1965
*Nov. 3, 4
1966
Jan. 25

ALLEN MANN ..... APPELLANT;

AND

HER MAJESTY THE QUEEN ..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Constitutional law—Criminal law—Provincial offence of careless driving—Whether conflict with offence of dangerous driving defined by Criminal Code—Highway Traffic Act, R.S.O. 1960, c. 172, s. 60—Criminal Code, 1953-54 (Can.), c. 51, s. 221(4).

The appellant was convicted on a charge of careless driving, contrary to s. 60 of the *Highway Traffic Act, R.S.O* 1960, c. 172. By way of a stated case brought by the appellant, the magistrate submitted for the opinion of the Supreme Court of Ontario the questions whether he erred in law in (1) finding that s. 60 of the *Highway Traffic Act* was not *ultra vires*, and (2) finding that there was no conflict between that section and s. 221(4) of the *Criminal Code*. Mr. Justice Haines ruled that s. 60 was valid provincial legislation but in conflict with s. 221(4) of the *Criminal Code*, and set aside the conviction. The Court of

*PRESENT: Cartwright, Fauteux, Abbott, Martland, Judson, Ritchie and Spence JJ.

Appeal answered both questions in the negative and restored the conviction. The appellant was granted leave to appeal to this Court. Leave to intervene in this appeal was granted to the Attorney General of Canada, the Attorney General for Quebec and the Attorney General for Manitoba.

Held: The appeal should be dismissed.

Per Cartwright and Spence JJ.: The decision of this Court in *O'Grady v. Sparling*, [1960] S.C.R. 804, which dealt with a similar legislation in Manitoba, makes it clear that s. 60 of the *Highway Traffic Act* was within the powers of the provincial legislature. In enacting s. 221 of the *Criminal Code*, Parliament has not defined "inadvertent negligence" as a crime. Consequently since parliament has not occupied the field covered by s. 60, that section does not cease to be operative. The present case was undistinguishable from *O'Grady v. Sparling*.

Per Fauteux, Abbott and Judson JJ.: The provisions of s. 60 of the *Highway Traffic Act* and s. 221(4) of the *Criminal Code* differ in legislative purpose and legal and practical effect. The provincial enactment imposes a duty to serve *bona fide* ends not otherwise secured and in no way conflicting with the federal enactment. There were no obstacles preventing both enactments living together and operating concurrently.

Per Martland, Judson and Ritchie JJ.: The purpose and effect of s. 221(4) is to make it a criminal offence for any one to drive to the public danger, but there is a type of careless and inconsiderate driving which falls short of being "dangerous" within the meaning of that section, and the purpose of s. 60 of the *Highway Traffic Act* is to provide appropriate sanctions for the regulation and control of such driving in the interests of the lawful users of the highways.

Section 60 of the *Highway Traffic Act* and s. 221(4) of the *Criminal Code* deal with different subject matters and were enacted for different purposes, and this case is therefore governed by *O'Grady v. Sparling*.

Per Spence J.: By the enactment of s. 221(4) of the *Criminal Code*, Parliament has not moved into the field of inadvertent negligence and therefore there is no repugnancy between that section and s. 60 of the *Highway Traffic Act* which would render the latter section inoperative. Although there may be overlapping between the two sections, the consequence is not repugnance. The two sections deal with different subjects and therefore they may stand together.

Droit constitutionnel—Droit criminel—Offense provinciale de conduite négligente d'automobile—Y a-t-il conflit avec l'offense de conduite dangereuse telle que définie par le Code criminel—Highway Traffic Act, S.R.O. 1960, c. 172, art. 60—Code criminel, 1953-54 (Can.), c. 51, art. 221(4).

L'appelant fut trouvé coupable sous un chef d'accusation d'avoir conduit une automobile de façon négligente, contrairement à l'art. 60 du *Highway Traffic Act*, S.R.O. 1960, c. 172. En vertu d'un dossier soumis par l'appelant, le magistrat a saisi la Cour suprême de l'Ontario des questions de savoir s'il avait erré en droit (1) en jugeant que l'art. 60 du *Highway Traffic Act* n'était pas *ultra vires*, et (2) en jugeant qu'il n'y avait pas conflit entre cet article et l'art. 221(4) du *Code criminel*. Le Juge Haines a jugé que l'art. 60 était une législation provinciale valide mais qu'il y avait conflit avec l'art. 221(4) du *Code*

1966

MANN
v.
THE QUEEN

criminel, et a mis de côté le verdict de culpabilité. La Cour d'Appel a répondu négativement aux deux questions et a rétabli le verdict de culpabilité. L'appelant a obtenu permission d'appeler devant cette Cour. La permission d'intervenir dans cet appel a été accordée au procureur général du Canada, au procureur général du Québec et au procureur général du Manitoba.

