jurisdiction?

Provincial Legislation in General—Sanction

Innumerable acts of all the provinces are criminal in that they create and define crimes and impose penalties. For example, the laws respecting companies, sales of shares, the business of insurance, motor vehicles, the use of liquors, Sunday observance, hours and conditions of labour, safety precautions, public health, returns for taxation purposes, marketing, and numerous other topics all impose penalties of fine or imprisonment for infraction. But for the most part these statutes could not be called enactments of criminal law, because their primary purpose is to regulate or to impose taxes and the penalty is only attached for the purpose of providing a sanction for a law in relation to a matter coming within one of the enumerated heads of s. 92. We are concerned, not with these cases, but with those others in which the provinces create and define crimes and endeavour to deter or punish their commission by fine, imprisonment or other penalty.

In most of such cases the act is straightforward enough and the question for the court to decide is, usually, whether the subject of the legislation is "in pith and substance" criminal law or property and civil rights in the province.

The validity of legislation upon such subjects as liquor prohibition,[351] Sunday observance,[352] gambling and slot machines[353] is sometimes exceedingly difficult to determine as the conflicting Privy Council cases show.[354] In such cases it is largely a matter of opinion as to whether the subject of the legislation falls under s. 92 and not under s. 91. But here again such acts are usually straightforward without expedient or device.

Devices and Expedients to Permit Criminal Law Legislation

Illustrative of the "device" is the practice adopted by Manitoba,[355] New Brunswick,[356] Nova Scotia[357] and Prince Edward Island[358] in their endeavour to suppress the use of slot machines. These provinces have enacted that slot machines shall not be capable of ownership nor be the subject of property rights. They have by "outlawing" property added heavily to the sanctions to enforce the existing Dominion[359] and provincial laws. In Ontario a provincial statute providing for the impounding of an automobile after a conviction under s. 285 (4) of the Criminal Code was held *intra vires*.[360]

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[349] See Part I, pp. 10 and 12.

[350] *Toronto City Corporation* v. *The King*, (1932) A.C. 98 at p. 104.

[351] See p. 13.

[352] *e.g.* (Quebec) Sunday Observance Act, R.S., 1925, c. 199; 1936, c. 4 repealing s. 7 of the Act which permitted Jews to work on Sunday in certain conditions; (British Columbia) Sunday Observance Act, R.S., 1936, c. 272 which made the law in force in England on November 19, 1858, effective in British Columbia. In *Young* v. *Taylor*, (1921) 3 W.W.R. 882, the Lord's Day Act, R.S.M., 1913, c. 119 was held *ultra vires* in so far as it was prohibitive. See also *Cote v. Friesen*, (1921) 3 W.W.R. 436, and *Ontario* v. *Hamilton Street Railway* (1903) A.C. 524.

[353] *e.g.* (Alberta) 1935, c. 14; 1936, c. 25; (Manitoba) 1935, c. 43; (Saskatchewan) 1934-35, c. 72, but in 1936 Saskatchewan passed another Slot Machine Act, c. 110, under which the property in all slot machines in Saskatchewan is vested in His Majesty in right of the province. At the same session c. 111 was passed repealing the Act of 1934-35, but the Acts of 1936 were only to come into force on proclamation and it is understood that they have not been proclaimed. In *The King* v. *Shaw*, 7 Manitoba L.R. 518 it was held that the matter can only be dealt with by the Dominion Parliament. *In re* Race Tracks and Betting, (1921) 61 D.L.R. 504 it was held that the Province of Ontario could not prohibit racing as this had been dealt with by s. 235 of the Criminal Code. A Quebec Act, 1915, c. 23, provides for the licensing of slot machines.

[354] Cf. *Russell* v. *The Queen*, (1882) 7 App. Cas. 829; *A.G. Ontario* v. *A.G. Canada*, (1896) A.C. 348; *Hodge* v. *The Queen*, (1883) 9 App. Cas. 117 and *The King* v. *Nat. Bell Liquors Ltd.*, (1922) 2 A.C. 128.

[355] 1935, c. 42 held *intra vires* in *The King* v. *Magid*, (1936) 43 M.R. 563.

[356] 1936, c. 48; 1937, c. 38.

[357] 1936, c. 2; 1937, c. 62.

[358] 1936, c. 25.

[359] Criminal Code, s. 226, 641, 986.

[360] Highway Traffic Amendment Act, 1938, c. 17, s. 10 held *intra vires* in *McDonald* v. *Brown*, (1939) 2 D.L.R. 177 citing the Quebec case of *Bedard* v. *Dawson*, (1921) 39 Can. C.C. 175, affirmed by Supreme Court in (1923) S.C.R. 681.

The "Padlock Law"

Perhaps the most ingenious use made by a province of the device of "outlawing" private property under its power to legislate respecting property and civil rights as a means of preventing the commission of a crime, all of an illegal act is the so-called "Padlock Act" enacted by Quebec in 1937.[361]

This Act aims to accomplish its purpose in two ways. In the first place, it declares it to be illegal "for any person, who possesses or occupies a house within the province, to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatsoever" (s. 2), and it gives the Attorney-General power to order the closing of the house for a period of not more than one year (s. 4). The owner of the house may petition a judge of the Superior Court (s. 6), whose judgment is final and without appeal (s. 9), to have the order revised upon proving that he was in good faith and in ignorance of the house being used in contravention of the Act. The Attorney-General may also permit the occupation of the house on such conditions as he may determine (s. 10 and 11).

In the second place, the Act provides in s. 12, 13 and 14 as follows:—

> "12. It shall be unlawful to print, to publish in any manner whatsoever or to distribute in the province any newspaper, periodical, pamphlet, circular document or writing whatsoever propagating or tending to propagate communism or bolshevism.
>
> 13. Any person infringing or participating in the infringement of section 12 shall be liable to an imprisonment of not less than three months nor more than twelve months, in addition to the costs of prosecution, and, in default of payment of such costs, to an additional imprisonment of one month.
>
> Part I of the Quebec Summary Convictions Act (Revised Statutes, 1925), chapter 165, shall apply to prosecutions for infringements of section 12.
>
> 14. Any constable or peace officer, upon instructions of the Attorney-General, of his substitute or of a person specially authorized by him for the purpose, may seize and confiscate any newspaper, periodical, pamphlet, circular, document or writing whatsoever, printed, published or distributed in contravention of section 12, and the Attorney-General may order the destroying thereof."

