THE CANADIAN BAR REVIEW

THE CANADIAN BAR REVIEW is the organ of the Canadian Bar Association, and it is felt that its pages should be open to free and fair discussion of all matters of interest to the legal profession in Canada. The Editorial Board, however, wishes it to be understood that opinions expressed in signed articles are those of the individual writers only, and that the REVIEW does not assume any responsibility for them.

☞ Articles and notes of cases must be typed before being sent to the Editor, Cecil A. Wright, Osgoode Hall Law School, Osgoode Hall, Toronto 2, Ontario.

The Twenty-first Annual Meeting of the Canadian Bar Association will be held in the City of Halifax on the 19th, 20th and 21st days of August, 1936.

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CASE AND COMMENT.

COMMORIENTES — SURVIVORSHIP — PRESUMPTIONS. — The advent of the "family automobile" has caused far-reaching changes to be made in the law of vicarious liability.[1] To suggest that it has given rise to a difficult situation concerning testate and intestate succession may seem a far cry, but one has only to recall the numerous occasions in which an entire family has been swept out of existence in one motor accident to realize that problems of survivorship and passing of title in the case of *commorientes* is likely to increase. In the present state of the law in the common law provinces in Canada, this problem is one which not only seems destined to produce litigation, and thus places a strain on the estates involved, but such litigation itself will be based on an array of flimsy opinion evidence on which courts will be asked to make a decision of fact in situations that are all but impossible of determination. That some courts will be prone to act in such situations in accordance with their

[1] In Canada the statutes imposing liability on the owner of a motor car for the negligence of the person driving with his consent extends the doctrine of vicarious liability so that it is almost true to say *qui facit per* auto *facit per se*. In the United States the doctrine of the "family automobile" achieves the same result. See Hope, *The Doctrine of the Family Automobile*, 8 Am. Bar Assoc. J. 359; Cockerill, *The Family Automobile*, 2 Va. L.R. 189.

sympathies in order to reach a fair result is natural, and in no way reflects on the judicial process. On the other hand, some courts will refuse to enter into what is at best mere guesswork, and this regardless of harsh results.

The facts in the situation recently presented to an Ontario court in *Re Warwicker, McLeod* v. *Toronto General Trusts Corporation*,[2] serve to indicate the nature of the problem involved, and the result, when compared with that reached in the leading English case of *Wing* v. *Angrave*,[3] which was very similar on the facts, indicates the possibility of different judicial approaches.

In *Re Warwicker*, Mr. and Mrs. Warwicker were driving in their automobile with their "adopted" son Douglas. The car left the highway and rolled into the Gatineau River. Mr. and Warwicker were both drowned. Douglas Warwicker survived. By wills made some time previously, Mr. Warwicker left all his property to his wife and "in the event of my said wife . . . . . predeceasing me", he gave his property to his adopted son Douglas. Mrs. Warwicker had bequeathed all her property to her husband, and "in the event of my said husband . . . . . predeceasing me", she left her property to her adopted son Douglas. Under these circumstances, the competition as to title under both estates was between the adopted son Douglas (who, not having been legally adopted could not inherit on an intestacy) and the next of kin of Mrs. Warwicker and the next of kin of Mr. Warwicker.

On this bald recital there can be no doubt that one's sympathies incline towards the adopted son Douglas. Plainly, both Mr. and Mrs. Warwicker intended that their adopted son should take his or her property in the event that the other spouse could not take. The difficulty, however, was how to reach that conclusion in accordance with the existing rules of law. On the authorities, the only way that Douglas could take anything, would be to show either that Mr. Warwicker predeceased Mrs. Warwicker or *vice versa*. In *Wing* v. *Angrave*,[4] on similar facts, it had been argued (and acceded to by Lord Campbell L.C., dissenting) that gifts over in wills similar to those in the *Warwicker Case* should take effect not merely if it could be proved that one or other of the spouses actually predeceased the other, but also if one or the other could not take because it was not proven that he did survive. As stated by Lord

[2] [1936] O.W.N. 329; [1936] O. R.
[3] (1860), 8 H.L.C. 183. See also *Underwood* v. *Wing* (1855), 4 DeG. M. & G. 633.
[4] *Op. cit.*

Wensleydale, it was argued that the words of gift should be read "as intending to provide, not merely for the case of the legatee dying in the lifetime of the testatrix, but dying at the same time, as if the words had been 'if the legatee shall not survive,' or, in other words, 'if the previous legacy shall lapse,' then over."[5] A liberal construction might quite easily have reached such a result both in *Wing* v. *Angrave* and *Re Warwicker*, for as Lord Campbell stated "if the object is plainly the same, whatever are the words used, the result must be the same."[6] The majority of the House of Lords held, however, that although the parties would undoubtedly have desired this result had the unusual circumstances been present to their minds, it was not so stipulated in the wills. The latter merely provided for a gift on a specific contingency, and such contingency had, therefore, to be proved by the claimant in order to displace the *prima facie* claim of the next of kin. Here arises, then, the real stumbling-block in case of this kind.