Arrêt: L'appel doit être rejeté.

Les Juges Cartwright et Spence: Le jugement de cette Cour dans la cause de *O'Grady v. Sparling,* [1960] R.C.S. 804, qui a traité d'une législation semblable venant du Manitoba, démontre clairement que l'art. 60 du *Highway Traffic Act* était de la compétence de la Législature provinciale. En décrétant l'art. 221 du *Code criminel,* le Parlement n'a pas défini "la négligence inattentive" comme étant un crime. En conséquence, puisque le Parlement n'a pas pris possession du domaine couvert par l'art. 60, cet article ne cesse pas d'avoir effet. On ne peut pas distinguer la cause présente de *O'Grady v. Sparling.*

Les Juges Fauteux, Abbott et Judson: Les dispositions de l'art. 60 du *Highway Traffic Act* et de l'art. 221(4) du *Code criminel* diffèrent dans leur but législatif et dans leur effet légal et pratique. La Loi provinciale tente d'obtenir des fins *bona fide* non autrement atteintes par et non en conflit avec la Loi fédérale. Il n'y a aucun obstacle qui empêche les deux lois d'exister côte à côte et d'opérer concurremment.

Les juges Martland, Judson et Ritchie: L'article 221(4) a pour but et effet d'ériger en offense criminelle la conduite d'une façon dangereuse pour le public, mais il y a un genre de conduite négligente et sans égards qui est moindre que la conduite dangereuse au sens de cet article, et le but de l'art. 60 du *Highway Traffic Act* est de pourvoir à des sanctions appropriées pour la réglementation et le contrôle d'une telle conduite dans l'intérêt des usagers de la route. L'art. 60 du *Highway Traffic Act et* l'art. 221(4) du *Code criminel* traitent de différents sujets et ont été décrétés pour des buts différents, et la présente cause est gouvernée par *O'Grady v. Sparling.*

Le Juge Spence: En décrétant l'art. 221(4) du *Code criminel,* le Parlement n'a pas envahi le domaine de la négligence inattentive et il n'y a en conséquence aucune incompatibilité entre cet article et l'art. 60 du *Highway Traffic Act* au point de rendre ce dernier article sans effet. Quoiqu'il puisse y avoir double emploi entre les deux articles, la conséquence n'est pas l'incompatibilité. Les deux articles traitent de sujets différents et en conséquence peuvent exister ensemble.

APPEL d'un jugement de la Cour d'Appel de l'Ontario[1], rétablissant un verdict de culpabilité. Appel rejeté.

APPEAL from a judgment of the Court of Appeal for Ontario[1], restoring a conviction. Appeal dismissed.

John Weingust, for the appellant.

T. D. MacDonald, Q.C., and *Jon van der Woerd,* for the Attorney General of Canada.

[1] [1965] 1 O.R. 483, 2 C.C.C. 338, 48 D.L.R. (2d) 481.

R. A. Cormack, Q.C., and *C. M. Powell*, for the respondent.

Gérald Le Dain, Q.C., for the Attorney General for Quebec.

CARTWRIGHT J.:—This appeal raises the question whether s. 60 of the *Highway Traffic Act*, R.S.O. 1960, c. 172, has ceased to be operative since the enactment by Parliament of s. 221(4) of the *Criminal Code*.

On May 12, 1964, the appellant was convicted by Deputy Magistrate Hamilton on the charge that he did on February 14, 1964, at Toronto, commit the offence of driving carelessly a vehicle on a highway contrary to s. 60 of the *Highway Traffic Act*.

On the application of the appellant the learned Magistrate stated a case submitting for the opinion of the Court the questions whether he erred in law in:

1. Finding that section 60 of the *Highway Traffic Act* was not ultra vires;

2. Finding that there was no conflict between section 60 of the *Highway Traffic Act* and section 221(4) of the *Criminal Code*.

The matter came before Haines J. The operative part of the formal order of that learned Judge reads as follows:

IT IS ORDERED that section 60 of the *Highway Traffic Act* R.S.O. 1960 is valid Provincial Legislation but in conflict with Section 221(4) of the *Criminal Code* of Canada, and the appeal is, therefore, allowed and the appellant's conviction for careless driving be hereby set aside.