In the recently decided case *Fineberg* v. *Taub*,[362] Greenshields, C.J., declared the so-called "Padlock Law" to be *intra vires* of the legislative authority of the Legislature of the province of Quebec, but an appeal against this judgment is now pending before the Court of Appeal of the province of Quebec. At page 240 of the judgment Greenshields, C.J., stated that he "cannot distinguish the present case from the Bédard-Dawson case."[363] In that case the Supreme Court of Canada held legislation providing for the padlocking of disorderly houses *intra vires*.

After quoting part of article 1624 of the Quebec Civil Code

> "The lessor has a right of action:
>
> 3. When the lessor uses the premises leased for illegal purposes or contrary to the evident intent for which they are leased."

Greenshields, C.J., states at p. 236 that the so-called "Padlock Law" is equivalent to amending C.C. 1624 by adding thereto:—

> "words to the effect that the lessor has a right of action to rescind the lease if the lessee uses the leased property to propagate communism." . . . "This leads to the conclusion that the incriminated statute deals entirely, to the exclusion of all others, with property and civil rights to the Province, as stated in par. 13 of sec. 92 of the British North America Act."

Again at p. 237, Greenshields, C.J., declares:—

> "The underlying purpose of the incriminated statute is to protect the Province of Quebec against communistic propaganda. Nowhere in the Act is a crime or criminal offence created. The purpose of the Act is to prevent and not punish. Clause (3) of the Act declares it to be illegal for any person who possesses or occupies a house within the Province to use it or allow any person to make use of it to propagate communism or bolshevism by any means whatever. That is clearly a declaration affecting the use of property within this Province."

To the argument that ss. 12, 13 and 14 of the Act are Criminal law, Greenshields, C.J., answers at p. 238 that their whole purpose

> "is to prevent and control publications of all kinds propagating communism, and then sec. 12 goes to the length of enacting a sanction or penalty, including imprisonment. Secs. 13 and 14 are among the many penal enactments which from time to time have been spread out on the statute books of all the Provinces of the Dominion."
>
> "It is again to be observed, that the sections of the statute having reference to the use of houses, enacted no penalty upon the owner or user other than

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[361] An Act respecting communistic propaganda, 1937, c. 11, noted in the Report of the Committee on Noteworthy Changes in the Statute Law of the Canadian Bar Association Proceedings, (1937) p. 256.

[362] (1939) 77-S.C. 233. The Civil Liberties League applied to the Dominion Government to disallow the Act and the Minister of Justice, after argument had been made to him by counsel for the applicants, reported to the Cabinet against disallowance. The report was released on July 7, 1938. The Act was received by the Minister of Justice on July 8, 1937, and as a year had elapsed since that date, the time for disallowance had gone by. In his report supporting his recommendation that the Act be not disallowed, the grounds urged by the applicants were summarized as asserting that the Act violates fundamental principles of the Canadian constitution with respect to freedom of speech and trespasses upon the Dominion's power to legislate respecting criminal law. The Minister did not make any comment upon this.

[363] *Bedard* v. *Dawson & A.G. Quebec*, (1923) S.C.R. 681 which held the Act 1920, c. 81 *intra vires*.

the deprivation for a given time or the use of his property for what is declared to be an illegal, but not in a true sense a criminal use."

He points out that:—

"Nowhere in the Criminal Code of Canada is there found any legislation declaring the act covered by the statute a criminal offence."

The learned Judge then refers to that part of the judgment in *G.T.R.* v. *A.G. Canada* (1907) A.C. 65 at p. 68 which sets out the theory of the "unoccupied field" in the case of overlapping legislation and he concludes that:—

". . . in the present case the field is absolutely clear."

At p. 241 to p. 244 are found the grounds given by Greenshields, C.J., for refusing to accept the argument that the Act is *ultra vires* as constituting a violation of constitutional rights.

In the *Alberta Reference*[364] there are some passages bearing on this question. At p. 119 Cannon, J., said:—

"Now, it seems to me that the Alberta Legislature by this retrograde Bill is attempting to revive the old theory of the crime of seditious libel by enacting penalties, confiscation of space in newspapers and prohibitions for actions which, after due consideration by the Dominion Parliament, have been declared innocuous and which, therefore, every citizen of Canada can do lawfully and without hindrance or fear of punishment. It is an attempt by the Legislature to amend the Criminal Code in this respect and to deny the advantage of s. 133 (*a*) to the Alberta newspaper publishers."

He goes on to say:—

"As stated in the preamble of the British North America Act, our constitution is and will remain, unless radically changed, 'similar in principle to that of the United Kingdom.' At the time of Confederation, the United Kingdom was a democracy. Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the Criminal Code and the common law. Every inhabitant in Alberta is also a citizen of the Dominion. The Province may deal with his property and civil rights of a local and private nature within the Province; but the Province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammelled opinion about Government policies and discuss matters of public concern. The mandatory and prohibitory provisions of the Press Bill are, in my opinion, *ultra vires* of the Provincial Legislature. They interfere with the free working of the political organization of the Dominion. They have a tendency to nullify the political rights of the inhabitants of Alberta, as citizens of Canada, and cannot be considered as dealing with matters purely private and local in that Province. The Federal Parliament is the sole authority to curtail, if deemed expedient and in the public interest, the freedom of the press and the equal rights in that respect of all citizens throughout the Dominion. *These subjects were matters of criminal law before Confederation, have been recognized by Parliament as criminal matters and have been expressly dealt with by the Criminal Code.*"

Prince Edward Island also has a "padlock law." The Prohibition Act[365] provides that upon a conviction being had against any person for a violation of the act in or in respect of any hotel or other premises, a magistrate, in writing, may order any constable to evict the occupants and to close the premises by means of seals, padlocks or otherwise for such period not exceeding twelve months as the magistrate may fix. An order may be varied or rescinded by the magistrate upon being satisfied that there has been a change in the ownership or occupancy of the premises.

