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Tests for Validity of Legislation under the British North America Act

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The purpose of this article is to explore two questions that arise in connection with the interpretation and application of the British North America Act, 1867:

(1) the nature of "matters" in relation to which laws may be enacted under that act; and

(2) how it may be determined that a law is "in relation to" a particular matter.

Although at first glance these questions may seem so vague and elusive that they should be dealt with by schoolmen rather than by work-a-day legal practitioners, they are practical questions that are before the courts every day. They spring directly from the language of the British North America Act. The opening words of section 91 of the British North America Act, 1867, authorize the Parliament of Canada "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. . .". Section 91 then goes on to declare that "the exclusive Legislative Authority of the Parliament of Canada extends

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to all Matters coming within the Classes of Subjects next hereinafter enumerated" and there follows the first of the famous enumerations—the specific federal powers. Section 92, dealing with the powers of the provincial legislatures, provides: "the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated" and the second enumeration—the provincial powers—follows. The closing words of section 91, after the enumeration in that section, provide: "And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces".

To give effect to this language, where a particular piece of legislation, or to use the precise terms of sections 91 and 92 where a particular "law", has been enacted by Parliament or by a legislature, in order to determine whether it is within the legislative authority of Parliament or the legislature, two questions must be answered:

(1) What is the "matter" which the law is enacted "in relation to"? and

(2) Into what "class of subject" does this "matter" fall?

The discussion in this article is restricted to the first of these questions, which is broken into its two components—What is the nature of a "matter"? and, What is the test to be applied to determine whether legislation is "in relation to" a particular matter?[1] The practical importance of answering these questions cannot be overestimated. Every opinion given by a practitioner on a constitutional question and every decision of the courts in a constitutional case necessarily proceed on some view of the nature of legislative "matters", as this expression is used in the British North America Acts, and on some test as to how to determine the matter "in relation to" which particular legislation is enacted.

The need for an understanding of legislative "matters" is emphasized by a brief review of the general principles of interpretation

[1] It may be doubted whether there is a distinction between "matters" and "subjects" or whether the "classes of subjects" are more than "classes of matters". Although prima facie this violates the canon of construction that different words should be given separate significance where possible, it seems doubtful whether in the present instance there is such a possibility. Even the closing words of section 91 refer to "classes of matters". If "matters" and "subjects" are synonymous, then the two components of the first question that must be analyzed will furnish the major part of the answer to the second, since the "classes of subjects" will be merely accumulations of "matters", which in fact is all they appear to be.

of sections 91 and 92 that are now, so far as they go, fairly clearly established.[2] These principles represent the application of ordinary rules of interpretation of statutes, and in fact all written documents, to the particular provisions of the British North America Act, 1867.[3] They may be arranged in a number of different ways and the following synopsis could be expressed in a number of different ways.

First, neither Parliament nor the legislatures can, under the authority of section 91 or 92, enact legislation repugnant to or inconsistent with other provisions of the British North America Act. It is therefore apparent that sections 91 and 92 must be interpreted so as not to include "matters" dealt with by these other provisions.[4]

Secondly, sections 91 and 92 must be read together as intended (subject to the one limitation just mentioned) to cover the full range of legislative authority necessary for the government of a sovereign nation such as Canada. They include therefore, subject to that one limitation, all "matters" for legislative action.[5]

Thirdly, the specific heads in sections 91 and 92 must be read together to ascertain what are included within the "matters" in each of them.[6] The classic example of this rule is that head 26 of section 91, which gives Parliament exclusive authority to legislate in relation to "Marriage and Divorce", must be interpreted not to include "The Solemnization of Marriage in the Province", dealt with by head 12 of section 92, for otherwise the latter provision would be nugatory.[7]

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[2] For an exhaustive review of the principles of interpretation and the authorities, of which merely a summary is given here, see W. R. Jackett, "Sections 91 and 92 of the British North America Act and the Privy Council", in Legal Essays in Honour of Arthur Moxon (University of Toronto Press, 1953) p. 156. In the footnotes that follow references are given to the cases as they appear in E. R. Cameron, The Canadian Constitution, Vol. I (1915) and Vol II (1930), or C. P. Plaxton, Canadian Constitutional Decisions (1939), in addition to the ordinary reports.

[3] *Edwards* v. *Attorney-General for Canada*, [1930] A.C. 124, at pp. 136-7, Plaxton 14, at pp. 25-6; *British Coal Corporation* v. *The King*, [1935] A.C. 500, at pp. 518-9, Plaxton 237, at pp. 253-4.

[4] *Ottawa Separate Schools* v. *Ottawa*, [1917] A C 76, at p. 80, II Cam 102, at p. 105; *Attorney-General for Canada* v. *Attorneys-General for Ontario, Quebec and Nova Scotia* (First Fisheries case), [1898] A C., 700, at pp. 712-3, I Cam. 542, at pp 553-4; *Attorney-General for Ontario* v *Attorney-General for Canada*, [1925] A.C. 750, II Cam 378; *Toronto* v *York*, [1938] A.C. 415; Plaxton 366

[5] *Bank of Toronto* v. *Lambe* (1887), 12 App. Cas. 575, at p. 587, I Cam. 378, at pp. 388-9; *Companies Reference*, [1912] A.C. 571, at p. 581, I Cam. 723, at p. 732; *Debt Adjustment Act Reference*, [1943] A.C. 356, at p. 371.

[6] *Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. 96, at p. 108, I Cam. 267, at p. 277; *John Deere Plow Co. Ltd.* v *Wharton*, [1915] A.C. 330, at pp. 338-340, I Cam 806, at pp. 812-4; *Paquet* v. *Pilots Corporation*, [1920] A.C. 1029, at p. 1031, II Cam. 186, at p 188, *Great West Saddlery* v. *The King*, [1921] 2 A.C 91, at p. 116, II Cam. 212, at p. 231.

[7] *Re Marriage Reference*. [1912] A.C. 880, I Cam 749.

Finally, the provision that the authority of Parliament under the heads of section 91 is "exclusive", coupled with the emphatic provision in the closing words of section 91 that "any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters . . . in the Enumeration of the Classes of Subjects. . ." in section 92, has the effect of removing from the heads of section 92 matters so enumerated in section 91 that might prima facie fall in them.[8]

In the result, reading the structures of the two sections together, matters dealt with by other sections of the British North America Acts fall outside sections 91 and 92; "matters" falling in the enumeration in section 91 are exclusively to be legislated upon by Parliament and fall outside section 92; "matters" falling in the enumeration in section 92 minus those enumerated in section 91 are exclusively to be legislated upon by the legislatures; and "matters" not falling in either enumeration fall within the general words at the beginning of section 91. When we have stated these principles, we see that, in order to apply them, we must determine which "matters" fall in which classes of subjects and what "matters" are withdrawn from them. The principles themselves however afford us no light on what constitutes a "matter". Without this, how can we apply them to determine what falls in each "matter" and what is excluded from it?

The authorities do not afford any clear general guide for determining these questions. This is not surprising. While these questions are of the utmost importance, they are also of the greatest difficulty. From the outset in the interpretation and application of the British North America Act, the Judicial Committee of the Privy Council and the Supreme Court of Canada have resisted all temptation to frame definitive generalizations that might be found later to be based on premature consideration. The courts have been content to dispose of each case on its merits in accordance with the apparent requirements in that particular case. As courts of last resort, they have not been able to afford the luxury of speculation. Speculation on these subjects is an intellectual flesh-pot to be enjoyed only on occasions where no actual issues are at stake.