Where two persons have died together in a common disaster which of them died first? In a case such as *Re Warwicker* (as also in *Wing* v. *Angrave*) where the same person is the ultimate beneficiary in both wills in case of one predeceasing the other, it seems sensible to say that it really makes no difference which died first. All that is required is that the court be convinced the parties did not die simultaneously. Opinions have been expressed to the effect that it is practically impossible for two persons to die simultaneously,[7] and therefore on this view the position of the adopted son, Douglas, looks most secure. Unfortunately, however, the House of Lords in *Wing* v. *Angrave* indicated that the fact that both wills were ultimately in favour of the same person was immaterial. The case must be treated as though different individuals were named. The result of this is to make necessary a finding as to *which* of the testators actually died first.[8] This, according to the House of Lords, is a matter of actual proof, the burden of which is on the claimant. In English law there is no presumption one way or another to assist him.

Taking this position, the House of Lords in *Wing* v. *Angrave* held that a claimant who was named ultimate beneficiary in

[5] 8 H.L.C. at p. 214.

[6] *Op. cit.*, at p. 196.

[7] See Sargant J. in *In re Fisher, Robinson* v. *Eardley*, [1915] 1 Ch. 302 at p. 305: "The death of one of two persons in the lifetime of the other is a certainty not only in common parlance but I think speaking scientifically, for having regard to the infinite divisibility of time it seems to me impossible that both should die at exactly the same moment."

[8] See Lord Wensleydale at p. 219.

the wills of a husband and wife "in case my husband shall die in my lifetime", and also "in case my wife shall die in my lifetime", failed to sustain the burden of showing which of the spouses outlived the other, and therefore had not proved the happening of either condition. In that case husband and wife had perished in a shipwreck and were swept overboard at the same time. As the bodies were not recovered, all the court had to go on was an array of medical opinion on both sides. Some views were that the wife would die first, others that you could not tell. As Wightman J. stated in an opinion in another application in the same case, "there may be surmise, and speculation and guess, but we think there is no evidence. . . . . We may guess or imagine or fancy, but the law of England requires evidence."[9] In this case we have a court refusing to speculate despite an admittedly unjust result.

On the other hand, in the *Warwicker Case*, the bodies were recovered, and from their condition, the amount of water in the lungs, and other facts, three doctors gave their opinion that Mrs. Warwicker died first. Two other doctors gave contrary evidence. McKay J. stated that he was able to act on a balance of probabilities, and, the opinion evidence disagreeing, he could form his own opinion.[10] He admitted that if the bodies had not been recovered this would be impossible. He therefore held as a fact that Mrs. Warwicker had died first. With this result, one can sympathize, even though he may doubt whether there was any more satisfactory evidence in the case than in *Wing* v. *Angrave*. Without in any way intending to be disrespectful, one may well wonder whether, had either testator left all his property to a stranger, in the event of the other predeceasing him, the same result would have followed, or whether the court might not have felt less inclined to make a definite finding.[11]

[9] *Underwood* v. *Wing* (1855), 4 DeG. M. & G. 633 at p. 657.

[10] Quoting Middleton J. in *Bennett* v. *Peattie* (1925), 57 O.L.R. at p. 242.

[11] The extent to which extraneous circumstances enter into all decisions, and particularly those on the construction of wills, can, of course, never be estimated, and in most cases would be denied. In his recent collection of cases on TRUSTS AND ESTATES (West Publishing Co. : St. Paul) Professor Powell of Columbia suggests to students that in examining cases on construction they bear in mind whether a construction other than that reached by the court would have disinherited heirs, disappointed persons having moral claims, run foul of the rule against perpetuities, etc., etc. To deny that such considerations influence a court seems to divorce law from any relation to human existence. Usually counsel recognize it when they have a case in which they expect to obtain the "sympathy" of the court. Given the "sympathy" of the court and the possibility of a court supporting one of two different findings by the rules in the books, it is not hard to tell how a court will decide. The writer believes that law students should early become acquainted with this phenomenon. It is just as much part of the administration of justice as so-called "legal principles". It is probably more important.

Although the House of Lords stated there was no presumption one way or another in cases of this kind, it is a rather remarkable fact, that unless a court wishes to make a definite finding as to which survived the other, based on evidence, the estates are divided as though the parties had actually died simultaneously. Indeed in *Underwood* v. *Wing*,[12] the Master of the Rolls had said that "there is therefore no evidence to show who was the survivor, and the conclusion of law is, that both died at the same moment." This was explained later by Lord Cranworth to mean that "the property must be distributed just as it would have been if they had both died at the same moment."[13] He admits that it is practically impossible for two persons to die at the same time, but states that because you cannot prove which died first it is the only thing to do. It is amazing that if a court refuses to indulge in theoretical speculation as to which of two persons survived it is forced to proceed on an assumption that is generally believed practically impossible.[14] It is probably due to this fact, as well as the feeling, expressed by a New York court, that "it is as unbecoming as it is idle for a judicial tribunal to speculate or guess whether during the momentary life struggle one or the other may not have ceased to gasp first,"[15] that England departed from the position of "no presumption" in 1925. *The Law of Property Act, 1925*, now provides as follows :

> In all cases where, after the commencement of this Act two or more persons have died in circumstances rendering it uncertain which of them survived the other, or others, such deaths shall (subject to any order of the court) for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder. [16]

Such a position is well suited to avoid the litigation and resulting guesswork that ensues in such cases as *Re Warwicker*. Despite the finding of the court in that case, surely the circumstances "rendered it uncertain" whether Mr. or Mrs. Warwicker died first. If that be so, and had Ontario such a statute, the Warwicker estates would have been spared the expense of nine counsel fees —a not inconsiderable sum.

