A. C. LAWSON (PLAINTIFF).....APPELLANT; 1930

AND *Oct. 7, 9. *Feb. 16.

INTERIOR TREE FRUIT AND VEGETABLE COMMITTEE OF DIRECTION (DEFENDANT) ..... } RESPONDENT;

AND

THE ATTORNEY-GENERAL OF CANADA ..... } INTERVENANT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Produce Marketing Act of B.C.—Ultra vires—Legislation within Dominion power—Trade and Commerce—Levy imposed by s. 10 (k)—Whether levy a tax—Direct or indirect taxation—Licence—B.N.A. Act, ss. 91 (2), 92 (2), 92 (9)—Produce Marketing Act, B.C., 1926-27, c. 54, ss. 2, 3, 10 (1), 10 (k), 15, 16, 20—Amending Act, (1928) B.C., c. 39.

By section 3 of the *Produce Marketing Act* of British Columbia (1926-27), c. 54 a "Committee of Direction" was constituted, "with the exclusive power to control and regulate (under the Act) the marketing of all tree fruits and vegetables * * *, being products grown or produced in that portion of the province contained within" boundaries therein specified. By section 10 (1), it was provided that, "for the purpose of controlling and regulating, under this Act, the marketing of any product within its authority (the) Committee shall, so far as the legislative authority of the province extends, have power to determine at what time and in what quantity, and from and to what places, and at what price the product may be marketed, and to make orders and regulations in relation to such matters." By section 10 (*k*), the committee was also given the power "for the purpose of defraying the expenses of operation, to impose levies on any product marketed." By subsection 3 of section 16, as enacted by the Amendment Act of 1928, c. 39, it was provided that "the committee may fix licence fees to be paid by shippers."

Held that this legislation is *ultra vires* of the provincial legislature.

Per Duff, Newcombe, Rinfret and Lamont JJ.—Such legislation is referable to the exclusive Dominion power to regulate trade and commerce. (Section 91 (2) B.N.A. Act.)

Newcombe J. however is careful expressly to reserve the position that the legislation would also be *ultra vires* of the province even if not within any of the Dominion enumerated powers.

Per Duff, Rinfret and Lamont JJ.—The provisions of the statute, which authorize the committee to impose levies and to fixe licence fees are *ultra vires*, the levy not being within section 92 (2) and the licence not being within section 92 (9) of the B.N.A. Act.

Per Cannon J.—The levy is an export tax falling within the category of duties of customs and excise and, as such, as well as by reason of its inherent nature as an indirect tax, could not competently be imposed by the provincial legislature.

*PRESENT:—Duff, Newcombe, Rinfret, Lamont and Cannon JJ.

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APPEAL from the decision of the Court of Appeal for British Columbia, affirming the judgment of the trial court, Murphy J. (1), and dismissing the appellant's action.

The action was brought at Grand Forks, on the 9th of August, 1929, by the appellant, a fruit rancher and shipper of fruit against the respondent, the Committee of Direction, claiming that the *Produce Marketing Act* was *ultra vires,* and for a declaration that he was under no obligation to obtain a licence from the Committee of Direction or to pay levies imposed or to otherwise observe the rules, regulations and orders passed by the Committee under the *Produce Marketing Act,* and for an injunction restraining the Committee from collecting such licence fees and levies or otherwise restricting the appellant from marketing the fruit and vegetables grown by him, and also for an injunction restraining the Committee from enforcing the general regulations passed by it and for damages. The action was brought as a test case for the purpose of determining whether or not the *Produce Marketing Act* was *intra vires* of the legislature of the province of British Columbia. The action was tried before the Honourable Mr. Justice Murphy at Vancouver on the 6th of March, 1930, who dismissed the appellant's action on the 11th of March, 1930. The appellant then appealed to the Court of Appeal for British Columbia which affirmed the judgment of the trial judge. The appellant obtained special leave to appeal to the Supreme Court of Canada on the 12th of September, 1930. The Attorney-General of Canada was granted leave to intervene before the Supreme Court of Canada.