Haines J. at the end of his careful and elaborate reasons summarized his conclusions as follows:

(1) The careless driving provision is valid provincial legislation in relation to the regulation of highway traffic, and thus within the competence of the provincial legislature.

(2) The dangerous driving provision is valid federal legislation in relation to criminal law and thus within the competence of the federal parliament.

(3) The physical conduct proscribed by the two sections is, in general substance and purpose, identical.

(4) *Mens rea* is not required to convict an accused under either section.

(5) Since both sections deal with inadvertent negligence, which does not admit of varying degrees of inattention, the mental element required to convict of either offence is the same.

Applying the principles of constitutional law referred to earlier, it follows that the two sections cannot stand together. Parliament having 'occupied the field', the federal legislation must take precedence and the operation of the careless driving section is precluded by reason of the dangerous driving provisions of the *Criminal Code*.

1966

MANN v. THE QUEEN

Cartwright J.

In considering paragraph (4) of this summary it is important to understand the sense in which the learned Judge employed the term *"mens rea"*. Earlier in his reasons he had itemized as follows three classes of conduct in the driving of an automobile in respect of which criminal liability may be imposed:

> (1) Conduct characterized by the actor's intention to bring about the result;
>
> (2) Conduct characterized by the actor's recklessness as to the result;
>
> (3) Conduct which is distinguished from acting intentionally or recklessly in that it does not involve a state of awareness.

In his view the existence of *mens rea* is an essential ingredient of an offence under items (1) and (2) but not of an offence under item (3); that is to say *mens rea* consists of intention or recklessness.

Pursuant to leave the Crown appealed to the Court of Appeal[1]. The appeal was allowed, the Court directed that both of the questions submitted in the stated case should be answered in the negative and that the conviction should be restored.

Porter C.J.O. delivered the unanimous reasons of the Court of Appeal. In his opinion the provincial section differs materially from s. 221(4) of the *Criminal Code* in that each section defines a different offence because a person could be convicted under s. 60 without proof that his manner of driving was in fact dangerous while such proof would be essential for a conviction under s. 221(4). He also held that the two sections differed in purpose, that of s. 60 being to control the flow of traffic in a safe and orderly manner and that of s. 221(4) being to punish dangerous driving. He concluded his reasons as follows:

> I am of the opinion that the two sections before us differed both in legislative purpose and legal and practical effect, the provincial Act imposing a duty to serve bona fide ends not otherwise secured and in no way conflicting with section 221(4) of the *Criminal Code*.

The appellant was granted leave to appeal to this Court from the judgment of the Court of Appeal. Leave to intervene in this appeal was granted to the Attorney General of Canada who supports the appeal, and to the Attorney General for Quebec and the Attorney General for Manitoba who oppose it.

[1] [1965] 1 O.R. 483, 2 C.C.C. 338, 48 D.L.R. (2d) 481.

The decision of this Court in *O'Grady v. Sparling*[1] dealt with s. 55(1) of the *Manitoba Highway Traffic Act*. There is no difference in substance between the wording of that section and that of s. 60 of the Ontario Act. The reasons of the majority of the Court delivered by Judson J. make it clear that s. 60 is within the powers of the provincial Legislature. He said in part, at page 810:

> The power of a provincial legislature to enact legislation for the regulation of highway traffic is undoubted. (*Provincial Secretary of the Province of Prince Edward Island v. Egan*). The legislation under attack here is part and parcel of this regulation. Rules of conduct on highways have been established by similar legislation in every province and the careless driving section is no different in character from the specific rules of the road that are laid down.

and at page 811:

> My conclusion is that s. 55(1) of the Manitoba *Highway Traffic Act* has for its true object, purpose, nature or character the regulation and control of traffic on highways and that, therefore, it is valid provincial legislation.

In the present appeal no counsel argues that s. 60 is *ultra vires* of the provincial legislature. Such an argument would be clearly untenable in view of the decision in *O'Grady v. Sparling*. The main argument in support of the appeal is that since the enactment of s. 221(4) of the *Criminal Code* which came into force on September 1, 1961, that sub-section has fully occupied the field covered by s. 60 and consequently s. 60 ceases to be operative. It is argued that the basis of the judgment in *O'Grady v. Sparling*, on this branch of the matter, was the finding that the provincial section dealt with "inadvertent negligence" while the relevant provisions of the *Criminal Code* dealt only with "advertent negligence". Stress is laid on the following paragraph of the reasons of Judson J. at page 809:

> What the Parliament of Canada has done is to define 'advertent negligence' as a crime under ss. 191(1) and 221(1). It has not touched 'inadvertent negligence'. Inadvertent negligence is dealt with under the provincial legislation in relation to the regulation of highway traffic. That is its true character and until Parliament chooses to define it in the *Criminal Code* as 'crime', it is not crime.

