THE LORD'S DAY ALLIANCE OF CANADA ON ITS OWN BEHALF AND IN ITS REPRESENTATIVE CAPACITY ..... APPELLANT;

1959
*Feb. 23, 24
Apr. 28

AND

THE ATTORNEY GENERAL OF BRITISH COLUMBIA, CITY OF VANCOUVER AND VANCOUVER MOUNTIES HOLDINGS LTD. ON ITS OWN BEHALF AND IN ITS REPRESENTATIVE CAPACITY ... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law—Validity of provincial enactment authorizing municipality to permit Sunday sport—Permissive enactment—Whether within exception of s. 6 of the Lord's Day Act, R.S.C. 1952, c. 171—Whether criminal legislation—Whether delegation of authority—The Criminal Code, 1953-54 (Can.), c. 51, ss. 7, 8, 11—The Constitutional Questions Determination Act, R.S.B.C. 1948, c. 66.

By s. 14 of Bill 55, the British Columbia Legislature proposed to amend the charter of the City of Vancouver by adding s. 206A thereto which authorized the city council to pass a by-law specifying public games and sports, other than horse-racing, that might be played in the city or parts thereof for gain, or prize, or reward, within certain hours on Sunday afternoons, and "which but for this section would be unlawful under . . . The Lord's Day Act (Canada)". The Lieutenant-Governor in Council of British Columbia referred to the Court of Appeal the question of the validity of the proposed legislation. By a majority it was held to be *intra vires*.

*PRESENT: Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Fauteux, Abbott, Martland and Judson JJ.

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Held: The proposed legislation was *intra vires* in its entirety.

Per Kerwin C.J. and Taschereau, Fauteux and Abbott JJ.: (1) The Bill governed the conduct of people on Sunday and did not create an offence against the criminal law. This permissive legislation fell within heads 13 or 16 of s. 92 of the *British North America Act* and was, therefore, within the power of the provincial Legislature. This was not a case of delegation where Parliament attempted to authorize a provincial legislature to do something beyond the latter's power but within the competence of Parliament. Section 6 of the *Lord's Day Act* does not apply to a province when it chooses to permit a certain occurrence. Looking at the pith and substance of the legislation, since in constitutional matters there is no general area of criminal law, the Legislature was not prohibiting something but merely stating in an affirmative manner that certain actions could be taken. The decision of the Privy Council in *Lord's Day Alliance of Canada v. Attorney General for Manitoba,* [1925] A.C. 384, completely covered the matter here in question and could not be distinguished by reference to English statutes, as now there are no criminal offences except those enacted by the Parliament of Canada.

(2) The point taken in the Court of Appeal, that the Legislature had attempted to delegate its powers to the council of the municipality was abandoned by the appellant, but, in any event, as was held by the majority in the Court of Appeal, the by-law would be a provincial law within s. 6 of the *Lord's Day Act,* R.S.C. 1952, c. 171.

Per Rand, Cartwright, Martland and Judson JJ.: Where a certain activity, when engaged in on Sunday, is not at the time forbidden as a criminal offence, the declaration by a provincial statute that it may be indulged in on that day is a valid enactment and is an Act "in force" within the meaning of those words in s. 6 of the *Lord's Day Act: Lord's Day Alliance of Canada v. Attorney General for Manitoba, supra.* There are no laws in force touching the observance of Sunday except the *Lord's Day Act,* since s. 8 of the new *Criminal Code* came into force. There is no such thing as a "domain" of criminal law. In a federal system, distinctions must be made arising from the true object, purpose, nature, or character, of each particular enactment. It is a misconception of the operation of s. 6 of the *Lord's Day Act* to say that its effect was to create a delegation of dominion power to the provinces. It cannot be open to serious debate that Parliament can limit the operation of its own legislation and may do so upon any event or condition.

Per Locke and Martland JJ.: The language of s. 6 as well as that of ss. 4 and 7 of the *Lord's Day Act* shows that the limitation of the prohibition applies not only to statutes passed prior to the coming into force of the Act but also to those which might thereafter be enacted. If therefore the province, in the exercise of its powers under heads 13 and 16 of s. 92 of the *British North America Act,* should permit the activities in question, the prohibition did not extend to them. By reason of s. 8 of the new *Criminal Code,* the Imperial statutes referred to in argument were no longer part of the law of British Columbia at the time the amendment was passed. There was no question of the delegation of the power of Parliament to the legislature, nor as to whether the provincial Act amended the *Lord's Day Act,* nor

of any adoption by the Dominion of the provincial legislation by virtue of the language in s. 6. The amendment was a "provincial act or law" within the meaning of ss. 4 and 6 of the *Lord's Day Act*.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], declaring, on a reference by the Lieutenant-Governor in Council of British Columbia, that a proposed amendment to the Charter of the City of Vancouver to permit Sunday sport was *intra vires*. Appeal dismissed.

