1920

*May 7.
*June 1.

IN THE MATTER OF

THE BOARD OF COMMERCE ACT AND THE COMBINES AND FAIR PRICES ACT OF 1919.

CASE STATED UNDER SECTION THIRTY-TWO OF THE BOARD OF COMMERCE ACT.

Constitutional Law—Legislative powers of Parliament—Combines and Fair Prices Act, 9 & 10 Geo. V, c. 45, ss. 18 and 22—Regulation of Trade and Commerce—Criminal law—Peace, order and good government.

A case stated for the opinion of the Supreme Court of Canada under sec. 32 of the Board of Commerce Act should not submit abstract questions but should state the facts of some matter pending before the Board and submit questions of law or jurisdiction arising when considering the same. *In re Cardigan County Council*, (54 J.P. 792), appl.

By sec. 18 of The Combines and Fair Prices Act, 1919, the Board of Commerce is empowered to inquire into and prohibit the making of unfair profits on the holding or disposition of necessaries of life, and practices with respect to such holding or disposition calculated to unfairly enhance the cost of such necessaries. The Board made an order restraining and prohibiting certain manufacturers of clothing from omitting or refusing to offer for sale in the city of Ottawa their commodities at prices not higher than are reasonable and just; offering the same for sale at prices higher than are reasonable and just; and marking for sale by retail said commodities at prices ascertained by the addition to cost of fifty per cent or more or made up of cost plus a gross profit of a percentage greater than by the order recognized as fair or a percentage indicated as unfair.

Held, per Davies C.J., Anglin and Mignault JJ., Idington, Duff and Brodeur JJ. contra, that the Board had authority to make the order; that Parliament had power to confer the authority on the Board by its jurisdiction to make laws for "the regulation of Trade and Commerce" and for "the peace, order and good government of Canada" and possibly, except as to the power of the Board to inquire into trade matters, by its jurisdiction to legislate on "Criminal Law."

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*PRESENT.—Sir Louis Davies C.J., and Idington, Duff, Anglin, Brodeur and Mignault JJ.

By sec. 38 of the Board of Commerce Act the Board is authorized to require that any order it issues shall be made a rule of the Exchequer Court or of any superior court of a province.

Held, per Davies C.J., Anglin and Mignault JJ., Idington, Duff and Brodeur JJ. expressing no opinion, that Parliament may, in passing legislation within its jurisdiction, impose duties upon any subjects of the Dominion including officials of provincial courts and that the Board could validly exercise the power so conferred.

CASE stated by the Board of Commerce for the opinion of the Supreme Court of Canada.

The provisions of the Acts in question on this appeal and the order of the Board are set out in the reasons for judgment. The questions submitted is whether or not the Board had jurisdiction to make the order and to require that it be made a rule of the Supreme Court of Ontario.

W. F. O'Connor K.C., and *Duncan*, appeared for the Attorney General of Canada.

Lafleur K.C., for the Attorney General of Alberta.

Tilley K.C., for Manufacturing Associations interested.

The opinions of the Chief Justice and of Anglin and Mignault JJ. were written by:—

ANGLIN J.—In this case I am to deliver the judgment of my Lord, the Chief Justice, Mr. Justice Mignault and myself.

The Board of Commerce, constituted under the authority of c. 37 of the Dominion Statutes of 1919, is by s. 32 of that Act empowered to

state a case in writing for the opinion of the Supreme Court of Canada upon any question which, in the opinion of the Board, is a question of law or of jurisdiction.

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Purporting to proceed under this provision the Board presented for determination by this court a series of six questions—three of them directed to the constitutional validity of certain provisions of the Combines and Fair Prices Act (c. 45 of the statutes of 1919) and the other three to the construction of certain sections of the same statute. With a view to meeting a suggestion that Parliament had not intended to authorize the submission of abstract questions for the opinion of the court, the Board amended the case by adding to it a statement that the questions submitted had arisen in the consideration of certain matters actually pending before it. *Glasgow Navigation Co.* v. *Iron Ore Co.* (1). After hearing argument during the winter term, however, the court was of the opinion that the case as presented was not a "stated case" within the contemplation of s. 32 of the Board of Commerce Act inasmuch as it did not contain any statement of concrete facts out of which the questions formulated arose; *Re County Council of Cardigan* (2); compare the English O. 34, r. 1 and *Bulkeley* v. *Hope* (3); but was rather, under the guise of a stated case, an unintentional assumption of the power conferred on the Governor-General-in-Council by s. 60 of the Supreme Court Act, to refer to this court for hearing and consideration important questions of law or fact touching (a) the interpretation of the British North America Acts, 1867 to 1886, or (b) the constitutionality or interpretation of any Dominion or provincial legislation.

The attention of counsel having been drawn to this aspect of the matter it was arranged that the case as originally submitted should be superseded by a new

(1) [1910] A.C. 293. (2) 54 J.P. 792.
(3) 8 DeG.M. & G. 36, 37.

case which should contain a statement of facts in some matter or matters pending before the Board and formulate questions of law or jurisdiction which had actually arisen in their consideration, indicating how such questions arose. Such a case was accordingly filed and supplemental argument upon it was recently heard. I am of opinion that inasmuch as by s. 33 (3) of the Board of Commerce Act the finding or determination of the Board on any question of fact within its jurisdiction is made binding and conclusive, the case as now submitted falls within the intendment of s. 32 of that statute. It states that the Board proposes to make an order in which, after reciting that it has upon an oral investigation found that in some thirty-six shops in the city of Ottawa men's ready made and partly made suits and overcoats, purchased at a cost of $30 or under, have as a practice been sold at the same percentage of gross profit or margin to the retailers as commodities purchased by them at a greater cost and that unfair profits have been made on such sales and that the merchants concerned have not offered their stocks-in-trade of such commodities for sale at prices not higher than are reasonable and just, but that extenuating circumstances render a prosecution unnecessary, and that in the opinion of the Board fair profits on such commodities may be ascertained on a basis set forth, it will proceed to order that the individuals, firms, and corporations conducting such establishments, naming them, be, and each of them is, restrained and prohibited from

(*a*) omitting or refusing to offer for sale within the city of Ottawa said commodities in accordance with the ordinary course of business at prices not higher than are reasonable and just;

(*b*) offering for sale within the City of Ottawa said commodities at prices higher than are reasonable and just;

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(c) making or taking upon dispositions within the city of Ottawa by way of sale of said commodities unfair profits being profits greater than those hereinbefore indicated as fair profits;

(d) instituting, continuing or repeating the practice of marking for sale by retail within the City of Ottawa either the said commodities or stocks-in-trade of clothing of which said commodities form part at prices calculated or ascertained by the addition to cost of fifty per cent or more of cost or at prices made up of cost plus a margin or gross profit of (a) a percentage greater than by this order recognized as fair, or (b) a percentage by this order indicated as unfair, whether or not sales are intended to be actually made at lower prices and in conformity with this order, such practices being in the opinion of the Board designed or calculated to unfairly enhance the price realized upon dispositions by sale of said commodities.

At bar Mr. O'Connor, representing the Attorney General, very properly conceded that clauses (a) and (b) of the proposed order would be merely repetitions of the general statutory prohibition implied in s. 17 of the Combines and Fair Prices Act and are not in a defensible form, and he accordingly abandoned them. As to the remaining clauses (c) and (d), the stated case submits two questions:

"(1) Has the Board lawful authority to make the order?

"(2) Has the Board lawful authority to require the Registrar or other proper officer of the Supreme Court of Ontario to cause the order when issued to be made a rule of said Court?"

Sec. 18 of the Combines and Fair Prices Act purports in explicit terms to confer the authority to make such a restraining or prohibitive order, and s. 38 of the Board of Commerce Act likewise purports in explicit terms to enable the Board to require that any order made by it shall be made a rule, order or decree of the Exchequer Court or of any superior court of any province of Canada. The questions presented are, therefore, in reality whether these particular provi-

sions are within the legislative jurisdiction of Parliament. They may be more conveniently considered separately.

Upon the policy, efficacy or desirability of such legislation it should be unnecessary to state that an opinion is neither sought nor expressed.

Could Parliament empower the Board to make the order?

Counsel representing the Attorney General maintains that it could by virtue of its legislative jurisdiction (a) over "The Criminal Law," (b) in regard to "The Regulation of Trade and Commerce," and (c) "To make Laws for the Peace, Order and Good Government of Canada" (B.N.A. Act, s. 91).

Sec. 17 of the Combines and Fair Prices Act prohibiting the unreasonable accumulation or withholding of "necessaries of life" defined by s. 18 (recently construed by this court in the case of Price Bros. Limited), and requiring that any excess of necessaries of life and all stocks in trade of such necessaries shall be offered for sale at reasonable and fair prices, and s. 22, which imposes penalties, *inter alia*, for contraventions of s. 17, may, I think, be held valid (the latter *pro tanto*) as criminal legislation. The provision of s. 18 authorizing the Board to make the inquiries therein provided for and to determine what shall constitute unfair profits may possibly be supported as ancillary criminal legislation, as well as for the purposes of s. 24.

But I think it is not possible to support, as necessarily incidental to the efficient exercise of plenary legislative jurisdiction over "the criminal law," the further provision of s. 18 purporting to empower the court to restrain prospective breaches of the statute, the making or taking of unfair profits, and practices calculated unfairly to enhance costs or prices, or the

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provisions of s. 38 of the Board of Commerce Act for making decisions or orders of the Board rules or decrees of the Exchequer Court or of any provincial superior court. The exception at the end of s. 91 of the B.N.A. Act, although applicable to all the enumerated heads of s. 92,

> was not meant to derogate from the legislative authority given to provincial legislatures by these sixteen subsections, save to the extent of enabling the Parliament of Canada to deal with matters local and private in those cases where such legislation is necessarily incidental to the exercise of the powers conferred upon it by the enumerative heads of s. 91.

Attorney General for Ontario v. *Attorney General for Canada* (1), at page 360; *Montreal* v. *Montreal Street Rly. Co.* (2).

In so far as the provisions of s. 18 immediately under consideration may involve an invasion of the field of property and civil rights assigned to provincial legislative jurisdiction by s. 92 (12), in my opinion they cannot be supported under s. 91 (27).

The jurisdiction of Parliament over "The Regulation of Trade and Commerce" (s. 91 (2)) has frequently been invoked—usually without success—either in supporting federal legislation alleged to invade the provincial field or in attacking the validity of provincial legislation claimed to fall under one of the enumerated heads of s. 92. In *Citizens Ins. Co.* v. *Parsons* (3), at page 112, the Judicial Committee first points out that these words are not used in an unlimited sense as is apparent from their collocation and from the specific enumeration of several subjects which in their broadest sense the words "the regulation of trade and commerce" would include. Their Lordships suggest

(1) [1896] A.C. 348. (2) [1912] A.C. 333, 343.
(3) 7 App. Cas. 96.

that regulations relating to general trade and commerce were in the mind of the legislature,

and that these words (p. 113)

would include political arrangements in regard to trade requiring the sanction of Parliament, regulation of trade in matters of interprovincial concern and it may be that they would include general regulation of trade affecting the whole Dominion; (but) their Lordships abstain * * from any attempt to define the limits of the authority of the Dominion Parliament in this direction.

