IN THE MATTER OF A REFERENCE AS TO WHETHER THE PARLIAMENT OF CANADA HAD LEGISLATIVE JURISDICTION TO ENACT THE EMPLOYMENT AND SOCIAL INSURANCE ACT, BEING CHAPTER 38 OF THE STATUTES OF CANADA, 1935.

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*Jan. 31,
*Feb. 1, 3.
*June 17.

Constitutional law—The Employment and Social Insurance Act, 25-26 Geo. V, c. 38—Constitutional validity—Taxation—Property and civil rights.

The *Employment and Social Insurance Act* provides (Part I, sections 4 to 9 inclusive) for the administration of the Act by a Commission consisting of three members to be called the Employment and Social Insurance Commission, whose duties are defined in these sections. Part II (sections 10 to 14 inclusive) of the Act provides for the organization and administration by the Commission of an employment service for the Dominion of Canada with regional divisions and a central employment office and employment offices within each division. Part III (sections 15 to 38 inclusive) of the Act provides for the establishment of an Unemployment Insurance Fund out of which unemployment insurance benefits would be payable to all persons of the age of sixteen years and upwards who are engaged in any of the insurable employments specified in the Act. Such fund is to be derived partly from moneys provided by Parliament and partly from compulsory contributions by employers and workers. The statutory conditions governing the eligibility and ineligibility of insured contributors for the receipt of benefits are defined in the Act. Penalties are provided for fraudulently obtaining benefits or evading payment and for other violations of the Act or the regulations under it. Part IV (sections 39 to 41 inclusive) of the Act, under the heading "National Health," charges the Commission with the duty of collecting information concerning any scheme, actual or proposed, for providing medical, dental, surgical and hospital care, and compensation for loss of earnings due to ill-health or accident. (Further particulars of the Act are contained in the judgments reported).

Held, per Rinfret, Cannon, Crocket and Kerwin JJ., that the Act is *ultra vires* of the Parliament of Canada; Duff C.J. and Davis J. holding that the Act is *intra vires.*

Per Rinfret, Cannon, Crocket and Kerwin JJ.—The validity of the legislation cannot be supported either as an exercise of the residuary power to make laws for the peace, order and good government of Canada, or as an exercise of the power to regulate trade and commerce.

The proposition that the Act could be supported in virtue of the power of the Dominion Parliament concerning statistics or criminal law need not retain our attention.

The legislation is not based on the Treaty of Peace (1919) and, therefore, no reliance for its validity can be made on section 132 of the B.N.A. Act.

Nor can it be supported under "the power to raise money by any mode or system of taxation," or "the power to appropriate public money for any public purpose." The statute, in its substance, is not an

*PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

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exercise of those powers. It clearly indicates that the Parliament of Canada intended primarily to legislate with regard to employment service, to unemployment insurance and to health matters. It is not concerned either with public debt and property or with the raising of money by taxation. Its provisions for levying contributions for the creation of the Unemployment Insurance Fund are nothing more than provisions to enable the carrying out of the true and only purpose of the legislation. These contributions (or taxes, if they are to be so called) are mere incidents of the attempted regulation of employment service and unemployment insurance.

It being well understood, and in fact conceded, that the subject-matters of the Act fall within the legislative authority of the provinces, the Dominion Parliament may not, under pretext of the exercise of the power to deal with its property or to raise money by taxation, indirectly accomplish the ends sought for in this legislation.

The effect of the Act under submission is "to attach statutory terms to contracts of employment" (Lord Haldane in *Workmen's Compensation Board* v. *Canadian Pacific Railway*, [1920] A.C. 184); and its immediate result is to create civil rights as between employers and employees. The Dominion Parliament cannot use its power of taxation to compel the insertion of conditions of that character in ordinary employment contracts.

Per Duff C.J. and Davis J. dissenting.—The aims stated in the preamble of the Act are legitimate, provided, of course, that the enactments themselves are within the ambit of the legislative powers possessed by Parliament. Reading subdivision 1 of section 91 and subdivision 3 of the B.N.A. Act together, the proper conclusion is that Parliament has exclusive authority to raise money by any mode or system of taxation for disposition by Parliament for any purpose for which it is competent to Parliament to apply the assets of the Dominion in virtue of subdivision 1. In effect, subdivision 1 endowes the High Court of Parliament with full discretionary authority to dispose of the public assets of the Dominion, and no other court is invested with jurisdiction to examine any purported exercise of that authority with a view to pronouncing upon its validity, subject only to the rule that the courts are always entitled to determine whether, in truth, any given enactment of Parliament professing to be an exercise of a given authority is not really an enactment of that character; but one relating to a subject over which Parliament has no jurisdiction.

The provisions requiring compulsory contributions by employers and employed possess the essential elements of legislation respecting taxation. On their true construction, they have that character because, first, it would not be competent to a provincial legislature to enact them in the context in which they stand, which demonstrates that the contributions are exacted for the purpose of raising moneys for exclusive disposition by Parliament; and, second, there is no adequate ground for holding that they are, either in purpose or in immediate effect, outside the ambit of the powers under subdivision 3.

So also as regards the enactments concerning the disposition of the proceeds of the levies upon employers and employed and of the contribution from the Dominion treasury. They are not enactments in respect of property and civil rights in any one province or in all of the provinces. They would not be competent as enactments by any or all of the provincial legislatures, and there is no adequate ground for affirming that these enactments are not legislation in relation to the subjects within the scope of subdivision 1.

Parliament can in the legitimate exercise of its exclusive authority under subdivisions 1 and 3 of section 91 of the B.N.A. Act, levy taxes for the purpose of raising money to constitute a fund to be expended, in conformity with the directions of Parliament, in unemployment benefits, and provide for a contribution to that fund from the Dominion treasury, and in executing these exclusive powers, Parliament is not subject to any control by the courts as to the form of the taxation or the incidence of it or as touching the manner or conditions of the payment of benefits.

Complete discretionary authority respecting the form and incidence of taxation under subdivision 3, and respecting the disposal of all public assets under subdivision 1, are essential to enable Parliament to discharge the responsibilities entrusted to it.

Legislation for raising money for disposition by Parliament under subdivision 3 of section 91, and directing the disposition of it under subdivision 1, is necessarily excluded from the jurisdiction of the provinces by the concluding words of section 91; and there is no sufficient ground for affirming that, in the enactments of this statute, Parliament is not exercising its powers under these subdivisions, or, in other words, that under the guise of doing so it is invading a provincial field from which it is excluded, for the purpose of attaining a result which it has full power to attain by legislating within fields in which it has exclusive authority.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, in the exercise of the powers conferred by section 55 of the *Supreme Court Act* (R.S.C. 1927, c. 35), of the following question: Is the *Employment and Social Insurance Act,* or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

The Order in Council referring the question to the Court reads as follows:

The Committee of the Privy Council have had before them a report, dated 31st October, 1935, from the Minister of Justice, referring to the *Employment and Social Insurance Act,* chapter 38 of the statutes of Canada, 1935, which was passed for the purposes set out in the recitals contained in the preamble of the said Act.

The Minister observes that doubts exist or are entertained as to whether the Parliament of Canada had legislative jurisdiction to enact the said Act, either in whole or in part, and that it is expedient such question should be referred to the Supreme Court of Canada for judicial determination.

The Committee, accordingly, on the recommendation of the Minister of Justice, advise that the following question be referred to the Supreme Court of Canada, for hearing

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and consideration, pursuant to section 55 of the *Supreme Court Act*,—

Is the *Employment and Social Insurance Act*, or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?