The caution of the courts in avoiding any attempt to formulate a statement of the nature of legislative "matters" is further illustrated by the very general nature of the tests that have been indicated

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[8] *First Fisheries Case*, [1898] A.C. 700 at pp. 714-5, I Cam. 542, at p 555; *John Deere Plow Co. Ltd.* v. *Wharton*, [1915] A C. 330, at pp 339-40 I Cam. 806, at pp. 814-5.

for determining what matter a particular law is enacted "in relation to". It is said that in determining the matter that a law is "in relation to", regard must be had to the "pith and substance", "the leading feature"[9] or the "true nature and character" of the legislation.[10] Regard is to be had to the "effect" and the "purpose" or "object" of the legislation.[11] At what subject matter is it "aimed" or "directed"?[12]

The most thorough discussion of the tests to be applied, which also illustrates the extreme caution that has been adopted, is set out in the judgment of the Privy Council in the *Alberta Bank Taxation Reference*.[13] There Lord Maugham says:[14]

> Whether a Provincial Act, which indirectly interferes in some degree with one of the powers of the Dominion, is or is not ultra vires must be determined in each case as it arises, for no general test applicable to all cases can safely be laid down: . . .
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> Admitting that a test applicable to every case of over-lapping powers specified in ss. 91 and 92 is more than elusive, yet is often comparatively easy to determine that the particular piece of legislation is an encroachment on a forbidden territory. . . .
>
> It is therefore necessary to compare the two complete lists of categories with a view to ascertaining whether the legislation in question, fairly considered, falls prima facie within s. 91 rather than within s. 92. The result of the comparison will not by itself be conclusive, but it will go some way to supply an answer to the problem which has to be solved.
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> The next step in a case of difficulty will be to examine the effect of the legislation: . . . For that purpose the Court must take into account any public general knowledge of which the Court would take judicial notice, and may in a proper case require to be informed by evidence as to what the effect of the legislation will be. Clearly, for it is often impossible to determine the effect of the Act under examination without taking into account any other Act operating, or intended to operate, or recently operating in the Province.
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> A closely similar matter may also call for consideration, namely, the object or purpose of the Act in question. . . . It is not competent

[9] *Union Colliery* v. *Bryden*, [1899] A.C. 580, at p. 587; I Cam 564, at pp. 569-70.

[10] *Russell* v. *The Queen* (1882), 7 App. Cas. 829, at pp. 839-40, I Cam. 310, at p. 319; *Hodge* v. *Queen* (1883), 9 App. Cas. 117, at p. 130, I Cam. 333, at p. 344. The earlier expressions are collected in the judgment of Duff J. for the Privy Council in *Attorney-General* v. *Reciprocal Insurers*, [1924] A C. 328, at pp. 336-7; II Cam 334, at p. 341

[11] *Attorney-General for Alberta* v *Attorney-General for Canada* (Bank Taxation), [1939] A C. 117, at pp. 130-1; Plaxton 394.

[12] *Attorney-General for Canada* v. *Attorney-General for Quebec* (Bank Deposits), [1947] A.C 33, at p. 44

[13] *Attorney-General for Alberta* v. *Attorney-General for Canada* (Bank Taxation), [1939] A C 117; Plaxton 394

[14] [1939] A C at pp 129-31; Plaxton at pp 405-7

> either for the Dominion or a Province under the guise, or the pretence, or in the form of an exercise of its own powers, to carry out an object which is beyond its powers and a trespass on the exclusive powers of the other Here again, matters of which the Court would take judicial notice must be borne in mind, and other evidence in a case which calls for it. It must be remembered that the object or purpose of the Act, in so far as it does not plainly appear from its terms and its probable effect, is that of an incorporeal entity, namely, the Legislature, and, generally, speaking, the speeches of individuals would have little evidential weight

This language goes farther than that in any other decision and appears to be reasonably helpful, but it does not always furnish the guidance we might expect when we come to apply it to testing the "pith and substance" of a particular statute. The difficulty with the various tests I have mentioned and with the language of the passage just quoted is that the terms used are all relative terms. We cannot, for example, determine what is the "pith and substance" of an act and what is merely incidental without having a standard to test substance by. Similarly, when we come to testing the "true nature and character" we may well ask, like Pilate, "What is truth?" Again, what "effects" are we to look for and how are we to determine which are to be considered as significant effects and which as merely by-products? Again, taking "purpose" as a test, in all democratic countries, or in Canada at least, all legislation is believed by the government to be for the purpose of better government or national welfare. To accomplish this broad purpose, there are many subsidiary purposes. What purpose out of this group of purposes is to be selected as the one upon which to test the nature of the legislation? Putting it another way, how are we to determine at what matter legislation is "aimed" or "directed' without some understanding of the nature of the target? Finally, how much weight is to be given to "effect" and how much to "purpose"? Is "effect" merely to be used as evidence to determine the "purpose" or has it a separate significance?

The difficulties in determining the nature of "matters" and of the test required by the words "in relation to" are further illustrated by considering some of the actual decisions on legislation "in relation to" particular "matters".

1. First, the fact that legislation appears in specific terms to deal with a matter within a class of subject enumerated in section 91 or section 92 does not necessarily mean that the legislation is "in relation to" that "matter". In *Bank of Toronto* v. *Lambe*,[15] for ex-

[15] (1887), 12 App. Cas. 575; 1 Cam. 378.

ample, a provincial statute specifically provided for the imposition of a tax on "banks". It was held, however, not to be legislation "in relation to" the federal matter "Banks and Banking", although in terms it dealt with "banks".

2. In contrast, although legislation does not in terms deal with a particular class of subject enumerated in section 91 or 92, it may be in relation to a "matter" within that class of subject. An example of this type of legislation was in question in the *Saskatchewan Farm Security Act Reference.*[16] The provincial statute provided that in a year of crop failure the principal amount owing on a mortgage would be reduced by an amount equal to the interest or four per cent of the principal, whichever was the greater. It expressly provided that the reduction would not in any way affect the accrual of interest. The Privy Council held the statute to be ultra vires on the ground, among others, that the provision for reduction of the principal was legislation in relation to "interest", being in its practical effect a cancellation of interest.

3. Again the legal effect of the statute does not necessarily appear to determine the matter "in relation to" which it is enacted. This is illustrated by the contrasting decisions in the *Bank of Toronto* v. *Lambe*[17] and the *Alberta Bank Taxation Reference.*[18] As already mentioned, the statute in *Bank of Toronto* v. *Lambe* specifically authorized a tax on banks. In the *Alberta Bank Taxation Reference* the statute imposed a tax on banks. In both cases the statutes had virtually identical legal operation or legal effect, that is, to provide for the imposition of a tax specifically on banks. In the *Lambe* case, however, legislation providing for the imposition of a reasonable tax as part of a general scheme of taxation was held to be valid and not "in relation to" banks, and in the Alberta case legislation imposing a very heavy, in fact prohibitive, tax was held to be invalid as being "in relation to" banks. The salient distinction was the amount of the tax, that is, the economic burden imposed on the taxpayer. So far as legal effect went, however, the two statutes merely imposed an obligation to pay a tax. The difference arose from their practical effect.

4. Finally, it appears that, in certain circumstances, laws having virtually identical practical effect can be "in relation to" different subject matters, that is, are not "in relation to" the same "matter". In *Attorney-General of P.E.I.* v. *Egan*[19] it was held that the pro-

[16] [1949] A.C. 110, at p. 125.
[17] (1887), 12 App. Cas. 575; I Cam. 378.
[18] [1939] A.C. 117; Plaxton 394
[19] [1941] S.C.R. 396

vision of the Criminal Code authorizing a magistrate to make an order prohibiting a person from driving after a conviction for driving while intoxicated was validly enacted by Parliament as "Criminal Law". It was also held that a provision in the provincial Highway Traffic Act providing that, where a person had been convicted of driving while intoxicated, his licence to drive might be revoked, thereby bringing him under the provisions of the act prohibiting him from driving without a licence, was valid. The practical effect of both enactments and the circumstances in which they came into operation were virtually identical. They were both held to be valid and to be laws in relation to different "matters".

The principles of interpretation of sections 91 and 92, the tests to determine validity indicated in the decisions and the actual decisions themselves all lead up to, but do not furnish, any clear guidance to the solution of the questions I propose for study, namely, what is the nature of the legislative "matters" to which the British North America Act refers and how do we test when legislation is "in relation to" one of these matters.[20] How then are these problems to be solved?

[20] The approach for determining the validity or operation of provincial or federal legislation that is now fairly well established is in accordance with the principles I have outlined. It also illustrates the vital need for an understanding of "matters" and of the expression "in relation to". In determining the validity or operation of provincial legislation, the following questions must be examined:

(1) Is the "matter" which the legislation is "in relation to" prima facie in section 92?

(2) If the legislation is prima facie in relation to a matter that is in section 92, is it really "in relation to" a "matter" falling in one of the enumerated heads in section 91, which is therefore withdrawn from the matters in section 92?

(3) If the legislation is in relation to a matter in section 92 and not in relation to a matter in section 91, is it repugnant to any provision of the British North America Act other than these?

(4) If the legislation is valid under question 1 or 2 and 3, there remains the final question, Does the provincial legislation conflict with or is it repugnant to federal legislation validly enacted by Parliament, so that its operation is overridden?

A similar but shorter series of questions must be answered in determining the validity of federal legislation. The questions are:

(1) Does the "matter" which the legislation is "in relation to" fall within the enumerated heads of section 91?

(2) If it does not do so, does the "matter" which the legislation is enacted "in relation to" fall outside the classes of subjects enumerated in section 92?

(3) If the legislation is valid under question 1 or 2, does it conflict with or is it repugnant to any other provision of the British North America Acts?