In *Bank of Toronto* v. *Lambe* (1), it was held that an attempt to make the expression, "the regulation of trade and commerce" cover direct taxation of banks so as to exclude provincial power to impose such taxation would unduly strain it. What was said in the *Parsons Case* (2), was impliedly approved in *The Local Prohibition Case* (3). In *Montreal* v. *Montreal Street Rly. Co.* (4), Lord Atkinson, after setting out some propositions which *The Local Prohibition Case* (1) should be taken to have established with regard to the purview of the exception to the provincial legislative authority contained in s. 91 of the B.N.A. Act at its end and the restrictions which must be imposed on the legislative powers of the Dominion over unenumerated subjects exercisable under its jurisdiction

to make laws for the peace, order, and good government of Canada,

says, at p. 344, that

these enactments, secs. 91 and 92, indicate that the exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in s. 91 ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance and ought not to trench upon provincial legislation with respect to any classes of subjects enumerated in s. 92, * * * and that if the Parliament of Canada had authority to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of

(1) 12 App. Cas. 575.
(2) 7 App. Cas. 96.
(3) [1896] A.C. 348.
(4) [1912] A.C. 333, 343.

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local or private interest upon the assumption that these matters also concern the peace, order and good government of the Dominion, there is hardly a subject upon which it might not legislate to the exclusion of provincial legislation. The same considerations appear to their Lordships to apply to two of the matters enumerated in s. 91, viz., the regulation of trade and commerce.

Ex *facie* the last sentence would almost seem to import that legislation properly held to fall within sec. 91 (2) of the B.N.A. Act must not trench upon the provincial field—that Parliament cannot in an otherwise legitimate attempt "to regulate trade and commerce" legislate so as to affect matters with which a provincial legislature might deal in some other aspect as falling within "property and civil rights." In *The Insurance Act Reference* (1), at page 309, I was disposed so to interpret his Lordship's language. But if that be its real meaning "the regulation of trade and commerce" would cease to be effective as an enumerated head of federal legislative jurisdiction. In the more recent decision of *John Deere Plow Co.* v. *Wharton* (2), the partial interpretation put on head No. 2 of sec. 91 in *Citizens Ins. Co.* v. *Parsons* (3), was again approved and, while it was pointed out that the exclusive power to regulate trade and commerce thereby conferred must, like the expression

property and civil rights in the province

in sec. 92, receive a limited construction, it was held to

enable the Parliament of Canada to prescribe to what extent the powers of companies the objects of which extend to the whole Dominion should be exercisable and what limitation should be placed on such powers. For if it be established that the Dominion Parliament can create such companies then it becomes a question of general interest throughout the Dominion in what fashion they should be permitted to trade.

(1) 48 Can. S.C.R. 260. (2) [1915] A.C. 330.
(3) 7 App. Cas. 96.

The clear effect of this last decision, I take it, is that s. 91 (2) retains its place and office as an enumerative head of federal legislative jurisdiction and that legislation authorized by its terms, properly construed, is not subject to the restrictions imposed on Dominion legislation that depends solely on the general "peace, order and good government" clause, but, on the contrary, is effective although it invades some field of jurisdiction conferred on the provinces by an enumerated head of s. 92.

Probably the test by which it must be determined whether a given subject matter of legislation, *primâ facie* ascribable to either, properly falls under s. 91 (2) or s. 92 (13) is this:—Is it as primarily dealt with, in its true nature and character, in its pith and substance, (in the language of Viscount Haldane's judgment just quoted)

a question of general interest throughout the Dominion

or is it (in Lord Watson's words in the Local Prohibition Case)

from a provincial point of view of a local or private nature?

In order to be proper subjects of Dominion legislation under "the regulation of trade and commerce" it may well be that the matters dealt with must not only be such as would ordinarily fall within that description, but, if the legislation would otherwise invade the provincial field, must also be

of general interest throughout the Dominion,

or, in the language used by Lord Watson in The Local Prohibition Case (p. 361) in regard to legislation under the peace, order and good government clause upon matters not enumerated in s. 91, must be

unquestionably of Canadian interest and importance.

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Mr. Justice Clement suggests this view in his valuable work on the Canadian Constitution (3 ed.), at pp. 448 and 688, and it may be that that was all Lord Atkinson intended when he said that the considerations applicable to the general powers of the Dominion Parliament supplementary to its enumerated powers apply also to the powers conferred on it under the head, "The Regulation of Trade and Commerce." Otherwise I find it difficult to reconcile his views with those expressed in the *Parsons Case* (1), and in *John Deere Plow Co.* v. *Wharton* (2).

The regulation of the quantities of "necessaries of life" that may be accumulated and withheld from sale and the compelling of the sale and disposition of them at reasonable prices throughout Canada is regulation of trade and commerce using those words in an ordinary sense. While the making of contracts for the sale and purchase of commodities is primarily purely a matter of "property and civil rights," and legislation restricting or controlling it must necessarily affect matters ordinarily subject to provincial legislative jurisdiction, the regulation of prices of necessaries of life—and to that the legislation under consideration is restricted—may under certain circumstances well be a matter of national concern and importance—may well affect the body politic of the entire Dominion. Moreover, "necessaries of life" may be produced in one province and sold in another. In the case of manufactured goods the raw material may be grown in or obtained from one province, may be manufactured in a second province and may be sold in several other provinces.

(1) 7 App. Cas. 96. (2) [1915] A.C. 330.

Effective control and regulation of prices so as to meet and overcome in any one province what is generally recognized to be an evil—"profiteering"—an evil so prevalent and so insidious that in the opinion of many persons it threatens to-day the moral and social well-being of the Dominion—may thus necessitate investigation, inquiry and control in other provinces. It may be necessary to deal with the prices and the profits of the growers or other producers of raw material, the manufacturers, the middlemen and the retailers. No one provincial legislature could legislate so as to cope effectively with such a matter and concurrent legislation of all the provinces interested is fraught with so many difficulties in its enactment and in its administration and enforcement that to deal with the situation at all adequately by that means is, in my opinion, quite impracticable.

Viewed in this light it would seem that the impugned statutory provisions may be supported, without bringing them under any of the enumerative heads of s. 91, as laws made for the peace, order and good government of Canada in relation to matters not coming within any of the classes of subjects assigned exclusively to the legislatures of the provinces, since, in so far as they deal with property and civil rights, they do so in an aspect which is not "from a provincial point of view local or private" and therefore not exclusively under provincial control.

"It must be borne in mind," says Lord Haldane in the recent case of *John Deere Plow Co.* v. *Wharton* (1), at page 339,

> in construing the two sections that matters which in a special aspect and for a particular purpose may fall within one of them may in a different aspect and for a different purpose fall within the other.

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

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In such cases the nature and scope of the legislative attempt of the Dominion or of the Province, as the case may be, have to be examined with reference to the actual facts if it is to be possible to determine under which set of powers it falls in substance and reality.

The legislation now under consideration must fall under the one set of powers or under the other, since

the powers distributed between the Dominion on the one hand and the provinces on the other hand cover the whole area of self-government within the whole area of Canada. It would be subversive of the entire scheme and policy of the Act to assume that any point of internal self-government was withheld from Canada. *Attorney General for Ontario* v. *Attorney General for Canada* (1), at page 581, per Loreburn L.C.

As put by Sir Montague Smith in *Russell* v. *The Queen* (2), at pages 839, 840:

What Parliament is dealing with in legislation of this kind is not a matter in relation to property and its rights, but one relating to public order and safety. That is the primary matter dealt with, and though incidentally the free use of things in which men may have property is interfered with, that incidental interference does not alter the character of the law. Upon the same considerations, the Act in question cannot be regarded as legislation in relation to civil rights. In however large a sense these words are used, it could not have been intended to prevent the Parliament of Canada from declaring and enacting certain uses of property, and certain acts in relation to property, to be criminal and wrongful.

After giving illustrations of laws designed for the promotion of public order, safety or morals which, nevertheless, prohibit certain uses of, and certain acts in relation to, property, his Lordship proceeds:

Few, if any, laws could be made by Parliament for the peace, order and good government of Canada which did not in some incidental way affect property and civil rights; and it could not have been intended when assuring to the provinces exclusive legislative authority on the subjects of property and civil rights, to exclude the Parliament from the exercise of this general power whenever any such incidental interference would result from it. The true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs.

(1) [1912] A.C. 571. (2) 7 App. Cas. 829.

Lord Fitzgerald in delivering the judgment of the Privy Council in *Hodge* v. *The Queen* (1), quoted extensively and with approval from the Russell judgment and referring to it and also to *Citizens Ins. Co.* v. *Parsons* (2), said

> that the principle which these cases illustrate is, that subjects which in one aspect and for one purpose fall within sect. 92 may, in another aspect and for another purpose fall within sect. 91,

and this is said, as the passages cited shew, in relation to the general Dominion power to make laws for the peace, order and good government of Canada as well as in relation to matters falling clearly within some one of the enumerated heads of s. 91. Reference may also be made to *Union Colliery Co.* v. *Bryden* (3), at page 587, and to the oft quoted language of Lord Watson in the *Local Prohibition Case* (4), at page 361.

> Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion.

I ventured in the *Insurance Act Reference* (5), at page 310, to state what I conceive to be the result of the authorities on this particular point in these words:

> When a matter primarily of civil rights has attained such dimensions that it affects the body politic of the Dominion and has become of national concern it has in that aspect of it, not only ceased to be "local and provincial" but has also lost its character as a matter of "civil rights in the province" and has thus so far ceased to be subject to provincial jurisdiction that Dominion legislation upon it under the "peace, order and good government" provision does not trench upon the exclusive provincial field and is, therefore, valid and paramount.

In the judgment of the Privy Council on the same Reference (6), Lord Haldane said, at page 595:

(1) 9 App. Cas. 117.
(2) 7 App. Cas. 96.
(3) [1899] A.C. 580.
(4) [1896] A.C. 348.
(5) 48 Can. S.C.R. 260.
(6) [1916] 1 A.C. 588.

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There is only one case, outside the heads enumerated in s. 91, in which the Dominion Parliament can legislate effectively as regards a province, and that is when the subject matter lies outside all the subject matters enumeratively entrusted to the province under sect. 92. *Russell* v. *The Queen* (1) is an instance of such a case.

It may be said that if the subject matter of the Dominion legislation here in question, when its true aspect and real purpose are considered, relates to public order, safety or morals, affects the body politic of the Dominion and is a matter of national concern, so that it can be supported under the general peace, order and good government provision of s. 91 without recourse to any of the enumerated heads, it is unnecessary and inadvisable to attempt to bring it under head No. 2. But while, as Lord Haldane said in *The Insurance Case* (2) at page 596, great caution must always be exercised in applying the well established principle that

> subjects which in one aspect and for one purpose fall within the jurisdiction of the provincial legislatures may in another aspect and for another purpose fall within Dominion legislative jurisdiction,

having regard to the warning of Lord Watson in the *Local Prohibition Case* (3), at pages 360-1, that

> the exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in s. 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in s. 92. To attach any other construction to the general power which, in supplement of its enumerated powers, is conferred upon the Parliament of Canada by s. 91 would, in their Lordships' opinion, not only be contrary to the intendment of the Act, but would practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest, upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in s. 92 upon which it might not legislate to the exclusion of the provincial legislatures,

(1) 7 App. Cas. 829. (2) [1916] L.A.C. 588.
(3) [1896] A.C. 348.