Another example, taken from Quebec, of legislation imposing a penalty by an act strictly limited in its immediate effect to property and civil rights is "An Act to safeguard the rights of the province," passed at the last session of the Legislature.[366]

In effect, this act declares that the movable and immovable property of any person in the employ of the province who has converted its moneys to his own use shall be subject to a privilege ranking ahead of all other rights without even the formality of registration.

The act is so unusual in its terms that we quote it at length:—

"1. Counting from the 1st of January, 1936, the moveable and immoveable property belonging at that date to any person who, belonging manifestly to the inside service of the province, has collected for his own personal profit, from the 1st of January, 1920, to the 1st of January, 1936, interest upon public moneys which were or were to be or should have been devoted to public purposes, shall be burdened with a privilege in favour of the Government of the Province of Quebec, representing such Province.

2. Such privilege shall be for the amount of the interest mentioned in section 1, plus, as a penalty and for liquidated damages, interest calculated at ten per cent per annum upon such interest from the time of the collection thereof.

[364] (1938) 2 D.L.R. 81. It may be argued that the liberty of the subject—freedom of speech, freedom of assembly and liberty of the press—is, in one aspect at least, safeguarded by the Dominion's power under s. 41 of the B.N.A. Act to regulate Dominion elections. Moreover, the Dominion legislation in s. 98 of the Criminal Code (since repealed) dealt with the same subject as a matter of criminal law and it was never seriously contended that s. 98 lay outside the Dominion's competence. The Quebec provincial authorities have rather taken the opposite view in explaining that the padlock law was justified, indeed necessitated, upon the repeal of s. 98.

[365] The Prohibition Act, 1937, c. 27, s. 126b.

[366] 1938, c. 95.

3. The privilege enacted in section 1 shall rank before law costs, without any formality or registration, upon the moveable and immoveable property contemplated in the said section 1.

4. In any judicial suit brought against any person contemplated by this act, the certificate of the Provincial Treasurer shall be prima facie proof of the amount which such person owes to the Government in virtue of this act.

5. The suit for the recovery of such claim shall be deemed summary matter and shall have precedence over every other suit. The said suit shall be prescribed three years after the coming into force of this act.

6. This act shall come into force on the day of its sanction."

Sections 497, 498 and 590 of the Criminal Code declare that collective action by trades unions shall not be unlawful as conspiracies in restraint of trade. In their legislation dealing with trades unions and conditions of labour many of the provinces have provisions visiting with penalty of fine and imprisonment offences in connection with conditions of labour or labour organization.[367] For example, see "*An Act to amend the Act respecting workmen's wages.*"[368] Section 39 of the Act reads in part:—

"whosoever,—

1. prevents or attempts to prevent, directly or indirectly, by threats or otherwise, an employee from becoming a member of an association;

2. makes an attempt upon the freedom of labour of an employee, by dismissing him, causing him to be dismissed, trying to have him dismissed, or preventing or trying to prevent him from obtaining work,—

(*a*) because he is a member of an association, or

(*b*) because he is not a member of any association, or

(*c*) because he is not a member of a particular association.—

commits an unlawful act and shall be liable to a fine not exceeding twenty-five dollars and costs for the first offence, and, upon failure to pay the fine, to an imprisonment of fifteen days." . . .

A similar provision is found in the Fair Wage Act.[369]

It is evident that this legislation is open to challenge as legislation upon criminal law.

Another Quebec statute prohibits "contests between competitors wherein human physical endurance is put to the test and which may become indecent, injurious to health or contrary to public order" without a permit from the local chief of police.[370]

(*c*) Provincial Legislation on Insolvency

The power to legislate respecting "Bankruptcy and Insolvency" conferred by s. 91 (21) upon the Dominion[371] has not prevented the province from enacting legislation which at first appears to fall under the head of insolvency legislation. Most of the provinces have since the depression which began in 1929 enacted legislation granting debtors delay and staying suit or foreclosure proceedings provided stipulated conditions are complied with. Such legislation, it is agreed, is justified under the province's authority to make laws in relation to s. 92:—

"13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts."

The dividing line between the Dominion and provinces is here again difficult to draw, but this is a subject to which the theory of the "unoccupied field" peculiarly applies. By that theory provincial legislation upon a subject which from some aspects falls under a head of s. 92 is effective until overridden by the enactment of Dominion legislation justified under some head of s. 91 and repugnant to the provincial act.[372]

The following have been held to be *intra vires* of the provinces: a Saskatchewan act providing that no legal proceeding should be made or continued unless the consent of the Debt Adjustment Board was first obtained;[373] a New Brunswick act dealing with voluntary assignments;[374] a Nova Scotia act providing for arrangements with creditors;[375] a Manitoba act providing penalties for an assignor who failed to disclose his property.[376]

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[367] It is interesting to note that s. 415a of the Criminal Code making it a crime to employ a person below the minimum wage still stands on the statute books though the Minimum Wages Act, 1935, c. 44 was held *ultra vires* by the Judicial Committee (*A.G. Canada* v. *A.G. Ontario*, (1937) A.C. 326). In the *King* v. *Lupovitch*, (1938) 76 S.C. 207 Marin, J., held that s. 415a did not make it a crime to contravene a provincial act.

[368] (Quebec) 1938, c. 52, which gave to the Act, 1936, c. 49 the title "Collective Labour Agreements Act", or in Alberta, The Industrial Conciliation and Arbitration Act, 1938, c. 57.

[369] (Quebec) 1938, c. 53, replacing s. 23.

[370] 1934, c. 48 added c. 164A to R.S.Q., 1925.

[371] *A.G. British Columbia* v. *A.G. Canada*, (1937) A.C. 391 holding the Farmers' Creditors Arrangement Act, 1934, c. 53, as amended by the Farmers' Creditors Arrangement Act Amendment Act, 1935, *intra vires*.

[372] *Cushing* v. *Dupuy*, (1880) 5 App. Cas. 409; *A.G. Ontario* v. *A.G. Canada*, (1894) A.C. 189; *McKinnon* v. *McDougall*, (1908) 3 E.L.R. 573; *Rumsey* v. *Hare*, (1877), 12 N.S.R. 4 (C.A.)

[373] *Maley* v. *Cadwell*, (1934) 1 W.W.R. 51 (Saskatchewan C.A.)