To answer these questions, we must determine the "matter" which the legislation is enacted "in relation to" and place it in the appropriate "Class of Subjects" in section 91 or 92. These questions are based generally on the principles of interpretation discussed. For the original authority on the foregoing approach to determining validity, see *Citizens Insurance Co.* v *Parsons* (1881), 7 App Cas 96, at p 109; 1 Cam 267, at p 278 For

In the first place, it is quite apparent that little help can be derived from these terms in the British North America Act—the words used—standing by themselves. The expressions "in relation to" and "matter" and "classes of subjects" are clearly expressions that were selected for the very reason that they are completely flexible and of the widest import. The term "field" and other similar terms that have been used in the decisions are not helpful either. They are words that invariably depend for their meaning upon the context in which they are used. Consideration of their meaning in the abstract or in general is of no help. Our only hope, therefore, in endeavouring to give any precise meaning to them lies in considering them in the context of the British North America Act as words relating to the conferring or distribution of legislative power.

When we consider the expressions in this context, a "matter" clearly does not refer merely to an existing body of law or body of existing legal concepts. The purpose of conferring legislative power in the broad terms of the British North America Acts is to permit the creation of new law or of new legal concepts not previously existing, or of additions to existing law or concepts or the abrogation or change of those existing. It involves freedom to choose what the law or legal concepts will be or whether there is to be any special law on the matter at all. The proposition that "matters" do not refer merely to existing bodies of law is demonstrable by many examples of the enactment of legislation by Parliament and the legislatures of law never within contemplation at the time of the passing of the British North America Acts. Moreover, the proposition is demonstrable by a clear-cut example. When in 1940 the British North America Act, 1867, was amended to add the head "Unemployment Insurance" to section 91, there was no existing body of law on this subject. "Unemployment Insurance" was merely an economic or social plan or scheme then being advocated, yet it constituted a "matter" in relation to which legislation was subsequently enacted.

It follows that, if "matters" do not describe bodies of law or legal concepts, they must relate to something that exists apart from the legal mechanism—to physical things or activities or persons

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authorities on the supremacy of valid federal legislation (which is not a rule of interpretation but is a rule on the operation of legislation which arises necessarily out of a federal constitution), see Jackett, *op cit.*, footnote 2, at p. 181, n. 91. And on the foregoing propositions generally, see Mr. Jackett's essay. Reference to sections 93, 94 and 95 is omitted in the foregoing.

or objects or purposes or interests or ideas or concepts that exist in the practical world. Such a view is in accordance with the essential nature of legislative authority. Law is merely a mechanism for regulating human conduct. It is not an end in itself. Parliament is not given authority to legislate merely for the sake of adding new laws to be printed in the statute books, but to have practical effects in ordinary human affairs and for practical purposes. When power is conferred, therefore, to make law in relation to matters, it is for the government of the practical work-a-day world that these laws are to be made, and "matters" would seem to be referable to practical affairs rather than to the legal system, which is merely the mechanism to achieve government.

The heads of section 91 and 92 amply demonstrate that "matters" refer to things or activities having existence apart from the legal system. For example, the opening words of section 92 and head 10(a) of that section are as follows:

> 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, —
>
> 10. Local Works and Undertakings other than such as are of the following Classes: —
>
> (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province; . . .

The language of this provision refers to non-legal things—real things existing in the practical world.

It has been held that the "Works" referred to in paragraph (a) are physical works.[21] "Undertakings" have been held to be the practical arrangements, whether by agreement in the practical sense or practical co-operation, under which physical works are used.[22] These physical works and practical arrangements obviously exist apart from the legal system or from rules of law and have a separate non-legal existence.[23]

[21] *City of Montreal* v. *Montreal Street Ry. Co.*, [1912] A.C. 333, at p. 342; I Cam. 711, at p. 719.

[22] *Radio Reference*, [1932] A.C. 304, at p. 315; Plaxton 137, at pp. 146-7.

[23] At first glance it would seem that certain heads in the enumerations refer to bodies of law, or legal concepts, for example, "Bills of Exchange and Promissory Notes", "Banking. . " and "Interest". In one sense these heads do describe existing fields of law. They also describe practical activities or transactions however. The fields of law only arose to govern the relations of persons engaged in these practical activities or transactions For example, a promissory note is in fact an unconditional promise to pay The law also gives recognition and protection to it The same thing is true of the other heads mentioned. The fields of law are reflections of practical activities or transactions and they govern the relations of persons engaged

What then is the essential connection between laws and the physical things or practical activities or concepts referred to in the descriptions of "matters"? If this question can be answered, we can then propose some meaning to be attributed to the expression "in relation to".

The courts have indicated that we must among other things consider the "effect" of a law in determining the "matter" that it is "in relation to" and it is apparent from the authorities already referred to that by "effect" is meant practical effect. Let me start my analysis with a consideration of what this means. What is the primary practical effect of a law? Law is a mechanism for the control of human conduct and the primary practical effect of a law is therefore some practical control or regulation. Prima facie it would seem that the connection between a law as a device for controlling or regulating conduct in a practical way and the things, activities or concepts specified in the "matters" is that the law regulates or controls those things, activities or concepts. This statement is clearly not precise enough however. Law does not control or regulate things, activities or concepts, but human conduct. Law regulates or controls conduct of persons with respect to things, or engaged in activities, or with respect to concepts. Moreover, law is not concerned with controlling all conduct of persons with respect to particular things, activities or concepts. Law is concerned only with regulating or controlling conduct of individuals in their relations with other people. A law controlling or regulating conduct of persons with respect to a thing or an activity or in respect of a concept, therefore, when its effects are considered, controls or regulates practical relations between those persons arising from or connected with that thing or activity or concept. This is the essential connection between laws and the physical things, or practical activities or concepts, referred to in the descriptions of "matters" in the British North America Acts. When the effect of the law is considered, "matters" would seem therefore to be fields of relations between individuals arising from or connected with the things, activities or concepts referred to in the language describing the

in them. This is true even of the head in section 92, "The Incorporation of Companies with Provincial Objects" It is true that corporations are artificial persons existing only in the eye of the law and this head might be thought to refer only to a legal concept. Apart from the fact that all legal personality is a legal concept designed for the regulation of practical relations between real persons, the law on corporations reflects the practical situation where groups of persons act in concert as one person and governs their relations with each other and with other persons when they are so acting. The corporation is merely a legal mechanism or device for controlling or regulating the relations between real persons.

matters. It would follow that a law is "in relation to" a matter when the practical effect of the law is to regulate or control a relation or relations between individuals in that field, that is, relations arising from or connected with the thing, activity or concept specified. In an expression often used, it "deals with" the matter when its practical operation is to control or regulate such relations.

The soundness of this analysis may be tested by considering some of the decisions on the enumerated heads of section 91 and 92. Head 10 of section 92 relating to "works" and "railways", quoted already, furnishes an example As already indicated, the courts have held that the "works" referred to in paragraph (a) are physical works. Railways are also physical works. Clearly the authority conferred by this section could not be restricted to making laws about the physical works or railways, since as I have said laws do not relate to things, but rather relate to persons and their conduct. That these heads must be interpreted to authorize making laws governing conduct of persons in their relations with each other arising from or connected with the things specified has been recognized in the decisions on these provisions They have held that the authority conferred by paragraph 10(a) on Parliament is not limited to making laws about the physical nature of the works, that is, the specifications according to which they are to be constructed and equipped. Parliament may do this and such laws govern the conduct of the designers and constructors. Parliament may also make laws controlling or regulating the whole practical field connected with their construction, management and operation Management and operation of a railway include all relations between persons arising from the operation of the railway—between the railway company and the persons actually running it, who are the company's employees, and between the railway company and its employees, on the one hand, and the members of the public, on the other.[24]

The reasons for judgment of the Supreme Court of Canada, and subsequently of the Privy Council, in the *Saskatchewan Farm Security Act Reference*[25] further illustrate that a "matter" is a

[24] *Grand Trunk Railway of Canada* v. *Attorney-General for Canada*, [1907] A.C. 65, at p. 68, 1 Cam 636, at p. 638, where Lord Dunedin refers to Parliament prescribing "the terms which regulate the relations of the employees to the corporation". See also *C P R* v. *Bonsecours*, [1899] A C 367, at p. 373, 1 Cam. 558, at p 562, where Lord Watson states that 'the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway and for its management "

[25] [1949] A C 110

field of practical relations of persons arising from a particular thing or activity or with respect to a particular concept and that the test whether a law is "in relation to" that matter depends on the practical operation of the law as it controls or regulates these relations. As already mentioned, the Farm Security Act of Saskatchewan provided that in a crop-failure year the amount of the principal owing on any mortgage would be reduced by an amount equal to the interest or four per cent of the principal, whichever was the greater. The legislation provided specifically that the reduction should not affect the accrual of interest. The Privy Council held, among other things, that the provision for reduction in the principal by an amount that in virtually all cases was equal to the interest was ultra vires the legislature of the province, being legislation in relation to "Interest", which is a federal matter. Its practical effect was to relieve the borrower of payment of an amount equal to the interest owing in the year and in this way its practical operation was to nullify the promise of the borrower to pay to his lender the agreed compensation for the use of the money lent, which is the practical concept of interest. This law therefore "dealt with" interest. From a technical legal point of view, in this respect the legislation did not touch the legal obligation to pay interest. This legal obligation continued to operate.