I think it is better that legislation such as that with which we are now dealing, which undoubtedly affects what would ordinarily be subject matters of provincial jurisdiction, should, if possible, be ascribed to one of the enumerated heads of s. 91. I prefer, therefore, to rest my opinion upholding its constitutional validity on the power of the Dominion Parliament to legislate for "the Regulation of Trade and Commerce" as well as on its power

to make laws for the peace, order and good government of Canada,

in regard to matters which, though not referable to any of the enumerated heads of s. 91, should, having regard to the aspect in which and the purpose for which they are dealt with, properly be held not to fall within any of the enumerated heads of s. 92—to "lie outside all the subject matters" thereby "entrusted to the province."

The carrying out of the Act now in question, as I have endeavoured to point out, will, in some of its phases, affect the inter-provincial trade and the foreign trade of Canada. It has to do with the general regulation of trade in necessaries of life throughout the Dominion. It would therefore seem to fall within the jurisdiction conferred by Head No. 2 as indicated in *Citizens Ins. Co.* v. *Parsons* (1), at pages 112-113.

No objection can successfully be founded upon the fact that the Board must exercise its powers from time to time in a particular province. *Colonial Building Association* v. *Attorney General of Quebec* (2). The necessity of such local action and regulation is perhaps the chief justification for the delegation to a

(1) 7 App. Cas. 96.

(2) 9 App. Cas. 157.

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Board or Commission of the power to define what shall be unfair profits and unreasonable and unjust prices. The unfairness of profits and the unreasonableness and injustice of prices, depends so largely on local conditions which vary from day to day and from place to place that Parliament could not itself deal with them by general legislation. Effective regulation of such matters can be accomplished only by some body such as the Board of Commerce endowed with the powers bestowed upon it and ready from time to time to deal promptly with the problems involved as they arise. Yet the power of Parliament to delegate its functions to the limited extent for which the Combines and Fair Prices Act provides has been challenged. We had occasion comparatively recently to consider and overrule a similar objection in *Re Gray* (1), at pp. 170, 175. Dealing with the power of a provincial legislature to confer on bodies of its own creation authority to make by-laws and regulations upon specific subjects and with the object of carrying an enactment of the legislature into effect, their Lordships of the Privy Council said in *Hodge* v. *The Queen* (2), at page 132:

> It is obvious that such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive, or absolutely fail. The very full and very elaborate judgment of the Court of Appeal contains abundance of precedents for this legislation entrusting a limited discretionary authority to others, and has many illustrations of its necessity and convenience. It was argued at the bar that a legislature committing important regulations to agents or delegates effaces itself. That is not so. It retains its powers intact, and can, whenever it pleases, destroy the agency it has created and set up another, or take the matter directly into its own hands. How far it shall seek the aid of subordinate agencies, and how long it shall continue them, are matters for each legislature, and not for courts of law, to decide.

(1) 57 Can. S.C.R. 150. (2) 9 App. Cas. 117.

The Acts now under consideration involve no such abdication of legislative jurisdiction—no such abrogation of the power of one of the integral constituents of the legislature as was attempted in recent Manitoba legislation held *ultra vires* by the Judicial Committee in *Re the Initiative and Referendum Act* (1), where such a limited delegation of legislative functions as was sanctioned in the *Hodge Case* (2) again received their Lordships' approval.

However formidable may be the obstacles to the creation of a Dominion court of criminal jurisdiction presented by clause 27 of section 91 and clause 14 of section 92, of the B.N.A. Act, I see no valid objection to the constitution by our Parliament under s. 101 of a court to carry out the provisions of the Acts now before us designed for the regulation of trade and commerce; and the power to make an order such as that now under consideration, eliminating from it clauses (a) and (b) of the paragraph numbered 1, which are not supported, seems a reasonable and necessary jurisdiction to vest in such a body, in order that its administration may be effective. At all events, if Parliament is endowed with legislative jurisdiction to deal with the subject of profiteering under the head of "the regulation of trade and commerce" as a matter not substantially of local or provincial interest but affecting the well being, social, moral and economic, of the Dominion at large, there appears to be no tenable objection to its jurisdiction to confer on a court of its own creation power to restrain and prohibit contraventions of such regulations and restrictions, general or particular, within the purview of the statute, as it may be found necessary or proper to impose.

(1) [1919] A.C. 935, at page 945. (2) 9 App. Cas. 117.

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Again it is objected that the proposed order is rather a local regulation than a restraining order. I think not. It will impose a behest *nominatim* on a number of individuals, firms and corporations who were first cited to appear before the Board and whose dealings with the subject matter of such behest were investigated by the Board. It is just as much an order within the contemplation of s. 18 of the Combines and Fair Prices Act as it would be if it were one of several similar documents dealing separately with each of the parties to be enjoined.

No valid objection to the provision for making such an order a rule, order or decree of a provincial superior court has, in my opinion, been presented. The machinery of the provincial court is to be utilized for a Dominion purpose. The power of Parliament to require this to be done is distinctly affirmed in *Valin* v. *Langlois* (1), and the express approval by this court of the following passage from the work of the late Mr. Lefroy on Legislative Powers in Canada, at page 510, in *Re Vancini* (2), at page 626, puts it beyond questionhere.

> The Dominion Parliament can, in matters within its sphere, impose duties upon any subjects of the Dominion whether they be officials of provincial courts, other officials, or private citizens; and there is nothing in the British North America Act to raise a doubt about the power of the Dominion Parliament to impose new duties upon the existing provincial courts, or to give them new powers as to matters which do not come within the subjects assigned exclusively to the legislatures of the provinces, or to deprive them of jurisdiction over such matters.

The authorities on this feature of the case are collected and discussed in Mr. Justice Clement's work, at p. 531.

We are for these reasons of the opinion that the power of Parliament to confer the authority, to the existence of which the questions in the stated case are directed,

(1) 5 App. Cas. 90. (2) 34 Can. S.C.R. 621.

has not been successfully impugned and that the right of the Board of Commerce to make the proposed order, eliminating from it clauses (a) and (b) of the operative paragraph numbered 1, may be upheld as an exercise of authority validly bestowed under the jurisdiction of Parliament to make laws for "the regulation of trade and commerce" and for "the peace, order and good government of Canada," and, in so far as the findings in its recitals are concerned, possibly also under Dominion legislative jurisdiction over "The Criminal Law," although the investigation and the findings made thereon for the purpose of determining what are reasonable and just prices and of affording a foundation for an order prohibiting the making or taking of unfair profits and practices calculated to unfairly enhance costs or prices may not form part of a criminal cause or matter. *Rex* v. *Manchester Profiteering Committee* (1).

We would therefore answer both the questions of the stated case in the affirmative.

IDINGTON J.—This is claimed to be a stated case pursuant to section 32 of the Board of Commerce Act, which reads as follows:—

32. (1) The Board may, of its own notion, or upon the application of any party, and upon such security being given as it directs, or at the request of the Governor-in-Council, state a case, in writing, for the opinion of the Supreme Court of Canada upon any question which in the opinion of the Board, is a question of law or of jurisdiction.

(2) The Supreme Court of Canada shall hear and determine such question or questions of law arising thereon, and remit the matter to the Board with the opinion of the Court thereon.

(1) 36 Times L.R. 254.

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This section is in substance the same as that appearing in the Railway Act as section 55 thereof and is evidently taken therefrom.

The Board of Railway Commissioners in practice formulate a statement of facts which of course is binding upon us, and then submit the questions of law which they desire answered.

The party then appealing has charge of the conduct of the appeal, and same is argued out in a due and orderly manner, first by counsel for appellant and then by the counsel for respondent, as all appeals on a stated or special case submitted to this or any other appellate court have been heretofore treated.

The origin of such a mode of appeal need not be traced for many illustrations are to be found in various branches of both civil and criminal, and quasi-criminal, law.

The necessity for the statement of a concrete case seems to me to be almost self-evident, and at all events all relevant precedents I can find establish that.

It so happened that the Board of Commerce got seized of the idea that all it had to do was to submit questions to this court for its opinion relative to mere abstract points raised upon the construction of some sections of the Combines and Fair Prices Act, without stating any concrete case. And half a dozen such were presented.

I was applied to as Judge in Chambers and refused to recognize such right by making any formal order but suggested to the Registrar that he had better set the matter down to be brought under the notice of the full court at its then approaching sittings, and he did so.

Upon its coming up there, it developed that there had been a number of questions raised by parties who had been before the Board.

I insisted, for my part, that unless and until a stated concrete case was made in accord with the settled practice of the Railway Board, there should not be a hearing granted.

There appeared counsel for the Board of Commerce, which surprised me somewhat, and for the Attorney General for Canada and for a number of the parties concerned.

A long discussion ensued resulting in the matter being left to all those so concerned to try and agree upon the selection of a case upon which argument could properly take place.

The case of the Ottawa Clothiers had been mentioned in the course of said discussion, as one in which all the questions desired to be raised had been therein raised before the Board, and another was suggested as equally important.

Previously to said sitting of this court, I had given leave to appeal in a concrete case from Winnipeg which I suggested might bring up much that it was desired to have this court pass upon.

The net result of the foregoing attempt to frame a suitable case, consisted of the so-called stated case submitted by the Board in the first place, with a brief typewritten memo, which was inserted therein, and after elaborate argument of counsel for all parties appearing before us, and due consideration of the non-observance of our demand, for a concrete case, it was determined by us to insist thereon. The decision in *Re the County Council of Cardigan* (1), was pointed to as a guide.

(1) 54 J.P. 792.

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The result is now before us in an alleged stated case in which instead of half a dozen questions as previously of a purely abstract character, we have presented to us to be answered, two questions relative to the jurisdiction to make a proposed order based upon what is alleged to be the finding of facts.

The latter are referred to as follows:—

All evidence elicited was given subject to the jurisdiction of the Board to make any order consequent upon the inquiry and to the power of the Parliament of Canada to enact the legislation under which the inquiry was proceeding, counsel for the clothiers having formally protested such jurisdiction. At the conclusion of the sittings argument was heard on behalf of the clothiers and as well on behalf of the public, whereafter the Board took into consideration all matters, including the protest as to jurisdiction. The Board, upon the evidence before it, found as matters of fact the matters set forth in the recitals to the draft order which is Schedule "B."

The recital thus referred to is as follows:—

It appearing that heretofore and since the 7th day of July, 1919, sales by retail of the commodities Men's Ready-Made and Partly Ready-Made Suits and Overcoats (hereinafter referred to as "commodities") purchased by the retailer thereof at a cost of thirty dollars or under have, as a practice, been made within the city of Ottawa by the respective persons, firms and corporations hereinafter named (all being retailers of clothing within said city) at the same percentage of gross profit or margin to the retailer as the commodities purchased by him or them at a greater cost than thirty dollars, and that said persons, firms and corporations respectively have, since said 7th day of July, 1919, made and taken unfair profits upon sales of such commodities so purchased at a cost of thirty dollars or under and have not offered their respective stocks-in-trade of such immediately hereinbefore mentioned commodities (the same being necessaries of life as defined by section 16 of the Combines and Fair Prices Act, 1919), at prices not higher than were reasonable and just, the said unfair profits being profits greater than those hereinafter indicated as fair profits; and it further appearing that the conditions mentioned are not such as to call for prosecution, because the making or taking of such unfair profits was not in deliberate breach of or non-compliance with section 17 of the Combines and Fair Prices Act, 1919, but was the result of the existence of a long standing practice of marking selling prices upon the basis of addition of arbitrary percentages for gross profit or margin to cost, which practice has been almost universal throughout Canada, was fair at the time of instituting it, but has become unfair and ought

to have been varied by reduction of such percentages in consequence of continued substantial increases in basic costs causing an increased yield of profit, in terms of money, net as well as gross or margin; wherefrom the hereinbefore indicated offences against said section 17 of the Combines and Fair Prices Act, 1919, resulted.