E. J. LEMAIRE,
Clerk of the Privy Council.

* The judgment of Duff C.J. and Davis J. was delivered by

DUFF C.J.—The preamble to the statute is as follows:—

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

No one of the aims stated in this preamble is illegitimate as an ultimate aim of legislation by the Parliament of Canada. If the subject matter of the enactment is within the ambit of the powers vested in Parliament it is lawful for Parliament to exercise those powers for the attainment of any or all of the objects set forth.

The immediate effect of the statute is to provide, by the means prescribed, a system of unemployment insurance. The essential elements of the scheme are the creation of the Fund—the Unemployment Insurance Fund—which is provided in part from compulsory contributions by em-

* *Reporter's note:* Counsel on the argument of this Reference were the same as those mentioned at p. 365.

ployers and employees in the insured employments, and in part by contributions from the Dominion Treasury under the authority of Parliament. The administration of the Fund is entrusted to a Board and unemployment benefits are payable by the Board out of the Fund to designated classes of unemployed persons under prescribed statutory conditions.

The exclusive legislative authority of Parliament extends *inter alia* to the subject "The Public . . Property." It cannot be doubted, we think, that "property" here is used in its broadest sense, and includes every kind of asset. This legislative authority is exercisable "notwithstanding anything in this Act." There is always, of course, the qualification, and everything hereinafter said is subject to that qualification, that Parliament is incapable of acquiring jurisdiction over matters within the exclusive competence of the provinces by legislating upon those matters under the pretence of exercising a power which does not embrace within its ambit the real subject matter of the legislation. Subject to that qualification, we know of no authority by which His Majesty's Courts have jurisdiction to examine, with a view to pronouncing upon its validity, legislation by Parliament in relation to the disposition of the assets committed to its control by section 91, B.N.A. Act.

Some reference was made on the argument to sections 102 and 106 B.N.A. Act, but we cannot find anything in those sections which in any way qualifies the authority bestowed by section 91. The phrase in section 106 "shall be appropriated by the Parliament of Canada for the public service" cannot, with propriety, be read, especially in view of the words already mentioned "notwithstanding anything in this Act," as restricting the discretion of the High Court of Parliament to determine finally what objects are and what objects are not within the scope of the words "for the public service of Canada."

It cannot, therefore, we think—and we do not think this was disputed on the argument, although we do not desire to put what we have to say upon any suggested admission —at all events, it cannot, we think, be disputed, even with plausibility, that, in point of strict law, Parliament has authority to make grants out of the public monies to individual inhabitants of any of the provinces, for example,

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for relief of distress, for reward of merit, or for any other object which Parliament in its wisdom may deem to be a desirable one. The propriety of such grants, the wisdom of such grants, the convenience or inconvenience of the practice of making such grants, are considerations for Parliament alone, and have no relevency in any discussion before any other Court concerning the competence of Parliament to authorize them.

We are satisfied, therefore, that, if Parliament, out of public monies exclusively, were to constitute a fund for the relief of unemployment and to give to unemployed persons a right to claim unemployment benefits, to be paid out of that fund upon such conditions as Parliament might see fit to prescribe, no plausible argument could be urged against the validity of such legislation.

It seems equally clear that it is exclusively within the discretion of Parliament to determine the manner in which the public assets shall be appropriated and applied for such purposes. The proceeds of any given tax, the sales tax, for example, might be validly appropriated for the purposes of such a fund. The appropriation might be affected antecedently by a direction that all or part of the proceeds of the tax should form such a fund in the hands of the Minister of Finance, or of any agency that might be designated for the purpose. The statute might take the form of requiring the Minister of Finance to pay into the fund monies from time to time provided by Parliament. True, the expectations of the authors of the scheme or of the intended beneficiaries might in any such case be falsified. Future Parliaments might find themselves in a state of financial embarrassment making it impossible to carry out the plan, or, if you like, regardless of the consequent disappointment and suffering, under altered views of policy or duty, abrogate the scheme and discontinue the payment of the benefits. But such possibilities and contingencies have no bearing upon the validity of such an enactment.

By section 35 (2) the statute now before us enacts as follows:—

> The Minister of Finance shall also deposit in like manner from time to time out of moneys provided by Parliament an amount equal to one-fifth of the aggregate deposits from time to time made as aforesaid after deducting from the said aggregate deposits any refunds of contributions from time to time made under the provisions of this Act from the Fund.

Some comment was made upon this provision; but the gist of the comment was that the observance of the mandate laid upon the Minister of Finance is necessarily contingent upon some further legislative act making available "monies provided by Parliament."

The enactment, nevertheless, is an enactment dealing with the public assets of the Dominion; it gives an explicit direction to the Minister of Finance as to the application of "monies provided by Parliament" for the purposes of the statute. The circumstance that the fate of the scheme may be dependent upon the action of future Parliaments is a circumstance which is of no pertinence in a question of the authority of the Parliament to give such a direction.

The real weight of the arguments against the legislation is to be found in the contention that the provisions of the statute are enactments on the subject of "property and civil rights" and not enactments touching any subject falling within the enumerated heads or the introductory words of section 91 B.N.A. Act. This argument has two branches. First of all, it is said that, as regards compulsory contributions, the legislation creates a compulsory contract between the persons liable to contribute and the Crown, or the Minister of Finance, to whom, in effect, the contributions are payable. Second, it is said, adapting the language of Lord Haldane in delivering the judgment in *Workmen's Compensation Board* v. *C.P.R.* (1), that the statute attaches statutory terms to contracts of employment; and that this is the real pith and substance of it.

The Dominion contends that the compulsory contributions are contributions which Parliament is competent to exact under the third subdivision of section 91, by which the exclusive legislative authority of Canada extends to all matters within the subject "The raising of money by any mode or system of taxation." As introductory to an examination of the argument on behalf of the Dominion, some brief general observations on this third subdivision of section 91 will not be out of place.

The authority, it will be noticed, is an authority to legislate in relation to the raising of money. There is no

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limitation in those words as respects the purpose or purposes to which the money is to be applied. An enactment, the real purpose of which is to raise "money by any mode or system of taxation," is not examinable by the courts as to its validity by a reference to the motives by which Parliament is influenced, or the ultimate destination of the proceeds of the tax. We speak, of course, subject to the qualification explained above which we shall not restate. There is one express qualification in the B.N.A. Act. That is contained in section 125 and precludes the taxation of the public property of the Dominion or of the provinces. Reading the words of subdivisions 1 and 3 together, we have no doubt that the words of subdivision 3 necessarily mean that Parliament is empowered to raise money, for the exclusive disposition of Parliament, by any mode or system of taxation.

In passing, it will not be out of place to observe that, reading the words of head no. 3 in this way helps to remove the difficulty which has been suggested in reconciling the language of head no. 3 of section 91 with head no. 2 of section 92, "direct taxation for provincial purposes within the province." If you read head no. 2 of section 92 with section 126, and by the light of the observations of Lord Watson in *St. Catherine Milling Co.* v. *The Queen* (1) there is, we think, solid ground for the conclusion that the words "for provincial purposes" mean neither more nor less than this: the taxing power of the legislatures is given to them for raising money for the exclusive disposition of the legislature. In this view, the subdivision of section 91 which deals with taxation, and section 92 which deals with the same subject, are on different planes and cannot come into conflict.

Even if to the words "for provincial purposes" in head no. 2 of section 92 there be ascribed a more restrictive operation, it seems clear enough that the power to legislate for taxation under that head, which is concerned with taxation for the purpose of raising monies for the exclusive disposition of the local legislature (even assuming, as we say, that in such disposition the provincial legislature is subject to some additional limitation imposed by the phrase

(1) (1888) 14 A.C. 46.