Again, in the *Fish Canneries* case[26] the Privy Council held that federal legislation providing for the regulation of fish canneries was not legislation in relation to "Fisheries". The Privy Council held that the commercial handling of fish once caught fell outside the "matter" of "fisheries" and fell within "Property and Civil Rights in the Province". This decision appears to accord with the views suggested. The relations of persons in their activities with respect to fish that have been caught and are being canned to be marketed do not fall within the field of relations arising from the activity of catching fish, to which the decision apparently restricted the "matter" of "Fisheries". The board did point out that the licensing or inspection of canneries might possibily be related to the taking of fish or the control of the taking of fish, but that this was not "obvious" and "no material had been placed before them . . . establishing the necessary connection".[27] In the terminology used in this article, the relations of persons with respect to commercial activities using fish that have been caught were held to be outside the "matter" of "fisheries", which comprised only the relations of

[26] [1930] A.C. 111; Plaxton 1,
[27] [1930] A.C. at pp. 121-2; Plaxton 11,

persons with respect to the taking of fish. The decision appears to be in line with the tests I have suggested.

To summarize the tentative conclusions reached so far, I have suggested that in one sense a "matter" may be a field of practical human relations arising from or connected with some practical thing or activity or concept or idea. I use "practical" in the sense of real relations between physical persons engaged in physical activities, personal transactions, and so forth, that exist apart altogether from the legal system. A law is "in relation to" such a "matter" when its practical effect is to deal with one or more of the relations in this field, by controlling or regulating them. In strict theory, to determine what is comprised in a "matter" the courts determine as a practical question in a work-a-day world—as a question of fact —what field of relations of individuals arises from or is connected with the thing or activity described in the language specifying the "matter". To determine whether a law is "in relation to" the matter in this sense, they then look to see whether in its practical operation it deals with one or more of the relations in the field by, in effect, controlling or regulating them. In practice, the course adopted is the reverse. The first question determined is: What relation or relations does the law in its practical effect control or regulate? The second is: What things, activities or concepts specified in section 91 or section 92 do they arise from or are they connected with? It must be admitted that these questions are far from easy questions to decide, particularly in view of the general nature of the "matters" and the "classes of subjects" enumerated in the British North America Acts. The writer submits however that, so far as we have yet gone in our analysis, they are in accordance with the result of the authorities and they do furnish some guidance on a test for the validity of legislation.

Although the foregoing analysis of the nature of a "matter" with a starting point of "effect", by defining matters in terms of fields of relations of individuals, appears to the writer to express most accurately the true position, since law in its final analysis regulates and controls relations between individuals, there are numerous other ways in which this aspect of matters can be described that approximate the same result, and these descriptions may be apt or helpful with respect to different types of matters. It may be said that, loosely speaking, "matters" describe fields of conduct which Parliament may legislate to regulate or control. It may be said that matters describe fields of interests of individuals or of the nation at large that Parliament may legislate to regulate. This mode of ex-

pression is based on the view that laws operate by creating legal rights and that, from a practical point of view, "rights" under the law are protected interests. By this is meant that an individual who has a legal right has from a practical point of view, by reason of that right, some advantage or benefit that is to his interest. The legal right is the protection furnished by the legal mechanism for that practical benefit or advantage or interest. Matters may then be sources of interests for individuals that laws may be enacted to regulate or protect. Whatever mode of expression is used, however, the essential point is that, in the sense we are now considering them, "matters" describe things or activities or concepts of a practical nature existing apart from the legal system, and laws are in relation to those matters when in their practical operation they regulate human conduct or the relations of individuals or their relative interests arising from or connected with those things, activities or concepts.[28]

When testing the validity of legislation, however, the courts have not stopped at giving consideration merely to its effect—its practical operation. They state that the "purpose" of the legislation must be taken into account. What does this mean and how is "purpose" relevant?

In the first place it is clear that the "purpose" of the legislation really means the purpose of Parliament or the legislature and not of the statute as such. A statute by itself has no purpose. Inanimate things do not have purposes. Purpose implies a mental state that can exist only in a person or a group of persons having mentality. What is the mental state of Parliament when it is enacting a law that has significance in rendering that law "in relation to" a particular "matter"?

It might be thought that "purpose" is an adequately clear indication of the nature of the mentality of Parliament contemplated and that it requires no further refinement. In most cases this is probably true, but on reflection it does not appear to be quite so

[28] If a matter is something that must be determined as a practical question in the every-day world, as a field of practical relations between individuals, what then at any particular time is the body of law in relation to a matter? The answer is that the body of law that confers rights or powers or imposes duties or liabilities on persons in their relations falling within the field, or that leaves them free or at liberty to act in relation to each other in such relations, is the body of law on that matter at any given moment. Speaking from a technical legal point of view, what Parliament may do in legislating in relation to a matter, therefore, is to create new rights or powers, or impose new duties or liabilities, or further restrict or extend liberty, in those relations, or vary, alter or revoke rights, powers, duties, liabilities or liberties existing under that body of law. This might be said to be the legal content of a matter corresponding to its practical content.

clear in all cases What is meant by "purpose"? It is sometimes said that the purpose of an act is the mental element of expectation or desire that certain results will follow from the doing of the act If this definition is applied in our problem, we appear to be arguing in a circle. We have already seen that in testing the matter that a law is enacted "in relation to" the effect of the law must be looked into as well as its purpose. If the purpose to be looked at is merely an expectation of or desire for these effects, what is the separate significance of Parliament's "purpose"? Parliament must be presumed always to have intended and expected those effects. If Parliament's "purpose" is to have a separate significance, we must mean a purpose that is more than to produce these effects.

That the purpose of Parliament is something beyond an intention to produce the immediate control or regulation that is its effect appears to be quite possible. The relevancy of effect is to ascertain what relations the law objectively controls or regulates. Control and regulation are not ends in themselves however. They are undertaken with some object or aim in view, to achieve some results in connection with the things, activities or concepts described in the "matter" It is this object or aim that constitutes Parliament's purpose. At first glance the connection between the mental state of Parliament in enacting a law and a "matter" that renders it a law "in relation to" that matter would therefore seem to be that the matter is to be interpreted in one sense as a description of an objective and that Parliament's aim or object in enacting the law is to promote that objective. All matters cannot be viewed as "objectives", however—for example "Sea Coast and Inland Fisheries" or "Railways". These phrases do not appear to define any objective. We may say that they could be so interpreted by reading them to mean "The government or regulation of Fisheries". An interpretation of these subjects as objectives in this way, however, also gives no significance to "purpose" in testing whether a law is in relation to these matters separately from the effect of the legislation. To meet the test of "effect", the law must always control or regulate relations of individuals arising from fisheries. The law must therefore always be for the government or regulation of fisheries in this sense, and the test of purpose would be met in all cases where the test of effect was met. On the other hand, we cannot interpret these "matters" to be objectives in any narrower or more limited sense, because such an interpretation would restrict Parliament's sovereign discretion to make such laws as it

considers advisable in relation to "Fisheries" and so forth. It is clear that Parliament's discretion in this respect is unfettered.

In the result the most we can say of the significance of Parliament's purpose from the point of view of desiring certain results is that the results desired must be some practical results in the work-a-day world connected with or arising from the thing, activity or concept described in the language constituting the matter. No more precise definition can be attempted, since Parliament has full legislative discretion to choose whatever course of action in relation to the matter it wishes. When we have gone this far, it seems to amount to the same thing, but to be more easily tested, to say that the motive that impelled Parliament to enact a law must be some fact, circumstance or idea arising from or connected with the thing, activity or concept described in the matter. In this sense, therefore, the "purpose" of Parliament is really to be interpreted to be its motive for acting.