Then follows the opinion of the Board thereon.

I do not consider this, which deals with or is made to represent the result of an inquiry by the Board into the respective courses of business pursued by thirty-six different persons or firms or corporate companies carrying on business in Ottawa and are grouped together in one order, is either such a concrete case as was demanded or presented by way of an appeal as such a case should be.

The Board frames and presents the order.

By section 3 of the Combines and Fair Prices Act, 1919, it is declared that the Board

shall have the general administration of this Act which shall be read and constructed as one with The Board of Commerce Act.

Section 18 of the same Act, which is the immediate authority upon which the proposed order must rest, if at all valid, by subsection (1) thereof provides as follows:—

18. (1) The Board is empowered and directed to inquire into and to restrain and prohibit,—

(*a*) any breach or non-observance of any provision of this Act;

(*b*) the making or taking of unfair profits for or upon the holding or disposition of necessaries of life;

(*c*) all such practices with respect to the holding or disposition of necessaries of life, as, in the opinion of the Board are designed or calculated to unfairly enhance the cost or price of such necessaries of life.

The only concrete facts presented to us are those above recited, presumably the result of the exercise of the powers and discharge of duties above set forth.

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There is no appellant named or indicated unless from the fact that a member of the Board appeared as counsel for the Attorney General for the Dominion, and opened the argument before us supporting the action of the Board.

On the application I have referred to, first coming before us, the Board was specifically represented by counsel for it; but none appeared on the last argument herein though the Board of Commerce Act, by subsection 7 specially provides for the Board being heard by counsel or otherwise on appeals such as this. Presumably this provision was made to overcome the possible effect of the case of *Smith* v. *Butler* (1), where the court held that the justices could not be heard in support of an appeal stated by them.

Such a case so presented without an appellant, I respectfully submit, should be dismissed.

The majority of the court hold that notwithstanding all the foregoing peculiar features of this case, as an appeal on a stated case, we must answer the questions submitted.

Therefore, bowing to their opinion, I will proceed to deal therewith.

On the first argument the leading counsel who presented the case in its then condition seemed to rest the exercise of power in question as based upon the power of the Dominion Parliament over criminal law, and his junior as if based upon its power over trade and commerce.

Counsel respectively for the firms or parties then concerned in the exercise of the power and for the Province of Alberta, each denying its existence, argued

(1) 16 Q.B.D. 349.

ably that we must look at the general purview of the whole Act to determine its character and by doing so urged that it could not be called legislation within the powers assigned Parliament relative to criminal law and hence must be held as an Act dealing with property and civil rights.

The elimination from the case, as first stated, of four of the questions thereby submitted has rendered much of the argument then considered necessary inapplicable to the case as it now stands before us.

The proposed order rests upon subsections 1 and 2 of section 18, of which subsection 1 is above quoted, and the said subsection 2 is as follows:—

(2) For the purposes of this Part of this Act, an unfair profit shall be deemed to have been made when, pursuant to and after the exercise of its powers by this Act conferred, the Board shall declare an unfair profit to have been made, and an unfair enhancement of cost or price shall be such enhancement as has resulted from the making of an unfair profit.

Indeed this sub-section (2) in the last analysis is that upon which it must rest.

Assuming the ancient laws against forestalling, regrating and engrossing, which had long been treated as obsolete, and, being considered unsuited to a free people, were finally repealed in England by 7 & 8 Vict., ch. 24, yet may be existent in older parts of Canada or re-enacted as part of our criminal law, how can that help to maintain said section as being within the power of the Dominion Parliament which for its legislative authority must act within the power conferred by the British North America Act?

It seems to me that the enactment of section 22 of the Combines and Fair Prices Act, coupled with much else therein, must have been passed by reason of an

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oversight of the limitations in the British North America Act, otherwise we would not be confronted with so much therein as seems, to say the least, of very questionable authority.

I cannot imagine that Parliament really intended to invade the rights secured to the provinces to the extent that some of these enactments (of which section 18 is one) clearly do.

Section 91 of the British North America Act provided as follows:—

91. It shall be lawful for the Queen, by and with the advice and consent of the House of Commons, to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces; and for greater certainty, but not so as to restrict the generality of the foregoing terms of this section, it is hereby declared that (notwithstanding anything in this Act) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated; that is to say:—

Item 27 of the enumeration reads as follows:—

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the procedure in criminal matters.

By section 92 it is enacted as follows:—

92. In each province the legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, that is to say,—

Item 14 of this enumeration reads as follows:—

14. The administration of justice in the province, including the constitution, maintenance, and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts.

The Board is constituted a court of record. Its acts must be taken to be those of a court.

How can such a court, declared by the above quoted section 3 of the Combines and Fair Prices Act to have

the general administration of that Act which is now in question, be held not to offend against these items, 27 of section 91, and 14 of section 92?

The constitution of courts of criminal jurisdiction

is expressly excluded by said item 27, and

the administration of justice in the province

is, by the enacting part of section 92 and said item 14 thereof handed over exclusively to the legislature thereof.

How can the Board claim in face thereof any right to administer what it urges is criminal law?

The administration of procedure in criminal law is not by a single line or letter assigned to the Dominion.

All the power that is conferred on Parliament relative to procedure is to define the mode of procedure to be followed by the provincial courts in the administration of criminal law.

Included in procedure, as heretofore interpreted, is the law of evidence which Parliament may declare.

It has never occurred to any one hitherto, that the conception of what would constitute relevant evidence should be something evolved by a court, constituted by Parliament first to inquire and declare what was a reasonable course of conduct on the part of any one of the classes of business men falling within the provisions of the Combines and Fair Prices Act, and then to warn, by virtue of section 18 thereof, those concerned where and how the line to regulate such course of conduct should be drawn in future; and then to inquire, after such warning had been given, whether any of those so warned had transgressed; and then, if any one found by the inquisition of the Board or its appointed examiners under section 19, by means of examining the accused, his employees and books, to

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have transgressed, the offender so found guilty may be handed over to the consideration of the Attorney General for the Province who, as well as the offenders, would be bound in duty duly to observe, under section 33 of the Board of Commerce Act, such findings of fact.

That section by sub-section 3 thereof provides as follows:—

> The finding or determination of the Board upon any question of fact within its jurisdiction shall be binding and conclusive.

Such is a fair outline of this new method of defining what may become evidence, and hence legislation within the meaning of item 27 of section 91 of the British North America Act relative to what is covered by the phrase therein

> but including the procedure in criminal matters.

There is no other ground upon which, in a strictly legal sense, such provision can be upheld, than as falling within this reservation relative to matters of procedure.

I submit respectfully that the closest examination, or most liberal interpretation, of these two items, 27 in section 91, and its counterpart in item 14 in section 92, of the British North America Act, preclude the possibility of making out of them anything which can maintain such a mixture of substantive "criminal law," and law including the procedure in criminal matters, consistent with a due observance of the exclusion of power over

> the constitution of courts of criminal jurisdiction

given by item 14 of section 92 to the provincial legislatures, or in any way to support or justify such legislation as in said section 18 of the Combines and Fair Prices Act, on which ultimately the proposed order must rest.

To do it justice the Board, or counsel for the Attorney General, failed to attempt to put forward such a direct method of dealing with the matter, though the section on which its proposed order must rest, for a basis, necessarily involves all I have set forth in light of the whole of the legislation in question.

The method of meeting so obvious a difficulty was to suggest that as relative to criminal law it was maintainable as ancillary thereto.

The British North America Act leave no room for any such distinction. And the same sort of argument was put forward in the case of *Montreal Street Railway Co.* v. *Montreal* (1), but rejected by a majority of this court, and we were upheld by the court above in the appeal taken therefrom by the decision in *City of Montreal* v. *Montreal Street Rly. Co.* (2).

That decision, of course, stands as a declaration of principle for much more than is merely relative to what was directly involved therein. I, therefore, rely upon its adoption of a principle applicable in other regards, as well as upon its apt disposition of the ancillary argument for which there was much more reason for its application therein than there is herein.

In default of that argument maintaining the jurisdiction of the Board, counsel falls back upon the provision in section 101 of the British North America Act, which reads as follows:—

> 101. The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance, and organization of a General Court of Appeal for Canada, and for the establishment of any additional courts for the better administration of the laws of Canada.

(1) 43 Can. S.C.R. 197.

(2) [1912] A.C. 333.

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By virtue of that section this court was constituted; and, by virtue of the last part thereof, the Court of Exchequer and the Board of Railway Commissioners were created.

Each of these lastly mentioned courts was constituted as an additional court for the better administration of the laws of Canada, and in no way, in actual practice, did they interfere with provincial rights save when straining the power given, as in the Montreal case just cited.

It is conceivable that within the powers thus assigned the Dominion Parliament, it might

for the better administration of the laws of Canada

i.e., laws enacted by that Parliament, create many such courts.

It is inconceivable to me how, when the relative powers of Parliament and provincial legislatures are so tersely dealt with and definitely expressed, as they are by the items of sections 91 and 92 which I have already quoted, Parliament can properly constitute any additional courts for the purpose in question herein.

In relation to many of the subjects enumerated in section 91 over which the Dominion Parliament is given plenary powers, the constitution by it of additional courts is quite conceivable, as within the scope of section 101, and is also clearly necessarily so, in relation to the government of territories not given a provincial legislature or the status of a province, and all implied therein.

But whilst the administration of justice thereunder may rest with the Dominion Parliament, how can the constitution of courts of criminal jurisdiction or any part of the administration of justice relative thereto

be assigned by Parliament in anything relative to the criminal law when so expressly excluded on the one hand regarding the constitution of courts, and all that which is relative to the administration of justice, so far as regards the constitution of courts of criminal jurisdiction is, on the other hand, so expressly assigned to the respective provincial legislatures.

Yet these enactments now in question, presume to hand over the greater part of the administration of what is claimed to be criminal law to the Board of Commerce. Not only that but do it in such a manner as is quite repugnant to the ideals of British law and justice, as well exemplified in the recent case of *Law* v. *Chartered Institute* (1).

This enactment which we have under consideration constitutes the Board of Commerce the sole investigator, the sole prosecutor, and the judge to determine the facts it has discovered, or imagines it has discovered, and only when the Board deems proper accused is to be handed over to have the formal part of rendering judgment duly executed. And, as if to let nothing escape its grasp, the Board has delegated to it the power to make further regulations as set forth below.

I suspect that the clear separation of the legislative power from the administration of its products in relation to criminal law was not born of accident but design, on the part of the astute men who framed the British North America Act. Many obvious reasons existed for doing so. The substantial racial differences between Upper and Lower Canada (now respectively Ontario and Quebec) must never be forgotten if justice is to be done in operating the British North America Act.

(1) [1919] 2 Ch. 276.

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Then failing to find that source of jurisdiction available, the argument in support of the proposed order fell back upon the old forlorn hope, so many times tried, unsuccessfully, upon this court and the court above, of item 2 of section 91 of the British North America Act, which empowers Parliament to deal with "the regulation of trade and commerce."