H. S. Wood K.C. and *C. F. R. Pincott* for the appellant.

H. B. Robertson K.C. for the respondent.

F. P. Varcoe for the intervenant.

The judgments of Duff, Rinfret and Lamont JJ. were delivered by

DUFF J.—The appellant, who is the plaintiff in the action giving rise to the appeal, claims a declaration that the respondent is not possessed of the authority which it is professing to exercise in control of the marketing outside the province of tree fruits and vegetables grown or pro-

(1) (1930) 42 B.C. Rep. 493; [1930] 2 W.W.R. 23.

duced within a defined area in British Columbia, over which the respondent professes to exercise jurisdiction.

By the *Produce Marketing Act* (s. 3), which was passed in 1927, there was constituted a Committee of Direction, under the name which the respondent bears, with "exclusive power to control and regulate" under the Act,

> the marketing of all tree fruits and vegetables (including tomatoes and melons), being products grown or produced in that portion of the province contained within

specified boundaries including what is described as the Grand Forks district, where the appellant has been for some years a fruit rancher and shipper. Two of the members of the Committee are selected by the Growers and Shippers Federation of British Columbia, which is a society of fruit growers and shippers incorporated under the *Societies Act,* while the third member of the Committee, the chairman, is named by the Lieutenant Governor in Council. The powers of the Committee are set forth in general terms, in the first paragraph of s. 10 (1) which reads thus:

> 10. (1). For the purpose of controlling and regulating, under this Act, the marketing of any product within its authority, a Committee shall, so far as the legislative authority of the Province extends, have power to determine whether or not and at what time and in what quantity and from and to what places *and at what price* and on what terms the product may be marketed and delivered and to make orders and regulations in relation to such matters.

Then follows a series of sub-paragraphs, in which are more specifically described functions and powers: to estimate the quantity of any product to be available for marketing and at what times and places; to fix the quantities which may from time to time be marketed at any place by a shipper; to fix the place or places from which any such product may be delivered or dispatched for marketing; to make arrangements for carriage from time to time; to set minimum and maximum prices for any such product; to require returns; to have inspection of books and other documents; to prescribe the terms of sale of a product including the minimum brokerage which may be paid in respect thereto.

Marketing is defined as

> the buying and selling of a product and includes the shipping of a product for sale or for storage and subsequent sale and the offering of a product for sale and the contracting for the sale or purchase of a product, whether the shipping, offering or contracting be to or with a purchaser,

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a shipper or otherwise, but does not relate to the marketing of a product for consumption outside the Dominion and "market" has a corresponding meaning.

Having regard to this definition, it is obvious that the scope of the marketing operations affected by s. 10 does not exclude the shipping for delivery outside the province of British Columbia, or the offering or contracting for sale of the products to which the section applies to or with persons outside the province.

The Committee also has power for the purposes of defraying the expenses of operation "to impose levies on any product marketed," which levies "shall be payable at such rates and in such manner and at such times" as may be determined by the Federation. By s. 15, shippers are obliged to comply with every determination, order or regulation of the Committee, and any contract made by a shipper in violation of this provision is void. By s. 16, shippers are prohibited from doing any act "within the meaning of marketing or selling" in relation to any product "which is subject to the control and regulation" of the Committee, without having obtained a shipper's licence "to market and sell such products." By the 3rd subsection, as amended in 1928

the Committee may fix licence fees to be paid by shippers. Shippers of car-load lots may be classified with reference to the quantity of product marketed and the fee may vary accordingly, but shall not in any case exceed twenty dollars; and in the case of other shippers the fee shall not exceed five dollars.

The Committee is also invested by the same section with authority to suspend or cancel the licence of a shipper

for violation of this Act or of any determination, order or regulation made by it under this Act.

Marketing or selling by a shipper without a licence is an "offence against the Act," and so also is the failure of any shipper to comply with any determination, order or regulation of the Committee. The penalty for an "offence against the Act" is under s. 20, a fine not exceeding $1,000, or imprisonment for a term not exceeding one year, for an individual who is a shipper, and, for a corporation who is a shipper, a fine not exceeding $10,000.