The argument continues that by s. 221(4) Parliament has now defined "inadvertent negligence" as a crime.

In determining whether or not this is so it will be of assistance to consider the history of the legislation.

[1] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

1966

MANN
v.
THE QUEEN

CartwrightJ.

The predecessor of s. 221(4) was enacted by 1938 Statutes of Canada, c. 44, s. 16 as s. 285(6) of the *Criminal Code*. It reads as follows:

(6) Every one who drives a motor vehicle on a street, road, highway or other public place recklessly, or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition, and use of the street, road, highway or place, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on such street, road, highway or place, shall be guilty of an offence and liable

(*a*) upon indictment to imprisonment for a term not exceeding two years or to a fine not exceeding one thousand dollars or to both such imprisonment and fine; or

(*b*) on summary conviction to imprisonment for a term not exceeding three months or to a fine not exceeding one hundred dollars or to both such imprisonment and fine.

When the new *Criminal Code* was enacted by 2-3 Eliz. II, c. 51, the dangerous driving section was omitted.

In the new Code s. 191 defines criminal negligence. It reads as follows:

191 (1) Every one is criminally negligent who

(*a*) in doing anything, or

(*b*) in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section 'duty' means a duty imposed by law.

Section 192 defines the offence of causing death by criminal negligence, the maximum punishment being life imprisonment. Section 193 defines the offence of causing bodily harm by criminal negligence, the maximum punishment being imprisonment for ten years.

Subsection (1) of s. 221 is as follows:

221(1) Every one who is criminally negligent in the operation of a motor vehicle is guilty of

(*a*) an indictable offence and is liable to imprisonment for five years, or

(*b*) an offence punishable on summary conviction.

Section 221(4) was enacted by Statutes of Canada 1960-61, c. 43, s. 3, and is as follows:

(4) Every one who drives a motor vehicle on a street, road, highway or other public place in a manner that is dangerous to the public, having regard to all the circumstances including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place, is guilty of

(*a*) an indictable offence and is liable to imprisonment for two years, or

(*b*) an offence punishable on summary conviction.

It will be observed that the words "recklessly or" which appeared in s. 285(6) do not appear in s. 221(4) and that, subject only to that omission, the wording of the two subsections is substantially identical.

In my opinion, s. 285(6) created two offences of which the driver of a motor vehicle on a highway or other public place might be guilty, (i) driving recklessly and (ii) driving in a manner dangerous to the public. The first of these offences continues to exist under the new Code by the combined effect of ss. 191 and 221(1). The second of these offences was reintroduced into the criminal law by the enactment of s. 221(4), and in ascertaining the intention of Parliament as to whether that sub-section was intended to render inadvertent negligence a crime it will be of assistance to consider the view taken by the Courts in the case of charges of dangerous driving laid under s. 285(6).

In *Loiselle v. The Queen*[1], Casey J. reviewed some of the earlier decisions in the courts of other provinces and in this Court and said at page 332:

> As I read these cases, each automobile accident presents two problems —Was there any negligence?—and if so, was the driver negligent to a degree over and above that which would be required to engage his civil responsibility? If the second question be answered affirmatively then it becomes necessary, having regard to the exact degree of negligence present, to decide what offence had been committed. But in all cases, and each must be treated on its own merits, it must first be found that there was negligence of sufficient gravity to lift the case out of the civil field into that of the Criminal Code. Both of the acts envisaged by s. 285(6) imply, as has been said elsewhere (*Rex v. Karasick* (1950) 2 W.W.R. 399, 195 Can. Abr. 184) 'something more than mere inadvertence or mere thoughtlessness or mere negligence or mere error of judgment'. They imply a knowledge or wilful disregard of the probable consequences or a deliberate failure to take reasonable precautions. It is this extra element which I think Mr. Justice Taschereau must have had in mind when he used (*American Automobile Ins. Co. v. Dickson*) the words 'a moral quality carried into the act'. Unless the record discloses some evidence from which the existence of this extra element can be inferred, the conviction cannot stand.

In my view this passage accurately stated the law. It negatived the suggestion that proof of mere inadvertent negligence would support a conviction on a charge of either of the crimes defined by s. 285(6). Had it been the intention of Parliament in enacting s. 221(4) to define inadvertent negligence as a crime it appears to me unlikely that it would have employed the very words which had been held, in *Loiselle v. The Queen* and the cases there referred to, not

[1] (1953), 17 C.R. 323, 109 C.C.C. 31.