F. A. Brewin, Q.C., and *R. J. McMaster*, for the appellant.

John J. Urie, for the Attorney General of British Columbia, respondent.

J. W. de B. Farris, Q.C., and *R. K. Baker*, for the City of Vancouver, respondent.

W. R. Jackett, Q.C., and *T. B. Smith*, for the Attorney General of Canada, intervenant.

W. B. Common, Q.C., for the Attorney General of Ontario, intervenant.

The judgment of Kerwin C.J. and Taschereau, Fauteux and Abbot JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal by The Lord's Day Alliance of Canada on its own behalf and in its representative capacity against a decision of the Court of Appeal of British Columbia[1] on a reference directed to it by the Lieutenant-Governor in Council of the Province. The question submited is:

Is Section 14 of Bill 55, entitled "An Act to Amend the Vancouver Charter", or any of the provisions thereof, and in what particular or particulars, or to what extent, intra vires the Legislature of the Province?

Section 14 of the Bill referred to provides:

14. The said Act is further amended by inserting the following as Section 206A:

206A. (1) Notwithstanding anything contained in the "Sunday Observance Act" or in any other statute or law of the Province, where a by-law passed under subsection (2) hereof is in force and subject to its provisions, it shall be lawful for any person between half past one and six o'clock in the afternoon of the Lord's Day, commonly called Sunday, to provide for or engage in any public game or sport for gain, or for any prize or reward, or to be present at any performance of such public game or sport at which any fee is charged, directly or indirectly, either for

[1] (1959), 15 D.L.R. (2d) 169, 121 C.C.C. 241.

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admission to such performance or to any place within which the same is provided, or for any service or privilege thereat, that is specified in such by-law and which but for this Section, would be unlawful under Section 6 of "The Lord's Day Act (Canada)" or to do or engage any other person to do any work, business or labour in connection with any such public game or sport which but for this Section would be unlawful under Section 4 of "The Lord's Day Act (Canada)".

(2) (*a*) The Council may pass a by-law declaring subsection (1) to be in force throughout the city or in such part or parts thereof as may be specified in the by-law and upon such by-law coming into force, subsection (1) shall apply throughout the city or in such specified part or parts as the case may be.

(*b*) the application of subsection (1) shall be limited to such public games or sports as are specified in the by-law.

(*c*) The by-law shall not specify horse-racing as a public game or sport.

(*d*) Where subsection (1) applies in specified parts of the city the limitation authorized by clause (*b*) hereof may differ in different parts.

(*e*) The by-law may reduce the period of time between half past one and six o'clock mentioned in subsection (1).

(*f*) The by-law shall provide for the regulation and control of the public games and sports specified in it and may provide for the regulation and control of any matter or thing in connection with such public games and sports.

(*g*) (*i*) No by-law passed under this section shall be repealed until the following question has been submitted to the electors, and a majority of affirmative votes obtained: Are you in favour of the repeal of the by-law passed under the authority of the Vancouver Charter that regulates public games and sports for gain on the Lord's Day?

(*ii*) The Council may submit the question set out above to the electors at any annual election.

(*iii*) Upon the presentation of a petition requesting that the by-law passed under this section be repealed, signed by at least ten percent of the electors of the municipality, the Council shall at the next annual election submit to the electors the question set out in subclause (i).

(*h*) Any petition mentioned in clause (*g*) (*iii*) above shall be deemed to be presented when it is lodged with the City Clerk and the sufficiency of the petition shall be determined by him, and his certificate as to its sufficiency shall be conclusive for all purposes. Provided, however, that a petition that is lodged with the City Clerk in the months of November or December shall be deemed to be presented in the month of February next following.