The interpretation of "purpose" as Parliament's motive for enacting a law does not overcome all difficulties, however, because the motives for any particular action are invariably numerous and mixed. The same is true if we consider purpose, not as merely a motive, but as directed at results. Not only may many motives cause Parliament to enact a law, but also many results may flow from a law. How are we to distinguish the significant motive or result? There is no clear-cut answer to this question. The problem is the same as the one that arises in connection with the determination of causation in other legal fields. All that can be said is that the cardinal or primary or governing motive must be selected. The question is a question of fact in each case that must be decided on the merits of that case.

A further difficult question may call for decision. When once the governing motive that impelled Parliament to enact the legislation has been ascertained, then it must be classified into the existing classification set out in sections 91 and 92. In some respects it would appear that the purpose might arise out of or be connected with two or more of the subject matters or concepts set out in those sections. For example, legislation reducing the interest on farm mortgages might be thought to be legislation in relation to "Agriculture" in section 95 equally as much as "Interest" in section 91. When classifying the motive, however, we must do so in accordance with the classes that are already established by sections 91 and 92 or sections 93, 94 and 95, which must be treated as exhaustive. Where a very wide, general subject or idea is specified in a

head in the enumeration in these sections, and narrower subjects or ideas are also enumerated that might appear to be included in the wider subject, then it would seem that the scope of the wider, general subject must be restricted to exclude the narrower, which must be treated as separate and distinct and as creating a prior motive. It is an application of the familiar principle underlying the rule on special and general enactments, and of reading the statute as a whole together. The governing purpose of the legislation would therefore fit into the appropriate class of purpose when all the classes are considered together in this way and given their appropriate priorities one with the other.

Although the foregoing analysis may indicate the nature of the "purpose" required of Parliament in a somewhat more precise way than the mere word "purpose", there is no magic in language and the mental element required may, for assistance in grasping its nature, be described in a number of ways. To be "in relation to" a matter we can say that the law must be enacted by Parliament with the intention of accomplishing some objective in a practical governmental sense connected with the thing, activity or idea specified in the language describing the matter; or, as I have said, that the state of mind of Parliament when enacting the statute was to carry out some scheme connected with them; or that when enacting the statute the policy Parliament was carrying out arose out of or was connected with them. Each of these may be of some aid in the determination of this question in particular cases.

The elusive nature of the mental element required for legislation to be "in relation to" a matter may also be somewhat clarified by considering the reason why the motive of Parliament is relevant. When considering the significance of the "effect" of legislation, I came to the conclusion that a "matter" is to be considered as an objective description of a field of practical human relations and that, testing by effect, a law is "in relation to" that matter when it "deals with", that is, controls or regulates in a practical sense, relations in that field. Difficulty arises, however, because the various fields of relations of individuals described by the matters in the British North America Act are not, from this purely objective point of view, mutually exclusive. The same relation between individuals may fall in several different fields: for example, relations arising out of the operation of ships may fall in "Fisheries" or in "Navigation and Shipping" or in "Property and Civil Rights". These various fields of relations overlap. The need for a reference to the "purpose" or motive of Parliament in enacting legislation is in

order to ascertain the point of view from which Parliament is acting with respect to the particular relation. To determine the particular matter under which Parliament is acting, a requirement that Parliament must be motivated by some fact or consideration arising out of the things, activities or concepts described in the matter must therefore be coupled with the objective description of the field of human relations falling within the matter. This subjective motive distinguishes the particular matter in relation to which Parliament has enacted a law where the relations dealt with by the law would fall in two or more matters objectively.

Both the need for distinguishing the motive of Parliament in enacting a law and the difficulty of describing in appropriate language the precise mental element required is illustrated by the third insurance company case in 1932.[29] An attempt was made to justify the legislation requiring foreign insurance companies to be licensed on the ground that it was legislation in relation to "aliens", "immigration" and "trade and commerce". Lord Dunedin, delivering the judgment of the Privy Council, said:[30]

> What has got to be considered is whether this is in a true sense of the word alien legislation and that is what Lord Haldane meant by 'properly framed legislation' Their Lordships have no doubt that the Dominion Parliament might pass an act forbidding aliens to enter Canada or forbidding them so to enter to engage in any business without a licence, and further they might furnish rules for their conduct while in Canada, e.g. to report at stated intervals. But the sections here are not of that sort, they do not deal with the position of an alien as such; but under the guise of legislation as to aliens, they seek to intermeddle with the conduct of insurance business, a business which by the first branch of the 1916 case has been declared to be exclusively subject to provincial law. Their Lordships have, therefore, no hesitation in declaring that this is not 'properly framed' alien legislation.

Apparently, in so far as the statute dealt with foreign companies, it might objectively have been considered to be legislation in relation to "aliens". The true aim or objective or purpose or motive underlying the action of Parliament was not the alien status of the companies however, but was a desire to regulate the business of insurance. This is what Lord Dunedin apparently meant by the rather vague statement that it was not alien legislation "as such". A similar expression sometimes used is that the law must be enacted as a law "qua" the matter in question, in this case "qua" aliens.

[29] *In re Insurance Act of Canada* (Quebec Insurance Reference), [1932] A.C. 41; Plaxton 81.

[30] [1932] A.C. at p. 51; Plaxton at p 90

The result of the foregoing discussion of "effect" and "purpose" is that "matters" must be considered to have dual characteristics. In one sense "matters" are objective descriptions of fields of practical human relations that may be regulated or controlled by law. In another sense they are to be interpreted as a description of ideas or concepts that may give rise to schemes of regulation and control or motives for legislative action. When we come to test whether a law is "in relation to" a matter, we must have regard to both of these characteristics. We must look to see what the law "deals with", that is, what relations the law actually regulates and controls and into what fields described in the matters the relations fall. This test is objective. We must then look also at the state of mind of Parliament when enacting the law, to ascertain the motive that impelled Parliament to provide for the control or regulation brought about by the legislation and with what matter it is connected. This test is subjective. For a law to be "in relation to" a matter it must be shown that both these requirements are met.[41]

Although both the effect of the law and the purpose of Parliament have separate significance, in the manner already indicated, as substantive elements in determining whether a law is "in relation to" a particular matter, it helps in avoiding confusion to note that they also have evidentiary weight as to each other. Very often the only evidence of the purpose of Parliament in enacting a law is the objective effect the law has. Parliament must be presumed to have intended that effect and therefore to produce it with its attendant practical operation in the every-day world. The motive for producing this effect can therefore be deduced from the effect itself. On the other hand, where a matter is described in extremely vague

[41] For laws that were invalid because they exceeded the "matter" in what they dealt with, see *Fish Canneries* case, [1930] A.C. 111, Plaxton 1; *Attorney-General for British Columbia* v. *Attorney-General for Canada* (Natural Products Marketing), [1937] A.C. 377, where Lord Atkin at p. 386 (Plaxton at p. 336) says: "There can be no doubt that the provisions of the Act cover transactions in any natural product which are completed within the Province and have no connection with inter-Provincial or export trade". This was wholly outside "The Regulation of Trade and Commerce". See also *Lethbridge Northern Irrigation District* v. *Independent Order of Foresters*, [1940] A.C. 513. For a law that apparently dealt with an authorized matter objectively, but was invalid because of the purpose of Parliament, see *Union Colliery Co.* v *Bryden*, [1899] A.C. 580, 1 Cam. 564, as interpreted by Duff J for the Privy Council in *Attorney-General for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328, at p. 338, II Cam. 334, at pp. 341-2. For laws apparently invalid on both grounds, see *Attorney-General for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328, at p. 339, II Cam. at p. 343; *Attorney-General for Alberta* v *Attorney-General for Canada* (Bank Taxation), [1939] A.C. 117, Plaxton 394, *Attorney-General for Canada* v. *Attorney-General for Quebec and others* (Bank Deposits), [1947] A.C. 33; *Farm Security Act Reference*, [1949] A.C. 110.

and wide language, the objective field of human relations it must be taken to describe is often difficult to determine. When therefore a law is passed with a motive that is clearly connected with things, activities or concepts described in the language specifying the "matter", the fact that the motive is so related is some evidence that the relations dealt with by the law fall in the field specified by the "matter". The scope of the field in such a case is largely a matter of judgment and opinion, and the judgment or opinion of Parliament is extremely valuable. The important fact to be noted is the distinction between these two ways in which purpose and effect operate: namely, first, that each has a separate substantive significance in determining the matter that a law is "in relation to"; and, secondly, that each may be evidence to be taken into account for the other. The observance of this distinction avoids confusion.