1966

MANN v. THE QUEEN

CartwrightJ.

to accomplish that purpose. In this connection I have not overlooked s. 21(4) of *The Interpretation Act*, R.S.C. 1952, c. 158, which reads as follows:

> (4) Parliament shall not, by re-enacting any Act or enactment, or by revising, consolidating or amending the same, be deemed to have adopted the construction that has, by judicial decision or otherwise, been placed upon the language used in such Act, or upon similar language.

In *Studer v. Cowper*[1], Kerwin J., as he then was, considered the effect of a similar sub-section and after quoting from the judgments of the Court in *Canadian Pacific Railway v. Albin*[2] and *Orpen v. Roberts*[3], went on to hold at page 454 that the effect of this sub-section of the *Interpretation Act* is that it

> merely removes the presumption that existed at common law and, in a proper case, it will be held that a legislature did have in mind the construction that had been placed upon a certain enactment when re-enacting it.

This view was approved and acted upon by the majority in this Court in *Canadian Acceptance Corporation Ltd. v. Fisher*[4].

The reasoning of Casey J. in the passage from his judgment quoted above appears to me to be applicable to a charge of dangerous driving under s. 221(4) of the *Criminal Code*, and I am of opinion that the argument that by that sub-section Parliament has defined "inadvertent negligence" as a crime must be rejected.

In the course of the argument reference was made to a number of decisions in other jurisdictions where the Courts have reached a different conclusion in construing enactments worded similarly to s. 221(4). I do not think it necessary to examine these decisions in detail; they are collected and discussed by Coffin J. in *Regina v. Jeffers*[5]. I agree with his conclusion that the principle stated in the judgment of Casey J. in *Loiselle v. The Queen* should be acted upon in interpreting s. 221(4). I agree also with his reasons for reaching that conclusion.

Having reached the conclusion that in enacting s. 221(4) Parliament has not defined "inadvertent negligence" as a

[1] [1951] S.C.R. 450, 2 D.L.R. 81.
[2] (1919), 59 S.C.R. 151 at 166.
[3] [1925] S.C.R. 364 at 374, 1 D.L.R. 1101.
[4] [1958] S.C.R. 546 at 553, 554, 14 D.L.R. (2d) 225.
[5] (1965), 45 C.R. 177.

crime, I find the present case indistinguishable from *O'Grady v. Sparling* and would dismiss the appeal.

Several other points were argued before us but, in view of the conclusion at which I have arrived on the point dealt with above, it becomes unnecessary to discuss them and I propose to follow the advice which Lord Macnaghten referred to as "often quoted but not perhaps always followed" and to refrain from "entering more largely upon an interpretation of the *British North America Act* than is necessary for the decision of the particular question in hand" (vide *A. G. of Manitoba v. Manitoba Licence Holders' Association*[1] and *Citizens Insurance Co. of Canada v. Parsons*[2]).

I would dismiss the appeal but would make no order as to costs.

Abbott and Judson JJ. concurred with the judgment delivered by

FAUTEUX J.:—On May 12, 1964, the appellant was tried, by Deputy Magistrate D. F. Hamilton in the Magistrates' Court in Toronto, for driving carelessly. This offence is described in s. 60 of *The Highway Traffc Act,* R.S.O. 1960, c. 172:

> 60. Every person is guilty of the offence of driving carelessly who drives a vehicle on a highway without due care and attention or without reasonable consideration for other persons using the highway and is liable to a fine of not less than $10 and not more than $500 or to imprisonment for a term of not more than three months, and in addition his licence or permit may be suspended for a period of not more than two years.

In limine litis, counsel for the accused submitted that s. 60 had become inoperative in view of subs. (4), recently added by Parliament to s. 221 of the *Criminal Code.* Sub-section (4) provides that:

> 221.....
>
> (4) Every one who drives a motor vehicle on a street, road, highway or other public place in a manner that is dangerous to the public, having regard to all the circumstances including the nature, condition and use of such place and the amount of traffic that at the time is or might reasonably be expected to be on such place, is guilty of
>
> (*a*) an indictable offence and is liable to imprisonment for two years, or
>
> (*b*) an offence punishable on summary conviction.

[1] [1902] A.C. 73 at 77. [2] (1881), 7 App. Cas. 96 at 109.

1966

MANN
v.
THE QUEEN

Fauteux J.

This submission was rejected and on the evidence the accused was found guilty.