Three members of the Court were of opinion that the section was *intra vires* the provincial Legislature and two that it was *ultra vires*. The later also certified that, in any event, a by-law of the council of the City of Vancouver passed in pursuance of any power or authority the Legislature might have under the provisions of the *Lord's Day Act*, R.S.C. 1952, c. 171, would not be a provincial law within

the meaning of the *Lord's Day Act*. This last point was abandoned before us but, in any event, as was held by the majority in the Court of Appeal, such a by-law would be a provincial law. The Legislature is merely providing that, if the city council passes a by-law under subs. (2), then subs. (1) takes effect.

The Legislature was purporting to proceed under the powers conferred by the exception contained in s. 6 of the *Lord's Day Act*:

> 6. (1) It is not lawful for any person, on the Lord's Day, except as provided in any provincial Act or law now or hereafter in force, to engage in any public game or contest for gain, or for any prize or reward, or to be present thereat, or to provide, engage in, or be present at any performance or public meeting, elsewhere than in a church, at which any fee is charged, directly or indirectly, either for admission to such performance or meeting, or to any place within which the same is provided, or for any service or privilege thereat.
>
> (2) When any performance at which an admission fee or any other fee is so charged is provided in any building or place to which persons are conveyed for hire by the proprietors or managers of such performance or by any one acting as their agent or under their control, the charge for such conveyance shall be deemed an indirect payment of such fee within the meaning of this section.

In my view the matter is covered completely by the judgment of the Judicial Committee in *Lord's Day Alliance of Canada v. Attorney General for Manitoba*[1]. Their Lordships there considered their earlier judgment in *Attorney General for Ontario v. Hamilton Street Railway Co.*[2], where it was held that in circumstances arising before the enactment of the *Lord's Day Act* in 1906 (Statutes of Canada, c. 27), the prohibition with sanctions of certain activities on Sunday came within the heading of criminal law and therefore within the exclusive legislative authority of the Parliament of Canada. It was as a result of that decision that the *Lord's Day Act* was enacted. Its effect was stated by Lord Blanesburgh in the *Manitoba* case at p. 391 as follows:

> The circumstances calling for the Act supply clearly enough the explanation of its content. The Act is laying down for the whole of Canada regulations for the observance of Sunday. Some things on that day are everywhere prohibited; others are everywhere allowed. But there is an intermediate class of activities—Sunday excursions are amongst them—with reference to which the Act recognizes that differing views may prevail in the respective Provinces of the Dominion, so varying in

[1] [1925] A.C. 384, 1 W.W.R. 296, 43 C.C.C. 185, 1 D.L.R. 561.
[2] [1903] A.C. 524, 2 O.W.R. 672, 7 C.C.C. 326.

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these Provinces are the circumstances, usages and predominant religious beliefs of the people. The Act proceeds to provide accordingly, putting it generally, that with reference to these matters, Provincial views shall within a Province prevail. As Anglin J. observed in *Ouimet v. Bazin*, 46 Can. S.C.R. 502, 530, this course was no doubt adopted "to enable local bodies to deal with the peculiar requirements of localities with which they would presumably be more familiar and perhaps more in sympathy".

There is therefore reserved to each Province power in these intermediate cases by (inter alia) "a Provincial Act . . . hereafter in force" to exempt that Province from the operation of the general prohibition in whole or in part.

Now, in their Lordships' judgment, a Provincial Act passed subsequently to the passing of this statute, if it is to be "in force" within the meaning of the reservation, must be one effectively enacted by the Provincial Legislature, and the solution of the problem whether the statute of Manitoba now under consideration, and in particular s. 1, is in that sense of these words "in force" in the Province, will be simplified if it be first asked whether or not it would have been within the competence of the Legislature of Manitoba effectively to enact it had there been on this subject of Sunday excursions no previous Dominion legislation at all.