" provincial purposes ") there is nothing in this head which can conflict with the exclusive authority given by the third head of section 91 " notwithstanding anything in this Act " to raise money by any mode or system of taxation for the exclusive disposition of Parliament. The two enactments are still on different planes. The one is concerned with raising money to be appropriated by the provincial legislatures exclusively, the other is concerned with raising money to be appropriated by Parliament exclusively for those purposes to which it thinks it advisable to devote the public assets of the Dominion.

At all events, it seems to be abundantly clear that there is nothing in either section 91 or section 92 which precludes the Dominion from raising money by any mode or system of taxation to be expended in the relief of distress among the inhabitants of any one or more provinces by direct application for the benefit of the inhabitants as individuals, still less for raising money to be expended for the relief of the inhabitants of the Dominion, almost all of whom are necessarily inhabitants of the provinces. The inhabitants of the provinces are taxable by the Dominion in order to raise moneys for any purpose in the furtherance of which it is competent to the Dominion to expend such moneys in exercise of its exclusive and plenary control over the public assets.

It is not improper here, we think, to advert to the character of the legislative powers of Parliament. We have had occasion to observe in connection with one of the other references that certain negative provisions of the Statute of Westminster emphasize in the most significant way the scope and character of these powers. First, there are the Recitals that

* * * it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom:

and that,

* * * it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion:

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Then, there is the enactment, section 7 (1), which, in categorical terms, provides that nothing in the Act shall be deemed to apply to the repeal, amendment or alteration of the *British North America Acts,* 1867 to 1930, or any order, rule or regulation made thereunder.

Subject to the restrictions in the Statute of Westminster and the *British North America Act,* and to whatever restrictions may be implied in the status of the Dominion, as owing a common allegiance to the Crown with the other members of the British Commonwealth, the Parliament of Canada is invested with plenary authority to legislate for the peace, order and good government of Canada over the whole field of legislative action, saving only those fields which, by the enactments of the *British North America Act,* have been withdrawn from it and assigned exclusively to the provincial legislatures.

This authority is not a delegated authority, as, for example, that of the legislative bodies of the United States. It is an authority which exists in virtue of the supreme law of the state and is of the same order, subject, of course, to the restrictions mentioned, as the legislative authority of the Imperial Parliament.

The language of subdivision 3 could hardly be broader. "Any mode or system of taxation" leaves in Parliament unlimited discretion so long as the essentials of taxation are present.

By section 17 of the statute now before us, the employed and employer are "liable" to pay contributions in accordance with the provisions of the second schedule of the Act which prescribes the rate of contribution. The payments are to be made by means of revenue stamps and section 18 authorizes the Governor in Council by regulation to provide for the payment of contributions

> by means of revenue stamps affixed to or impressed upon books or cards * * * and such stamps and the devices for impressing the same shall be prepared and issued in such manner as may be prescribed by such regulation.

By subsection 2,

> * * * the Commission may make regulations providing for any matters relating to the payment and collection of contributions payable under this Act, and in particular for—
>
> (*a*) regulating the manner, times and conditions, in, at and under which payments are to be made;

(*b*) the entry in or upon unemployment books or cards of particulars of contributions and benefits paid in respect of the persons to whom the unemployment books or cards relate;

(*c*) the issue, sale, custody, production and delivery up of unemployment books or cards and the replacement of unemployment books or cards which have been lost, destroyed or defaced; and

(*d*) the offering of reward for the return of an unemployment book or card which has been lost and for the recovery from the person responsible for the custody of the book or card at the time of its loss of any reward paid for the return thereof.

By section 31, the failure to pay any contribution which an employer or an employee is liable to pay under the Act is constituted an offence punishable by fine or imprisonment or both. By section 35 (1) it is provided:

The Minister of Finance shall from time to time deposit in the Bank of Canada, to the credit of the Commission, in an account to be called "The Unemployment Insurance Fund" (hereinafter referred to as "The Fund"), all revenue received from the sale of unemployment insurance stamps and all contributions, if any, paid otherwise than by means of such stamps (including contributions recovered by process of law) under the provisions of this part of this Act.

The Governor General in Council, by section 18 (1) is authorized to make regulations touching the payment and collection of contributions payable under the Act. This section (35 (1)) which in unqualified terms lays upon the Minister of Finance the duty to pay into the Fund "all revenue received from the sale of unemployment insurance stamps and all contributions and all contributions (if any) paid otherwise than by means of such stamps (including those recovered by process of law)" manifests very clearly the intention that the compulsory contributions shall be paid to the government and shall be recoverable by process of law; although it is left to the Governor General in Council to make specific provision by regulation for the collection and payment of such contributions.

Now let it be observed, in the first place, that on the hypothesis on which we are proceeding, if the monies raised by these compulsory contributions are monies raised "by any mode or system of taxation," these enactments are within the powers of Parliament, but, if the attack upon the legislation is well founded, Parliament has no authority to obtain money in this way. It would appear that, having regard to the nature of the legislative authority vested in Parliament, and to the wide discretion reposed in Parliament touching the manner in which monies are to be raised under subdivision 3, a court ought to observe

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a high degree of caution in pronouncing upon the invalidity of an enactment, by which monies become by compulsion of law payable by individuals to the Dominion Treasury for a public purpose, on the ground that, in truth, it does not possess its *prima facie* character, that of a taxing statute, but is legislation intending to do what Parliament has otherwise no manner of authority to do. We are disposed to think that something approaching a demonstration ought to be required to lead one to such a conclusion.

Let it not be overlooked that we are not here dealing with an attempt on the part of Parliament to do something it has no power to do. We have not before us an attempt under the guise of taxation to regulate insurance contracts, or an attempt under the guise of criminal legislation to regulate insurance contracts, or an attempt under the guise of legislation for the regulation of mines to regulate in relation to aliens. The statute before us has nothing of that character. If we are right in what we have already said, it is entirely competent to Parliament to resort, as sources for the provision of the unemployment fund, to taxes levied on employers and employees and to taxes levied "by any mode or system" which Parliament in its discretion may adopt.

We ask ourselves then, What are the indicia in this statute which compel us to conclude that Parliament, instead of resorting to taxation which it had authority to do, has resorted to legislation in regard to civil rights which it had no authority to enact?

The essentials of taxation are present. The contributions are levied by Parliament directly. That the contributions are to be paid by revenue stamps is prescribed by Parliament; but the Governor General in Council is to regulate payment and collection. Payment is compulsory. Contributions are recoverable by process of law and failure to pay is an offence punishable by fine and imprisonment. The contributions are payable into the public treasury of the Dominion, and are to be paid by the Minister of Finance into a fund which is to be applied as directed by Parliament.

In *Lower Mainland* v. *Crystal Dairy* (1) Lord Thankerton, speaking for the Judicial Committee of the Privy Council, said:—

> In the opinion of their Lordships, the adjustment levies are taxes. They are compulsorily imposed by a statutory Committee consisting of three members, one of whom is appointed by the Lieutenant-Governor in Council, the other two being appointed by the dairy farmers within the district under s. 6 of the Act. They are enforceable by law, and a certificate in writing under the hand of the chairman of the Committee is to be *prima facie* evidence in all Courts that such amount is due by the dairy farmer (s. 11). A dairy farmer who fails to comply with every determination, order or regulation made by Committee under the Act is to be guilty of an offence against the Act (s. 13) and to be liable to a fine under s. 19. Compulsion is an essential feature of taxation: *City of Halifax* v. *Nova Scotia Car Works, Ltd.* (2). Their Lordships are of opinion that the Committee is a public authority, and that the imposition of these levies is for public purposes. Under s. 22 the Lieutenant-Governor in Council has power to suspend the functions of a Committee, if its operations are adversely affecting the interests of consumers of milk or manufactured products, and the Committee is to report annually to the Minister and to send him every three months the auditor's report on their accounts (s. 12, subs. 2, and s. 8A). The fact that the moneys so recovered are distributed as a bonus among the traders in the manufactured products market does not, in their Lordships' opinion, affect the taxing character of the levies made.