Although the foregoing submissions are all directed at establishing a separate and distinctive significance for purpose and effect in determining the validity of legislation, it must be admitted that another view is possible. It may be argued that questions on the nature of matters and the determination of whether legislation is "in relation to" matters are similar in kind to questions that arise in other legal fields, for example, the questions whether an employee is acting within the "scope of his employment" or where a person is "resident" at a particular time. No clear-cut, precise lines of demarcation can be laid down on these subjects and the courts have adopted the policy in each case of balancing a large number of factors and arriving at their decisions on the basis of all these factors taken together. This may be true also in determining whether legislation is "in relation to" a matter.[32] For the reasons already given, however, the view preferred by the writer, and which appears to be in line with the decisions, is that effect and purpose each have a separate significance, although the lines of demarcation for testing the effect or the language to describe the proper purposes may be difficult to arrive at.

It may well be, however, that the weight to be attributed to the "effect" and the "purpose" of a particular law in determining whether it is "in relation to" a particular "matter" may vary. The field of relations arising from or connected with things, activities

[32] See W. R. Lederman, "Classification of Laws and the British North America Act", in Legal Essays in Honour of Arthur Moxon, *supra*, footnote 2, at p. 183. The writer feels that to take this view in a field that is as yet comparatively unexplored is unwise. In the end I may have arrived at somewhat vague conclusions in the present article, but it is suggested that they at least limit the area of vagueness and may be more refined by further consideration.

or concepts described in a "matter" may be so wide that in the result the validity of legislation purporting to be enacted in relation to it may turn almost solely on the "purpose" of Parliament. An example of this is the "Criminal Law". The courts have laid it down that there is nothing that is intrinsically criminal and that Parliament may legislate to prohibit any conduct if the aim and object of Parliament is solely to prohibit it with a sanction of punishment. Objectively, the field is wide enough to include all the relations between the individual and the state, in the sense of the state representing all other persons. Parliament may enact laws to deal with any of these relations and the law will be "Criminal Law", if the sole motive for enacting the law is the prohibition or elimination of the doing of the proscribed act.[3]

The matter "Defence" may be of a similar nature. No decision of the courts is of assistance on this question. Certainly the judgment or opinion of Parliament that a law dealing with certain relations is for a defence aim or object would be given the greatest weight by the courts.[4]

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[3] For legislation held to be valid "Criminal Law" and establishing the test of its validity, see: *Ontario* v. *Hamilton Street Ry. Co.*, [1903] A.C. 524, I Cam. 600; *Proprietary Articles Trade Association* v. *Attorney-General for Canada*, [1931] A.C. 310, at pp. 323-5, Plaxton 52, at pp. 65-6; *Attorney-General for British Columbia* v. *Attorney-General for Canada* (Section 498A of the Criminal Code), [1937] A.C. 368, Plaxton 318. For unsuccessful attempts to justify a law as "Criminal Law", see: *In re the Board of Commerce Act, 1919*, and *The Combines and Fair Prices Act, 1919*, [1922] 1 A.C. 191, at p. 198, II Cam. 253, at p. 259, *Attorney-General for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328, II Cam. 334; *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396, at pp. 406-8, II Cam. 363, at p. 371, *Attorney-General for British Columbia* v. *Attorney-General for Canada* (Natural Products Marketing), [1937] A.C. 377, Plaxton 327; *Canadian Federation of Agriculture* v. *Attorney-General for Quebec and others*, [1951] A.C. 179, at pp. 195-6.

[4] See generally on the effect of Parliament's judgment in "matters" of this kind, *Fort Frances Pulp and Power Co.* v. *Manitoba Free Press*, [1923] A.C. 695, at pp. 704-708; II Cam. 302, at pp. 308-310. Lord Haldane says on the power of Parliament in times of emergency: "No authority other than the central government is in a position to deal with the problem, which is essentially one of statesmanship". This is certainly true of "Defence", where the basic and fundamental facts cannot in all cases in the modern world be made known to the courts.

The authority of Parliament over such a "matter" appears to be the same as that conferred by statutes giving authority to make "such regulations or orders" as the Governor in Council "deems necessary or advisable" for certain purposes. See War Measures Act, R.S.C., 1952, c. 288; National Emergency Transitional Powers Act, 1945, Stats. Can. (2nd sess.) 1945, c. 28; *In Re Gray* (1917), 57 S.C.R. 150; *Chemicals Reference*, [1943] S.C.R. 1; *Japanese Orders in Council Reference*, [1947] A.C. 87; and *Attorney-General for Canada* v. *Hallet and Carey* (Wheat Board), [1952] A.C. 427. By these decisions it has been held that, under authority expressed in the manner set out above, the only ground for holding an order or regulation invalid is that it can be demonstrated that the Governor in Council did not in fact "deem" the order or regulation to be "necessary or advisable"

The foregoing analysis of the nature of matters as having dual characteristics, namely, embodying a description of an objective field of human relations that may be regulated or controlled in a practical way by a law and requiring an appropriate motive on the part of Parliament at the time it enacts a law, with the correlative dual tests of the effect of the law and motive of Parliament, is borne out by consideration of various statements that have been made in the judgments of the Privy Council on the nature of matters and the tests of validity.

In the first place, although the British North America Act provides for "exclusive" heads of authority, it has been said that "there can be a domain in which provincial and dominion legislation may overlap" and reference has been made to "overlapping fields".[35] Next, there is the "double aspect" rule, that "subjects which in one aspect and for one purpose fall within Section 92 may in another aspect and for another purpose fall within Section

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for an authorized purpose, that is, that he acted in bad faith or, which is the same thing, no reasonable person could deem it to be so necessary or advisable. It is said that there is no objective limitation on what the regulations may deal with. The sole test is the state of mind of the Governor in Council: Was it deemed necessary or advisable by the Governor in Council for an authorized purpose? These decisions are difficult to reconcile with those under the British North America Act, because apparently Parliament is subject to an objective limitation on its authority, but in accordance with these decisions Parliament can, superficially at least, confer subordinate authority that is not subject to such a limitation. Even in times of emergency, under the British North America Act the objective requirement does not seem to be totally eliminated, as Lord Haldane in the judgment referred to earlier in this footnote clearly considered that the courts could hold legislation to be invalid even though apparently Parliament had a proper state of mind when enacting it. The farthest he goes is to say that the courts would be "loathe" to do so. One answer to this difficulty might be that certain "matters", for example, Parliament's authority in time of emergency, are of a kind different from the great bulk of the other "matters", in that the only limitation on the authority conferred by them is that Parliament have a required purpose or state of mind. They would therefore differ in kind from those matters that have an objective limitation as well. Another answer is that for certain matters the fields of relations that Parliament may affect by legislation are so wide and depend for their boundaries so much on judgment that the courts will accept Parliament's judgment, as shown by its purpose, as virtually conclusive evidence that the legislation deals with the prescribed fields They will not overrule Parliament's judgment unless no reasonable person could reach such a conclusion. This is the limitation to which the subordinate legislative authority referred to is subject Since Lord Haldane and other authorities do not abandon the power of the courts to hold legislation ultra vires apparently on an objective test and do not state that the purpose of Parliament is conclusive, and since the tests of "effect" and "purpose" are stated in the authorities to be of quite general application, the latter answer is adopted in this article.

[35] *Grand Trunk Railway* v. *Canada* (Contracting-Out), [1907] A.C. 65, I Cam. 636; *Fish Canneries* case, [1930] A.C 111. The propositions in the latter case, although they require careful examination, have been frequently repeated

91 ".[36] Again, certain provisions in laws are said to be merely "ancillary" or "incidental to" laws in relation to a particular matter and, on the other hand, certain laws are in relation to "an essential part" of the "matter".[37] It has also been said that laws may "affect" a matter but not necessarily be "in relation to" that matter.[38]

All these statements can be reconciled if the dual nature of "matters" and the dual tests whether legislation is "in relation to" matters are borne in mind. As already indicated, the objective content of a matter—the field of human relations comprised within it—may well include relations that fall within fields described in several matters. The nature of the "matter" is further refined, however, when consideration is given to the purposes that Parliament must have in mind when legislating.

It is true to say that the objective side of "matters" may overlap, but once the element of purpose is taken into account they do not do so. Where two matters overlap objectively, that is, the same relation falls in both matters, legislation may be enacted by Parliament to control or regulate that relation for one purpose and legislation may be enacted by the legislature of the province to control or regulate the relation for another. In such a case the legislation overlaps. The "matters" do not, however, overlap. They overlap only in the objective sense, but are truly exclusive when the mental element of "purpose" is taken into account. Full effect is therefore given by the foregoing analysis of the dual characteristics of "matters" to both the foregoing rule and to the language of the British North America Act stating that the matters in section 91 are "exclusive" and also to the closing words of section 91.[39]

It seems hardly necessary to point out that the term "aspect" in the "double aspect" rule clearly refers to the purpose of Parlia-

[36] *Hodge* v. *The Queen* (1883), 9 App. Cas. 117, at p. 130; I Cam. 333, at p. 344. This proposition has also been frequently repeated. For an excellent illustration, see *Royal Bank* v. *Larue*, [1928] A.C. 187, II Cam. 455.