[374] *Tooke Bros. Ltd.* v. *Brock and Patterson Ltd.*, (1907) 3 New Brunswick Eq. 496, applying *A.G. Ontario* v. *A.G. Canada*, (1894) A.C. 189; *Clarkson* v. *Ontario Bank*, 15 O.A.R., 166; *Parent* v. *Trudel*, (1887) 16 L.N. 267 (C.A.).

[375] Re Windsor & Annapolis Railway (1883) 16 N.S.R. 312 (C.A.); *In re* Wallace Huestis Grey Stone Co., (1881) R.E.D. 461.

[376] The Assignment Act, R.S.M., 1913, c. 21. *In re* Churchill, (1919) 2 W.W.R. 541, but see *contra The King* v. *Chandler*, (1869) 12 N.B.R. 556.

Provincial legislation granting relief to debtors and otherwise in the nature of insolvency legislation is referred to in the following table:—

PROVINCIAL DEBT LEGISLATION

Alberta
- Reduction and Settlement of Debts Act, 1936 (2nd Sess.), c. 2.[377]
- Debt Adjustment Act, 1936 (2nd Sess.), c. 3; 1937,[377] c. 9; 1938, c. 27.
- The Home Owners Security Act, 1938 (Bill 74).[378]
- The Debt Proceedings Suspension Act, 1938 (Bill 65).[378]

British Columbia
- Mortgagors' and Purchasers' Relief Act, 1934, c. 49; 1935, c. 49; 1936, c. 37; 1938, c. 41.

Manitoba
- Debt Adjustment Act, 1932, c. 8.
- The Orderly Payment of Debts Act, 1932, c. 34; 1933, c. 30.

New Brunswick

Nova Scotia
- Mortgagors' and Purchasers' Relief Act, 1933, c. 3, which expired in 1934 and has not been renewed.

Ontario
- Mortgagors' and Purchasers' Relief Act, 1933, c. 35; 1938, c. 21.

Prince Edward Island

Quebec
- Moratorium and Safeguarding Small Property Act, 1936, c. 37; 1937, c. 37; 1938, c. 92.

Saskatchewan
- Debt Adjustment Act, 1933, c. 82.[379]
- Debt Adjustment Act, 1934-35, c. 88.
- The Limitation of Civil Rights Act, 1933, c. 83; 1934, c. 60; 1935, c. 89; 1936, c. 119; 1937, c. 94.

[377] Held *ultra vires* in *Independent Order of Foresters* v. *Lethbridge Northern Irrigation District*, (1937) 2 D.L.R. 109; and *Credit Foncier* v. *Ross*, (1937) 3 D.L.R. 365.

[378] Disallowed. See pp. 58-59.

[379] Held *intra vires* in *Maley* v. *Cadwell*, (1934), 1 W.W.R. 51.

(d) PROVINCIAL LEGISLATION ON INTEREST

Despite the fact that the power to legislate upon interest is conferred by s. 91 (19) of the British North America Act upon the Dominion and the Dominion has provided in the *Interest Act, R.S.C., 1927, c. 102, s. 2,* that the lender may stipulate for and exact any rate of interest which may be agreed upon, several of the provinces have legislation upon the subject.[380] In Alberta, *The Reduction and Settlement of Debts Act, 1936 (2nd Sess.), c. 2,* providing that payments of interest and principal since 1932 should be deducted from the debt and fixing maximum rates of interest on new debts at 5 per cent, was held *ultra vires* by the Appellate Division as trenching on the Dominion's exclusive authority over interest.[381] *The Securities Tax Act, 1938, Bill No. 84,* imposing a tax of 2 per cent on the principal of mortgages was disallowed. *The Provincial Securities Interest Act, 1937, c. 13,* reduces interest rates on all securities issued by the province.[382] *The Provincial Guaranteed Securities Interest Act, 1937, c. 12,* reducing interest on provincially guaranteed securities was held *ultra vires.*[383]

[380] See *Bradburn* v. *Edinburgh Assurance Co.*, (1903), O.L.R. 657; *Royal Canadian Insurance Company* v. *Montreal Warehousing* Co., (1880) 3 L.N. 155; *Lynch* v. *Can. N.W. Land Co.*, (1891) S.C.R. 204.

[381] *Credit Foncier* v. *Ross*, (1937) 3 D.L.R. 365; also *Royal Trust Co.* v. *A.G. Alberta*, (1937) 1 D.L.R. 709.

[382] An earlier act, 1936 (2nd Sess.) c. 11 of similar character was held *ultra vires* in *Independent Order of Foresters* v. *Lethbridge Northern Irrigation District*, (1937) 2 D.L.R. 109; and this act was held *ultra vires* in *Independent Order of Foresters v. The King*, (1939) 2 D.L.R. 53, affirmed by the Court of Appeal on April 5, 1939.

[383] *Independent Order of Foresters* v. *Lethbridge*, (1937) 4 D.L.R. 398; (1938) 2 W.W.R. 194 (a second case between the same parties).

Chapter X

DENIAL OF RIGHT

Introduction

In addition to the two classes of subjects already treated, there is a third class which for want of a better title we have called Denial of Right. Under the Canadian constitution there is nothing similar to the "Bill of Rights" in the United States which *inter alia* prohibits the taking of a citizen's property without due process of law. But while the provinces have sovereign powers within the limits conferred upon them by the British North America Act, they may not overstep the limits of those powers, and the final determination of the limits of provincial authority must be with the courts. Indeed the right to be heard, to have the legality of the law tested by judicial process, is fundamental to the whole concept of a federal constitution in a democratic country. If a province could by an exercise of legislative or executive authority deny to the citizen the right to have an unconstitutional law declared invalid, it could ride rough-shod over the constitution and make its text meaningless.

Here we are not concerned with all provincial acts which restrict the jurisdiction of the courts. There are innumerable provincial statutes setting up commissions dealing with workmen's compensation, the regulation of public utilities, the control of liquor, pensions, loans for various purposes, and the like, and these confer quasi-judicial functions, sometimes to the exclusion of the courts. We have in mind legislative or executive acts which, if they do not prevent it entirely, add greatly to the difficulty of securing the enforcement of the constitutional restrictions upon the provincial authority.