The judgment of the majority of this Court in *Lawson* v. *Interior Tree, Fruit and Vegetable Committee of Direction* (3) is to the same effect.

In *Workmen's Compensation Board* v. *C.P.R.* (4), assessments upon employers, for the purpose of providing an accident fund out of which compensation was payable by the Compensation Board to persons injured by accident in the course of their employment and to dependents in case of death, were held to fall within the denomination "direct taxation" within the meaning of section 92 (2) of the *British North America Act*.

Subsection 3 of section 17 and subsection 1 of section 33 require notice in this connection. As to the first of these enactments, the subject does not appear to admit of extended argument, but we ourselves are unable to perceive any valid reason for holding that the authority to make laws in relation to the "raising of money by any mode or system of taxation" does not embrace the authority to require "A" to pay in the first instance a tax in

(1) [1933] A.C. 168.
(2) [1914] A.C. 992, at 998.
(3) [1931] S.C.R. 357 at 362.
(4) [1920] A.C. 184.

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respect of which "B" is liable, and to give "A" a right to reimbursement from "B" out of "B's" monies in "A's" hands, or otherwise.

As to section 33, we are disposed to think that the provision in question, although unusual, is not beyond the power of Parliament to enact as an additional means for insuring the payment of contributions by employers and the satisfactory working of the scheme. However that may be, that provision is plainly severable. It is not a necessary part of the legislative scheme. Assuming it to be *ultra vires* and to afford some evidence of an intention on the part of Parliament to legislate for regulating the relations between employer and employee, such evidence is not sufficiently powerful to deprive the legislation of its *prima facie* character, which, as we have said, is that of an enactment in respect of the subject matter of head no. 3 of section 91.

There remains the broad contention that the provisions of the statute viewed as a whole disclose a scheme under which a statutory contract arises imposing upon employers and employees a contractual duty to contribute to an insurance fund and conferring upon insured persons contractual rights to be paid unemployment benefits out of that fund when the statutory prerequisites are observed.

In *Workmen's Compensation Board* v. *C.P.R.* (1), it was held, as we have seen, that the assessments levied upon employers in order to provide an accident fund out of which compensation was to be paid to employees injured by accident were in the nature of taxes.

Their Lordships' Board in that case had to consider a section of the Compensation Act under which, where the accident happened on a ship or a railway outside the province, and the workman was a resident of the province, and the nature of the employment was such that the work or service performed by the workman had to be performed both within and without the province, the workman or his dependents should be entitled to recover compensation if the circumstances were such that he would have possessed such a right had the accident happened within the province. It was held that it was competent to the provincial legis-

(1) [1920] A.C. 184.

lature to give such a right of recovery in such circumstances, as a statutory condition of the contract of employment made with a workman resident within the province.

This right, it was said, arises, not out of tort, but out of the workman's statutory contract, and, it was added, their Lordships think it is a legitimate provincial object to secure that every workman resident within the province who so contracts should possess it as a benefit conferred on himself as a subject of the province.

The statute also provides that in any case where compensation was payable in respect of an accident happening elsewhere than in the province, if the employer had not contributed fully to the accident fund in respect of his workmen engaged in the service in which the accident happened, the employer should pay to the Board the full amount of the compensation payable in respect of the accident, and that the payment of this sum should be enforceable in the same manner as an assessment. As regards this provision, their Lordships observed:

* * * it also appears to them to be within the power of the province to enact that, if the employer does not fully contribute to the accident fund out of which the payment is normally to be made, the employer should make good to that fund the amount required for giving effect to the title to compensation which the workman acquired for himself and his dependents.

The question before their Lordships concerned the competence of the provincial legislature under the powers vested in it by section 92 to enact this legislation. A ship, the property of the C.P.R. Co., had been lost at sea outside Canadian territorial waters, and it was argued, on behalf of the respondent company, that the right the legislature professed to give the workman in such circumstances, and the liability the legislation professed to impose upon the owner of the ship, was necessarily a right and a liability having a situs outside the province, and consequently not within the authority of the province to create, in exercise of its jurisdiction concerning "property and civil rights" within the province. This argument was based mainly, if not exclusively, upon the decision of the Judicial Committee in *Royal Bank* v. *The King* (1).

The judgment does not in terms state that the liability of the ship owner, where he has not fully contributed to the accident fund in respect of the employees engaged in

(1) [1913] A.C. 283.

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the service in which the accident occurred, to make good such contribution in the manner mentioned was a liability arising out of the statutory term attached to the contract. The liability to pay assessments in the first instance is treated as a liability to pay a tax. As to the special duty arising from the failure to keep up his contributions, there seems to be no reason to think it was placed upon any other footing. At p. 192 (1) their Lordships point out that the fundamental question was whether or not

> a contract of employment made with persons within the province has given a title to a civil right within the province to compensation.

Their Lordships proceed,

> The compensation, moreover, is to be paid by the Board and not by the individual employer concerned.

Then their Lordships observe that the C.P.R. Co., carrying on business in the province of British Columbia, is subject to the jurisdiction of the provincial legislature to enact laws within certain limits imposing civil duties upon it. There is no suggestion that the liability under this special provision is of a character different from the civil duty in respect of assessments made for the purpose of providing compensation for employees whose duties are confined to the province.

It will be observed that the real effect of the decision is that these matters—the matter of constituting an accident fund by compulsory contributions from employers carrying on business by the province and employees resident in the province, and by an optional contribution from the provincial government, for the purpose of providing accident benefits for workmen resident in the province injured in the course of their employment—that these matters may, in their provincial aspects and for the purpose of establishing such a scheme of insurance, fall within the legislative authority of the province in relation to taxation, to property and civil rights, and, it may be, in relation to matters merely local and private within the province. Such a scheme it is within the authority of any province to establish. It does not follow that it is within the authority of any province, or all the provinces combined, validly to enact the legislation or, indeed, any part of the legislation necessary to give effect to the system set up by the statute before us.

(1) [1920] A.C. 184.

It seems to me to be impossible to escape the conclusion that those parts of the enactment which concern the compulsory contributions are provisions relating to the subject of taxation. As pointed out in the *Crystal Dairy* case (1), and as appears from *Workmen's Compensation Board* v. *C.P.R.* (2), the circumstance that the fund is to be distributed for the benefit of private individuals does not militate against the view that these contributions have the character of taxes. As already observed, the essentials of taxation are indubitably present. Moreover, a provincial enactment providing for such contributions to be paid by revenue stamps to the Dominion Government, and to be collected according to regulations prescribed by the Governor in Council, and to be applied by the Minister of Finance in a manner provided by the statute, would plainly be *ultra vires*. A province has, obviously, no power to pass such an enactment. The Dominion has the power if it is an enactment in relation to taxation.