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[12] *Op. cit.*

[13] 4 DeG. M. & G. at p. 661.

[14] McKay J. in *Re Warwicker* quoted the passage of Sargant J., *supra*, note 7, as to the impossibility of two persons dying simultaneously. It is small wonder the court felt impelled to find as a fact that one or other other died first, rather than proceed to divide the estates "as if" they died at the same time.

[15] *Newell* v. *Nichols* (1878), 75 N.Y. 78.

[16] 15 Geo. V, c. 20, s. 184.

Quebec, following the French Civil Code, has long had provisions concerning presumptions when two or more persons "perished in the same accident". The provisions of the Civil law, as found in the Quebec Civil Code, are very elaborate and are based on differences in age and sex set out in the Code itself.[17] The simplicity of the English Act seems preferable, since at best any result is arbitrary and is based on convenience. The common law provinces already have provision made in the Uniform Life Insurance Act for a statutory presumption concerning survivorship between a beneficiary and the assured who die "in the same disaster".[18] It is to be hoped that the common law provinces will adopt general legislation similar in principle to that now in force in England with an eye to limitating estate litigation as well as saving the courts from the necessity of choosing between the theories and speculations presented in opinion evidence.[19]

C. A. W.

[17] Art. 603. Where several persons, respectively called to the succession of each other, perish by one and the same accident, so that it is impossible to ascertain which of them died first, the presumption of survivorship is determined by circumstances, and, in their absence, by the considerations of age and sex, conformably to the rules contained in the following articles.

Art. 604. Where those who perished together were under fifteen years of age, the eldest is presumed to have survived;

If some were under the age of fifteen and others over that of sixty, the former are presumed to have survived;

If some were under fifteen or over sixty years of age, and the others in the intermediate age, the presumption of survivorship is in favour of the latter.

Art. 605. If those who perished together were all between the full ages of fifteen and sixty, and of the same sex, the order of nature is followed, according to which the youngest is presumed to survive;

But if they were of different sexes, the male is always presumed to have survived.

Similar provisions, with an improved wording have been adopted in Louisiana and California. See WOERNER, AMERICAN LAW OF ADMINISTRATION, 2nd ed., p. 446.

[18] See, for example, The Insurance Act, R.S.O. 1927, c. 222, s. 161: "When the person whose life is insured and any one or more of the beneficiaries perish in the same disaster, it shall be *prima facie* presumed that the beneficiary or beneficiaries died first."

[19] See Middleton J. A. in *Bennett* v. *Peattie* (1925), 57 O.L.R. 233 at p. 240: "Where upon the death of two the right depends upon survivorship, and the whole fund must go to one or the other according to the determination as a question of fact that one person killed in a common accident drew his last breath a moment after the other expired, the difficulty of the inquiry and the unsatisfactory nature of the result are obvious. There is no way by which a division of the property can be secured unless the common sense of the contending factions triumphs over the desire to litigate. . . . . The Civil Law, which raises presumptions of a survivorship based upon the presumed strength of the individual, of the selfishness by which he would save himself at the expense of the weak, had, no doubt, its origin in cases of drownings at sea or similar catastrophes; but, in the case of a railway accident and similar disasters, mere bodily strength avails little. Legislation to clear up this situation seems to me to be needed."

CONFLICT OF LAWS — CONSTRUCTION OF STATUTE — LIFE INSURANCE MONEY NOT AVAILABLE FOR CREDITORS.—Some interesting questions as to administration of estates and succession to property are suggested by the case of *Public Trustee of New Zealand* v. *Lyon*,[1] decided by the Privy Council on appeal from the Court of Appeal of New Zealand.

It is provided by s. 65, sub-s. of 2, of the Life Insurance Act, 1908, of New Zealand as follows :

> Where a policyholder dies leaving a will, the policy-moneys shall not be applied in payment of his debts or of any legacies payable under his will unless in and by his will he has by express words specially referring to such moneys declared that the same shall be so applied.

One Lyon was the holder of a policy of insurance issued to him when he was domiciled in Scotland by a Scottish company which carried on business in Scotland, and which had no office or agency in New Zealand. The policy was payable to the holder, his executors, administrators and assigns, on his surviving the 28th February, 1942, or on his death at an earlier date. He died on the 8th August, 1932, domiciled in New Zealand, having made a will by which he gave all policies of insurance to his wife and certain of his children, or such of them as should survive him, and which contained no declaration that insurance money should be applied in payment of his debts. Administration was granted in New Zealand to the Public Trustee. There was no grant of representation by any Court in Scotland and therefore there was no administration of the estate in Scotland. The Scottish company, pursuant to s. 19 of the Revenue Act, 1889, of the United Kingdom, paid the insurance money to the Public Trustee of New Zealand.[2] The proceeds of the policy thus transmitted to New Zealand were, said Kennedy J. in the Court of Appeal, "like the movables of a deceased person reduced into the possession of the New

[1] [1936] A.C. 166, affirming *In re Lyon, Lyon* v. *Public Trustee*, [1934] N.Z.L.R. 296.