The appellant appealed, by way of a stated case, to the Supreme Court of Ontario. The questions of law submitted, by the Deputy Magistrate, for the opinion of the Court were:

> Did I err in law in
>
> (i) finding that Section 60 of The Highway Traffic Act was not ultra vires,
>
> (ii) finding that there was no conflict between Section 60 of The Highway Traffic Act and Section 221(4) of the Criminal Code of Canada.

Mr. Justice Haines, who heard the appeal, held that both s. 60 and s. 221(4) are valid legislation, the first as being legislation in relation to the regulation of highway traffic and, as such, within the competence of a Legislature, and the second as being legislation in relation to criminal law and, as such, within the competence of Parliament. To determine whether, as contended for by the appellant, these two sections were in collision or conflict, the learned Judge proceeded to analyse and compare, from the point of view of *actus reus* and of *mens rea,* the components of each of the two offences. With respect to *actus reus,* he reached the view that the use, in s. 60, of the words "*due* care and attention" and "*reasonable* consideration for other persons using the highway" contemplates a manner of driving that is *dangerous* to the public or that it is so similar as to be undistinguishable for practical purposes from the manner of driving prescribed by s. 221(4) of the *Criminal Code.* He thus found that s. 60 and s. 221(4), respectively defining the offence of *driving carelessly* and the offence of *dangerous driving,* are designed to embrace the same conduct and that under both provisions *actus reus* is similar. With respect to *mens rea,* the learned Judge relied mainly on certain statements in the judgment of this Court in *O'Grady v. Sparling*[1], found that under neither section was *mens rea* a requisite to convict and hence that there was also, in this respect, similarity under both sections. The learned Judge then concluded that Parliament having occupied the field, the federal legislation must take precedence and the operation of the careless driving provision of

[1] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

The Highway Traffic Act is precluded by reason of the dangerous driving provision of the *Criminal Code*. The appeal was allowed and the conviction of the appellant for the offence of driving carelessly was set aside.

From this decision respondent appealed to the Court of Appeal of Ontario[1]. By a unanimous judgment, the Court, composed of Porter C.J.O., Roach, Gibson, MacKay and Kelly JJ.A., allowed the appeal and set aside the Order of Mr. Justice Haines.

The appellant now appeals, with leave, to this Court. Leave to intervene was granted to the Attorney General of Canada, the Attorney General of the Province of Quebec and the Attorney General of the Province of Manitoba.

It cannot be disputed that the responsibility for the regulation of highway traffic, including the authority to prescribe the conditions and the manner of the use of motor vehicles on the highways, in the province, is primarily committed to local Legislatures (*Provincial Secretary of the Province of P.E.I. v. Egan*[2]). Nor can it be challenged that an enactment of a nature such as that of s. 60 of the Ontario *Highway Traffic Act* is legislation in relation to the regulation of highway traffic in the province (*O'Grady v. Sparling, supra*). The sole issue in the present appeal stems from the fact that, since the decision of this Court in the latter case, Parliament has enacted s. 221(4); and this issue is whether, as contended for by appellant with the support of the Attorney General of Canada but contested by respondent with the concurrence of the Attorney General of the Province of Quebec and the Attorney General of the Province of Manitoba, s. 60 is in conflict, in the technical sense, with s. 221(4), with the consequence that s. 60 would now be suspended or inoperative. Rejecting as ill-founded the suggestion of conflict, Porter C.J.O., who delivered the judgment for the Court of Appeal, quoted, as also obtaining in this case, the test adopted as well as the conclusion reached by this Court in *O'Grady v. Sparling*. This test was whether the two pieces of legislation considered in that case to wit s. 55(1) of the *Highway Traffic Act*, R.S.M. 1954, c. 112, which is couched in terms similar to those of s. 60 and s. 221(1) of the *Criminal Code* which deals with the offence of criminal negligence in the operation of a motor vehicle,

[1] [1965] 1 O.R. 483, 2 C.C.C. 338, 48 D.L.R. (2d) 481.
[2] [1941] S.C.R. 396, 76 C.C.C. 227, 3 D.L.R. 305.