The plaintiff's main contention on this appeal is that the respondent Committee is destitute of the powers it assumes to execute because the statute is *ultra vires*. This proposition is based on two general grounds. First, it is

said that the substantive enactments of the statute are enactments on the subject of "trade and commerce" within the meaning of these words as used in head 2 of s. 91 of the *British North America Act;* then it is said that the statute directly and substantively regulates the conduct of people outside the province and thereby purports to operate within a sphere beyond the control of the provincial legislature. Furthermore, particular provisions are attacked upon special grounds. These will be discussed.

It will not be necessary to pass upon the second of these grounds. What, if any, limitations affect the authority of a provincial legislature to determine, for the province, the legal effect, within the province, of extra-provincial acts, and to prescribe the rules of law, which, except in matters governed by s. 91, the provincial courts are to observe in controversies arising in relation to such acts, is a subject of multifarious ramifications, of great importance, and, in some respects, not free from difficulty. The prudent course would appear to be to express no opinion upon the points which have been raised within the limits of that subject in the present litigation; because in my opinion, the appeal can be determined without any reference to them. It must be understood that it is not intended to throw out or intimate any view upon any of those points.

It should perhaps be noted that the section, which defines, in general terms, the power of the Committee of Direction as a power

> to determine at what time, and in what quantity and from and to what places, and at what price the product may be marketed, and to make orders and regulations in relation to such matters,

limits, in explicit terms, the scope and operation of the power in this fashion: "so far as the legislative authority of the province extends." It has been pointed out, however, with perfect accuracy, that the section proceeds in a series of subsections to a specification of the powers with which the Committee is endowed, and that in bestowing these specified powers, the section does not, in express terms, impose any such limitation. As against this, it may no doubt be said that the specification is intended only as an exposition and elaboration of the powers embraced within the general words, and that consequently the qualification quoted affects all these specified powers. It is to be observed also that the definition of "marketing" does

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indisputably point to an intention that the jurisdiction of the Committee in controlling the action of shippers shall run beyond the boundaries of the province. As to that again, it may be argued, that it is within the authority of the provincial legislature, in dealing with a subject matter falling within s. 92, to legislate conditionally as well as absolutely. The legislature, although convinced of its own power to pass a given enactment, is quite competent, it may be contended, not without plausibility, to make the legal effectiveness of its enactment dependent upon the condition that the matter of it is within those classes of matters in relation to which it is competent to it to make rules of law. It is not necessary, however, to decide upon the effect of these qualifying words in s. 10, for the purpose of dealing with any branch of the appeal; and no opinion is expressed thereon. The Committee of Direction, in respect of the matters complained of by the appellant, acted systematically on the view that they possessed the powers *ex facie* given them by the statute, when read irrespectively of the qualifying words; and even if the effect of them is to provide an answer to the allegation that the legislation is *ultra vires*, they provide no answer to the charge that, in the matters complained of, the Committee was exercising an authority it did not possess, because the legislature of British Columbia is incompetent to invest it with such authority. And, if the charge can be made good, that the Committee has been employing its ostensible powers to put into effect orders, rules and determinations to which the legislature is not competent to impart compulsory force, the appellant, in so far as they prejudice him, is entitled to a declaration to that effect.

Before proceeding to discuss the question arising in relation to head no. 2 of s. 91, I shall consider, first of all, the levies imposed upon the appellant by s. 10 (*k*), and the demands for the payment of such levies. I think the contention of the appellant is well founded, that such levies so imposed, have a tendency to enter into and to affect the price of the product. I think, moreover, that levies of that character, assuming for the moment they come under the head of taxation, are of the nature of those taxes on commodities, on trade in commodities, which have always been regarded as indirect taxes. If they are taxes, they cannot