The Alberta Legislation

The most striking example of legislative action of this kind is the Alberta statute[384] which provided that every payment heretofore made to the province on account of any tax imposed under a statute declared to be *ultra vires* should be deemed to have been lawfully made and no action would lie for its recovery. This province also tried to close access to the courts to (i) the employee of a banker who did not pay the large sums necessary to obtain a licence;[385] (ii) a person seeking to have a law declared unconstitutional unless he had first obtained the permission of the government,[386] and (iii) a person seeking to recover money payable in respect of any provincially guaranteed security without the consent of the government.[387]

The Ontario Hydro Legislation

Perhaps the next most serious effort of this kind by a province was that of the province of Ontario where by legislative action it terminated contracts for the supply of power to the Hydro Electric Power Commission of Ontario by Gatineau Power Company, Beauharnois Light, Heat & Power Company, Ottawa Valley Power Company and James McLaren Company, Limited[388] by declaring the contracts illegal, void and unenforceable as against the Hydro Commission. The Act further provided that no action might be brought against the Commission founded on any of these contracts.

In so far as it affected the contracts of the Ottawa Valley Power Company with the Hydro Commission, the Act was declared to be *ultra vires* by judgment of the Ontario Court of Appeal.[389]

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[384] 1934, c. 16.

[385] The Bank Employees Civil Rights Act, 1937 (2nd Session) c. 2, disallowed on August 17, 1937.

[386] The Judicature Act Amendment Act, 1937 (2nd Session) c. 5. On this act being disallowed on August 17, 1937, the province amended the rules of court so as to forbid the issue of certain process without the consent of the executive, but these amendments were held ineffective in *Steen* v. *Wallace,* (1937) 3 W.W.R. 654.

[387] The Provincially Guaranteed Securities Proceedings Act, 1937, c. 11 held *ultra vires* in so far as concerns an action taken by a non-resident. *Independent Order of Foresters* v. *Lethbridge Northern Irrigation District,* (1937) 4 D.L.R. 398.

[388] The Power Commission Act, 1935, c. 53, s. 6 (4) explained by 1937, c. 58, noted below. The Act was brought into force by proclamation on December 6, 1935.

[389] *Ottawa Valley Power Company* v. *Hydro-Electric Power Commission et al,* (1936) 4 D.L.R. 594 (rev'g (1936) 3 D.L.R. 468) because it assumed to destroy civil rights outside Ontario. This judgment was followed by the Court of Appeal in the case of *Beauharnois Light, Heat & Power Co.* v. *The Hydro-Electric Power Commission of Ontario, et al,* (1937) 3 D.L.R. 458. New contracts were made with the same companies and by the act, 1938, c. 27, were declared to be valid. On the validity of legislation dealing with civil rights outside the province, see such cases as *The Royal Bank* v. *The King,* (1913) A.C. 283; *Credit Foncier* v. *Ross,* (1937) 3 D.L.R. 365; *Independent Order of Foresters* v. *The King,* (1939) 2 D.L.R. 53 at p. 56; *Workmen's Compensation Board* v. *Canadian Pacific Railway,* (1920) A.C. 184; *Day* v. *Victoria,* (1938) 3 W.W.R. 161; *Mount Albert Borough Council* v. *Australasian Temperance & General Mutual Life Assurance Society Limited,* (1938) A.C. 224; *Ladore, et al* v. *Bennett et al,* (1938) 3 D.L.R. 212 at p. 217.

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This effort was then reinforced by *The Power Commission Declaratory Act, 1937, c. 58* which set forth the meaning and effect to be given to ss. 4 of s. 6 of The Power Commission Act, as prohibiting any action of whatsoever kind against the Hydro Commission or against any member of the Commission without the consent of the Attorney-General. The Act was intended to have retroactive effect.

By the judgment of the Ontario Court of Appeal rendered in *Beauharnois Light, Heat & Power Company* v. *Hydro Electric Power Commission, et al*[390] it was held that this legislation had no effect on this particular action since the rights of the parties had already passed into judgment.

The Privy Council Appeals Act, R.S.O., 1937, c. 98, provided for a stay of execution without giving security in Privy Council Appeals, where the appellant is the Crown in right of the province of Ontario or the Hydro Electric Power Commission. It further provided for the payment out of court of moneys already paid in as security pursuant to court order. This Act was held to be *intra vires* of the provincial legislature in a judgment of the Ontario Court of Appeal.[391]

Securities Acts

The Quebec Securities Act[392] is a good example of this type of legislation. Section 15 reads:—

> "15. No action whatever, and no proceedings by way of injunction, mandamus, prohibition or other extraordinary remedy, shall lie or be instituted against the Attorney-General, the Provincial Secretary or the Registrar, or against any person or company acting upon the written or verbal instructions of the Attorney-General, the Provincial Secretary or the Registrar, in respect of any act or omission in connection with the administration or carrying out of the provisions of this Act."

Section 30 is a provision which does not appear in any of the other Securities Acts, except those of British Columbia and Manitoba.[393] It reads:—

> "30. The Registrar may, from time to time, and must upon the Attorney-General's instructions, order any broker or salesman not to trade in one or several classes of securities. Upon receipt of such order, the broker or salesman must refrain from trading in the security or securities mentioned in the order. Failure by the broker or salesman to comply with such order shall constitute an offence."

Under this section the Registrar may issue a stop order for any reason deemed sufficient by himself or by the Attorney-General. It will be noted that the section does not limit the issue of a stop order to cases where there has been an infringement of the Act. The power of the Registrar appears to be unlimited, and under s. 15, quoted above, may not be challenged in the courts.[394]

In this way, the province may stop the sale of shares even of a Dominion company, in virtue of an act which purports to leave the Dominion company and everyone else without redress in the courts.

The Padlock Law

The Quebec Padlock Law, noted above, is a good example of this type of legislation. The Attorney-General may issue an order to padlock a house and the order is not subject to review, except by the Superior Court, as already explained.[395]

Validity of Provisions Barring Court Proceedings

The validity of provisions of the type under consideration still remains to be determined in a judgment of the Supreme Court or Judicial Committee.[396] While the provinces have plenary power within the limits imposed by the constitution and while acting within those limits can unquestionably confiscate property and destroy rights, it would be anomalous, to say the least, if the province could, by enacting an unjust law, guard itself against the consequences of having an unlawful law declared unlawful.