[2] Section 11 of the Revenue Act, 1884, provides : "Notwithstanding any provision to the contrary contained in any local or private Act of Parliament, the production of a grant of representation from a Court in the United Kingdom by probate or letters of administration or confirmation shall be necessary to establish the right to recover or receive any part of the personal estate and effects of any deceased person situated in the United Kingdom." This was subject to a proviso which was amended by the Revenue Act, 1889, s. 19, to read as follows : "Provided that where a policy of life assurance has been effected with any insurance company by a person who shall die domiciled elsewhere than in the United Kingdom, the production of a grant of representation from a court in the United Kingdom shall not be necessary to establish the right to receive the money payable in respect to such policy." See the discussion of these provisions in *Haas* v. *Atlas Assurance Co. Ltd.*, [1913] 2 K.B. 209.

Zealand administrator as such and brought into New Zealand before any person in Scotland obtained any valid title by the *lex situs* or reduced them into possession (see Dicey's Conflict of Laws, 5th ed. 383), and the insurance money became assets to be administered in the New Zealand administration."[3]

The estate was insolvent, and the administrator took out an originating summons in New Zealand for the determination of the question whether s. 65 of the New Zealand statute applied to the policy in question so as to render the insurance money not available to creditors, the summons being served on the widow, representing herself and the children, and on one Page, representing himself and all other creditors of the testator. The Court of Appeal of New Zealand, by a majority judgment, reversing the decision of Ostler J., held that the money was not available for creditors. On the Public Trustee's appeal, the Privy Council affirmed the judgment of the Court of Appeal, finding, after an examination of various provisions of the statute, that there was nothing in the statute which expressly or impliedly limited its application to a policy issued by a company carrying on business in New Zealand or having an office or agency there; and Lord Thankerton quoted with approval[4] the following passage from the judgment of Kennedy J. :[5]

> The object of s. 65 plainly is to encourage provision by way of insurance for the person insured and his wife or children, even to the extent of freeing the proceeds of an insurance policy from the claims of creditors. Individuals, and not policies, are the objects of the solicitude of the Legislature. If that be the true view, as I think it is, then there does not appear any reason why protection should apply for the benefit of a policyholder, his wife or children, in respect of a policy which has been issued in New Zealand or on a proposal made in New Zealand, but should not apply for the benefit of the same person or persons in respect of a policy issued abroad on a proposal there made.

Lord Thankerton concluded his reasons for judgment as follows :[6]

> The appellant is in this difficulty; if the provisions of s. 65 merely bar the [creditors'] right of recovery in New Zealand, such bar will

[3] [1934] N.Z.L.R. 296, at p. 312. Kennedy J. added : "The facts in this case are, it thus appears, different from those disclosed in *Cook* v. *Gregson* (1854), 2 Drew. 286. There the administrator had in England assets which he had collected in Ireland under an Irish grant. As the administrator had a two-fold character — namely, that of an English administrator and also that of an Irish administrator — he was held bound to administer the Irish assets as an Irish administrator."

[4] [1936] A.C. 166, at p. 176.

[5] [1934] N.Z.L.R. 296, at p. 314.

[6] [1936] A.C. 166, at p. 177.

> operate to prevent their recovery in the New Zealand administration, in course of which the present question arises. If, on the other hand, s. 65 destroys the right or title of the New Zealand creditors as against the policy moneys which form part of the estate of a person domiciled in New Zealand then, even if there had been a Scottish administration, the New Zealand creditors could not have proved in the Scottish administration any claim of debt against the policy moneys.

The dilemma stated in the passage just quoted is of course dependent upon the facts of the case, and especially upon the fact that the claims of New Zealand creditors only were in question, and as regards such creditors, the passage omits in the first sentence the contingency mentioned in the second sentence, namely, "if there had been a Scottish administration."

If there had been a Scottish administration, the question of the construction of the New Zealand statute and its applicability to New Zealand creditors as well as other creditors claiming in the Scottish administration would have been a question for a Scottish court[7] and not a question for a New Zealand court or for the Privy Council acting in the character of the supreme appellate court of New Zealand; and Lord Thankerton's statement of what a Scottish court would decide as to the claims of New Zealand creditors is interesting from the point of view of the conflict of laws. Owing to the fact that the question for decision was only as to the effect of a New Zealand statute in a New Zealand administration of the estate of a person who was domiciled in New Zealand, the whole case is suggestive, rather than decisive, of questions of conflict of laws. It was immaterial to the decision whether the court construed the statute as one which merely barred the remedy of creditors or one which destroyed the right or title of creditors, or, whether the court characterized the statute as being one relating to administration only, and therefore limited in its application to a New Zealand administration (governed by the law of the forum of administration or, in other words, the *lex situs* of the assets included in that administration), or as being a statute relating to succession, and therefore (by reason of the New Zealand domicile of the testator) applicable to all life insurance moneys, without regard to the situs of the assets or the place of administration.[8] If there had been a Scottish administration, these questions would have been material. Lord Thankerton expressly says that if the New Zealand statute destroyed the right or title of the New

[7] (1935), 13 Can. Bar Rev. 42, at p. 45.

[8] See *Administration and Succession in the Conflict of Laws* (1934), 12 Can. Bar Rev. 67, at pp. 129 *ff.*; *cf.* note on *In re Wilks*, [1935]-Ch. 645, in 13 Can. Bar Rev. 749.

Zealand creditors, they could not claim in a Scottish administration, whereas, impliedly, if the statute merely barred the remedy, such creditors might claim in Scotland, though not in New Zealand. On the latter construction of the statute, Scottish creditors might claim in Scotland, but not in New Zealand. On the former construction of the statute, the Scottish creditors would not be entitled to claim in New Zealand, but would they be entitled to claim in Scotland?