1966

MANN
v.
THE QUEEN

Fauteux J.

differed both in legislative purpose and legal and practical effect; and the conclusion reached was that the provincial enactment was imposing a duty to serve *bona fide* ends not otherwise secured and in no way conflicting with the federal enactment. With these views of the Court of Appeal I am in respectful agreement. Notwithstanding the able argument of Counsel for the Attorney General of Canada, I am quite unable to read, in what constitutes the essence of the *ratio decidendi* in the *O'Grady* case, anything supporting the theory of conflict advanced in the present case. When a question of conflict arises with respect to the criminal law power of Parliament and the provincial regulatory power, it appears to me that one must be mindful that broadly as the criminal law power of Parliament has been construed—as is illustrated by the classic statement of Lord Atkin in *Proprietary Articles Trade Association v. Attorney General of Canada*[1]—it has never been authoritatively suggested that the construction of this power could be validly extended to a point leading to the gradual and eventual absorption or virtual extinction of the provincial regulatory power. Indeed, both these powers must be rationalized in principle and reconciled in practice whenever possible. I do not think that because the circumstances of a particular case may bring it within the scope of both s. 221(4) and s. 60 one may validly conclude that s. 60 does not impose a duty to serve *bona fide* ends not otherwise secured and in no way conflicting with s. 221(4). In the present case, I see no obstacle preventing both enactments living together and operating concurrently.

Being of opinion that the provisions of s. 221(4) and those of s. 60 differ with respect to subject-matter as well as with respect to legislative purpose and legal and practical effect, I would dismiss the appeal but make no order as to costs.

Martland and Judson J.J. concurred with the judgment delivered by

RITCHIE J.:—I have had the advantage of reading the reasons for judgment of my brothers Cartwright and Spence and I agree with them that this appeal should be dismissed and that the provisions of s. 221(4) of the

[1] [1931] A.C. 310 at 324, 1 W.W.R. 552, 55 C.C.C. 241, 2 D.L.R. 1.

Criminal Code are not to be construed as creating a crime of "inadvertent negligence".

It appears to me to be obvious that everyone who drives a motor vehicle in a manner contrary to the provisions of s. 221(4) of the *Criminal Code* is driving "without due care and attention or without consideration for other persons using the highway" (contrary to s. 60 of the *Highway Traffic Act*, R.S.O. 1960, c. 172), but I do not consider that the converse is necessarily the case.

The purpose and effect of s. 221(4) is to make it a criminal offence for anyone to drive to the public danger but, notwithstanding the careful argument to the contrary addressed to us on behalf of the Attorney General of Canada, I am satisfied that there is a type of careless and inconsiderate driving which falls short of being "dangerous" within the meaning of that section and that the purpose of s. 60 of the *Highway Traffic Act* is to provide appropriate sanctions for the regulation and control of such driving in the interests of the lawful users of the highways of Ontario.

I am accordingly of the opinion that s. 60 of the *Highway Traffic Act* and s. 221(4) of the *Criminal Code* deal with different subject matters and were enacted for different purposes and that this case is therefore governed by the decision of this Court in *O'Grady v. Sparling*[1].

I would dispose of the appeal as proposed by my brother Cartwright.

SPENCE J.:—I have had the privilege of reading the reasons of Mr. Justice Cartwright and, with respect, I agree that the appeal should be dismissed for the reasons set out by my brother. I think it proper, however, to add certain further considerations.

Judson J. in *O'Grady v. Sparling*[1] said:

> What the Parliament of Canada has done is to define "advertent negligence" as a crime under ss. 191(1) and 221(1). It has not touched "inadvertent negligence". Inadvertent negligence is dealt with under the provincial legislation in relation to the regulation of highway traffic. That is its true character and until Parliament chooses to define it in the *Criminal Code* as "crime", it is not crime.

[1] [1960] S.C.R. 804, 33 C.R. 293, 33 W.W.R. 360, 128 C.C.C. 1, 25 D.L.R. (2d) 145.

1966

MANN
v.
THE QUEEN

Spence J.

We would therefore be assisted in the solution to our problem if we were able to determine whether by the enactment of s. 221(4) of the *Criminal Code* Parliament has moved into the field of inadvertent negligence by the enactment of a provision which is repugnant to s. 60 of the *Highway Traffic Act* of the Province of Ontario and, therefore, render the latter inoperable. I accept as a standard of repugnance that adopted by Martland J. in this Court in *Smith v. The Queen*[1]:

> The fact that both provisions prohibit certain acts with penal consequences does not constitute a conflict. It may happen that some acts might be punishable under both provisions and in this sense that these provisions overlap. However, even in such cases, there is no conflict in the sense that compliance with one law involves breach of the other. It would appear, therefore, that they can operate concurrently.

Surely a practical test is to consider whether there may be cases in which the accused's conduct would justify a conviction under the provisions of s. 60 of the *Highway Traffic Act* of Ontario but where no conviction would be possible under the provisions of s. 221(4) of the *Criminal Code*.