To this question no other than an affirmative answer can, their Lordships think, be given. The argument to the contrary proceeds upon a view of *Attorney-General for Ontario v. Hamilton Street Ry. Co.* (1903) A.C. 524 decision, which they conceive is not admissible. The Board, dealing there with the Ontario Act as a whole—as an Act which created offences and imposed penalties for their commission—held that such a statute was part of the criminal law, and, as such, exclusively within the competence of the Parliament of Canada. But the Board was not considering the power of a Provincial Legislature to recognize what may be called the non-observance of Sunday as distinct from its assumption of power to enforce by penalties or punishment the observance of that day. And the two things are very different. Legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath-breaking is no part of the criminal law where the acts and things permitted had not previously been prohibited. Such permission might aptly enough be described as a matter affecting "civil rights in the Province" or as one of "a merely local nature in the Province". Nor would such permission necessarily be otiose. The borderline between the profanation of Sunday—which might at common law be regarded as an offence and therefore within the criminal law—and the not irrational observance of the day is very indistinct. It is a question with reference to which there may be infinite diversity of opinion. Legislative permission to do on Sunday a particular act or thing may, therefore, amount to a useful pronouncement that within the Province the acts permitted are on the one side of the line and not on the other. In the present case, as it happens, no objection could have been taken to the section under consideration on the ground that Sunday excursions were in Manitoba unlawful or criminal. They were not. They had never, according to the present assumption, been specifically prohibited by the Parliament of Canada. They were not unlawful by the laws of England existing on July 15, 1870, from which day the Dominion Parliament, by 51 Vict. c. 33, introduced into Manitoba such of these laws as related to matters within the jurisdiction of the Parliament of Canada. It follows that, prior to the Dominion Act of 1906, Sunday excursions were not in Mani-

toba the subject of prohibition. Enacted, therefore, by the Provincial Legislature before that statute, s. 1 of the Manitoba Act of 1923 would, in the opinion of their Lordships, have been intra vires and effective. The section would have been "in force" in the Province in the fullest meaning of these words, as found in the Act of 1906. And the section, if then in "force", would have so continued notwithstanding the passing of that Act. It would have been a "Provincial Act . . . now in force".

As Duff J. says in *Ouimet v. Bazin*, 46 Can. S.C.R. 502, 526, when speaking of the *Lord's Day Act*, 1906: "This latter enactment appears to be framed upon the theory that the provinces may pass laws governing the conduct of people on Sunday; and by the express provisions of the Act such laws, if in force when the Act became law, are not to be affected by it. That is a very different thing from saying that in this Act the Dominion Parliament has manifested an intention to give the force of law to legislation passed by a provincial legislature professing to do what a province under its own powers of legislation cannot do, viz., to create an offence against the criminal law within the meaning of the enactments of the 'British North America Act' already referred to". With those observations the Board is in entire agreement.

To paraphrase the words of Duff J., approved in the *Manitoba* case, s. 14 of Bill 55 governs the conduct of people on Sunday and does not create an offence against the criminal law. It follows that the permissive legislation here in question falls within Heads 13 or 16 of s. 92 of the *British North America Act* and is, therefore, within the power of the provincial Legislature. It is not a case of delegation where the Dominion Parliament attempts to authorize a provincial legislature to do something beyond the latter's power, but within the competence of Parliament, such as occurred in *Attorney General of Nova Scotia v. Attorney General of Canada*[1]. Section 6 of the *Lord's Day Act* merely provides that if a provincial legislature chooses to permit a certain occurrence, then that section does not apply to the particular province. In constitutional matters there is no general area of criminal law and in every case the pith and substance of the legislation in question must be looked at. This proposition is not inconsistent with anything that was said in the judgment of this Court in *Henry Birks & Sons v. City of Montreal*[2]. Here the Legislature is not prohibiting something but merely stating in an affirmative manner that certain actions may be taken. This distinguishes the situation from that which confronted this Court in *Ouimet v. Bazin*[3].

[1] [1951] S.C.R. 31, [1950] 4 D.L.R. 369.
[2] [1955] S.C.R. 799, 5 D.L.R. 321.
[3] (1912), 46 S.C.R. 502, 20 C.C.C. 458, 3 D.L.R. 593.

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It was sought to distinguish the *Manitoba* case on historical grounds and reference was made to certain English statutes:

An Act for punishing Divers Abuses Committed on the Lord's Day, called Sunday (1625) 1 Car. I, C. 1;

An Act for the further Reformation of Sunday Abuses Committed on the Lord's Day, commonly called Sunday (1627) 3 Car. II, C. 7;

An Act for the better observation of the Lord's Day, commonly called Sunday (1626) 29 Car. II, C. 7;

An Act for preventing certain Abuses and Profanation of the Lord's Day, called Sunday (1780) 21 Geo. III, C. 49;

An Act to Amend the Laws in England relative to Games (1831) 1 and 2 Will. IV, C. 32;

An Act to Repeal an Exception in an Act of the Twenty-seventh Year of King Henry the Sixth concerning the days whereon Fairs and Markets ought not to be kept (1850) 13 and 14 Vict., C. 23.