In the case of *In re Lorillard*[9] the testator died domiciled in New York, leaving movable property in England and in New York. The claims of certain American creditors were barred by lapse of time in England, but not in New York. In the New York administration there was a deficiency of assets, whereas in the English administration there was a surplus. Hence the strange result that by reason of the application in each forum of the *lex fori* relating to limitation of personal actions, the English court distributed in accordance with the *lex domicilii* the beneficial interest in a surplus, notwithstanding that this surplus did not exist by the *lex domicilii* in the sense that if the English administrator had paid the surplus to the New York administrator for distribution, the latter would probably have paid the American creditors, whose claims were valid by New York law (*lex fori*) and there would have been no surplus to which the New York law of succession (*lex domicilii*) would have been applicable.

The case of *Public Trustee of New Zealand* v. *Lyon* suggests the converse situation, namely, that in a Scottish administration the claims of creditors might be allowed against the insurance money, so as to leave no surplus to which the law of New Zealand (*lex domicilii*) would apply. This result would be clear if the Scottish court construed the New Zealand statute as merely barring the remedy of creditors, that is, as being part of the procedural law of the forum. Both Scottish and New Zealand creditors would be entitled to claim in the Scottish administration, but not in the New Zealand administration. If, as Lord Thankerton suggests might be done, the statute were construed as destroying the right or title of creditors, a Scottish court might say that it destroyed the rights or title of New Zealand creditors only. If the Scottish court construed the statute as being a statute relating to succession to movables, which Lord Thankerton does not in terms suggest as a possibility, then the statute should govern the succession everywhere, and even in

[9] [1922] 2 Ch. 638.

the Scottish administration the money should be paid to the beneficiaries under the *lex domicilii* and should not be available even for Scottish creditors.

The statute in question in *Public Trustee of New Zealand* v. *Lyon* invites comparison with s. 145, sub-s. 1, of the (Ontario) Insurance Act, R.S.O. 1927, c. 222, [10] which reads as follows:

> "Where the insured . . . . . designates as beneficiary or beneficiaries a member or members of the class of preferred beneficiaries [the husband, wife, children, grandchildren, father and mother of the person whose life is insured], a trust is created in favour of the designated beneficiary or beneficiaries, and, so long as any of the class of preferred beneficiaries remains, the insurance money, or such part thereof as is or has been apportioned to a preferred beneficiary, shall not, except as otherwise provided in this Act, be subject to the control of the insured, or of his creditors, or form part of the estate of the insured."

By virtue of s. 146 of the same statute, notwithstanding the designation of a preferred beneficiary or beneficiaries, the insured may subsequently alter or revoke any prior designation "so as to restrict, limit, extend or transfer the benefits of the contract to any one or more of the class of preferred beneficiaries to the exclusion of any or all others of the class," etc.

In *Re Baeder and Canadian Order of Chosen Friends* [11] an Ontario benevolent society issued to one Baeder, then domiciled in Ontario, a benefit certificate or policy, within the terms of the Ontario Insurance Act and governed by Ontario law. In this policy the designated beneficiaries were the three children of the insured. Baeder subsequently migrated to New York and died domiciled there. By the law of New York the beneficiaries of a policy could not be changed by the will of the insured, whereas the Ontario Insurance Act permits, and the similar statute formerly in force permitted, the insured by his will to make a new designation of beneficiaries, subject to the limitations mentioned in the provisions quoted above. Baeder made a will, valid as regards form by both Ontario and New York law, giving all his life insurance to a granddaughter. It was held that the designation of the grandchild as beneficiary was valid, because the policy, read with the statute, constituted a contract or statutory trust under which the rights of the

[10] The same provision occurs in the statutes of all the provinces of Canada (except Quebec) by virtue of the adoption of the uniform Life Insurance Act prepared in 1923 by the Conference of Commissioners on Uniformity of Legislation in Canada.

[11] (1916), 36 O.L.R. 30, 28 D.L.R. 424. Generally, as to questions of conflict of laws relating to insurance policies, *cf.* BEALE, CONFLICT OF LAWS (1935), vol. 2, pp. 1210 - 1215, vo.. 3, pp. 1488 - 1491.

parties, including the limited power of the insured to change the beneficiaries, were crystallized and defined at the time of the issue of the policy, or alternatively because the statute created a special power of appointment exercisable as defined in the statute, and that the rights of the parties were not affected by Baeder's acquisition of a new domicile in New York.

Impliedly the decision in the *Baeder* case negatives the characterization of the statutory provisions as being provisions relating to succession to movables, because on the basis of that characterization the proper law would be the *lex domicilii* of the testator at the time of his death. The provisions of s. 65 of the New Zealand Life Insurance Act might much more easily, it is submitted, be characterized as a part of the New Zealand law of succession to movables and therefore applicable, in New Zealand or in Scotland or elsewhere, to all the life insurance of a testator who dies domiciled in New Zealand.

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NEGLIGENCE—ABSOLUTE LIABILITY—*RES IPSA LOQUITOR.*—The decision of the Ontario Court of Appeal in *Hutson et al.* v. *United Motor Service Ltd.*[1] should be of particular interest in view of the article of Professor Paton on *res ipsa loquitur* which appears elsewhere in this issue of the REVIEW. In addition, the opinions contain certain observations concerning the rule in *Rylands* v. *Fletcher*,[2] which, when placed in conjunction with a discussion of *res ipsa loquitur* seem, to the writer at least, to lead to some confusion.