Haines J., in giving judgment upon the application to quash in the present case, said:

> It is true that the careless driving section makes no express reference to creating an element of danger to the safety of members of the public. However, the use of the words "due care and attention and reasonable consideration for other persons using the highway" clearly contemplates a manner of driving that is dangerous to the public or that is so similar as to be indistinguishable for practical purposes from the manner of driving prescribed by the corresponding section of the Criminal Code.

With respect, I am unable to agree with that statement. It is true that in many cases upon the prosecution for a breach of s. 60 of the *Highway Traffic Act* of Ontario the Crown may be able to demonstrate that the driving of the accused either created a danger or at any rate was in circumstances where danger was probable. In my view, however, that danger was not a necessary ingredient of the offence charged under s. 60 of the *Highway Traffic Act* of Ontario.

Judson J. in *O'Grady v. Sparling, supra,* said at p. 810:

> The power of a provincial legislature to enact legislation for the regulation of highway traffic is undoubted. (*Provincial Secretary of the*

[1] [1960] S.C.R. 776 at 800, 33 C.R. 318, 128 C.C.C. 145, 25 D.L.R. (2d) 225.

Province of Prince Edward Island v. Egan, 1941 S.C.R. 396). The legislation under attack here is part and parcel of this regulation. Rules of conduct on highways have been established by similar legislation in every province and the careless driving section is no different in character from the specific rules of the road that are laid down.

LeBel J.A., in giving one of the judgments for the Court of Appeal of Ontario in *Regina v. Yolles*[1], said at p. 228:

> In the absence of such a compendious rule, (the present s. 60 of the Highway Traffic Act) the Province could not exercise effective control of traffic on its highways in the general interest of the safety; it would be quite impossible to do so in my opinion, and I think it is equally impossible to expect the Province to enact specific rules of the road to cover all contingencies that might call for the exercise of caution.

The history of motor vehicle legislation over the past decades has shown the inclusion in the statute of an ever-increasing number of statutory "Rules of the Road". The present *Highway Traffic Act* of Ontario, R.S.O. 1960, c. 172, has a Part devoted to such Rules which commences at s. 62A and proceeds through to s. 100. Many of those sections have a considerable number of subsections.

As said by LeBel J.A., it is "impossible to expect the province to enact specific rules of the road to cover all contingencies".

There are many situations where the action of a driver might endanger no other person upon the highway or where there may be no probable situation of danger but there could be inconvenience to other users of the highway, obstruction of the free use of the highway, or other interference with the rights of other users of the highway. In my view, the person guilty of that kind of conduct would be, to use the words of s. 60 of the *Highway Traffic Act* of Ontario, "driving without due care and attention or without reasonable consideration for other persons using the highway". Under such circumstances, there could be a conviction for breach of the provisions of s. 60 of the *Highway Traffic Act* of Ontario. However, no conviction for a breach of s. 221(4) of the *Criminal Code* could have resulted as the driving was not "in a manner dangerous to the public".

With respect, I adopt the words of Porter C.J.O. in giving the judgment in the Court of Appeal in the present case when he said:

[1] [1959] O.R. 206, 30 C.R. 93, 123 C.C.C. 305, 19 D.L.R. (2d) 19.

1966

MANN
v.
THE QUEEN

Spence J.

To succeed in a prosecution under the section it would be sufficient to prove that the accused was driving in a manner which would answer either one of these descriptions. And this would suffice whether or not the manner of driving were also dangerous. The accused would be liable to conviction whether the driving were dangerous or not. The section contemplates, not only that the highways should be made safe, but that travellers on the highways should conduct themselves in a civilized and considerate manner toward their fellow travellers. Thus the Provincial section differs materially from the section of the Code. Each section defines a different offence.

It is also worthy of note that s. 60 of the *Highway Traffic Act* of Ontario is by its terms confined to the highway which is restrictively defined in s. 1(1), para. 10, of the *Highway Traffic Act* while s. 221(4) of the *Criminal Code* applies, *inter alia,* to "a public place" which may be much broader than any area included in the definition in the *Highway Traffic Act.*

It follows, therefore, that although there may be overlapping the consequence is not repugnance. The two sections deal with different subjects and therefore they may stand together. Section 221(4) of the *Criminal Code* has not made inoperable s. 60 of the *Highway Traffic Act.*

Appeal dismissed; no order as to costs.

Solicitors for the appellant: Weingust & Halman, Toronto.

Solicitor for the Attorney General of Canada: E. A. Driedger, Ottawa.

Solicitor for the respondent: W. C. Bowman, Toronto.

Solicitor for the Attorney General of Quebec: G. LeDain, Montreal.