However, ss. 7 and 8 of the new *Criminal Code* provide:

7. (1) The criminal law of England that was in force in a province immediately before the coming into force of this Act continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.

(2) Every rule and principle of the common law that renders any circumstance a justification or excuse for an act or a defence to a charge continues in force and applies in respect of proceedings for an offence under this Act or any other Act of the Parliament of Canada, except in so far as they are altered by or are inconsistent with this Act or any other Act of the Parliament of Canada.

8. Notwithstanding anything in this Act or any other Act no person shall be convicted

(*a*) of an offence at common law,

(*b*) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or

(*c*) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province of Canada,

but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or magistrate had, immediately before the coming into force of this Act, to impose punishment for contempt of court.

The criminal law of England is "altered", "varied", "modified" and "affected" by s. 8 by providing that, notwithstanding anything in the Code or any other Act, no person shall be convicted of an offence at common law, or of an offence under any Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland. There are, therefore, no criminal offences, except those which are such by enactments of the Parliament of Canada.

The appeal should be dismissed without costs.

The judgment of Rand, Cartwright, Martland and Judson JJ. was delivered by

RAND J.:—This is an appeal from the majority answer given by the Court of Appeal of British Columbia[1] to a question put to it by the Lieutenant-Governor in Council of that province relating to a Bill proposing an amendment to the Charter of Vancouver, introduced into the legislature and read a first time on February 26, 1958. The Bill in part was in these terms:

14. The said Act is further amended by inserting the following as section 206A:

(1) Notwithstanding anything contained in the "Sunday Observance Act" or in any other statute or law of the Province, where a by-law passed under subsection (2) hereof is in force and subject to its provisions, it shall be lawful for any person between half past one and six o'clock in the afternoon of the Lord's Day, commonly called Sunday, to provide for or engage in any public game or sport for gain, or for any prize or reward, or to be present at any performance of such public game or sport at which any fee is charged, directly or indirectly, either for admission to such performance or to any place within which the same is provided, or for any service or privilege thereat, that is specified in such by-law and which but for this Section, would be unlawful under Section 6 of "The *Lord's Day Act* (Canada)" or to do or engage any other person to do any work, business or labour in connection with any such public game or sport which but for this Section would be unlawful under Section 4 of "The *Lord's Day Act* (Canada)".

The question put was:

Is section 14 of Bill 55, entitled "An Act to Amend the 'Vancouver Charter'," or any of the provisions thereof, and in what particular or particulars, or to what extent, intra vires the Legislature of the Province?

To this O'Halloran, Bird and Davey JJ.A. answered that the Bill in its entirety was *intra vires* of the province; Sidney Smith and Sheppard JJ.A. that it was *ultra vires*.

In the view I take of it, the answer depends upon the nature or character of a provincial Act of a permissive as contradistinguished from a prohibitory effect where there is no existing prohibition of the activity which is the subject-matter of the Act and where any repealing effect of which would be confined to matters consequential or collateral to the prohibited matter or otherwise related to but not directly aimed against the activity by reason of public policy on the observance of Sunday in a religious aspect.

[1] (1959), 15 D.L.R. (2d) 169, 121 C.C.C. 241.

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On that matter we have two authoritative pronouncements by the Judicial Committee: *Attorney General for Ontario v. The Hamilton Street Railway Company*[1] and *The Lord's Day Alliance v. Attorney General for Manitoba*[2]. The former held that prohibitory provisions of an *Act to Prevent the Profanation of the Lord's Day* enacted by the legislature of Ontario were *ultra vires* as being within the area of criminal law exclusively committed to the Dominion Parliament; in the latter a provision in a provincial Act passed in 1923 by the Manitoba legislature by which it was declared that it "shall be lawful", by any mode of conveyance, to run excursions to summer resorts, beaches or camping grounds on Sunday, was within provincial power and valid. This judgment, in my opinion, governs the present controversy and requires the same answer.

Section 6 of the *Lord's Day Act*, R.S.C. 1952, c. 171, deals with the subject-matter of the Bill here:

> 6. (1) It is not lawful for any person, on the Lord's Day, *except as provided in any provincial Act or law now or hereafter in force,* to engage in any public game or contest for gain, or for any prize or reward, or to be present thereat, or to provide, engage in, or be present at any performance or public meeting, elsewhere than in a church, at which any fee is charged, directly or indirectly, either for admission to such performance or meeting, or to any place within which the same is provided, or for any service or privilege thereat.