be justified as Direct Taxation within the province. That they are taxes, I have no doubt. In the first place they are enforceable by law. Under s. 13 they can be sued for, and a certificate under the hand of the chairman of the Committee is *prima facie* evidence that the amount stated is due; and the failure of a shipper to comply with an order to pay such a levy would appear to be an offence under the Act by s. 15. Then they are imposed under the authority of the legislature. They are imposed by a public body. This Committee, of which the chairman is appointed by the Lieutenant-Governor in Council, and which is invested with wide powers of regulation and control over the fruit and vegetable industry within a great extent of territory, constituted by, and acting in every way under, the authority of the statute, exercising compulsory powers as well as inquisitorial powers of a most exceptional character, is assuredly a public authority. The levy is also made for a public purpose. When such compulsory, not to say dictatorial, powers are vested in such a body by the legislature, the purposes for which they are given are conclusively presumed to be public purposes. Indeed, when one considers the number of people affected by the orders of this Committee, and the extent of the territory over which it executes its orders and directions, it becomes evident that, in point of their potential effect upon the population of the territory and of the interest of the population in the Committee's activities, the operations of the Committee, as contemplated by the statute, greatly surpass in public importance many municipal schemes, the levies for the support of which nobody could dispute, would come under the head of taxation.

This brings us to the question whether the levies complained of are levies which can be brought under head no. 9 of s. 92. The words are these:

> Shop, saloon, tavern, auctioneer and other licences in order to the raising of a revenue for provincial, local or municipal purposes.

The question has never yet been decided whether or not the revenue contemplated by this head can in any circumstances be raised by a fee which operates in such a manner as to take it out of the scope of "direct taxation." *Prima facie,* it would appear, from inspection of the language of the two several heads, that the taxes contemplated by no. 9 are not confined to taxes of the same char-

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acter as those authorized by no. 2, and that accordingly imposts which would properly be classed under the general description "indirect taxation" are not for that reason alone excluded from those which may be exacted under head 9. 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. Here, such is the primary purpose of the legislation. The imposition of these levies is merely ancillary, having for its object the creation of a fund to defray the expenses of working the machinery of the substantive scheme for the regulation of trade. Even the licence fee is discretionary with the Committee. This part of the statute would appear to be *ultra vires*. The levy authorized is not within s. 92 (2), and the licence is not within s. 92 (9).

It follows that the appellant is entitled to succeed upon that branch of his claim *which affects the levies in question.*

Coming now to the first ground of attack, namely, that the statute constitutes an attempt to regulate trade within the meaning of head no. 2 of s. 91. To repeat the general language of s. 10 (1), the functions of the Committee are

for the purpose of controlling and regulating the marketing of any product within its authority,

and for that purpose the Committee is empowered

to determine whether or not and at what time, and in what quantity and from and to what places and at what price and on what terms the product may be marketed and delivered.

As I have said, the respondent Committee has attempted (in professed exercise of this authority) and in this litigation asserts its right to do so—to regulate the marketing of products into parts of Canada outside British Columbia. It claims the right under the statute to control (as in fact it does), the sale of such products for shipment into the prairie provinces as well as the shipment of them into those provinces for sale or storage. The moment his product reaches a state in which it becomes a possible article of commerce, the shipper is (under the Committee's interpretation of its powers), subject to the Committee's dictation as to the quantity of it which he may dispose of,

as to the places from which, and the places to which he may ship, as to the route of transport, as to the price, as to all the terms of sale. I ought to refer also to the provision of the statute which prohibits anybody becoming a licensed shipper who has not, for six months immediately preceding his application for a licence, been a resident of the province, unless he is the registered owner of the land on which he carries on business as shipper. In a statute which deals with trade that is largely interprovincial, this is a significant feature. It is an attempt to control the manner in which traders in other provinces, who send their agents into British Columbia to make arrangements for the shipment of goods to their principals, shall carry out their interprovincial transactions. I am unable to convince myself that these matters are all, or chiefly, matters of merely British Columbia concern, in the sense that they are not also directly and substantially the concern of the other provinces, which constitute in fact the most extensive market for these products. In dictating the routes of shipment, the places to which shipment is to be made, the quantities allotted to each terminus *ad quem,* the Committee does, altogether apart from dictating the terms of contracts, exercise a large measure of direct and immediate control over the movement of trade in these commodities between British Columbia and the other provinces.