Until the decisions in the Alberta cases there were only scattered remarks of the most general character which throw any light at all on the question. Thus, it has generally been held, that the question of the validity of an act is a question of substance to be determined from the act[397] and the court will not hesitate to look behind a general disclaimer purporting to limit the application of the act to whatever may be constitutional.[398]

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[390] (1937) 3 D.L.R. 458.

[391] *Beauharnois Light, Heat & Power Company.* v. *Hydro-Electric Commission of Ontario,* (1937) 4 D.L.R. 225.

[392] R.S.Q., 1925, c. 228A as enacted by 1930, c. 88. The Security Frauds Prevention Acts of the other provinces have provisions similar to s. 15 in the Quebec Act, e.g. Alberta, s. 18; British Columbia, s. 32; Manitoba, s. 14; New Brunswick, s. 32; Nova Scotia, s. 25; Ontario, s. 30; Prince Edward Island, s. 14; Saskatchewan, s. 16. Alberta has a similar provision in its Oil and Gas Conservation Act, 1938 (2), c. 15, s. 28.

[393] The Security Frauds Prevention Act of British Columbia has a similar provision in s. 18 (g), as has Manitoba in s. 29 (c) added by 1937, c. 38, s. 3.

[394] See on Judicial Scrutiny of departmental orders in England a note in (1931) 9 Canadian Bar Review 575.

[395] See *supra,* p. 61.

[396] The question was raised in *Electrical Development Company* v. *A.G. Ontario,* (1919) A.C. 687 but it was not decided.

[397] *A.G. Manitoba* v. *A.G. Canada,* (1925) A.C. 561 at p. 566.

[398] *The King* v. *Nat. Bell Liquors Ltd.,* (1922) 2 A.C. 128; *A.G. British Columbia* v. *A.G. Canada,* (1937) A.C. 377 at p. 388; *In re* Alberta Legislation, (1938) 2 D.L.R. 81 at p. 131; *A.G. Manitoba* v. *Manitoba Licence Holders' Association,* (1902) A.C. 73 at p. 79.

In *Independent Order of Foresters* v. *Lethbridge Northern Irr. District*[399] Ives, J., said at p. 110:—

"I know that it has been authoritatively held that in matters within its jurisdiction of a purely local and private nature access to its Courts of Judicature may be lawfully denied the subject by the Province but to extend that right so as to prohibit any questioning of an *ultra vires* statute is most repugnant to one's instinctive sense of justice.

Here the plaintiff is the owner of 'property and civil rights' outside Alberta (a provincially guaranteed bond presented for payment in Toronto). This Province has no power to limit those rights or their enforcement. To deny the plaintiff the right to bring an action in our Courts would clearly enable the Province to do indirectly what it cannot do directly, viz., modify the Interest Act."

The Province appealed from this judgment but before the Appeal was heard, the Legislature passed the *Provincially Guaranteed Securities Proceedings Act, 1937, c. 11,* purporting to prohibit suit for the recovery of money, payable in respect of a security guaranteed by the province, without its consent. Despite this, the plaintiff sued again for the amount of its bond[400] and the action was maintained by Ewing, J., for reasons similar to those stated by Ives, J., in the previous case.

Speaking at p. 401, Ewing, J., said:—

"If either the Dominion or the Provinces be at liberty to invade at will the legislative jurisdiction of the other and give practical effect to that invasion by denying the Courts the jurisdiction to declare such invasion to be unlawful, then the division of powers as contained in the British North America Act is a futility. Such a result would nullify the constitution and must therefore be unconstitutional."

The right of the province to prevent recourse to the courts was questioned in the case of *Ottawa Valley Power Co.* v. *A.G. Ontario.*[401] After referring to the argument in *Electrical Development Company* v. *A.G. Ontario,*[402] in which the point was raised, but not decided, Masten, J.A., said at p. 603:—

"The conclusion at which I have arrived is as follows:

(1) The general rule is clear that the administration of justice being by the British North America Act committed to the Provinces the jurisdiction of the several courts set up by the Legislature to administer justice is that which is prescribed by the Legislature. Generally speaking any statute passed by a Provincial Legislature limiting the jurisdiction of the Provincial Court is binding on it.

(2) But to that general rule I think there is this exception, viz., that the Legislature cannot destroy, usurp, or derogate from substantive rights over which it has by the Canadian Constitution no jurisdiction and then protect its action in that regard by enacting that no action can be brought in the Courts of the province to inquire into the validity of its legislation, thus indirectly destroying the division of powers set forth in the British North America Act. In other words it cannot by such indirect means destroy the Constitution under which it was created and now exists. In the words of Sir John Simon it is of the essence of the "Canadian Constitution that the determination of the legislative powers of the Dominion and of provinces respectively ought not to be withdrawn from the judiciary." If the power to adjudicate upon the validity of such an Act is withdrawn from the jurisdiction of the Courts the result would be that unless and until such Act of the Provincial Legislature is disallowed by Dominion authority it is the law of the Province and governs the rights and liabilities of the citizens of that Province. If, for example, the Province of Alberta were to invade the field of interest and of banking by declaring that no incorporated bank should charge more than 3 per cent interest on any money loaned by it, grave disruption of the commercial and financial world of Canada might well result, pending any declaration by the Dominion authority disallowing the Act."

In *Beauharnois Light, Heat & Power Co.* v. *Hydro-Electric Power Commission*[403] the same question came up in a slightly different setting. Referring to the *Ottawa Valley Case,* Middleton, J.A., said at p. 461:—

"Dealing with the first question, a reference to the reasons for judgment will show that the conclusion there arrived at was based upon the opinion that the substantive enactment contained in c. 53 of the Ontario Statutes of 1935, s. 2, was *ultra vires* because it assumed to destroy civil rights outside the province, and the Legislature could not, by enactment of adjectival law, preclude the courts of Ontario from so declaring."

Collection of Taxes

We have already referred to the possibility of a government exacting more taxes than it is entitled to under succession duty legislation. There can be no doubt but that uncertainty as to the constitutional position and the possibility of heavy penalties if the courts ultimately decide for the province has resulted on many occasions in forcing the citizen to pay the tax (or more frequently make a compromise settlement) rather than expose himself to the risks of long-drawn-out litigation against the full resources of the state.