The reasons of the Judicial Committee in the *Manitoba* case were given by Lord Blanesburgh. Speaking of the scope of the Dominion Act, he distributed the matters dealt with as (*a*) certain acts absolutely forbidden, (*b*) certain left unaffected, and (*c*) others specified in ss. 4, 6 and 7 lying within a controversial range on which there are such differences of opinion that it would be legitimate to respect in any particular area those there predominating. It was to give effect to them that the language of exception contained in the sections mentioned was designed: local attitudes so expressed were to prevail. On p. 391 in his own words:

> The Act is laying down for the whole of Canada regulations for the observance of Sunday. Some things on that day are everywhere prohibited; others are everywhere allowed. But there is an intermediate class of activities—Sunday excursions are amongst them—with reference to which

[1] [1903] A.C. 524, 2 O.W.R. 672, 7 C.C.C. 326.
[2] [1925] A.C. 384, 1 W.W.R. 296, 43 C.C.C. 185, 1 D.L.R. 561.

the Act recognizes that differing views may prevail in the respective Provinces of the Dominion, so varying in these Provinces are the circumstances, usages and predominant religious beliefs of the people. The Act proceeds to provide accordingly, putting it generally, that with reference to these matters, Provincial views shall within a Province prevail. As Anglin J. observed in *Ouimet v. Bazin,* 46 Can. S.C.R. 502, 530, this course was no doubt adopted "to enable local bodies to deal with the peculiar requirements of localities with which they would presumably be more familiar and perhaps more in sympathy."

And at p. 392:

> Legislative permission to do on Sunday things or acts which persons of stricter sabbatarian views might regard as Sabbath-breaking is no part of the criminal law where the acts and things permitted had not previously been prohibited. Such permission might aptly enough be described as a mater affecting "civil rights in the Province" or as one of "a merely local nature in the Province." Nor would such permission necessarily be otiose. The borderline between the profanation of Sunday—which might at common law be regarded as an offence and therefore within the criminal law—and the not irrational observance of the day is very indistinct. It is a question with reference to which there may be infinite diversity of opinion. Legislative permission to do on Sunday a particular act or thing may, therefore, amount to a useful pronouncement that within the Province the acts permitted are on the one side of the line and not on the other. . . . It follows that, prior to the Dominion Act of 1906, Sunday excursions were not in Manitoba the subject of prohibition. Enacted, therefore, by the Provincial Legislature before that statute, s. 1 of the Manitoba Act of 1923 would, in the opinion of their Lordships, have been intra vires and effective. The section would have been "in force" in the Province in the fullest meaning of these words, as found in the Act of 1906.

I take that language to mean that where a certain activity, when engaged in on Sunday, is not at the time, as a criminal offence, forbidden, the declaration by a provincial statute that it may be indulged in on that day is a valid enactment and is an Act "in force" within the meaning of those words in s. 6 of the *Lord's Day Act.* In other words, a positive declaration of a liberty to act in a particular manner as the converse expression of the absence of any prohibition against it, exhibiting impliedly the view on the matter of the exception provided in the statute to be attributed to a province, as contemplated by s. 6, is a valid Act in force. The conversion of a negative state of absence of prohibition of an act into a positive assertion of permission to do that act is in substance a "useful pronouncement" on a matter on which there may be an "infinite diversity of opinion", a declaration "that within the Province the acts permitted are on the one side of the

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line and not on the other", and a sufficient subject-matter for the exercise of provincial legislative power. This was in principle the argument presented in the *Manitoba* appeal on behalf of the province when, as it appears at p. 386, it was urged by counsel that "the Act of 1923 merely declared the common law." The declaration was held also to be made as effectively by an Act passed subsequently to 1906 as one in force at the time of passing the enactment of that year.