It is of supreme importance at this point to keep in mind the fundamental principle governing the construction of the *British North America Act:* matters which in one aspect and for one purpose may, as subjects of legislation, fall within subdivisions of s. 92 may, in another aspect, and for another purpose, fall within section 91. A provincial legislature may require such compulsory contributions for the purpose of some scheme of unemployment insurance set up by itself in the exercise of powers of legislation which it possesses. In such a case, it would appear, from the decisions in the *Workmen's Compensation Board* v. *C.P.R.* (2), in the *Crystal Dairy* case (1) and in *Lawson's* case (3), that such contributions have the character of taxes; and legislation with regard to them would not, therefore, fall within the category of legislation respecting civil rights within the meaning of section 92. But, even assuming that such legislation by a province could be regarded as legislation in relation to civil rights, as adding a statutory term to contracts of employment, it would appear to be extremely difficult to classify the enactments requiring the payment of the contributions now in question as belonging to the category of legislation in relation to civil rights

(1) [1933] A.C. 168. (2) [1920] A.C. 184.
(3) [1931] S.C.R. 357.

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within a province, especially in view of the provisions of the statute, already mentioned, under which the Dominion Government is the payee, and the Governor in Council possesses the power to regulate payment and collection of all contributions, and all such contributions are to be applied by the Finance Minister in the manner prescribed by the statute.

We find ourselves unable to conclude that, reading these provisions as a whole, these enactments requiring compulsory payments can be considered as enactments on the subject of property and civil rights within any province or within all the provinces.

Turning now to the provisions of the statute dealing with unemployment benefits. These provisions, again, if found in a scheme of unemployment insurance set up by a province, might be regarded, as similar provisions in *Workmen's Compensation Board* v. *C.P.R.* (1) were regarded by the Judicial Committee, as having the effect of annexing a statutory term to contracts of employment. But one thing seems to be clear,—no single province, nor all the provinces combined, could enact this legislation in the exercise of their powers in regard to civil rights within the respective provinces. The enactments constitute directions for the application of a fund constituted by contributions out of the public funds of the Dominion and no province possesses any authority to legislate in relation to the application of such a fund.

Our conclusion, therefore, is, first, that in its main provisions this statute ought on its true construction to be sustained as a valid exercise of the powers of the Dominion Parliament under subdivisions 1 and 3 of section 91. Second, that as to many of its provisions, they are plainly outside any authority possessed by any province or all the provinces under section 92 and, in so far as they do not fall within the ambit of the subdivisions mentioned, must be embraced within the general authority of the Dominion to make laws for the peace, order and good government of Canada.

We should add that we are unable to agree with Mr. Rowell's contention that this legislation can be supported

(1) [1920] A.C. 184.

as legislation under head no. 2 of section 91, or that, in its entirety, it falls within the ambit of the residuary clause as interpreted and applied in recent decisions which are binding upon us.

To summarize:—

The aims stated in the preamble are legitimate, provided, of course, that the enactments themselves are within the ambit of the legislative powers possessed by Parliament. Reading subdivision 1 of section 91 and subdivision 3 together, the proper conclusion is that Parliament has exclusive authority to raise money by any mode or system of taxation for disposition by Parliament for any purpose for which it is competent to Parliament to apply the assets of the Dominion in virtue of subdivision 1. In effect, subdivision 1 endows the High Court of Parliament with full discretionary authority to dispose of the public assets of the Dominion, and no other court is invested with jurisdiction to examine any purported exercise of that authority with a view to pronouncing upon its validity, subject only to the rule that the courts are always entitled to determine whether, in truth, any given enactment of Parliament professing to be an exercise of a given authority is not really an enactment of that character; but one relating to a subject over which Parliament has no jurisdiction.

The provisions requiring compulsory contributions by employers and employed possess the essential elements of legislation respecting taxation. On their true construction, they have that character because, first, it would not be competent to a provincial legislature to enact them in the context in which they stand, which demonstrates that the contributions are exacted for the purpose of raising monies for exclusive disposition by Parliament; and, second, there is no adequate ground for holding that they are, either in purpose or in immediate effect, outside the ambit of the powers under subdivision 3.

So also as regards the enactments concerning the disposition of the proceeds of the levies upon employers and employed and of the contribution from the Dominion treasury. They are not enactments in respect of property and civil rights in any one province or in all of the provinces. They would not be competent as enactments by

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any or all of the provincial legislatures, and there is no adequate ground for affirming that these enactments are not legislation in relation to the subjects within the scope of subdivision 1.

It is hardly susceptible of dispute that Parliament could, in the legitimate exercise of its exclusive authority under subdivisions 1 and 3 of section 91, levy taxes for the purpose of raising money to constitute a fund to be expended in conformity with the directions of Parliament, in unemployment benefits, and provide for a contribution to that fund from the Dominion treasury, or to maintain that, in executing these exclusive powers, Parliament is subject to any control by the courts as to the form of the taxation or the incidence of it or as touching the manner or conditions of the payment of benefits.

It is, perhaps, not too much to say that complete discretionary authority respecting the form and incidence of taxation under subdivision 3, and respecting the disposal of all public assets under subdivision 1, are essential to enable Parliament to discharge the responsibilities entrusted to it.

In a word, legislation for raising money for disposition by Parliament under subdivision 3 of section 91, and directing the disposition of it under subdivision 1, is necessarily excluded from the jurisdiction of the provinces by the concluding words of section 91; and there is no sufficient ground for affirming that, in the enactments of this statute, Parliament is not exercising its powers under these subdivisions, or, in other words, that under the guise of doing so it is invading a provincial field from which it is excluded, for the purpose of attaining a result which it has full power to attain by legislating within fields in which it has exclusive authority.

The statue is, therefore, *intra vires*.

RINFRET J. (Cannon and Kerwin JJ. concurring)—The constitutionality of the *Employment and Social Insurance Act* (see ch. 38 of the statutes of Canada, 25-26 Geo. V, assented to 28th June, 1935) was referred by the Governor

in Council to the Supreme Court of Canada under sec. 55 of the *Supreme Court Act*.

The statute is entitled "An Act to establish an Employment and Social Insurance Commission, to provide for a National Employment Service, for Insurance against Unemployment, for aid to Unemployed Persons, and for other forms of Social Insurance and Security, and for purposes related thereto." The preamble refers to the Treaty of Peace made between the Allied and Associated Powers and Germany, signed at Versailles on the 28th day of June, 1919. It states that it is desirable to discharge the obligations to Canadian Labour flowing from articles 23 and 427 of the Treaty, and that it is essential for the peace, order and good government of Canada to adopt such an Act for the purpose of maintaining on equitable terms interprovincial and international trade, to authorize the creation of a National Fund out of which benefits to unemployed persons throughout Canada will be payable and to provide for the levying of contributions from employers and workers for the maintaining of the said fund and for contributions thereto by the Dominion.

After making provision for the short title and the interpretation clauses, the Act is divided into five parts. Part 1 relates to the Employment and Social Insurance Commission, which is thereby brought into existence. Part II relates to Employment service. Part III relates to Unemployment Insurance. Part IV relates to National Health. Part V contains general provisions concerning regulations; the annual report to be submitted by the Commission; all other reports, recommendations and submissions required to be made to the Governor in Council; the disposition of fines; repeal, audit and the coming into force of the Act.

It is followed by three schedules, the first of which defines employment within the meaning of Part III of the Act and enumerates the "excepted employments." The second schedule fixes the weekly rates of contribution and establishes the rules as to payment and recovery of compulsory payments by employers on behalf of unemployed persons. The third schedule fixes the rates of unemployment benefits.

Under Part I, the Act is to be administered by a Commission consisting of three members to be called the Em-

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ployment and Insurance Commission, with wide powers of investigation for assisting unemployed persons and for providing to them physical and industrial training and instruction.