The scope and purpose of this power has so often been referred to in numerous cases, that I hardly think it necessary to repeat what has so often been said in that regard.

I doubt if it has ever been heretofore relied upon in support of such an extravagant claim as this put forward herein.

To regulate the prices charged in the tailor shop, or the corner grocery, needs a power which has not only the limited powers of Parliament but also all that is comprehended in the item 13 of section 92 of the British North America Act, which gives exclusively to provincial legislatures the power to make laws in relation to "property and civil rights in the province."

What is this power so assigned to each of the provincial legislatures worth, if it can be effectually wiped out by the Dominion Parliament enacting a so-called criminal law and supplementing it by such legislation as before us, including the large delegation of legislative power given by section 39 of the Board of Commerce Act which reads as follows:—

> 39. Any rule, regulation, order or decision of the Board shall, when published by the Board, or by the leave of the Board, for three weeks in the *Canada Gazette*, and while the same remains in force, have the like effect as if enacted in this Act, and all courts shall take judicial notice thereof.

Is there any sumptuary law or socialistic conception of organized society which could not be made to fall within the power of Parliament, by the same process of reasoning as must be resorted to, in order to maintain the right of the Board to make the proposed order?

Our Confederation Act was not intended to be a mere sham, but an instrument of government intended to assign to the provincial legislatures some absolute rights, and of these none were supposed to be more precious than those over property and civil rights.

The case of *Citizen's Ins. Co.* v. *Parsons* (1), at an early date in our system of Federal Government decided in effect, by the principle expressly and impliedly adopted therein, much more than appears on the superficial aspects thereof relative to the contractual powers falling within civil rights. Its implications have been maintained in many well known ways by numerous decisions needless to cite.

The case of *Vancini* v. *The King* (2), so much relied on, not only binds us but in the result reached I fully agree; yet I fail to see how that or any of the decisions in the cases cited on behalf of the Board's power, at all help to support its pretension in question herein; unless that in the case of *Geller* v. *Loughrin* (3), which does not bind us. If there was much resemblance between the legislation in question in that case and this, I might find it necessary to say something, but I fail to find any close resemblance.

Indeed there is, I venture to say, no judicial authority maintaining such legislation.

(1) 7 App. Cas. 96. (2) 34 Can. S.C.R. 621.
(3) 24 Ont. L.R. 18.

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The counsel for the Attorney General of the Dominion in his opening on the first argument, referred to certain remarks made by me in the case of *Weidman* v. *Schragg* (1), at page 22, and repeats the reference in his supplemental factum as if supporting his contention. I was therein attempting to properly appreciate the scope of section 498 of the Criminal Code as then in force. I still adhere to all I therein expressed, not only in its immediate bearing upon the issue presented for consideration therein, but, if I may be permitted to say so, in a much wider sense lying within the power of Parliament to deal effectively with, not only by way of the criminal law but also that bearing upon its power over patents and of incorporating companies and the limitations it can impose relative to their operative results.

I fail to see, however, that what I had there in mind (and beyond, relative to which I did not give expression of judicial opinion) can in any way help to maintain such legislation as before use.

Parliament has, in its residual power for the "peace, order and good government of Canada," both legislatively and administratively, a plenary power over territory not yet given the status of a province.

Yet default satisfactory authority for the maintenance of the remarkable legislation, now in question in relation to those dwelling in one of the provinces, the residual power of Parliament was invoked.

Whatever may be said and must be admitted, relative to the proper exercise of any of the enumerated powers conferred on Parliament being likely to touch incidentally and necessarily upon property and civil rights within a province, there the power to do so ends.

(1) 46 Can. S.C.R. 1.

I deny its existence in the residual power of Parliament, save in the extreme necessity begotten of war conditions, or in manifold ways that do not touch provincial rights.

The war had ended when the legislation now in question was enacted.

It is one of the many curious things relative to these Acts that there seems so much difficulty on the part of those who ought to know in assigning them, or parts of them, to the exact power that is sought to be exercised thereby.

It generally happens that amendments to the criminal law are presented as such and the clear purposes and powers had in view are, therefore, thereby well understood.

In this instance, if so designed, those sections which form Part 2 of the Combines and Fair Prices Act, save section 20 expressly excluded, I respectfully submit should have found a place in the chapter of important amendments to the Criminal Code passed in the same session, assented to same day, and forming the very next chapter of the statutes. And, not having done so, coupled with the curious blending of that which is *intra vires* with what is *ultra vires* of Parliament, gives rise to many questions we have not to answer, yet renders any consideration of these we are asked to answer rather confusing.

Counsel for Alberta submits a recent decision in *Rex* v. *Manchester Profiteering Committee* (1), upon an analogous statute in England, where it was held that the legislation there in question, though dealing with the fixing of prices and affixing penalties for breaches

(1) 36 Times L.R. 254.

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of the order determining same, was not criminal law, is a very important one when we apply it to what may be possible for provincial legislatures to enact within their powers over property and civil rights.

In that connection it tends to demonstrate that all that is proposed by the form of order presented herein is quite within the powers of the provincial legislatures to enact and hence not within any of the powers assigned to the Dominion.

However that may be we are confronted with section 22 of the Combines and Fair Prices Act which enacts as follows:—

22. (1) Any person who contravenes or fails to observe any of the provisions of this Part of this Act other than section twenty shall be guilty of an indictable offence and liable upon indictment or upon summary conviction under Part XV of the Criminal Code to a penalty not exceeding five thousand dollars, or to imprisonment for any term not exceeding two years or to both fine and imprisonment as specified, and any director or officer of any company or corporation who assents to or acquiesces in the contravention or non-observance by such company or corporation of any of the said provisions shall be guilty of such offence personally and cumulatively with his company or corporation and with his co-directors or associate officers.

(2) For the purposes of the trial of any indictment for any offence against this part of this Act, section five hundred and eighty-one of the Criminal Code, authorizing speedy trials without juries, shall apply.

There cannot be a doubt surely of the intention that this enactment should be held part of the criminal law however absurd some of the consequences may be.

For example, under section 18, if the Board failed to observe any of its provisions, it must be held liable to be indicted and punished according to the terms of the enactment.

Such like complications may arise in applying section 22 to other sections, save section 20, in same part 2 of the Act.

This sort of legislation is characteristic of much more in these two Acts to be administered by the Board of Commerce.

Fortunately we have only to pass upon section 18 and answer one question, if concluding, as I do, for the reasons assigned above, that it is *ultra vires* the Dominion Parliament and infringes upon the exclusive jurisdiction of provincial legislatures, over property and civil rights, and over the administration of justice in the province including

> the constitution, maintenance and organization of provincial courts both of civil and of criminal jurisdiction

as above set forth.

Hence I say "No" in answer to the first question Has the Board lawful authority to make the order?

And, as an obvious consequence of that answer, the second needs no answer.

As I am unable to find an appellant who has prosecuted this so-called appeal, I cannot suggest imperatively who should pay the costs.

The Attorney General for the Dominion had the same right, as of course, to intervene and be heard in argument on so grave a constitutional question, as has always been accorded by this court, in the like cases, to him and provincial attorneys general.

But I cannot in the case before us hold him to have been the appellant.

This is another illustration of how futile this whole proceeding has been, and how far it has fallen short of what is required in a stated case.

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To illustrate further what I have advanced I imagine the order proposed might be held quite valid if dealing with traders in Dawson City in the Yukon, over which Parliament has plenary power, but not when dealing with traders in Ottawa, which is part of the Province of Ontario.

DUFF J.—The scope of the authority arising under sec. 91-(2) of the B.N.A. Act has been much discussed. No precise definition of that authority has of course been given or even attempted; nevertheless, it has for 40 years been a settled doctrine that the words "regulation of trade and commerce" as they appear in that item cannot be read in the sense which would be ordinarily ascribed to them if they appeared alone and unaffected by a qualifying context. To adopt the language of Lord Hobhouse in the case of *The Bank of Toronto* v. *Lambe* (1) at page 586.

> it has been found absolutely necessary that the literal meaning of the words should be restricted in order to afford scope for powers which are given exclusively to the provincial legislatures,

and some definite limiting rules are deducible from the decided cases.

In the *Parsons Case* (2), it was held that

> this authority does not comprehend the power to regulate by legislation the contracts of a particular business or trade in a single province

the particular business or trade there under consideration being the business of fire insurance.

In *Hodge* v. *The Queen* (3), the authority given to the Provinces by item 9 of sec. 92 to make laws with respect to licenses for raising a revenue for provincial purposes was considered sufficient to enable a province

(1) 12 App. Cas. 575. (2) 7 App. Cas. 96.
(3) 9 App. Cas. 117.

to regulate within its own boundaries the manner in which a particular trade is to be carried on and in the judgment delivered upon the reference touching the validity of the Liquor License Act of 1883, commonly known as the McCarthy Act, it was held that the authority of the Dominion in relation to trade and commerce did not include authority to regulate a particular trade by a licensing system applicable to the whole Dominion. And again on the reference upon the subject of the Dominion Insurance Act in 1916, *Attorney General for Canada* v. *Attorney General of Alberta* (1), this decision was affirmed and it was decided that the Dominion Insurance Act professing to regulate the business of insurance by a single system of licensing governing the whole of Canada could not be supported as an exercise of the Dominion legislative power in relation to trade and commerce.

The decisions of the Judicial Committee in the two last-mentioned cases appear to have been the logical result of the decision in *Hodge's Case* (2), for although it is quite true that after all proper modifications of the natural meaning of the words used in the respective enumerations in secs. 91 and 92 have been made (by a comparison of the enumerations with each other in accordance with the well known doctrine in *Parson's Case* (3) at pages 108-9, there must still be considerable overlapping of the domains ascribed to the Dominion and the Provinces respectively by these enumerations; this is not because the provinces are authorized by sec. 92 to trench upon the subject matters strictly comprised within the enumerated items of sec. 91 (to pass laws for example which could be described as "railway

(1) [1916] 1 A.C. 588. (2) 9 App. Cas. 117.
(3) 7 App. Cas. 96.

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legislation strictly so called," *Canadian Pacific Rly. Co.* v. *Bonsecours* (1), or legislation dealing with the subject matter of fisheries or a bankruptcy law or a copyright law, *Attorney General for Canada* v. *Attorney General for Ontario* (2)), but because the Dominion for the purpose of giving effect to a legislative scheme properly falling within the authority of one or more of the enumerated heads of sec. 91 may in order to prevent the defeat of the scheme enact proper ancillary provisions upon matters falling under some of the heads of sec. 92, *Attorney General for Canada* v. *Attorney General of Ontario* (2).