Such matters seem to constitute " matters of interprovincial concern," that is to say, of direct, substantial and immediate " concern," to the receiving province as well as to the shipping province. Otherwise you seem to denude the phrase of all meaning. No doubt the Committee also regulates the local trade in British Columbia, but the regulation of the trade with other provinces is no mere incident of a scheme for controlling local trade; it is of the essence of the statute and of the object and character of the Committee's activities. We have not here to do with any mere matter of contract or of civil status, with the right, for example, to sue in the provincial courts. Contract is no doubt involved, as the control of property is involved; but the central purpose of the legislation is to assume direct control of the trade as trade. Its aim is to regulate the producer and shipper as trader; as proprietor

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and contractor, it affects him directly and necessarily, but only as a means of governing him in carrying on his trade.

The scope which might be ascribed to head 2, s. 91 (if the natural meaning of the words, divorced from their context, were alone to be considered), has necessarily been limited, in order to preserve from serious curtailment, if not from virtual extinction, the degree of autonomy which, as appears from the scheme of the Act as a whole, the provinces were intended to possess. Therefore, it has been found necessary to say that this head does not comprise the regulation, by a system of licences, of a particular business within any one or within all of the provinces. But there is no lack of authority for the proposition that regulations governing external trade, that is, trade between Canada and foreign countries, as well as regulations in matters affected with an interprovincial interest, or regulations which are necessary as auxiliary to some Dominion measure relating to trade generally throughout the Dominion, and dealing with matters not falling within s. 92, such as, for example, the incorporation of Dominion companies, are within the purview of that head. In the elucidation of the words by Sir Montague Smith in *Parsons* case (1), it is pointed out that there is a field over which the powers given by that head may operate quite consistently with the settled principle (*Montreal Street Rly. Co.* v. *City of Montreal* (2)), which precludes the Dominion from interfering (in attempted exercise of the authority thereby given) with matters which are not of unquestionably Canadian interest and importance, or which are in each province of local or private interest only. Sir Montague Smith's words are these (*Parson's* case) (3):

> Construing therefore the words "regulation of trade and commerce" by the various aids to their interpretation above suggested, they would include political arrangements in regard to trade requiring the sanction of parliament, regulation of trade in matters of interprovincial concern, and it may be that they would include general regulation of trade affecting the whole Dominion. Their Lordships abstain on the present occasion from any attempt to define the limits of the authority of the Dominion Parliament in this direction. It is enough for the decision of the present case to say that, in their view its authority to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contracts of a particular business or trade, such as the business of fire insurance in a single province.

(1) (1881) 7 App. Cas. 96. (2) [1912] A.C. p. 96.
(3) (1881) 7 A.C. 96, at 113.

This passage received formal approval by the Judicial Committee in *Wharton's* case (1), where Lord Haldane said:

> Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens' Insurance Co.* v. *Parsons* (2), on head 2 of s. 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade.

In the *Insurance* case (3), it was laid down that

> the authority of the Dominion Parliament to legislate for the regulation of trade and commerce does not extend to the regulation by a licensing system of a particular trade in which Canadians would otherwise be free to engage in the provinces.

The distinction signalized in these cases is that indicated above, and fully expounded in *Montreal Street Ry.* v. *City of Montreal* (4), between what is national in its scope and concern and that which in each of the provinces is of private or local, that is to say, of provincial, interest.