And it may be noted here that the obstacles in the way of the citizen have been greatly increased

[399] (1937) 2 D.L.R. 109.
[400] *Independent Order of Foresters* v. *Lethbridge Northern Irrigation District,* (1937) 4 D.L.R. 398, affirmed by the Court of Appeal, (1938) 3 D.L.R. 89.
[401] (1936) 4 D.L.R. 594. See also *Day* v. *Victoria,* (1938) 3 W.W.R. 161.
[402] (1919) A.C. 687.
[403] (1937) 3 D.L.R. 458.

by the peculiar immunities of the Crown from both liability to legal action in the ordinary courts[404] and for payment of costs.[405] The citizen is not likely to set out on the long and always uncertain journey through the courts to obtain the exact interpretation and application of the law when he can only begin suit to recover back his own money with the consent of the governmental authority[406] which in his opinion exacted payment from him illegally.

Beneficiaries Seizin Tax

A striking example of this was the *Beneficiaries Seizin Act* of the province of Quebec.[407]

The Succession Duties Act of the province of Quebec did not purport to impose any duties upon movable property when both property and beneficiary were outside the jurisdiction of the province and the only element within the province was that the deceased resided there. To meet this case the province enacted the Beneficiaries Seizin Act. By this the province attempted to tax the transmission, owing to the death of a person domiciled in the province, of movable property legally situated outside the province to a person domiciled or ordinarily resident outside the province. The device used was to call the tax a court fee, the payment of which was a condition precedent to valid delivery of the property bequeathed. The fee or tax was fixed at 3 per cent upon the value of movable property outside the province and transmitted in the direct line, 9 per cent if the transmission was to collaterals and 15 per cent if to others. A fine of twice the tax payable was exacted from any executor, etc., who effected a transfer of a legacy subject to the payment of the tax without first complying with the formalities and paying the tax imposed by the Act.

From its outset the Act was regarded by many constitutional authorities as *ultra vires;* but, despite this, it was not challenged in the courts for a number of years and its existence proved embarrassing in the case of estates which had property within the province as well as property outside. The reason for this embarrassment was that a transfer of the property within the province was not permitted unless a certificate was obtained that the duties exigible had been paid or that no duties were exigible in accordance with the provisions of s. 14 of the Quebec Succession Duties Act. In order to obtain such certificate it was necessary to file a declaration which would disclose any assets outside the province, and it was the practice of the Department to refuse to give certificates in respect of the property *inside the province* until the Beneficiaries Seizin Tax was paid in respect of the property *outside the province.* The estate was therefore completely tied up and no payments of any kind could be made until the Beneficiaries Seizin Tax was paid. Once it was paid, the estate would have to sue for its recovery, and, even if the province granted a fiat to take an action and even if the action was taken within the period of six months to which actions of this character were restricted, the estate would be faced with the probability that such an action would be contested by the province to the Privy Council.

It followed that numerous estates paid seizin tax and that the tax was not challenged until the case of *Gary* v. *The King*[408] in which Cannon, J., held the Act unconstitutional and recommended the refund by the province of a large sum paid for seizin tax. Almost immediately upon this decision being rendered the legislature repealed the Act.[409]

This is a striking illustration of the way in which a province may, under cover of a doubtful law, use its executive authority so as to make it difficult or even impossible for the citizen to have the validity of the law tested in the courts.

Ontario Succession Duties

In Ontario the Provincial Treasurer may issue an order in writing or by telegram directing a person to keep any property or document until the order is revoked under pain of a fine of $50,000 or to imprisonment for two years or both.[410] Further, it is provided that no action and no proceeding shall be against the Provincial Treasurer or his representatives for anything done under the Act.[411]

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[404] *Royal Trust Co.* v. *A.G. Alberta,* (1936) 2 W.W.R. 337. Numerous instruments of the Crown engaged in private business enjoy the same immunity either under the general law or by the express terms of a statute, as for instance, the National Electricity Syndicate of Quebec created by 1937, c. 24, s. 42.

[405] *The King* v. *Meilicke,* (1938) 2 W.W.R. 97 in which it was held by the Saskatchewan Court of Appeal that the Imperial Crown Suits Act, 1855, was in force in that province and that consequently no costs could be recovered against the Crown.

[406] *Royal Trust Company* v. *A.G. Alberta,* (1936) 2 W.W.R. 337; Article 1011 of the Quebec Code of Civil Procedure on procedure by petition of right or The British Columbia Crown Procedure Act, R.S., 1936, c. 68.

[407] 1922, c. 90, s. 1 which became R.S.Q., 1925, c. 30 and was amended by 1928, c. 19 and 1930, c. 30.

[408] (1938) 76 S.C. 66.

[409] 1938, c. 30, sanctioned March 18, 1938.

[410] (Ontario) The Succession Duty Act, 1934, s. 25k as added by 1937, c. 1, s. 8.

[411] The Judicature Amendment Act, 1937, c. 2, s. 2, adding s. 32a to The Judicature Act.

Laws Limiting Actions

The difficulties in the way of the citizen above referred to are aggravated if the Crown has sought protection in special statutes of limitation.

In Alberta, *The Limitation of Acts Act, 1935, Amendment Act, 1938, Bill No. 115,* providing that action to realize on any debt incurred before 1936 must be taken before July 1, 1940, and then only with the permission of the Debt Adjustment Board would, if enforced, practically coerce every creditor into making an arrangement dictated by the debtor.

The Quebec *Crown Payments Prescription Act*[412] prescribes a special statutory period of six months for suits for recovery of money paid as taxes. It reads:—

> "Every right of action for the recovery of sums of money paid through error in law, before or after the 3rd of April, 1925, to the Government of the Province as duties or taxes, imposed by any Act of the Legislature, shall be absolutely extinguished if the action has not been instituted within six months from the date of payment."

In Ontario an amendment to the Succession Duty Act makes every statement issued by the Department absolutely binding unless it is objected to within thirty days of mailing.

In Ontario actions may not be taken against public officers unless commenced within six months and actions will not lie against the officers because a statute is *ultra vires.*[413]

[412] R.S.Q. 1925, c. 23.