It is, of course, an important principle that legislation which for one aspect and for one purpose falls within the authority conferred by sec. 92, may in another aspect and for another purpose fall within the authority conferred by sec. 91, but where the question concerns the scope of the enumerated heads of sec. 91 it is in the sense just indicated that this principle must be understood. It cannot be applied in such a way, as Lord Herschell said in the decision in the Fisheries case just referred to, as to enable a provincial legislature to legislate in respect of the matters which fall strictly within one of the specified classes enumerated in sec. 91. Therefore the decision in *Hodge's Case* (3), appears to have involved the conclusion that the kind of regulation which the Judicial Committee there held to be competent to a provincial legislature, was not the kind of regulation which is exclusively committed to the Dominion Parliament by the second enumerated head of sec. 91; and it would only be a corrollary of this to hold that the Dominion could not

(1) [1899] A.C. at page 372. (2) [1898] A.C. 700, at page 715.
(3) 9 App. Cas. 117.

by enacting a law professing to put into effect the same kind of regulation in each province, legitimately appropriate a field belonging to one of the enumerated specific classes of sec. 92; and this is what was decided upon the Reference touching the validity of the McCarthy Act. In *Attorney General for Canada* v. *Attorney General of Alberta* (1), Lord Haldane speaking for the Judicial Committee said:—

> But in *Hodge* v. *The Queen* (2), the Judicial Committee had no difficulty in coming to the conclusion that the local licensing system which the Ontario statute sought to set up was within provincial powers. It was only the converse of this proposition to hold, as was done subsequently by this Board though without giving reasons, that the Dominion licensing statute known as the McCarthy Act, which sought to establish a local licensing system for the liquor traffic throughout Canada, was beyond the powers conferred on the Dominion Parliament by s. 91.

By parity of reasoning it seems to follow as a result of *Parson's Case* (3) that legislation regulating the contracts of a particular business or trade is not the kind of regulation which is exclusively committed to Parliament by that provision of sec. 91 now under discussion and consequently that it is not competent to the Dominion to regulate such contracts in each Province by legislation applicable to all of the provinces.

Again in the *Montreal Street Railway Case* (4), a Dominion enactment purporting to regulate local railways in respect of through traffic, that is to say traffic passing from a Dominion to a local line and *vice versâ*, was held to be *ultra vires* and it was decided that the authority conferred by item No. 2 of sec. 91 could not be legitimately exercised in regulating the management of "local works or undertakings" of the kind committed to the exclusive jurisdiction of the province by item No. 10 of sec. 92.

(1) [1916] A.C. 588, at p. 596.
(2) 9 App. Cas. 117.
(3) 7 App. Cas. 96.
(4) [1912] A.C. 333.

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In *Parson's Case* (1), at pages 112 and 113 appears the well known elucidation of the language of No. 2 of sec. 91 by Sir Montague Smith. In the *Montreal Street Railway Case* (2) at page 344, the substance of this passage is adopted by the Judicial Committee; and again in *John Deere Plow Co.* v. *Wharton* (3), at page 340, Lord Haldane speaking for the Judicial Committee said:—

> Their Lordships find themselves in agreement with the interpretation put by the Judicial Committee in *Citizens Insurance Co.* v. *Parsons* (1), at pages 112 and 113, on head 2 of s. 91, which confers exclusive power on the Dominion Parliament to make laws regulating trade.

Turning then to the exposition in *Parson's Case* (1), thus adopted in 1912 and 1915, we find (in addition to the negative proposition that the authority in question does not comprehend the power to enact minute regulations in respect of a particular trade), 1st that the context affords an indication that "regulations relating to general trade and commerce" were in the mind of the legislature, and 2nd that matters embraced by these words would include

> political arrangements in regard to trade requiring the sanction of Parliament; regulation of trade in matters of interprovincial concern

and possibly

> general regulation of trade affecting the whole Dominion.

It is not easy to ascribe a precise meaning to the words "general trade and commerce" but the passage seems to imply that the words "trade and commerce" are to be read conjunctively or at all events that the word "trade" takes on a special colour and significance from its association with the word "commerce"; and whatever be the precise significance of the word

(1) 7 App. Cas. 96. (2) [1912] A.C. 333.
(3) [1915] A.C. 330.

"general" we are at least able to affirm in consequence of the decisions already mentioned that it excludes regulations such as those which were in question in *Hodge's Case* (1), in the McCarthy Act reference, in *Parson's Case* (2), and in the *Montreal Street Railway Case* (3). To borrow a phrase used arguendo on the Liquor License appeal, *Attorney General of Ontario* v. *Attorney General for Canada* "general" in this passage means

> general not as including all particulars but general as distinguished from some particulars.

In the *Montreal Street Railway Case* (3), at page 344, it was laid down in effect that the authority to deal with trade and commerce ought not to be so construed and applied as to enable the Parliament of Canada to make laws applicable to the whole Dominion in relation to matters which in each province are substantially of local or private interest and in particular in relation to matters which in each province are comprehended within the subject matters assigned to the province by No. 10 of sec. 92, viz., "local works and undertakings."

In addition to these negative and limiting rules a recent decision, *Wharton's Case* (4), affords an illuminating example of the application of the considerations mentioned in *Parson's Case* (2). It was there held that companies incorporated under the residuary power arising under sec. 91, having the status of corporations throughout the Dominion generally might properly be subjects of regulation under No. 2 of sec. 91 in the sense that Parliament in the exercise of the

(1) 9 App. Cas. 11.
(2) 7 App. Cas. 96.
(3) [1912] A.C. 333.
(4) [1915] A.C. 330.

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authority thereby conferred might prescribe the extent to which such companies should be entitled to trade in any of the provinces. That is entirely consistent with the proposition laid down in *Parson's Case* (1), that the authority of Parliament under the heading mentioned is an authority to pass regulations in relation to "general" trade and commerce. For the regulation in question in *Wharton's Case* (2), was not a regulation relating to any particular kind of trade or business, but a regulation touching the trading powers of all Dominion Companies engaged in any kind of business and applying to all such companies alike and thus at least potentially affecting Dominion trade and commerce in general through one of its most important instrumentalities.

Coming to the consideration of the Combines and Fair Prices Act, and particularly section 18 of that Act under which the order in dispute has been made. The jurisdiction of the Board under this section falls broadly into two sub-divisions, first the jurisdiction to make orders prohibiting the accumulation of articles to which the statute applies or the withholding from sale at reasonable prices of any such articles in excess of the amount reasonably required for domestic purposes, or for the ordinary purposes of business, and secondly the jurisdiction to regulate profits; that is to say to declare what constitutes an unfair profit upon the holding or disposition of such articles, to prohibit the making or taking of such profits and to prohibit any practice which in the opinion of the Board has a tendency to enhance the cost of such articles, or the profits rising from the holding or the disposition of them, or the price of them.

(1) 7 App. Cas. 96. (2) [1915] A.C. 330.

As regards the first head of jurisdiction, the authority of the Board extends to traders and non-traders alike, to persons accumulating by means of purchase or by means of production, to articles accumulated whether by means of production or otherwise, for domestic use or for use for the ordinary purposes of business. For example it applies to accumulations by the house-holder of articles of food produced by the house-holder himself, the small farmer's pork and butter, as well as to his cordwood. It applies to the stock of coal accumulated by a railway or shipping company, or of coal or coke by a gas company or a smelting company, as well as to the coal accumulated by a coal mining company or the gas produced by a gas company; to the dairyman's as well as to the rancher's herd.

In so far as the Act authorizes the Board of Commerce to compel persons who are not engaged in trade to dispose of their property subject to conditions fixed by the Board and persons who are traders to dispose of property in respect of which they are not engaged in trade, (the coal of the railway company or of the gas company, the dairyman's herd for example), I have not a little difficulty in classifying it as an enactment relating to the matters comprised within section 91-(2), upon any fair construction of the words "regulation of Trade and Commerce." It is legislation effecting trade and commerce no doubt, but I am unable to distinguish such an enactment from an enactment authorizing a Board established by Parliament to take over such property on terms to be fixed by the Board and to dispose of it itself. Such compulsory enactments seem to be enactments on the subject

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of the rights of property, 92-(13) and "local undertakings," 92-(10) rather than enactments in regulation of trade and commerce.

Turning now to the authority vested in the Board by section 18, in relation to profits and prices. The provisions of section 18 on this subject appear to be obnoxious to the principles laid down in the passages referred to in *Parson's Case* (1), *the Montreal Street Railway Case* (2), and the *Wharton Case* (3). The authority given to the Board is an authority to prohibit the making or taking of unfair profits upon the holding or disposition of any articles to which the statute applies, and the section provides,

> that an unfair profit shall be deemed to have been made, when the Board shall declare an unfair profit to be made.

It is thus left to the Board to make orders affecting individual holders or traders, to fix the terms upon which they are required to dispose of articles withheld from disposition or held for disposition, and such terms the Board is not required to fix by any general regulation, but may, and in the normal course would, fix them with reference to the circumstances of a particular case. The fixing of the terms of disposition by reference to the prohibition against unfair profits might well result in great disparity between the prices charged for the same article by different traders. The creation of an authority endowed with such powers of fixing the terms of contracts in relation to specific articles appears to involve an interpretation of the words, "regulation of trade and commerce," much more comprehensive than anything contemplated by the decisions and judgments referred to

(1) 7 App. Cas. 96. (2) [1912] A.C. 333.
(3) [1915] A.C. 330.

above. I have indicated the principle which in my opinion is deducible from *Parson's Case* (1), namely that section 91-(2) does not authorize an enactment by the Dominion Parliament regulating in each of the provinces the terms of the contracts of a particular business or trade, for the reason (put very broadly) that such legislation involves an interposition in the transactions of individuals in the provinces, within the sphere of

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not contemplated by section 91-(2). Legislation, for example, imposing upon the trade in ready-made clothing throughout Canada, the prohibitions put into force by the order out of which this reference arises would, if my view of the effect of *Parson's Case* (1) be the right view, pass beyond the scope of the authority given in 91-(2); an enactment, that is to say, by the Dominion Parliament in the precise words of the order now in question could not be supported under that head. I cannot discover any principle consistent with these conclusions, upon which an enactment delegating to a commission the authority to regulate the terms of particular contracts of individual traders in a specified commodity according to the views of the Board as to what may be fair between the individual trader and the public in each transaction, can be sustained as an exercise of that power; and if such legislation could not be supported when the subject dealt with is a single commodity, or the trade in a single commodity, or a single group of commodities, how can jurisdiction be acquired so to

(1) 7 App. Cas. 96.

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legislate by extending the scope of the legislation and bringing a large number of specified trades or commodities within its sweep? Every consideration which can be invoked in support of the view that the authority to regulate by general regulations of uniform application the contracts of a trade in one commodity, does not fall within section 91-(2), can properly be brought to bear with I think increased force in impeaching legislation of the character now in question.

The point may be illustrated by reference to the provincial jurisdiction concerning Local Works and Undertakings. The power given to the Board by section 18, is a power to interfere with the management of local undertakings in respect of all the matters mentioned, accumulation, withholding from sale, making and taking profits, from holding or selling, prices, cost, and practices affecting prices and cost. The authority extends to such undertakings for example, as coal mines and gas works. Electricity does not fall within the definition of section 16, but could I think be brought within the jurisdiction of the Board by a regulation passed under that section. Section 19 shows that such undertakings are within the contemplation of section 18, and in *Union Colliery Co.* v. *Brydon* (1), at page 585, it was laid down that coal mines are local undertakings within 92-(10).