[37] *Attorney-General for Ontario* v. *Attorney-General for Canada* (Voluntary Assignments), [1894] A.C. 189, at p. 200, I Cam. 447, at p. 456, *Grand Trunk Railway* v. *Canada* (Contracting-out), [1907] A.C. 65, at p. 68, I Cam. 636, at p. 639; *Fish Canneries* case, [1930] A.C. 111, at p. 118, Plaxton at p. 8.

[38] *Gold Seal Limited* v. *Attorney-General for Alberta* (1921), 62 S.C.R. 424, *per* Duff J. at p. 460.

[39] It is this situation—that laws made by Parliament and the legislature of a province may objectively collide—that leads to the rule that the legislation of Parliament must prevail. The rule is not expressed in the British North America Act, but is inherent in a federal system. Clearly one or other of the laws must prevail, and in a federal system such as Canada's it obviously must be the federal law. For an exhaustive list of authorities that establish this rule, see Jackett, *op. cit.*, footnote 2, p. 181, n. 91.

ment. In fact the word "purpose" is used in the statement of the rule. In the example just mentioned, where the same relations fall objectively in two fields or matters, the relations may be dealt with by a law enacted under each matter for the purposes of that matter. For one purpose they fall in one and for another purpose in the other.

Further, it is apparent that what is meant by "ancillary" arises from the same situation. Where the same relations fall objectively into two fields and are not exclusively part of only one field, the relations may be dealt with by laws enacted for different purposes under different matters. The provisions of those laws in this relation are "ancillary" or "incidental to" laws on those matters in the sense that they are not dealing with relations that are essentially part of one field only. On the other hand, certain relations may fall solely within one matter viewed as an objective field of human relations. In such a case these relations cannot be dealt with by laws enacted under any other matter. In fact any law dealing with them can have only one purpose, since they are inherently so essential a part of that matter that the purpose of any legislation dealing with them can only be related to that "matter".[40]

Finally, where a law deals with relations that objectively fall in two or more matters for a purpose related to one of those matters so that it is "in relation to" that matter, the law "affects" the other "matter" or "matters" into which the relation falls objectively, but is "in relation to" only that to which the purpose relates.[41]

The foregoing analysis also furnishes some basis for indicating what is meant by a "law" within the meaning of section 91 and 92. The courts have never confined the consideration of the validity of a law to a consideration of the provisions of an individual statute. They will look at the provisions of several statutes and consider them together, or will look at part only of one statute. A clear understanding of what is a "law" is needed to know how much of an act or how many acts are to be considered. What then is a "law"? It is suggested that, if the foregoing analysis is correct, a law includes all the legislative provisions made by Parliament in

[40] *Attorney-General for Canada* v. *Attorney-General for Quebec and others* (Bank Deposits), [1947] A.C. 33, at p. 44. See, for additional examples: *Postal Reference*, [1948] S.C.R. 248; *Johannesson* v. *West St. Paul*, [1952] 1 S.C.R. 292.

[41] Reference could also be made to the use of the term "colourable" to describe legislation A statute is colourable when it is drafted to deal objectively with relations in an authorized field but with a purpose of accomplishing aims or objects in an unauthorized field. A similar explanation may be given of the rule that Parliament cannot do indirectly what it cannot do directly

pursuance of one aim or objective or pursuant to one motive for action existing in the mind of Parliament. In the insurance cases after the first Insurance Act had been found invalid because it purported to regulate a trade carried on wholely within a province, Parliament removed the section imposing a penalty from the statute and simply purported, by amending the Criminal Code, to make it a criminal offence to carry on business without a licence. The court held that all these legislative provisions must be looked at together as comprising one "law". They all form part of one "scheme" to accomplish one aim or objective. The connection is the state of Parliament's mind. All enactments so connected are one "law" for the purpose of testing validity.[42]

If this view is accepted, the test of "severability" becomes quite clear. "Severability" of a statute arises where a part of a statute is invalid but other parts would be valid standing alone. Is the whole statute to be held bad or may it be "severed" so that the good part remains? The test laid down is, When the invalid parts are deleted from the law, can it be presumed that Parliament would have enacted the remainder by itself?[43] In other words, did Parliament have a separate aim or objective for each part—the bad and the good. Really the question is, Are there two laws? If the remnant of the statute may be viewed as enacting one law in the pursuit of one aim or objective of Parliament and the invalid part may be viewed as enacting another law, then the remnant will be held to stand although the invalid part falls. Again, it is a question to be determined in accordance with Parliament's purpose or intention.

The function of evidence in determining whether a law is "in relation" to a "matter" can also be readily explained in accordance with the foregoing analysis. In the judgment of Lord Maugham, quoted already, it is stated that evidence is admissible on the effect of the statute and the purpose of Parliament. We can now see the issues on which evidence is both relevant and admissible and the nature of the evidence that may be tendered. There are two questions of fact: What is the practical effect of the law and what was the purpose of Parliament in enacting it? As to effect, common knowledge may be taken into account and evidence on the practical

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[42] See Duff J. in *Attorney-General for Ontario* v. *Reciprocal Insurers*, [1924] A.C. 328, at p. 332, 11 Cam. 334, at p 337.

[43] *Attorney-General for Manitoba* v. *Attorney-General for Canada* (Futures Grain Tax), [1925] A.C. 561, at p. 568, 11 Cam. 381, at p. 386; *Attorney-General for Alberta* v. *Attorney-General for Canada* (Alberta Bill of Rights), [1947] A.C 503, at pp. 518-9.

operation of the statute and its practical effect in every-day affairs is admissible. This evidence would be directed to showing what the legislation in its practical effect "deals with"—the relations of the persons the legislation deals with in a practical way. As to purpose, the sole matter in issue is the mental state of Parliament at the time it passed the law. On this point evidence is much more restricted. In general the purpose of Parliament must be derived from what it did. Common knowledge is however permissible as showing the state of mind of Parliament.[44]

The kind of evidence that is not admissible is indicated by the Privy Council in *Union Colliery* v. *Bryden:*[45]

> . . . the controversy has been limited to the single question—whether the enactments of s. 4, in regard to which the appellant company has stated the plea of ultra vires, were within the competency of the British Columbian Legislature.
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> In considering the issue to which the case has thus been narrowed, the evidence led by the parties appears to their Lordships to be of no relevancy. It is chiefly directed to the character, whether reasonable or unreasonable, of the legislation which has been impugned by the appellant company. But the question raised directly concerns the legislative authority of the legislature of British Columbia, which depends upon the construction of ss. 91 and 92 of the British North America Act, 1867. These clauses distribute all subjects of legislation between the Parliament of the Dominion and the several legislatures of the provinces. In assigning legislative power to the one or the other of these parliaments, it is not made a statutory condition that the exercise of such power shall be, in the opinion of a court of law, discreet. In so far as they possess legislative jurisdiction, the discretion committed to the parliaments, whether of the Dominion or of the provinces, is unfettered It is the proper function of a court of law to determine what are the limits of the jurisdiction committed to them; but, when that point has been settled, courts of law have no right whatever to inquire whether their jurisdiction has been exercised wisely or not.

Finally, the analysis of the nature of matters I have put forward may be supported as being consonant with the oft-repeated admonition of the Privy Council and the Supreme Court of Canada set out in the passage just quoted. The courts have held consistently that they are not concerned with the wisdom or policy of legislation

[44] This question is not unlike the one that arises over the use of legislative history, in the sense of what was said or what happened in Parliament, to interpret a statute. Evidence on these matters is inadmissible. For an analysis of the reasons for this rule, which to anyone familiar with the legislative process in a parliamentary system should be definitive, see J. A Corry, The Use of Legislative History in the Interpretation of Statutes (1954), 32 Can. Bar Rev 624. Legislative history, in the sense of previous legislation that has been passed on the same subject, is of course admissible: *Alberta Bank Taxation* case, [1939] A.C. 117, Plaxton 394;

[45] [1899] A C. 580, at pp 584-5; I Cam 564, at pp. 567-8

when the question for consideration is one of ultra vires. The only question is: Did Parliament have power to enact the legislation? This statement conflicts with the assertion frequently made that questions of validity in constitutional law are really merely political questions and that the decision turns upon the political views of the tribunal required to decide them. In the view of the writer this assertion is incorrect and cannot be reconciled with the numerous statements of the Privy Council and the Supreme Court of Canada illustrated by the quotation just given. If the analysis I have suggested of the nature of "matters" is accepted, it appears that the political views of the judges called upon to decide a question of ultra vires, or their views on the wisdom or stupidity of any piece of legislation that comes before them, are quite irrelevant. As regards the objective aspect of a "matter", the question is simply one of fact. Do the relations between individuals dealt with by the legislation fall within the field described by the "matter"? Again, the motive of Parliament is also to be ascertained as a fact. Did the motive that impelled Parliament to enact legislation arise from or is it connected with the thing, activity or concept described in the matter? On these two tests, the social scheme or views in accordance with which Parliament has enacted the legislation are not relevant.