The plaintiffs had leased to the defendants a building for the purpose of carrying on the business of repairing automobiles. On a warm summer day the defendants were cleaning a large floor, a square at a time, by pouring gasoline on the square which was then scraped and brushed. After this, a solution called oakite was applied hot to the square. The oakite was kept hot in a tank under which there were two gas jets. No evidence was given at the trial to show whether these jets were lit or not. Having cleaned practically all the floor, the defendants were working in the last square—in which the tank of oakite was kept—when an explosion occurred causing a fire which

[1] [1936] O.R. 225.
[2] (1868), L.R. 3 H.L. 330.

seriously damaged the plaintiff's building. The plaintiffs sued for this damage. The case was tried by Rose C.J.H.C. without a jury, and he dismissed the action on the ground that "the evidence here, uncontradicted, makes it apparent that the ordinary practice of persons operating garages such as the garage operated by the defendant has been to use gasoline and to use it in the manner in which the defendants were using it."[3] The plaintiffs appealed.

There was no dispute between the parties as to the cause of the fire. It was apparent that the gasoline had mingled with the air and had, in some manner, been ignited. Middleton J.A. first considered the "ground of liability" of the defendant. Having discarded the basis of nuisance, inasmuch as the act in question was "an isolated act done upon the defendant's own premises and done with proper precautions not calculated to interfere with the public weal or the individual comfort of the plaintiff," he then discussed the question of liability under *Rylands* v. *Fletcher* which had been advanced. He rejects this "strict" liability on the ground that the rule in that case covers only the use of lands and the resulting liability for escape of things from lands which caused damage. He then asks, "Then is what was done a tort? I think it is under this head that there is here liability." This seems strange since all the grounds previously discussed sound in tort. Apparently he has in mind, however, the tort of negligence, because he goes on to speak of the care required in the handling of gasoline. His judgment becomes a little more difficult to follow when, after quoting from Salmond,[4] concerning the French doctrine of *le risque créé*, he says, "anyone who does a patently dangerous thing should, I think, be responsible. The incident of the ownership of land is merely incidental and subsidiary." This raises doubt whether Middleton J.A. based his judgment on "negligence" or on a "strict liability" similar to that in *Rylands* v. *Fletcher*. Further than that, it necessitates some discussion of the difference between the two.

Professor Stallybrass has classified the "strict liability" of *Rylands* v. *Fletcher* as a type of "negligence".[5] This may lead to difficulties in such a case as the present. It seems correct to say that forseeability of harm is a factor in "strict liability" as well as "negligence".[6] But forseeability of harm is not enough

[3] Quoted by Macdonnell J.A. in [1936] O.R. at p. 243.
[4] TORTS, 8th ed., p. 598.
[5] SALMOND, TORTS, 8th ed., pp. 595 *ff.*
[6] HARPER, TORTS (Indianapolis, 1933) states (p. 11) that "the forseeability factor is essential to liability" in all cases of tort. Without accepting

(*Continued on p. 516*)

to found liability in negligence. It is forseeability of harm *plus* the exposing of the plaintiff to an unreasonable risk of harm that constitutes negligence. Ordinarily a jury will pass on the unreasonableness of the conduct involved, and in deciding whether there was negligence or not, the risk created will be considered along with other factors such as "the utility and social desirability of the conduct".[7] Thus, machinery involves greater risks of harm than hand work; the running of railway trains or even automobiles may be "patently dangerous" things, in the language of Middleton J.A. However, the social desirability of doing these things may outweigh the added hazard. All this is a question of fact disguised under the covering phrase "due care in the circumstances". When, however, Middleton J.A. says that he believes a person doing a "patently dangerous" thing should be responsible as in the case of an unnatural user of land, the implication is, that once a jduge decides an act is "patently dangerous" liability follows; the defendant has no defence, and a jury is deprived of the opportunity of weighing the factors which made the defendant's conduct unreasonable. This is what occurs on the doctrine of strict liability in *Rylands* v. *Fletcher*, in which the court said that the liability of a landowner for the escape of anything likely to do mischief is not based on failure "to take all reasonable and prudent precautions", but is an absolute liability if the thing does escape.

In order properly to appreciate such a finding we must put the matter in this way : even though the conduct of the defendant is not negligent inasmuch as he has used all due care under the circumstances, he is nevertheless liable. Putting negligence in terms of creating an unreasonable risk, we are forced to say that although the defendant did not create an *unreasonable* risk of harm, he is none the less liable. As a recent writer puts it, "the problem is purely one of allocating a probable or inevitable loss." The same problem is inherent in the whole doctrine of respondent superior. An employer who has created no unreasonable risk of harm by sending out a competent driver of a bread wagon must answer for the torts of such servant. Why? The following excerpt indicates the nature of the problem :

(Continued from p. 515)

such a wide proposition (which requires careful manipulation in such cases as trespass to land) it does seem correct to accept the forseeability doctrine with regard to *Rylands* v. *Fletcher*. Thus, on the question of the class of persons threatened by activity involving "strict liability", Harper states (p. 19) that "it is hardly to be supposed that had the plaintiff in *Rylands* v. *Fletcher*, owned land so far from the location of the defendant's reservoir that no one could foresee danger to his interests therein even if the reservoir should burst, there could have been a recovery against the defendant."

[7] See Terry, *Negligence* (1915), 29 Harv. L.R. 40.