Under Part II, the Commision is to organize an Employment Service for the Dominion of Canada. The Act provides for the constitution and management of such Employment service on a very large scale. Regional divisions are established. There is to be in each such division a central employment office and as many employment offices as the Commission will deem expedient and desirable for the purposes of the Act. The Commission is to have the direction, maintenance and control of all employment offices so established. The Commission may make regulations authorizing advances by way of loans towards meeting the expenses of workers travelling to places where employment has been found for them through an employment office.

Part III of the Act provides for Unemployment Insurance. The persons to be insured against unemployment are defined. The Act regulates the manner in which the funds required shall be collected partly from monies provided by Parliament, partly from contributions by employed persons and by the employers of those persons. But the employer shall, in the first instance, be liable to pay both the contribution payable by himself and also, on behalf of the employed person, the contribution payable by that person, subject to the right to recover by deduction from the wages or otherwise. The payment of contributions is to be made by means of revenue stamps affixed to or impressed upon books or cards specially prescribed for that purpose. There follows statutory conditions for the receipt of unemployment benefits. One of them is that the person insured shall not be entitled to the benefit until contributions on his behalf have been made for not less than forty full weeks. The manner in which and the conditions under which the contributions are to be paid are defined in numerous sections and subsections.

All questions concerning the rights of persons under the Act are to be determined by the Commission. The Commission may employ insurance officers in each regional division; and the Governor in Council is further authorized to designate such number of persons as are necessary

in each such division to act as umpires, deputy-umpires, courts of referees, chairmen of those courts, etc., for the purpose of examining and determining all claims for benefit, with elaborate provisions for appeal.

Then follow a number of sections dealing with penalties, legal proceedings, civil proceedings by the employee against the employer for neglect to comply with the Act, including the authorization for the Commission to institute proceedings on behalf of the employed person, or for the recovery as civil debts of sums due to the Unemployed Insurance Fund established under the Act.

Inspectors are to be appointed for the purpose of the execution of the Act with power to do all or any of several things, including the right to enter premises other than private dwellings, to make examinations and inquiries, to examine persons and to exercise such other powers as may be necessary to carry the Act into effect.

Then come the financial provisions. The revenue from the sale of the stamps and from all contributions are to be deposited from time to time in the Bank of Canada, by the Minister of Finance, to the credit of the Commission, in an account to be called "The Unemployment Insurance Fund." And in a similar way are to be deposited the monies provided by Parliament; and there is to be an Investment Committee of three members consisting of one member nominated by the Government, one by the Minister of Finance, and one by the Governor of the Bank of Canada, to look after the investment of such sums standing to the credit of the Fund as are not required to meet current expenditures.

In addition to all the above officials, there will be appointed an Advisory Committee, the duties of which are to give advice and assistance to the Commission in relation to the discharge of its functions under the Act and to make reports on the financial condition of the Fund. This Committee shall consist of a Chairman and not less than four, nor more than six, other members. Further, the Commission is given authority to make regulations relating to persons working under the same employer partly in insurable employment and partly in other occupations; also for prescribing the evidence to be required as to the fulfilment of the conditions for receiving unemployment benefits; for

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prescribing the manner in which claims for unemployment benefit may be made, the proceedings to be followed in the consideration and examination of claims; and also regulations with respect to the references to the central or local committees, and to persons employed on night work and to penalties for the violation of any regulation.

Under Part IV, the duties and powers of the Commission are defined with respect to its co-operation in matters of health and health insurance. It may undertake special investigations in regard thereto, subject to the approval of the Governor in Council.

The weekly rates of contribution provided for under the second schedule are graduated according to the class and the wages of the employed person. The weekly contributions are made payable for each calendar week during the whole or any part of which an employed person has been employed by an employer. The payment of contributions both by the employer and by the employee is compulsory. All conditions prescribed for the payment of these contributions including the right of the employer to recover from the employed person the amount of any contributions paid by him on behalf of the employed person are made essential and necessary conditions of the contract of engagement between the employer and the employee. In fact, Part II of the second schedule contains any number of these conditions and provides for further regulations which may be made by the Commission in connection therewith.

The Court is asked to give its opinion upon the question whether the Act, or any of the provisions thereof, is *ultra vires* of the Parliament of Canada.

The written submission of the Attorney-General of Canada was that the Act in its entirety was within the legislative power of the Parliament of Canada in virtue of

(1) its residuary power to make laws for the peace, order and good government of Canada, and

(2) its exclusive power (*a*) to regulate trade and commerce, (*b*) to raise money by any mode or system of taxation, (*c*) to appropriate public money for any public purposes, (*d*) to provide for the collection of statistics; and, incidentally, (*e*) to enact criminal laws.

It is unnecessary for me to add anything to what has already been said—and so well been said—by my Lord

the Chief Justice in connection with the other References made to the Court at the same time as the present one (more particularly those concerning the *Natural Products Marketing Act,* 1934 (p. 403), and the *Dominion Trade and Industry Commission Act,* 1935 (p. 381), to indicate the reasons why I think that the validity of this legislation cannot be supported as an exercise of the residuary power to make laws for the peace, order and good government of Canada, or as an exercise of the power to regulate trade and commerce.

Insurance of all sorts, including insurance against unemployment and health insurances, have always been recognized as being exclusively provincial matters under the head "Property and Civil Rights," or under the head "Matters of a merely local or private nature in the Province." By force of the *British North America Act,* the power to make laws for the peace, order and good government of Canada is given to the Dominion Parliament only "in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces."

The exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in section 91 was, by more than one pronouncement of the Judicial Committee of the Privy Council, declared to be "strictly confined to such matters as are unquestionably of Canadian interest and importance" (*Attorney General for Ontario* v. *Attorney General for Canada*) (1); it will be recognized by the Courts "only after scrutiny sufficient to render it clear that circumstances are abnormal . . . such as cases of war or famine" (2); and "instances of these cases . . . are highly exceptional" (3).

In this particular matter, there is no evidence of an emergency amounting to national peril; but, moreover and still more important, the statute is not meant to provide for an emergency. It is not, on its face, intended to cope with a temporary national peril; it is a permanent statute dealing with normal conditions of employment. There was accordingly here no occasion, nor foundation, for the exercise of the residuary power.

(1) [1896] A.C. 348. (2) [1922] 1 A.C. 200.
(3) [1923] A.C. 695; [1925] A.C. 396.

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Nor is this legislation for the regulation of trade and commerce. It is not trade and commerce as defined by the Privy Council in its numerous decisions upon the subject. It deals with a great many matters which are trade and commerce in no sense of the word, such as the contract of employment, employment service, unemployment insurance and benefit, and health.

The proposition that the Act could be supported in virtue of the powers of the Dominion Parliament derived from Head 6 (Statistics), or Head 27 (Criminal Law) of section 91 need not retain our attention and it was not pressed at the argument.

It may be stated further that the legislation is not based on the Treaty of Peace, although it is referred to in the preamble. In fact, counsel for the Attorney General of Canada positively stated at bar that he was not relying on any treaty or on section 132 of the *British North America Act*.

There remains, therefore, in the submission made on behalf of the Dominion Government, only two heads that have to be considered in support of the legislation; and they are: "the power to raise money by any mode or system of taxation" (91-3), and "the power to appropriate public moneys for any public purpose."

In truth, these powers were only faintly advanced by counsel for the Dominion in favour of the legislation Nevertheless, they were referred to, and more particularly as I understand that they were accepted in support of the validity of the Act by my Lord the Chief Justice, I realize that my reasons for holding a different view must be explained as fully, though as concisely, as possible.