It must be admitted that the terminology used in the foregoing analysis of the nature of "matters" and the meaning of "in relation to" is not to be found in many judgments of the Judicial Committee of the Privy Council or of the Supreme Court of Canada. It is submitted, however, that the substance of the analysis corresponds with the views expressed in the judgments.

By way of conclusion it is proposed to refer to two recent judgments of the Privy Council as complete illustrations of the consistency of the foregoing analysis with the reasoning followed. In the *Quebec Bank Deposits* case[46] the issue was the validity of provincial legislation declaring that deposits in credit institutions that had not been for thirty years or more the subject of any operation or claim were to be deemed to be vacant property belonging to the Crown in right of the province. It was argued, on the one hand, that the law was "in relation to" the matter "Property and Civil Rights in the Province" as a law for the transmission of property and, on the other hand, that the law was "in relation to" the federal matter of "Banking". Lord Porter states:[47]

[46] *Attorney-General for Canada* v. *Attorney-General for Quebec and others*, [1947] A C. 33.
[47] At pp. 43-4.

Nevertheless, an answer is still required to the question, what is the pith and substance of this Act, the validity of which is challenged. No doubt in many cases it can be said that the enactment which is under consideration may be regarded from more than one angle and as operating in more than one field. If, however, the matter dealt with comes within any of the classes of subjects enumerated in s. 91 it is under the terms of that section not to be deemed to come within the classes of subjects assigned exclusively to the legislatures of the Provinces, even though the classes of subjects looked at singly overlap in many respects. The whole scheme for distribution of powers must be looked at, . . .

Is then, the repayment of deposits to depositors or their successors in title under the law as existing a part of the business of banking or necessarily incidental thereto, or is it concerned primarily with property and civil rights or incidental to those subjects? Their Lordships cannot but think that the receipt of deposits and the repayment of the sums deposited to the depositors or their successors as defined above is an essential part of the business of banking. The relation between banker and customer who pays money into the bank is stated in words which have ever since been accepted in *Foley* v. *Hill* (1848), 2 H.L. Cas. 28, as 'the ordinary relation of debtor and creditor, with a super-added obligation arising out of the custom of bankers to honour the customer's drafts'. No question of possession of or property in the deposit arises. The obligation is mutuum not commodatum. Once the deposit is made there remains only a debt due from the banker to the customer It is urged, however, on behalf of the respondents that the legislation is not aimed at banks. It is, they say, of general application and affects not banks only but credit institutions of all kinds. The Chief Justice of Quebec has pointed out in answer, and St. Germain J. appears to agree with him, that it is directed only at the banks because in every other case these deposits had already become the property of the depositors by prescription. In so stating he no doubt had in mind s. 92 of the Bank Act of the Dominion (24 & 25 Geo. 5, c. 24) and the fact that apart from those made by banks most loans are repayable at a fixed or indefinite time and not, as in the case of advances by banks, repayable on demand, so that, even if in some cases it may apply to other institutions, in the vast majority of cases, and primarily, the legislation now in question affects banks and them alone

If that be the main object and effect of the Provincial Act it does, in their Lordship's view, invade the field of banking. It comes in pith and substance within that class, and the fact that it may incidentally affect certain other institutions cannot take away its primary object and effect.

In the *Saskatchewan Farm Security Act Reference*,[48] as already indicated, the issue was the validity of legislation reducing the principal amount of a mortgage in a crop failure year by an amount equal to the interest. Viscount Simon states:[49]

[48] *Attorney-General for Saskatchewan* v. *Attorney-General for Canada*, [1949] A.C. 110.

[49] At pp. 123-4.

> A more difficult question is raised by the alternative contention that the legislation is in relation to civil rights in the Province. Contractual rights are, generally speaking, one kind of civil rights, and, were it not that the Dominion has an exclusive power to legislate in relation to 'interest', the argument that the provincial legislature has the power, and the exclusive power, to vary provisions for the payment of interest contained in contracts in the province could not be overthrown. But proper allowance must be made for the allocation of the subject matter of 'interest' to the Dominion legislature under head 19 of s. 91 of the British North America Act. . . It is therefore clear that a provincial statute which varies the stipulation in a contract as to the rate of interest to be exacted would not be consonant with the existence and exercise of the exclusive Dominion power to legislate in respect of interest. The Dominion power would likewise be invaded if the provincial enactment was directed to postponing the contractual date for the payment of interest without altering the rate, for this would equally be legislating in respect of interest
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> There thus remain two questions to be considered. first, does the provincial statute now under consideration operate to the above effect? And secondly, even if it does, can the consequent invalidity be avoided because this result should be regarded as merely incidental to the achievement of the real and valid statutory purpose, so that, although the topic of interest is trenched upon, the subject of interest is not the pith and substance of the Act? The first of these questions must be answered in the light of an established rule of construction in such cases, namely, that regard must be had to the substance and not to the mere form of the enactment, so that 'you cannot do that indirectly which you are prohibited from doing directly'. If, under colour of an arrangement which purports to deal only with the principal of a debt, it is really the contractual obligation to pay interest on the principal which is modified, the enactment should be regarded as dealing with interest.

These extracts, which are the governing parts of the judgments on the points dealt with, are, it is submitted, entirely in accord with the analysis suggested in this article. I believe the same thing could be said of all other judgments on sections 91 and 92. It has been possible to refer to authorities in this article for illustrative purposes only since, as pointed out at the outset, the questions discussed arise in every case on the competing powers of section 91 and section 92 It is believed, however. that no decision conflicts with the views expressed

If my analysis is correct, it would appear to be inadvisable to attempt precise definitions of the scope of particular "matters" in the abstract. It is sufficient, after a law is passed, to look at it objectively to determine from its effect what relations or interests it regulates. Then we must ascertain the purpose of Parliament. Having ascertained these, the things, activities or concepts men-

tioned in section 91 or section 92 that they arise from or are connected with can be determined without further abstract definitions being necessary. It may be, however, that a clearer understanding of the tests to be applied will assist in arriving at a clearer understanding of the nature of the laws that may be made under the three most difficult parts of sections 91 and 92, "The Regulation of Trade and Commerce", "Property and Civil Rights in the Province" and the authority of Parliament under the opening words of section 91 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. . . ".

End Products

Canada is a country which has always had an adventurous and enterprising frontier and may always have one, but behind the minority of the venturesome there has grown up a larger and larger majority of the timid and canny whose lethargy has denied to Canadians their proper heritage. That cautious, conservative majority can rouse itself to quite exciting life if it wants to. Scholarship is the frontier of the mind and Canadians have shown that they can excel there They will do so for Canada if Canada shows that they are appreciated And there are endless tasks at hand for scholarship No one knows accurately, for instance, the *revealed* natural resources of Canada; or how to make use of the mountains of waste, rich in iron, which accumulate hourly at Canada's metal mines; or what would be the most efficient national structure for Canadian industry and finance, or how effective Dominion-Provincial relations might be achieved; or what political parties in Canada represent; or what has happened to the churches and religion, literature and the arts; or whether or not a Canadian Province could make a quasi-treaty with an American State; or so on *ad infinitum.*

The whole adventure on the frontier of the mind is up to the whole of Canada and there could be no more rewarding mission for Canadians in the future. It must have its missionaries, sent out for the most part from the universities, but speaking through all manner of men who receive the faith. Its creed might perhaps be taken from the teachings of that most North American of philosophers, William James: 'The world is only beginning to see that the wealth of a nation consists more than in anything else in the number of superior men that it harbors. In the practical realm it has always recognized this and known that no price is too high to pay for a great statesman or great captain of industry. But it is equally so in the religious and moral sphere, in the poetic and artistic sphere and in the philosophic and scientific sphere. Geniuses are ferments; and when they come together, as they have done in certain lands at certain times, the whole population seems to share in the higher energy which they awaken.' (Scholarship for Canada: The Function of Graduate Studies (1945). By John Bartlet Brebner)