> Liability "without fault", as it were, is imposed upon grounds that are purely socionomic, upon the theory that one who so conducts himself as to create certain unusual risks towards others, for his own advantage, shall do so at his peril as the price of his social privilege of carrying on the dangerous activity. The activity is not, of itself, negligence, for, although it involves forseeable risks to others, still such threats are not unreasonable by virtue of the social utility and community benefits of the enterprise. Nevertheless, such social benefits and individual privileges may not be created at the risk of the unfortunate individuals who happen, sometimes by accident, to be within the danger zone. He who is most benefitted must therefore carry such risks.[8]

Returning to the facts of the *Hutson Case*, the problem then is this: Even if a jury were to find that the defendants used due care in the handling of the gasoline, should the courts impose a liability? One can hardly imagine that this is what Middleton J.A. intended, and yet the "strict liability" of *Rylands* v. *Fletcher*, if extended to such a case, would require such a holding. Why the handling of gasoline should require this any more than the unloading of turnips in the market place is hard to see. Both are socially desirable. Both are harmless if done with due care. Surely a court should not have a power arbitrarily to classify certain enterprises in such a way as to prevent a jury passing on the question of the reasonableness of the conduct involved. To invoke *Rylands* v. *Fletcher* is to say you cannot use gasoline at all unless you pay for all the resulting damage no matter how caused. Surely this was not intended. If it were, it is difficult to see how the maxim *res ipsa loquitur* became involved in the case. The judgment of Masten J.A. deals largely with this maxim, and with that judgment Middleton J.A. agrees, in addition to his own reasons. He himself speaks of a dangerous situation calling for a strict application of *res ipsa loquitur* almost in the same breath as he speaks of *Rylands* v. *Fletcher*. This seems to confuse two distinct things. The escape of the water in *Rylands* v. *Fletcher* could not possibly be a case of *res ipsa loquitur*, for however that maxim may operate, it does go to prove negligence, and as we have seen, negligence was not an issue in *Rylands* v. *Fletcher*.

In view of the foregoing, it seems that the issue in the *Hutson Case* was whether the defendants had used due care under the circumstances. Had there been a jury, this would have been clearer, since in that case, the issue would have been left to them. The real difficulty in the case arose from the fact that there was no evidence to show how the accident occurred. If,

[8] HARPER, TORTS, pp. 15-16.

however, the case was one of negligence, the burden of proving negligence lay with the plaintiff. It is at this stage we encounter the conflict of opinion concerning *res ipsa loquitur*.

If from the fact of the accident itself the court believes the damage was not likely to have occurred without negligence, or as stated by Greer L.J. in *Langham* v. *Governors of Wellingborough School,*[9] the odds are in favour of the defendant's negligence, the maxim operates in the plaintiff's favour to relieve him from adducing evidence showing specifically the unreasonable conduct causing the damage.[10] On this everyone can agree. Further than this the decisions agree on very little. Professor Paton in his article in this issue of the REVIEW has indicated his view that the maxim does little more than get the plaintiff to the jury. Similar views have been recently expressed by Professor Stallybrass[11] and by Mr. Underhay in an extremely able treatment of the subject in a recent issue of this REVIEW.[12] The difficulties in the case law seem to have arisen from a failure to differentiate between the operation of various presumptions and the burden of proof—a difficulty not confined to this branch of the law. Some presumptions may operate to shift the burden of proving the issue. Thus, it has been decided that the statutory presumption of negligence on the part of the motorist, found in many Canadian acts dealing with accidents between motorists and pedestrians, has the effect of making the motorist disprove negligence.[13] If, after all the evidence is before the court, the jury's (or other fact finder's) mind is in a state of doubt, the pedestrian obtains a verdict. On the other hand, in a testamentary action, it is said there is a presumption of sanity in proof of our execution of the will.[14] If, however, when all the evidence is before the court, the probabilities are evenly balanced, the person propounding the will loses the verdict.[15]

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[9] (1932), 101 L.J.K.B. 513.

[10] This is stating the rule in a very wide form. In the *Hutson Case,* Masten J.A. (at p. 235) said the maxim applied because the use of gasoline was so dangerous, that in the absence of an explanation the defendant was liable. See, however, the discussion in *Shawinigan Carbide Company* v. *Doucet* (1909), 42 Can. S.C.R. 281, concerning an explosion within a furnace used to manufacture carbide. Anglin J. stated that this did not "warrant the inference that it was caused by negligence." (p. 338) Also in *Wright* v. *Mitchell* (1919), 17 O.W.N. 290, an explosion of acetylene gas did not allow the plaintiff to rely on the maxim. See the cases discussed in Underhay, *Manufacturers' Liability* (1936), 14 Can. Bar Rev. 283 at pp. 292-3.

[11] SALMOND, TORTS, 8th ed., p. 468.

[12] (1936), 14 Can. Bar Rev. at pp. 292-3.

[13] *Winnipeg Electric Company* v. *Geel,* [1932] A.C. 690.

[14] *Sutton* v. *Sadler* (1857), 3 C.B.N.S. 87.

[15] See Duff J. in *Smith* v. *Nevins,* [1925] S.C.R. 619 at pp. 638 *ff.* On the whole problem, see MacRae, *Evidence* 4 C.E.D. (Ont.) 1 pp. 752-773.