The critical question is whether or not the statute is, in its substance, an exercise of those powers to raise money by taxation and to make laws for the disposal of the public property.

At the outset, let us remember the remark of Lord Coke (4 Inst. 330) that the preamble of a statute is "the key to open the minds of the makers of the Act and the mischiefs which they intended to remedy."

The recitals of the preamble have already been referred to. They mention the Treaty of Versailles and the promise of the signatories to endeavour to secure and maintain

fair and humane conditions of labour for industrial wage earners. They indicate the desirability of discharging certain obligations to Canadian Labour. They invoke the importance for the peace, order and good government of Canada to provide for a National employment service, for insurance against unemployment and for other forms of social insurance. They allege the necessity of maintaining on equitable terms interprovincial and international trade. They mention the purpose of creating a national fund, out of which benefits to unemployed persons throughout Canada will be payable, and of providing for the levy of contributions from employers and workers for the maintaining of this fund and for contribution thereto by the Dominion.

With deference, it seems to me that these recitals clearly indicate that the Parliament of Canada intended primarily to legislate with regard to employment service, to unemployment insurance, and to health matters; that it was not concerned with the public debt and property or with the raising of money by taxation; and that the provisions for levying contributions for the creation of the national fund were nothing more than provisions to enable the carrying out of the true and only purposes of the legislation. The Act is one dealing with and regulating employment service and unemployment insurance. The contributions (or the taxes, if we are to call them so) are mere incidents of the regulation.

It is hardly necessary to repeat that, when investigating whether an Act was competently passed by Parliament, the courts must ascertain the " true nature and character " of the enactment, its " pith and substance," and the legislation must be " scrutinized in its entirety " for the purpose of determining within which of the categories of subject-matters mentioned in sections 91 and 92 the legislation falls (*Citizens Insurance Co.* v. *Parsons* (1); *Union Colliery Company* v. *Bryden* (2); *Great West Saddlery Company* v. *The King* (3); *Reciprocal Insurers* case (4); *Toronto Electric Commissioners* v. *Snider* (5).

(1) (1881) 7 App. Cas. 96.
(2) [1899] A.C. 580.
(3) [1921] 2 A.C. 91, at 117.
(4) [1924] A.C. 328, at p. 337.
(5) [1925] A.C. 396, at p. 407.

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In my humble view, the subject-matter of the Act is employment service and social insurance, not public debt and property or taxation. The object of the Act, the end sought to be accomplished by it is a scheme for employment service and unemployment insurance; the contributions levied from the employers and employees are only incidents of the proposed scheme, and, in fact, merely means of carrying it into effect. The Act does not possess the character of a taxing statute, but it is legislation intending to do precisely what the title says: to establish an employment insurance commission, to provide for a national employment service, for insurance against unemployment, for aid to unemployed persons, or other forms of social insurance and security and for purposes related thereto.

It being well understood and, in fact, conceded that these are subject-matters falling within the legislative authority of the provinces, the Dominion Parliament may not, under pretext of the exercise of the power to deal with its property, or to raise money by taxation, indirectly accomplish the ends sought for in this legislation. If it were otherwise, the Dominion Parliament, under colour of the taxing power, would be permitted to invade almost any of the fields exclusively reserved by the Constitution to the legislatures in each province.

One of the effects of the Act under submission is, in the language of Lord Haldane, in *Workmen's Compensation Board* v. *C.P.R.* (1), "to attach statutory terms to contracts of employment," and to impose contractual duties as between employers and employees. In its immediate result, the Act creates civil rights as between the former and the latter.

I doubt whether the contribution received from the employee can properly be described as a tax. In fact, it would seem to me to partake more of the nature of an insurance premium or of a payment for services and individual benefits which are to be returned to the employee in proportion to his payments. Be that as it may under all circumstances, the benefits conferred on the employees by the Act are not gifts with conditions attached, which

(1) [1920] A.C. 184.

the employees are free to accept or not; the conditions attached to the benefits are made compulsory terms of all contracts in the specified employments, and I deprecate the idea that the Dominion Parliament may use its power of taxation to compel the insertion of conditions of that character in ordinary contracts between employers and employees.

It may be that some of the provisions of the Act are not open to objection. But I fail to see how they can be severed from the general scheme organized under the Act or from the powers conferred on the Commission; and the legislation as it stands must undoubtedly fall as a whole.

In the premises, the Act submitted to the Court is not a mere encroachment on the provincial fields through the exercise of powers allegedly ancillary or incidental to one of the enumerated powers of section 91; in its pith and substance, it is a direct and unwarranted appropriation of the powers attributed to the legislatures by force of Section 92 of the Constitution.

For these reasons, and also for the reasons given by my brother Kerwin, with whom I entirely concur, I have come to the conclusion that the *Employment and Social Insurance Act* (chapter 38 of the statutes of Canada, 25-26 Geo. V) is wholly *ultra vires* of the Parliament of Canada.

CROCKET, J.—For the reasons given by my brother Rinfret, I agree that the above statute is wholly *ultra vires* of the Parliament of Canada.

KERWIN J. (Rinfret and Cannon JJ. concurring)—The Governor General in Council has referred to this Court for hearing and consideration pursuant to section 55 of the *Supreme Court Act* the following question: "Is the *Employment and Social Insurance Act,* or any of the provisions thereof and in what particular or particulars or to what extent, *ultra vires* of the Parliament of Canada?"

Section 1 of the Act merely gives its short title; section 2 is the interpretation section, while section 3 provides that the remainder of the Act may be referred to as follows:

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PART I, sections four to nine inclusive, relating to the Employment and Social Insurance Commission;

PART II, sections ten to fourteen inclusive relating to Employment Service;

PART III, sections fifteen to thirty-eight inclusive relating to Unemployment Insurance;

PART IV, sections thirty-nine to forty-one inclusive relating to National Health;

PART V, sections forty-two to forty-eight inclusive, General.

The sections included in Part II provide that The Employment and Social Insurance Commission constituted under Part I shall organize an employment service for the Dominion of Canada, and contain supplementary provisions for the collection of information, advances to workers seeking employment, etc.

The sections included in Part IV enact that the duties and powers of the Commission under that Part shall be exercised so far as may be found practicable and expedient in co-operation with any department or departments of the Government of Canada, with the Dominion Council of Health, with any province or any number of provinces collectively, or with any municipality or any number of municipalities collectively, or with associations or corporations, and provide that it shall be the duty of the Commission to assemble reports, publications, etc., concerning certain schemes or plans for medicinal, dental or surgical care, including medicines, drugs or hospitalization, or compensation for loss of earnings arising out of ill-health, accident or disease.

By themselves the provisions of Part II and of certain portions of Parts IV and V might be unobjectionable but in my opinion they are so inextricably interwoven with the powers of the Commission set up under Part I and with the scheme of unemployment insurance referred to in Part III that they must stand or fall according to the validity or otherwise of sections 15 to 38 inclusive which form Part III.

As to Part III serious questions arise. In addition to the arguments of counsel, I have had the advantage of reading the opinion of My Lord the Chief Justice but with deference I find myself unable to agree with the conclusions

expressed therein that this Part of the Act may be justified as an exercise by Parliament of its powers under Head 1 "The Public Debt and Property" and Head 2 "The Raising of money by any mode or system of taxation" of section 91 of the *British North America Act*, 1867. It is quite true that Parliament, by properly framed legislation may raise money by taxation and dispose of its public property in any manner that it sees fit. As to the latter point, it is evident that the Dominion may grant sums of money to individuals or organizations and that the gift may be accomplished by such restrictions and conditions as Parliament may see fit to enact. It would then be open to the proposed recipient to decline the gift or to accept it subject to such conditions. As to the first point, it is also undoubted, I conceive, that Parliament, by properly framed legislation may raise money by taxation, and this may be done either generally or for the specific purpose of providing the funds wherewith to make grants either before or after the conferring of the benefit.