The judgment of Lord Haldane in the *Board of Commerce* case (5), requires special examination. And, first of all, it is necessary to remember what it was the Judicial Committee was there dealing with. The Board of Commerce Act, 1919, had set up a Board endowed with most extraordinary powers, both regulative and inquisitorial, enabling it to examine minutely into the affairs of everybody, traders and non-traders alike, with the view to discovering and preventing the hoarding of the necessaries of life (as defined by the Board), or unfairness in the prices exacted from the purchasers of such commodities, and to promulgate regulations and particular orders in regard to all these things. There are few incidents of the daily economic life of private persons which the powers of the Board were not capable of reaching. These powers extended to matters of interprovincial concern, no doubt, but the predominant feature of the statute was its attempt to control matters of individual and local interest. An attempt was made to support the enactment as enacted under the residuary powers of s. 91, and also by reference to head no. 2 of the same section, Trade and Commerce. As to the first of these arguments, the contention was that, the matter of the legislation being the subjects of hoarding and fair prices, it must in the circumstances of the time be

(1) [1915] A.C. 330 at 340.
(2) (1881) 7 App. Cas. 96, at 112, 113.
(3) [1916] 1 A.C. 588.
(4) [1912] A.C. 96.
(5) [1922] 1 A.C. 191.

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held to have a distinct Dominion aspect, to have, that is to say, in each province, an aspect which was the concern of the Dominion as a whole, and which therefore would fall within the same category as the subject matter dealt with in *Russell's* case (1); that the subject matter of the legislation was not property and civil rights within the provinces, nor was it in each of the provinces substantially of local or private interest, but was strictly a matter of national concern in the sense in which those words were used in *Attorney-General for Ontario* v. *Attorney-General for Canada* (2).

While the legislation dealt with matters which undoubtedly were of Dominion competence, it was, I repeat, mainly designed for the minute regulation of the affairs of individuals, in such a manner that, if it was to take effect, the Board established thereby might supersede the provincial legislatures in no unimportant degree. It is with reference to this state of affairs that the language which now follows must be interpreted: "It can, therefore," said Lord Haldane,

> be only under necessity, in highly exceptional circumstances, such as cannot be assumed to exist in the present case, that the liberty of the inhabitants of the provinces may be restricted by the Parliament of Canada, and that the Dominion can intervene in the interests of Canada as a whole in questions such as the present one. For, normally, the subject-matter to be dealt with in the case would be one falling within s. 92. Nor do the words in s. 91, the "Regulation of trade and commerce," if taken by themselves, assist the present Dominion contention. It may well be, if the Parliament of Canada had, by reason of an altogether exceptional situation, capacity to interfere, that these words would apply so as to enable that Parliament to oust the exclusive character of the provincial powers under s. 92.

Lord Haldane then proceeds to refer specifically to *Wharton's* case (3), and to the *Insurance* case (4). He lays down two propositions, but these, as we shall see, do not derogate from the proposition in *Wharton's* case, in which the language in *Parson's* case (5) is explicitly approved. He says nothing about it, and for a very good reason. In the *Board of Commerce* case (6), he is not dealing, as we have seen, with matters that Sir Montague Smith mentions as constituting a field for the operation of the Dominion power in relation to trade and commerce, after excluding

(1) (1881) 7 App. Cas. 829.
(2) [1896] A.C. 348, at 360, 361.
(3) [1915] A.C. 330.
(4) [1916] 1 A.C. 588.
(5) (1881) 7 App. Cas. 96.
(6) [1922] 1 A.C. 191.

from the operation of that power matters possessing, in themselves, no immediate interprovincial concern or national concern, but possessing only a local or private interest in each of the provinces. Such matters—matters which in the passage quoted are designated as properly within the field of s. 91 (2)—were not before the Board, because while the statute legislated upon them, its enactments included local matters also, to which, as I have said, the statute was mainly directed; and the operation of the statute in relation to the two classes of matters was so inseparable, that it must be *ultra vires*, as a whole, unless Dominion jurisdiction over such local matters could be maintained.

Of the two propositions, enunciated by Lord Haldane, both of which are expressed in the affirmative, the first is that, while s. 91, head 2, was, in *Wharton's* case (1), held to be susceptible of lending aid to Dominion powers conferred by the general language of s. 91,

> that was because the regulation of the trading of Dominion Companies was sought to be invoked only in furtherance of a general power which the Dominion Parliament possessed independently of it.