[413] The Public Authorities Protection Act, R.S., 1937, c. 135. See also to the same effect the British Columbia Magistrates Act, R.S., 1936, c. 163, s. 9 and *Johnston* v. *C.C.M.T.A.*, (1932) S.C.R. 219; the Alberta Public Authorities Protection Act, R.S. 1922, c. 91.

Expropriation and Confiscation

By reason of its power to make laws in relation to property and civil rights being practically unrestricted, there is nothing in the constitution to prevent a province from confiscating property or from declaring what is ours shall be yours. Thus, the province of Quebec passed a law empowering the Lieutenant-Governor in Council to authorize any person to acquire by expropriation a pulp mill in the village of Chandler in the province of Quebec.[414]

In Ontario, the Legislature declared the contracts between the Ontario Hydro Commission and several power companies to be invalid, but the Ontario Court of Appeal held the Act to exceed the jurisdiction of the province in so far as it dealt with the question of contract and civil rights outside the province.[415]

In Prince Edward Island the government may take private property for the purpose of public parks without compensation, except such as the government itself chooses to offer[416] and the province may take away from the owner (to whom they had been granted by the Crown) mineral rights to oil and gas without any compensation whatever.[417]

[414] (Quebec) An Act to promote the development of the Gaspesian area, 1936, c. 23. Further, by 1937, c. 5, the Lieutenant-Governor in Council was authorized to grant to Gaspesia Sulphite Co. Ltd., which by that time had acquired the Chandler Mill, the 524 miles of timber limits situate in the Gaspe Peninsula and sold in 1934 to Maritime Operating Corporation.

[415] 1937, O.R. 265 (rev'g (1936) 3 D.L.R. 468).

[416] The National Parks Act, 1936, c. 17, and The Road Act, 1936, c. 1, s. 53.

[417] An Act to Encourage the Discovery and Development of Oil and Natural Gas, 1920, c. 20.

Appendix I

PREAMBLE TO CHAPTER 46 OF THE STATUTES OF CANADA FOR 1932

An Act Respecting Canadian and British Insurance Companies

(Assented to 26th May, 1932.)

Whereas it is desirable to define the status and powers of insurance companies incorporated by the Parliament of Canada, and by the Legislature of the late province of Canada, and to prescribe the limitations to be placed on the exercise of such powers; and

Whereas it is desirable to provide for the registration of such companies and of British insurance companies and associations which may desire to carry on the business of insurance in Canada, and for the voluntary registration of provincial companies; and

Whereas the said companies incorporated by the Parliament of Canada and by the Legislature of the late province of Canada, carry on business in more than one province of Canada and many of them carry on business in Great Britain, the other Dominions and foreign countries; and

Whereas the said British insurance companies, when permitted to carry on business in Canada, carry on business in more than one province; and

Whereas the insurance business transacted within and outside of Canada by companies incorporated by the Parliament of Canada, and by the Legislature of the late province of Canada, and within Canada by British insurance companies, constitutes an important factor in the international and interprovincial trade and commercial relations of Canada; and

Whereas it is contrary to the public interest that insurance companies or associations which are unable to discharge their liabilities to policyholders in Canada as they become due, or are otherwise insolvent, should be permitted to carry on the business of insurance in Canada; and

Whereas it is desirable to provide by a system of returns and inspections against such companies or associations engaging in, or continuing to carry on, business in Canada while unable to discharge their liabilities to such policyholders as they become due or while otherwise insolvent, and to declare the conditions upon which such companies shall be deemed to be insolvent and be subject to be wound up under the provisions of the Winding-Up Act: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

Appendix II

PREAMBLE TO CHAPTER 47 OF THE STATUTES OF CANADA FOR 1932

An Act Respecting Foreign Insurance Companies In Canada

(Assented to 26th May, 1932.)

Whereas the Parliament of Canada has jurisdiction, by properly framed legislation, to prohibit aliens, whether natural persons or foreign companies, from carrying on the business of insurance in Canada without a licence; and

Whereas certain sections of the Insurance Act, chapter one hundred and one of the Revised Statutes of Canada, 1927, requiring foreign insurance companies to obtain a licence as a condition of carrying on business in Canada, have been declared, in view of their relation to other provisions of the said Act, to be not properly framed and, therefore, unconstitutional; and

Whereas foreign insurance companies are soliciting applications for and issuing life insurance policies as protection and long term investments of the savings of their policyholders in Canada, and such companies now have outstanding more than four million four hundred thousand policies in Canada to an aggregate amount of more than two billions of dollars; and

Whereas foreign insurance companies, associations and exchanges now have insurance in force against the destruction of property in Canada by fire to an amount of more than four and a quarter billions of dollars, and insurance providing for the payment of large sums dependent on other contingencies; and

Whereas such insurance constitutes an important factor in the international trade and commercial relations of Canada; and

Whereas certain foreign insurance companies and exchanges have in times past become insolvent while carrying on business in Canada, and the policyholders in Canada thereof would have sustained serious losses but for provisions in the then existing legislation which required such companies and exchanges to deposit assets in Canada as security for their liabilities in Canada, and to make returns as to their business and financial standing, and to submit to inspection by representatives of the Government; and

Whereas foreign insurance companies, associations and exchanges, transacting the business of insurance throughout Canada, receive each year from policyholders in Canada many millions of dollars in premiums, and incur liabilities to such policyholders requiring involved actuarial and other computations for their determination, and the ability or inability of such companies, associations and exchanges to discharge such liabilities, as they become due, is dependent upon the character and value of their assets available for such purpose; and

Whereas it is contrary to the public interest that such foreign insurance companies, associations and exchanges which are unable to discharge their liabilities to policyholders in Canada as they become due, or are otherwise insolvent, should be permitted to carry on the business of insurance in Canada; and

Whereas it is desirable to provide, by a system of registration, deposit of securities, inspection and returns, against such foreign companies, associations or exchanges engaging in or continuing to carry on business in Canada while unable to discharge their liabilities to such policyholders as they become due or while otherwise insolvent and to declare the conditions upon which such companies, associations and exchanges shall be deemed to be insolvent and be subject to be wound up under the provisions of the Winding-Up Act.