It was argued by Mr. Brewin that a sufficiently distinguishing circumstance between the *Manitoba* case and that here lay in the fact that in that province prior to 1906 there was no law against running excursions by conveyances but that in British Columbia the law of England introduced in 1858 did forbid such games as those dealt with in the Bill now proposed. I see no basis for that distinction as applied in the case before us. The *Criminal Code* which came into force on April 1, 1955, by declaring in s. 8 that "no person shall be convicted" of any offences at common law or under an Act of the Parliament of England or of Great Britain or of the United Kingdom of Great Britain and Ireland or under an Act or ordinance in force in a province before it became a province of Canada has effectually abolished all offences created otherwise than by the Parliament of Canada. The provisions of the *Act Respecting the Observance of Sunday,* R.S.B.C. 1948, c. 318, enacted originally in 1858 and continued as law in the province by the *Confederation Act* of 1867 were thus repealed. At the time of the introduction of the Bill there was, and on its enactment at any subsequent time there will be, no law in force touching the observance of Sunday except that of the Dominion Act of 1906. The situation in this respect is then identical with that in Manitoba in 1923.

Into this branch of his argument Mr. Brewin injected the idea of a "domain" of criminal law which, as I understood it, was in some manner a defined area existing apart from the actual body of offences at a particular moment; and that it was characterized by certain distinguishing qualities. Undoubtedly criminal acts are those forbidden by law, ordinarily at least if not necessarily accompanied by penal sanctions, enacted to serve what is considered a

public interest or to interdict what is deemed a public harm or evil. In a unitary state the expression would seem appropriate to most if not all such prohibitions; but in a federal system distinctions must be made arising from the true object, purpose, nature or character of each particular enactment. This is exemplified in *Attorney General for Quebec v. Canadian Federation of Agriculture*[1], in which certain prohibitions with penalties enacted by Parliament against certain trade in margarine were held to be *ultra vires* as not being within criminal law.

Beyond or apart from such broad characteristics, of no practical significance here, which describe an area by specifying certain elements inhering in criminal law enactments, no such "domain" is recognized by our law. The language of Lord Blanesburgh in the *Manitoba* case refers to "domain" as the body of present prohibitions, the existing criminal law, and nothing else. The same view expressed in *Proprietary Articles Trade Association v. Attorney General for Canada*[2] by Lord Atkin will bear repeating:

> The power must extend to legislation to make new crimes. Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the State. The criminal quality of an act cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: Is the act prohibited with penal consequences? . . . It appears to their Lordships to be of little value to seek to confine crimes to a category of acts which by their very nature belong to the domain of "criminal jurisprudence"; for the domain of criminal jurisprudence can only be ascertained by examining what acts at any particular period are declared by the State to be crimes, and the only common nature they will be found to possess is that they are prohibited by the State and that those who commit them are punished.

There is nothing here of a domain free from such mundane requirements.

It was argued finally that the effect of the exception in s. 6 was to create a delegation of dominion power to the province contrary to the holding of this Court in *Attorney General for Nova Scotia v. Attorney General for Canada*[3]. The idea of delegation arises from a misconception of the operation of s. 6. The legislative efficacy in prohibiting the activity named is that solely of Parliament; the effect of the exception is to declare that in the presence of a

[1] [1951] A.C. 179, [1950] 4 D.L.R. 689.
[2] [1931] A.C. 310 at 324, 55 C.C.C. 241, 2 D.L.R. 1, 1 W.W.R. 552.
[3] [1951] S.C.R. 31, [1950] 4 D.L.R. 369.

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provincial enactment of the appropriate character the scope of s. 6 automatically ceases to extend to the provincial area covered by that enactment. The latter is a condition of fact in relation to which Parliament itself has provided a limitation for its own legislative act. That Parliament can so limit the operation of its own legislation and that it may do so upon any such event or condition is not open to serious debate.

I would, therefore, dismiss the appeal. There will be no costs to any party.

The judgment of Locke and Martland JJ. was delivered by

LOCKE J.:—The question referred to the Court of Appeal[1] under the provisions of the *Constitutional Questions Determination Act*, R.S.B.C. 1948, c. 66, reads:

> Is Section 14 of Bill 55 entitled "An Act to amend the 'Vancouver Charter'," or any of the provisions thereof, and in what particular or particulars, or to what extent, *intra vires* the Legislature of the Province?

The terms of the section mentioned are stated in other reasons to be given in this matter.

The answer to be made depends, in my opinion, entirely upon the interpretation that is to be given to s. 6 of the *Lord's Day Act*, R.S.C. 1952, c. 171.