It is necessary to observe that we are not dealing with a statute clearly within one of the enumerated heads of section 91, and only incidentally affecting local undertakings, or other matters committed to the province. The normal operation of section 18, being such as I have pointed out, namely through the instrumentality of orders made by the Board directly

(1) [1899] A.C. 580.

against individuals and particular undertakings, and based upon conclusions derived from a consideration of the circumstances of each particular case, it becomes plain that what is contemplated is a direct interference by the Board, in respect of the matters committed to its jurisdiction, in the management of such undertakings, the property held in connection with them and the contracts made by their proprietors. Let us take as instances, coal mines and gas works. The authority given to the Board to fix the rate of profit, to prohibit accumulation beyond the amount which in the opinion of the Board may reasonably be required for the purposes of the business, to prohibit practices which in the opinion of the Board enhances costs or profits, is essentially an authority to interfere with the management of undertaking A, undertaking B, and undertaking C, notwithstanding that the authority is given in general terms, and therefore the legislation creating that authority is not legislation merely affecting such undertakings but legislation in relation to such undertakings; *Canadian Pacific Railway Co.* v. *Bonescours* (1), at page 372; *Montreal* v. *Montreal Street Ry. Co.* (2) at page 346.

It may be conceded that while section 18 could in its very terms be validly enacted by a provincial legislature, the authority reposed in a Commission created by such a legislature, would not of course extend beyond the ambit of authority committed to the legislature itself and consequently such a Commission would not acquire power to deal with matters belonging to the subjects of foreign trade, inter-provincial trade, and the regulating of the management of Dominion undertakings and beyond the legitimate

(1) [1899] A.C. 367. (2) [1912] A.C. 333.

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scope of the legislative activities of the province; but it does not follow because the Dominion could alone deal with these last mentioned matters it is itself authorized to enter upon fields exclusively reserved for the provinces, in order to carry out a legislative design necessarily incomplete without legislation on matters so exclusively reserved; co-operation between the Dominion and the provinces may be necessary to attain the ends desired by the legislators and such co-operation is of course not unknown and has indeed in some cases been expressly provided for in Dominion legislation, see for example 9 & 10 Geo. V., chapter 68, section 373, sub-section 6.

Having regard then to the scope of section 18, the authority conferred upon the Board to interfere with the proprietary rights of producers, holders and consumers of any of the articles to which the Act applies, and the authority to interfere with the management of local works and undertakings, and to prescribe the conditions of contracts relating to such articles and to the manner in which the Act takes effect, I conclude that it is not an enactment in relation to trade and commerce within section 91-(2).

The second question is whether section 18 can be sustained as an exercise of the power of the Dominion under the introductory clause of section 91 to

make laws for the peace, order and good government of Canada.

Two conditions govern the legitimate exercise of this power. First—it is essential that the matter dealt with shall be one of unquestioned Canadian interest and importance as distinguished from matters merely local in one of the provinces; and, secondly, that the legislation shall not trench upon the authority of the province in respect of the matters enumerated in

section 92. *Attorney General of Ontario* v. *Attorney General for Canada* (1), *Montreal* v. *Montreal Street Ry. Co.* (2), at pages 343 and 344; *Wharton's Case* (3), at page 337. I have already pointed out that section 18 does profess to deal with matters which in each province are, from the provincial standpoint, rights of property and civil rights there and matters which, in each province, are comprehended within the subject matter "local undertakings."

It is true that in *Russell* v. *The Queen* (4), the Canada Temperance Act was held to be validly enacted under this general power and that in *Local Option Reference* (1), and in the *Manitoba License Holders' Case* (5), the enactment of similar legislation was held to be competent to a local legislature, the legislation being, of course, limited in its operation, to the province; but it is I think impossible to draw from these authorities on the "drink" legislation any general principle which can serve as a guide in passing upon the validity of the statute before us.

Russell's Case (4) was accepted by the Judicial Committee in 1896, as decisively determining the validity of the Canada Temperance Act and to that extent it was treated as a binding authority.

But it must be remembered that *Russell's Case* (4), was in great part an unargued case. Mr. Benjamin who appeared for the appellant—the provinces were not represented upon the argument—conceded the authority of Parliament to enact legislation containing the provisions of the Canada Temperance Act to come into force at the same time throughout the whole

(1) [1896] A.C. 348.
(2) [1912] A.C. 333.
(3) [1915] A.C. 330.
(4) 7 App. Cas. 829.
(5) [1902] A.C. 73.

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of Canada and this Lord Herschell said in a subsequent case, was a "very large admission." The Judicial Committee proceeded upon the view that legislation containing the provisions of the Canada Temperance Act was not, from a provincial point of view, legislation relating to "property and civil rights" within the province; it was, they said, legislation dealing rather with public wrongs, having a close relation to criminal law and on this ground they held that the subject matter of it did not fall within the exceptions to the introductory clause.

The subsequent judgments of the Judicial Committee in the *Local Option Reference* of 1896 (1) and in the *Manitoba License Holders' Case* (2) show that consistently with the validity of the Canada Temperance Act similar legislation by the provinces limited in its operation to the province, can be supported as being from a provincial point of view legislation dealing with matters merely local. In the last mentioned case Lord Macnaghten said it might be doubtful whether if such legislation were from the provincial point of view properly classified as legislation upon the subjects denoted by "property and civil rights," general legislation by the Dominion such as the Canada Temperance Act could be sustained.

There is no case of which I am aware in which a Dominion statute not referable to one of the classes of legislation included in the enumerated heads of sec. 91 and being of such a character that from a provincial point of view, it should be considered legislation dealing with "property and civil rights," has been held competent to the Dominion under the introductory clause; and the effect of decisions in the Mont-

(1) [1896] A.C. 348. (2) [1902] A.C. 73.

real Street Railway case, or the McCarthy Act Reference and in the Insurance Act Reference, *Attorney General for Canada* v. *Attorney General of Alberta* (1), is that legislation by the Dominion applying to the whole of Canada dealing with matters which from a provincial point of view fall within No. 9 or No. 10 of sec. 92, is not a competent exercise of this general power.

"Property and civil rights," of course, taken in the most comprehensive sense, is a phrase of very wide application and like the words "Trade and Commerce," it must be restricted by reference to the context and the other provisions of sections 91 and 92. But my view is that where a subject matter is from a provincial point of view comprehended within the class of subjects falling under "property and civil rights," properly construed (*ex hypothesi* such matter could not fall strictly within any of the classes of subjects enumerated in sec. 91) it is incompetent to the Dominion in exercise of the authority given by the introductory clause to legislate upon that matter either alone or together with subjects over which the Dominion has undoubted jurisdiction as falling neither within sec. 92 nor within the enumerated heads of sec. 91; and legislation which in effect has this operation cannot be legitimised by framing it in comprehensive terms embracing matters over which the Dominion has jurisdiction as well as matters in which the jurisdiction is committed exclusively to the provinces.

Nor do I think it matters in the least that the legislation is enacted with the view of providing a remedy uniformly applicable to the whole of Canada in relation to a situation of general importance to the Dominion. The ultimate social economic or political

(1) [1916] 1 A.C. 588.

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aims of the legislator cannot I think determine the category into which the matters dealt with fall in order to determine the question whether the jurisdiction to enact it is given by sec. 91 or sec. 92. The immediate operation and effect of the legislation, or the effect the legislation is calculated immediately to produce must alone, I think, be considered. I repeat that if, tested by reference to such operation and effect, the legislation does deal with matters which from a provincial point of view are within any of the first fifteen heads of section 92, it is incompetent to the Dominion unless it can be supported as ancillary to legislation under one of the enumerated heads of section 91.

This view may be supported by contrasting the decision of the Judicial Committee in *Russell's Case* (1), with its decision on the McCarthy Act reference. The Canada Temperance Act was an attempt on the part of the Parliament of Canada to cope with the evils arising from the sale of intoxicating liquor, and that Act as already mentioned was held to be within the power of Parliament as dealing not with civil rights and property but with public wrongs, and being legislation analogous in character to the statute restricting the sale of explosives and poisons and having a close relation to the criminal law. The McCarthy Act which was passed shortly after the decision in *Russell's Case* (1), recited that it was expedient to regulate the traffic in intoxicating liquors by a system uniform throughout Canada for the purpose of preserving public order, and then proceeded to regulate the liquor trade by a system of licensing. This decision, as already mentioned, was a logical conse-

(1) 7 App. Cas. 829.

quence of the preceding decision of the Board in *Hodge's Case* (1), to the effect that from a provincial point of view such a system of licensing fell within number 9 of section 92. The combined effect of these decisions seems clearly to be that while for the purpose of dealing with a matter of interest to the whole Dominion in the sense of being a matter affecting and pertaining to the public order and good government of the whole Dominion (the evils of the liquor trade), Parliament may legislate so long as its enactments are of such a character that they do not deal with matters from a provincial point of view within the specific classes of subjects enumerated in section 92, (that is, the first fifteen heads) it is not within its power under the residuary clause to enact legislation which from the provincial point of view falls within any one of such classes. It is quite true that the McCarthy Act Reference principally involved a consideration of only one of the enumerated heads, No. 9, but it is difficult to find any satisfactory relevant distinction between No. 9 and No. 10 (as regards matters falling under this head, the *Montreal Street Railway Case* (2), seems to be conclusive), or between No. 9 and No. 13, although as regards the last mentioned head, caution must be used in observing the limits necessarily imposed by the context in the two sections upon the scope of their application.

The argument based upon the residuary clause rests upon the principles supposed to be deducible from the decisions upon the liquor legislation. The result of the decisions of the Judicial Committee in *Russell's Case* (3), on the Local Option Reference in

(1) 9 App. Cas. 117. (2) [1912] A.C. 333.
(3) 7 App. Cas. 829.

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1896, and the *Manitoba License Holders Case*, in 1902 (1), is that while the restriction or prohibition of the liquor traffic in the manner effected by the Canada Temperance Act within a single province, may from a provincial point of view fall within No. 16, it may also fall within the ambit of the residuary clause as subject matter of legislation; but there is in my judgment no justification for applying the reasoning of their Lordships in their judgments in the Local Option Reference, in support of the proposition that matters falling within any of the other heads of section 92 as subject matter of legislation can be dealt with by the Dominion under a general law passed under the authority of the residuary clause, and the doubt expressed by Lord Macnaghten in the *Manitoba License Holders Case* (1) affords very weighty argument against such an interpretation of Lord Watson's judgment on the Local Option Reference.

The consequences of this proposed view of the residuary clause, can be illustrated by the present legislation. The scarcity of necessaries of life, the high cost of them, the evils of excessive profit taking, are matters affecting nearly every individual in the community and affecting the inhabitants of every locality and every province collectively as well as the Dominion as a whole. The legislative remedy attempted by section 18 is one of many remedies which might be suggested. One could conceive, for example, a proposal that there should be a general restriction of credits, and that the business of money lending should be regulated by a commission appointed by the Dominion Government with powers conferred by Parliament. Measures to increase production might

(1) [1902] A.C. 73.

conceivably be proposed and to that end nationalization of certain industries and even compulsory allotment of labour. In truth if this legislation can be sustained under the residuary clause, it is not easy to put a limit to the extent to which Parliament through the instrumentality of commissions (having a large discretion in assigning the limits of their own jurisdiction, see sec. 16), may from time to time in the vicissitudes of national trade, times of high prices, times of stagnation and low prices and so on, supersede the authority of the provincial legislatures. I am not convinced that it is a proper application of the reasoning to be found in the judgments on the subject of the drink legislation, to draw from it conclusions which would justify Parliament in any conceivable circumstance forcing upon a province a system of nationalization of industry.