But in my view, after a careful consideration of all the sections in Part III of the Act, in substance Parliament does not purport to do either of these things. Section 15 provides that the designated persons, referred to as "unemployed persons" shall be insured against unemployment in the manner provided for by the Act. Section 17 enacts that the funds required for providing "unemployment benefit" and for making any other payments which are to be made out of the Unemployment Insurance Fund established later under Part III shall be derived partly from moneys provided by Parliament, partly from contributions from employed persons and partly from contributions from employers of those persons, which contributions shall be paid by means of revenue stamps or otherwise as may be prescribed by the Commission. Rates of contribution are set forth in the second schedule to the Act, and by ss. 3 of s. 17 except where regulations under the Act otherwise prescribe, the employer shall in the first instance be liable to pay both the contribution payable by himself and also the contribution payable by the employed person with power to the employer, subject to regulations, to recover from the employed persons to the amount of the contributions so paid on behalf of the latter by the employer. By

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section 19 every unemployed insured person who complies with prescribed "statutory conditions" is entitled to receive what is known as an "unemployment benefit." There is a provision by which certain employed persons may be exempted from the provisions of the Act, but subject to that, the individuals covered by this Part are obliged to become insured by means of a statutory condition attached to the contract of employment.

While there are numerous other provisions, I believe I have correctly set forth the marrow of Part III of the Act and I am unable to ascertain in what maner they may be termed an exercise of the power conferred upon Parliament to tax. It occurs to me that if it were otherwise the Parliament of Canada might in connection with any matter whatsoever, by the mere imposition of a tax, confer upon itself authority to legislate upon matters over which the legislature of each province would ordinarily have jurisdiction. This must be understood, of course, as not referring to any power in the legislatures of the various provinces to originate or assist its local scheme by indirect taxation.

That, with this qualification, the subject matter of Part III would ordinarily fall within the ambit of the powers of the provinces within their respective boundaries was not, I think seriously disputed. It deals with contracts of employment and attaches thereto a statutory condition. It interferes with property and civil rights. A reference particularly to section 15 and to the recitals in the Act indicates that the very pith and substance of this part of the Act deals with unemployment insurance.

In re The Insurance Act of Canada (1) was an appeal from the judgment of the Court of King's Bench (Appeal Side) for the Province of Quebec in answer to the following questions referred to that Court by the Lieutenant-Governor in Council of the Province:

1. Is a foreign or British insurer who holds a licence under the Quebec Insurance Act to carry on business within the Province obliged to observe and subject to ss. 11, 12, 65 and 66 of the Insurance Act of Canada, or are these sections unconstitutional as regards such insurer?

2. Are ss. 16, 20 and 21 of the Special War Revenue Act within the legislative competence of the Parliament of Canada? Would there be any difference between the case of an insurer who has obtained or is bound

(1) [1932] A.C. 41.

to obtain under the Provincial law a licence to carry on business in the Province and any other case?

In delivering the judgment of their Lordships, Viscount Dunedin after referring to *Attorney-General for Canada* v. *Attorney-General for Alberta* (1), and stating that that decision conclusively and finally settled that regulations as to the carrying on of insurance business were a provincial and not a Dominion matter, concluded: "It really only carried to their logical conclusion the two cases already cited"; the two cases being *Citizens Insurance Company* v. *Parsons* (2) and *John Deere Plow Company's* case (3). He then discussed the *Reciprocal Insurers* case (4), pointing out that the Board had there decided that section 508C of the Criminal Code was not a genuine amendment of the criminal law, but was really an attempt by a soi-disant amendment of the criminal law to subject insurance business in the Province to the control of the Dominion—that which had exactly been determined to be *ultra vires* the Dominion by the judgment of 1916. Their Lordships therefore in the 1931 case decided that the first part of question 1 should be answered in the negative. They then proceeded to the second question and quoted the only section of the *Special War Revenue Act* that in their opinion needed to be considered. That section was as follows:

16. Every person resident in Canada, who insures his property situate in Canada, or any property situate in Canada in which he has an insurable interest, other than that of an insurer of such property, against risks other than marine risks: (*a*) with any British or foreign company or British or foreign underwriter or underwriters, not licensed under the provisions of the Insurance Act, to transact business in Canada; or (*b*) with any association of persons formed for the purpose of exchanging reciprocal contracts of indemnity upon the plan known as inter-insurance and not licensed under the provisions of the Insurance Act, the chief place of business of which association or of its principal attorney-in-fact is situate outside of Canada; shall on or before the thirty-first day of December in each year pay to the Minister, in addition to any other tax payable under any existing law or statute a tax of five per centum of the total net cost to such person of all such insurance for the preceding calendar year.

The judgment continues:

Now as to the power of the Dominion Parliament to impose taxation there is no doubt. But if the tax as imposed is linked up with an object which is illegal the tax for that purpose must fall.

On page 53 Viscount Dunedin quoted the following extract from the judgment of the Board in the *Reciprocal Insurers'* case (4):

In accordance with the principle inherent in these decisions their Lordships think it is no longer open to dispute that the Parliament of

(1) [1916] 1 A.C. 588.
(2) [1881] 7 A.C. 96.
(3) [1915] A.C. 330.
(4) [1924] A.C. 328.

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REFERENCE *re* THE EMPLOYMENT AND SOCIAL INSURANCE ACT.

Kerwin J.

Canada cannot, by purporting to create penal sections under s. 91, head 27, appropriate to itself exclusively a field of jurisdiction in which, apart from such a procedure, it could exert no legal authority, and that if, when examined as a whole, legislation in form criminal is found, in aspects and for purposes exclusively within the Provincial sphere, to deal with matters committed to the Provinces, it cannot be upheld as valid.

He then continued:—

> If instead of the words "create penal sanctions under s. 91, head 27" you substitute the words "exercise taxation powers under s. 91, head 3," and for the word "criminal" substitute "taxing," the sentence expresses precisely their Lordships' views.

If this be the case where the Court decides that Parliament has colourably invaded the field of provincial jurisdiction, how much more cogent is the reasoning if one comes to the conclusion that the legislation in question does not even purport to be a taxing Act.

In the present reference that is the conclusion to which I am impelled and it follows that in my view Part III may not be justified under either of the heads of section 91 of the *British North America Act* to which I have referred. For the reasons already given the remainder of the Act is in the same position.

Elsewhere in his consideration of other Acts referred at this time to this Court, my Lord the Chief Justice has dealt exhaustively with the powers of Parliament under the residuary clause of s. 91 of the *British North America Act* and also with the powers of the Dominion under head 2, "The Regulation of Trade and Commerce," of that section. It is unnecessary, therefore, for me to refer to the decisions and I content myself with expressing the opinion that even if the object aimed at by Part III of the present Act may be praiseworthy and if the desired result might better be obtained by the Dominion than all or some of the provinces acting within their constitutional limitations might accomplish, the matter is not translated from the jurisdiction of the provincial legislature to that of Parliament. In the same way I am unable to see how, in view of the summary of the powers of the Dominion with reference to trade and commerce also given elsewhere by the learned Chief Justice, the matter could be considered as falling within that head of section 91.

For these reasons, and for the reasons given by my brother Rinfret which I have had the opportunity of perusing, I have come to the conclusion that the Act *in toto* is *ultra vires* of the Parliament of Canada.