Subsection (1) of s. 6, so far as it is necessary to consider its provisions, reads:

> It is not lawful for any person, on the Lord's Day, except as provided in any provincial Act or law now or hereafter in force, to engage in any public game or contest for gain, or for any prize or reward, or to be present thereat . . .

The prohibition, on the face of it, does not purport to be absolute. Had the legislation in question been passed prior to the coming into force of the *Lord's Day Act* and, if at that time the Imperial statutes to which we have been referred had not been in force in British Columbia, it would have been impossible to successfully contend that the legislation was not *intra vires* the Legislature since, by the very terms of s. 6, activities of the nature referred to in British Columbia were not affected. This aspect of the matter was

[1] (1959), 15 D.L.R. (2d) 169, 121 C.C.C. 241.

referred to by Lord Blanesburgh in the judgment of the Judicial Committee in *Lord's Day Alliance v. Attorney General of Manitoba*[1].

Subject to the powers given to the legislature by head 15 of s. 92, the exclusive authority to legislate in relation to the criminal law, except as to the constitution of courts of criminal jurisdiction, is vested in Parliament by head 27 of s. 91. Parliament cannot extend the jurisdiction of the legislature by delegation, *A.G. N.S. v. A.G. Canada*[2], nor by abstaining from legislating to the full extent of its powers in a field in which its jurisdiction is exclusive, *Union Colliery v. Bryden*[3].

The language of s. 6 as well as that of ss. 4 and 7 shows that the limitation of the application of these sections applied not only to statutes passed prior to the coming into force of the Act but also those which might thereafter be enacted. The words are "provincial Act or law now or hereafter in force", which makes it perfectly clear that if the province, in the exercise of its powers under heads 13 and 16 of s. 92 of the *British North America Act* should permit such activities, the prohibition did not extend to them.

The Imperial statutes referred to were no longer part of the law of British Columbia at the time the amendment was passed by reason of s. 8 of the new *Criminal Code*.

In my opinion, no question of the delegation of the power of Parliament to the Legislature, nor as to whether the provincial Act in some way amends the *Lord's Day Act*, nor of any adoption by the Dominion of the Provincial legislation by virtue of the language employed in s. 6, arises in the matter. The powers of the Legislature which have been invoked are derived solely from s. 92. Section 6 of the *Lord's Day Act* does not prohibit Sunday sports of the kind referred to in the impugned legislation if the statute of the province, whensoever enacted, permits them. The scope of the prohibition is limited by Parliament and no question of conflict between the Dominion and the provincial legislation arises.

[1] [1925] A.C. 384 at 393, 1 W.W.R. 296, 43 C.C.C. 185, 1 D.L.R. 561.
[2] [1951] S.C.R. 31, [1950] 4 D.L.R. 369.
[3] [1899] A.C. 580 at 588.

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Sidney Smith and Sheppard JJ.A., who dissented from the view of the majority of the court, considered that the amendment was not a "provincial Act or law" within the meaning of that expression in ss. 4 and 6 of the *Lord's Day Act*. Counsel appearing for the appellant before us said that he did not contend that the legislation was invalid on this ground. This, however, does not relieve this Court of its duty of considering the question. This is a reference—not an action.

The learned judges who dissented considered that under the amendment it was the City by-law which was the operative provision which permitted Sunday games and sports, and the Vancouver City council, and not the Legislature, which was to decide whether or not these should be permitted. The view of the majority was, however, that a provincial Act—such as the present amendment—which becomes effective in a defined area upon the passing of a municipal by-law in accordance with its terms, is a provincial law within the meaning of s. 6. That was the view expressed by Dennistoun J.A. in *Rex v. Thompson*[1].

I agree with the opinion of the majority of the Court of Appeal. It is the amending section that declares that it shall be lawful to engage in these activities when the conditions prescribed have been complied with, and the Act as thus amended the authority for what is done.

In my opinion, the legislation is *intra vires* in its entirety and the answer to the question submitted should be in the affirmative.

I would dismiss this appeal.

Appeal dismissed without costs.

Solicitor for the appellant: R. J. McMaster, Vancouver.

Solicitor for the Attorney General of British Columbia, respondent: G. D. Kennedy, Victoria.

Solicitor for the City of Vancouver, respondent: E. N. R. Elliott, Vancouver.

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[1] [1931] 1 W.W.R. 26, 39 Man. R. 277, 55 C.C.C. 33, 2 D.L.R. 282.