The matters in respect of which head 2 was invoked in *Wharton's* case (1), and to which Lord Haldane herein refers, were not, in fact, in themselves, matters belonging to or immediately connected with the subject of interprovincial trade or that of foreign trade. They were matters connected with the exercise, within each of the provinces, by Dominion trading companies of their constitutional capacities, which they had received from the Dominion; matters which, in each of the provinces, would have fallen within the subjects described in head 13 or head 16 of s. 92, had it not been for the language of head 11, by virtue of which the provincial jurisdiction in relation to "incorporation of companies" was confined to the creation of "companies with provincial objects," and, accordingly, the subject of the incorporation of companies with "objects" other than "provincial" was relegated to the residuary capacity of the Dominion, under the reservation expressed in the general words of section 91.

The *British North America Act* treats a trading company created by the Dominion, under this residuary author-

(1) [1915] A.C. 330.

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ity, as endowed with the status of an incorporated trading company in all the provinces; and its status and constitution as a corporation as being, therefore, matters not of provincial, but of direct and immediate national concern. Consequently, as Lord Haldane observes, the manner in which such trading companies shall be permitted to trade within each of the provinces acquires character as a matter of interest throughout the Dominion. Matters, otherwise of local concern only, and, so long as they continue to be so, outside the scope of head 2 of section 91, may become, in virtue of their relation to the trading activities of such companies, matters of national concern, and, in so far as they are so, subject to regulation under that head. It seems hardly necessary to observe that, here, there is nothing pointing to the conclusion that the regulative authority in respect of Trade and Commerce, in its application to matters which, in themselves, are involved in interprovincial or foreign trade, can only be invoked in aid of the execution of some power which the Dominion possesses independently of that head. Lord Haldane's proposition is strictly limited to matters which, in themselves, and independently of their connection with a Dominion trading company, would be of local concern only.

His Lordship's second proposition is that

> where there was no such power in that Parliament, as in the case of the *Dominion Insurance Act*, it was held otherwise, and that the authority of the Dominion Parliament to legislate for the regulation of trade and commerce did not, by itself, enable interference with particular trades in which Canadians would, apart from any right of interference conferred by these words above, be free to engage in the provinces (1).

The statute which the Board had to consider in the *Insurance* case (2) was one which professed to regulate, by a licensing system, the whole business of insurance, including business entirely local, within a particular province; and his Lordship is here dealing with the business of insurance in so far as it might be regarded as a branch of trade, as a local matter. In the same judgment, the Dominion Parliament was held to be empowered, in "regulation of Trade and Commerce," to regulate the conditions upon which a foreign insurance company should be entitled to carry on its business in a single province in Canada. The authorities relied

(1) [1922] 1 A.C. 191, at 198. (2) [1916] 1 A.C. 588.

upon were principally *Hodge* v. *The Queen* (1), and the decision on the *McCarthy Act Reference* (2), which affirmed the exclusive authority of the provinces to regulate local trade within their own borders.

I do not think further examination of the authorities would be useful. The more recent cases leave entirely untouched the view embodied in the passage quoted from *Parsons* case (3), and expressly adopted in *Wharton's* case (4), that foreign trade and trading matters of interprovincial concern are among the matters included within the ambit of head 2, s. 91.

It is not necessary, for the purposes of this appeal, to determine whether or not this statute could, in its entirety, be lawfully enacted by the Dominion Parliament alone. It is sufficient, for our present purposes, that in its characteristic and ruling provisions (the qualifying words in s. 10 being neglected), it aims at control of trade "in matters of interprovincial concern," in such a degree as to exclude it from the category of legislation in respect of matters local in the provincial sense; and that the Committee of Direction construes the powers it derives from the Act as enabling it to exercise such control, and executes those powers accordingly.

In the result, the appeal should succeed with costs throughout. The appellant is entitled to a declaration that he is not liable to the imposition of any levy by the respondents on, or in respect of, any product marketed by him; and that the respondents have no authority in any manner, to regulate or control the "marketing" (in the sense defined by the Act) of his product for consumption beyond the boundaries of British Columbia.