Mr. O'Connor's chief contention was that the enactments of section 17 are enactments upon the subject of criminal law, within the meaning of that phrase as used in section 91 and that the provisions of section 18 can be supported as provisions ancillary to these enactments. I think it is open to doubt whether the enactments in section 17 can be supported as enactments upon the subject of "the criminal law." Section 22 it is true makes infractions of section 17 punishable as therein provided, but the penal sanctions provided by section 22, apply clearly to any contravention of any provisions of Part 2 of the Combines and Fair Prices Act, and it is not easy to believe that every such infraction (for example, subsection 3, sec. 19) was intended by the legislature to be classed as a crime in the strict sense. Moreover having regard to the jurisdiction conferred upon the Board (by sec. 16) to enlarge the application of the statute, it seems

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very doubtful indeed if such could have been the object of the legislature. But assuming this view of section 17 to be the right view, I cannot agree that the enactments of section 18 are in any proper sense ancillary to the enactments of section 17. Sections 17 and 22 are quite complete in themselves, and while I think the legislature might very well have provided as ancillary to these enactments special administrative machinery for the investigation of questions of fact pertaining to the matters dealt with in these two sections, and have reformed the criminal procedure for the purpose of meeting the difficulties of enforcing section 17, the authority conferred upon the Board by section 18 is not in my opinion in any way necessary in order to give complete effect to sections 17 and 22.

BRODEUR J.—The Board of Commerce had, on the 9th of January, 1920, under section 32 of the Board of Commerce Act (9 & 10 George V, ch. 37) stated a case for the opinion of this court upon several questions which, in the opinion of the Board, were questions of law.

The specific facts which had arisen and the decision arrived at on these facts had not been mentioned in the stated case and it could hardly be considered that the questions were properly submitted. *In re Cardigan County Council* (1). It was found advisable, at the suggestion of the Court, that a new case should be submitted. The Board then stated a new case with regard to the retail clothiers of the City of Ottawa, in which it is alleged that the Board had made of its own motion an inquiry under the provisions of

(1) 54 J.P. 792.

section 18 of The Combines and Fair Prices Act, 1919 (ch. 45, 9 & 10 Geo. V.) and that it was found that those merchants had made unfair profits on the sales of men's clothing and that after a certain date an order would issue restraining them from selling these goods, except at a certain margin of profit. We are asked to determine whether or not the Board has the authority to make such an order and to require the Registrar or other proper authority of the Supreme Court of Ontario to cause the order to be made a rule of said court.

This new stated case supersedes the question formerly submitted. It is made with the evident intention of testing the validity of section 18 of the Combines and Fair Prices Act. There was at first some uncertainty as to whether the proposed order was issued under sections 17 and 18; but at the argument it was stated as a common ground that the only section of the Act applicable to the facts of the case is section 18. This section 18 declares that the Board is empowered to inquire into and to prohibit any breach of any provision of the Act, the making of unfair profits upon necessaries of life and all practices calculated to unfairly enhance their cost.

The Attorney General of Alberta, who had appeared by counsel on the first stated case which covered the validity of the whole Act, has also appeared on this amended issue to contest the validity of the order. He does not desire to question the wisdom of any proper legislative attempts to regulate prices in the interest of the consumers, but he claims that such a legislation is within the exclusive jurisdiction of the Provincial Legislature.

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The retail clothiers specifically named in the proposed order are being defended by the association of which they are members, the Retail Merchants Association of Canada, and this association, as well as some other associations and organizations which are interested in the proceedings instituted before the Board of Commerce, have also appeared and have asked us to declare *ultra vires* the legislation on which the order is based.

The Attorney General of Canada upholds the constitutionality of the said order, his main ground being that section 18 is legislation ancillary to criminal legislation. viz., to section 17 of the Combines and Fair Prices Act. The first question then is as to whether or not section 17 is criminal legislation.

Section 17 prohibits undue accumulation of necessaries of life and forces the accumulators to dispose of these necessaries at fair prices.

In other words, it is an enactment relating to the quantity of goods which a person may possess and determines the conditions at which they should be sold. *Primâ facie* it is legislation affecting property and civil rights and would fall within provincial and not federal jurisdiction. Sec. 92, s.s. 13.

It is true that penalties are imposed on those who contravene or fail to observe any provisions of the Act and even these contraventions are indictable offences; (sect. 22). But the imposition of penalties would not by itself give the Federal Parliament power to legislate. As it was declared by the Privy Council in *The Insurance Reference* (1), such penalty is an ancillary enactment. We must ascertain the class

(1) [1916] 1 A.C. 588 at p. 594.

to which the operative enactment really belongs, the primary matter dealt with, the true nature and character of the legislation, its leading features, its pith and substance. *Union Colliery Co.* v. *Bryden* (1).

What is the object of the legislation at issue in this case? It is to investigate and restrain the withholding and enhancement of the price of commodities. A Board is created for that purpose with very extensive powers. If the intention of Parliament was to enact criminal legislation, it would likely have been embodied in an amendment to the Criminal Code, as they have done by the following chapter, chapter 46 of the statutes passed in the same year.

Similar provisions had to be construed in the *Insurance Reference* (ss. 4 and 70 of the Insurance Act) (2). Penalties and imprisonment were enacted for the contravention; but it was mildly contended it could be considered as criminal legislation before this court (2); it was not mentioned before the Privy Council (3).

Legislation similar to the one we have to construe in this case was passed last year in England and was called "The Profiteering Act". Under that Act the Board of Trade has power to investigate prices, profits, etc., and for that purpose to require any person to appear before them, and on any such investigation they may by order fix maximum prices and declare the price which would give a reasonable profit.

(1) [1899] A.C. 580. (2) 48 Can. S.C.R. 269 *at* p.313.
(3) [1916] 1 A.C. 588.

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By subsection 2 of section 1 of the Act it was declared:

> If as the result of any investigation undertaken on their own initiative or on complaint made to them, it appears to the Board of Trade that the circumstances so require, the Board shall take proceedings against the seller before a court of summary jurisdiction, and if in such proceedings it is found that the price charged or sought about which the complaint was made, or the price discovered at the investigation to have been charged or sought, was such as to yield a profit which is, in view of all the circumstances, unreasonable, the seller shall be liable on summary conviction to a fine not exceeding £200 or to imprisonment for a term not exceeding three months or to both such imprisonment and fine.

By section 2 of the same Act, the Board of Trade has power to establish local committees to whom the Board may delegate any of their powers.

The Lancashire and Yorkshire Railway were charged before the Manchester Profiteering Committee for charging at their restaurant exorbitant prices. The railway company applied for a writ of prohibition and the court, on the 15th March, decided that

> a prosecution under s. 1, sub-s. 2, of the Act is a separate and independent proceeding from the investigation with a view to declaring a price and ordering repayment of any amount in excess of that price under s. 1, sub-s. 1, and that the investigation was not a criminal cause or matter.

Even if section 17 were criminal legislation, it could not be claimed that the order is valid because it is ancillary to criminal legislation.

The power to pass criminal laws belongs to the Federal Parliament (B.N.A. Act, s. 91, s.s. 27). In its ordinary sense, the words *criminal law* would cover not only the definition and punishment of crime, but also the procedure and the courts for the trial of persons accused of crime. But section 92, s.s. 4, gives to the provincial legislatures the legislative control over the constitution of the courts of criminal jurisdiction, and, besides, subsection 27 of section 91,

in giving legislative power to the Federal Parliament on the criminal law, excepts formally the constitution of the courts of criminal jurisdiction.

It is such a formal enactment that I cannot accept the proposition that the creation of a court like the Board of Commerce could be validly constituted as a court of criminal jurisdiction. Section 101, which is invoked also in that respect, could not alter the formal provisions of section 91 which should stand *"notwithstanding anything in this Act,"* as it is declared therein.

I admit that *intra vires* federal legislation will override inconsistent provincial legislation and that the widest discretion must be allowed to the federal Parliament in the moulding of its legislation, but at the same time no usurpation should be made under the guise of so-called ancillary legislation. *Montreal* v. *Montreal Street Railway Co.* (1).

It could not be considered as essential to the exercise of the Dominion legislative authority that section 18 of the Fair Prices Act should have been passed, and I understand this as the test which should be adopted to determine the validity of any ancillary legislation.

The Board in exercising its powers under section 18 exercises independent civil powers and the order we have to examine is made for the purpose of forcing the merchants to sell their goods at a certain price.

It is contended also that this can be dealt with by the Federal Parliament as a regulation of Trade and Commerce.

The words "regulation of trade and commerce" may cover a very large field of possible legislation and there has been much discussion as to their limits.

(1) [1912] A.C. 333.

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They were first considered in the *Parsons Case* (1), in 1881, and there it was stated that these words in their unlimited sense would include every regulation of trade ranging from commercial treaties with foreign governments down to minute rules for regulating particular trades, but a consideration of the context and of other parts shows that these words should not be used in this unlimited sense. The collocation of the regulation of trade and commerce with classes of subjects of national and general concern affords an indication that regulations relating to general trade and commerce were in the minds of the fathers of Confederation when they gave the Federal Parliament the power to deal with it.

Views to the same effect have been expressed by the Privy Council in *Bank of Toronto* v. *Lambe* (2), and in *Montreal* v. *Montreal Street Railway Co.* (3).

The last case where this power of regulating trade and commerce has been considered by the Privy Council is the *Insurance Reference* (4), and it was held there that

> the regulation of trade and commerce does not extend to the regulation of a particular trade.

In the Combines and Fair Prices Act, there is an attempt to regulate the trade of those who are engaged in dealing with necessaries of life, as there was an attempt in the Insurance Legislation to regulate the trade of those engaged in the insurance business.

Then the contention is made that this legislation is valid in the exercise by the Federal Parliament of its power to make laws for the peace, order and good government of Canada.

(1) 7 App. Cas. 96.
(2) 12 App. Cas. 575.
(3) [1912] A.C. 333.
(4) [1916] 1 A.C. 588.

According to the principle of construction adopted in the *Parsons Case* (1), the first question to be determined with regard to the distribution of legislative powers is whether section 18 of the Combines and Fair Prices Act falls within any of the classes of subjects enumerated in section 92 and assigned exclusively to the legislatures of the provinces. If it does, then the further question would arise whether the subject of the Act does not also fall within one of the enumerated classes of section 91 and so does not still belong to the Dominion Parliament.

Primâ facie section 18 of the Combines and Fair Prices Act is legislation affecting property and civil rights and would fall within provincial control and not federal control (s. 92, s.s. 13) and, as I have shown above also, the subject of the Act does not fall within the regulation of trade and commerce or criminal law.

There may be matters not included in the enumeration of section 91 upon which the Parliament of Canada has power to legislate, because they concern the peace, order and good government of the Dominion, but if they are enumerated in sec. 92, then the Dominion Parliament has no authority to encroach upon these subjects. It is not claimed that the order in question is of Canadian interest or importance, because this order has reference to merchants of a certain city and the provincial authorities could certainly pass the necessary legislation to carry out such an order. *Attorney General of Ontario* v. *Attorney General of Canada* (2).

(1) 7 App. Cas. 96. (2) [1896] A.C. 348.

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I do not then hesitate to say that section 18 of the Combines and Fair Prices Act could not be considered as valid under the exercise by the Federal Parliament of its power to legislate concerning peace, order and good government. The legislation in question is then *ultra vires* and should be declared unconstitutional.

For these reasons the answer to the first question submitted should be in the negative. As to the second question, it is not then necessary for me to deal with it.