NEWCOMBE J.—The legislation in question, unless within property and civil rights in the province or private and local matters in the province, is clearly incompetent to the legislature; and, if it come within any of the classes of subjects enumerated in s. 91, it is, by the concluding paragraph of that section, not within any of the enumerations of s. 92.

(1) (1883) 9 App. Cas. 117.
(2) (1885) 12 L.N. 206.
(3) (1881) 7 App. Cas. 96.
(4) [1918] A.C. 330.

1930

LAWSON v. INTERIOR TREE FRUIT AND VEGETABLE COMMITTEE OF DIRECTION.

Newcombe J.

Now I wish to exclude, for the purposes of this judgment, any conclusion as to what the result would be if the *Produce Marketing Act* of British Columbia were not within any of the Dominion enumerated powers; there it appears that differences might emerge, and these are subjects of debate in which it is not necessary that we should now engage, because I am in complete agreement with the majority of my learned brothers that the legislation is referable to the exclusive Dominion power to regulate trade and commerce.

I thought there were two ways, either of which would serve to demonstrate the invalidity of the Act, and I had proposed to shew, independently of s. 91, that the legislation was neither property and civil rights nor private and local matters in the province; and, consequently, not within any of the provincial enumerations—a *ratio decidendi* which I thought free from difficulty. But, seeing that the majority of the Court has reached practically the same result by the other route, holding that the subject matter is embraced in the regulation of trade and commerce, where I think it strictly belongs, I am content, for the present purposes, to leave the extent of the provincial field, as defined by s. 92, unexplored.

CANNON J.—My brother Duff has in his opinion gone into all the details of the Act and regulations and, to avoid repetition, I will shortly state my views.

The Act, if restricted to the local provincial market, would, according to the evidence, have affected less than ten per cent of the fruit and vegetables grown in British Columbia; its intent and purpose was to regulate the trade outside the province. Its actual operation affects the shipment to points in Canada outside of British Columbia of about 90 per cent of the products.

The Act is intended to operate interprovincially, and its clauses and the regulations adopted to carry it out constitute barriers to free trade between the provinces and clash with section 121 of the *British North America Act*, 1867, which, in enacting that

> 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,

prevents, in my humble opinion, any hindrance, such as that now before us, by legislation of the untrammelled

commerce between the provinces in all "articles of the growth, produce or manufacture" of any one of them.

By the *Produce Marketing Act* of 1927, the province of British Columbia imposed levies on the fruits or vegetables grown or produced in a large area, including appellant's farm, and obliged all shippers to secure a licence to market and sell products of the province anywhere within the Dominion under a penalty for each contravention. Even leaving aside the licence, and considering only the levy, I believe, as pointed out by my brother Duff, that such imposts on commodities, on trade in commodities, have always been regarded as indirect taxes for a public purpose and come under the head of "taxation"—which is dealt with in Part VIII of the *British North America Act,* where is found article 121. It may be considered as an excise tax which necessarily has a tendency to affect, and affects, the price of the product to the customer in another province. To use the words of Lord MacMillan, in *Attorney-General for British Columbia* v. *McDonald Murphy Lumber Company* (1), the levy in question

> is an export tax falling within the category of duties of customs and excise, and as such, as well as by reason of its inherent nature as an indirect tax, could not competently be imposed by the provincial legislature.

I, therefore, reach the conclusion that this legislation is an attempt to impose by indirect taxation and regulations an obstacle to one of the main purposes of Confederation, which was, ultimately, to form an economic unit of all the provinces in British North America with absolute freedom of trade between its constituent parts.

The appellant is entitled to a declaration that he is not liable to the imposition of any levy by the respondent on any product marketed by him, and that the respondent has no authority in any manner to regulate or control the marketing and sale by him of any product to any point beyond the boundaries of British Columbia, with costs throughout against respondent.

Appeal allowed with costs.

Solicitors for the appellant: *Pincott & Pincott.*
Solicitor for the respondent: *T. G. Norris.*
Solicitor for the intervenant: *W. S. Edwards.*

(1) [1930] A.C. 357, at 363.