In this case, the presumption merely takes the case to the jury, and calls on the other side to adduce some evidence—not necessarily to *prove* insanity, but to raise a case which may make insanity as probable as sanity. If this be done, the proponent, who has the burden of proving sanity as an issue in his case, loses. It is submitted that *res ipsa loquitur* serves this latter function, despite the remarks of Lord Wright in *Winnipeg Electric Company* v. *Geel*,[16] who linked its operation with the statutory presumption above referred to.[17] The more recent statement of this view is that of Langton J. in *The Kite*,[18] who, having held that *res ipsa loquitur* assisted the plaintiff, stated :

> What the defendants have to do here is not to prove that their negligence did not cause the accident. What they have to do is to give a reasonable explanation which if it be accepted, is an explanation showing that it happened without their negligence. They need not even go so far as that, because if they give a reasonable explanation which is equally consistent with the accident happening without their negligence as with their negligence, they have again shifted the burden of proof back to the plaintiffs to show—as they always have to show from the beginning—that it was the negligence of the defendants that caused the accident.

In discussing the operation of *res ipsa loquitur* in *Ballard* v. *North British Railway Co.*,[19] Lord Dunedin had reached exactly the same conclusion.[20] Indeed, a view which requires the defendant to *disprove* negligence might very well have the effect of giving the plaintiff a judgment based on negligence where, from the facts proved to the court, negligence is no more probable than due care.

Nevertheless, Masten J.A. in the *Hutson Case* stated that the onus "of establishing that it was not negligent" lay on the defendant. He apparently disapproved of the decision in *The Kite*, and noting the inconsistency between Lord Dunedin's judgment in the *Ballard Case* and the dictum of Lord Wright

[16] *Op. cit.*, at p. 699.

[17] For the cases supporting the view suggested in opposition to the dictum of Lord Wright, see Underhay, *op. cit.*, at pp. 292-3, and Paton, *Res Ipsa Loquitur* (1936), 14 Can. Bar Rev.

[18] [1933] P. 154.

[19] [1923] S.C. (H.L.) 43. "Taking the cases in which the mere fact of the accident is relevant to infer negligence, it is sometimes said . . . . . that there is then raised a presumption of negligence. I think that is too absolute a method of expressing the legal result in all cases . . . . . I think that if the defender can show a way in which the accident may have occurred without negligence the cogency of the fact of the accident by itself disappears and the pursuer is left as he began, namely that he has to show negligence."

[20] See also *Langham* v. *Governors of Wellinborough School* (1932), 101 L.J. K.B. 513.

in the *Winnipeg Electric Case*, he adopts the latter statement. It is submitted that Masten J.A. erred in putting the operation of *res ipsa loquitur* on so high a plane as to place the ultimate burden of disproving negligence on the defendant. Furthermore, in adopting the dictum of Lord Wright, the earlier judgment of the Privy Council in *Canadian Pacific Railway Company* v. *Pyne*[21] seems to be disregarded. Speaking for the Committee, Duff J. stated :

> If the facts in evidence pointed to something beyond the control of the appellant company as the cause of the accident *with a probability equal to that attached to the inference which ascribes it to the default of the company*, then of course a verdict against the company ought not to be given.[22]

In other words, the only burden which a defendant faced with *res ipsa loquitur* should have to bear, is to show that the accident *might* have occurred through no negligence. He is not bound to convince a court there was no negligence. If he produces a state of doubt, where the tribunal cannot be sure there was negligence, he should be exonerated because the plaintiff has not proved what he claimed.[22A]

As a matter of fact, the manner in which Masten J.A. dealt with the operation of the maxim apparently had no actual effect on his decision, for he found as a fact that "the evidence is more consistent with negligence than with no negligence." In other words the problem raised by the different views of the maxim's operation apparently did not arise.

Had there been a jury, however, the problem would have been more acute. How should the jury be instructed? Must they be told, if *res ipsa* applies, that "the defendant must prove to you there was no negligent conduct on his part, etc.," or is it sufficient to say that "if the defendant has shown that it is as probable there was no negligence as that there was negligence the plaintiff must fail"? The latter, on the basis of the more recent English and Australian cases should be the proper treatment. The plaintiff must prove his case. If he is asisted

[21] (1919), 48 D.L.R. 243.

[22] Italics are the writer's.

[22A] Since writing the present comment the Ontario Court of Appeal has again stated its view of *res ipsa loquitur* in *The Rideau Lawn Tennis Club* v. *The City of Ottawa*, [1936] O.W.N. 347. The case involved an explosion of a sewer under the control of the defendant. Holding that *res ipsa* operated in the plaintiff's favour, (quoting the *Hutson Case*) Middleton J.A. then said, "the onus is therefore upon the defendant to show the absence of negligence" (p. 349). See also Masten J.A.: "The onus of establishing that the presence of this explosive gas in the sewer did not arise from any neglect on its part", was on the defendant.

by a presumption, the presumption will last only so long as evidence has not made its application as improbable as it is probable.[23]

C. A. W.

* * *

QUEBEC—EVIDENCE—PRIVILEGE—DOCTOR AND PATIENT.—*Mutual Life Insurance Company* v. *Dame Jean-Notte-Lamarche*,[1] was an action for annulment of an insurance policy. The plaintiff appellant attempted to question the insured's doctor with regard to statements made by the insured in his application. The doctor refused to testify on the ground of professional privilege. His refusal was upheld in the Superior Court by Desaulniers J., although the insured had expressly renounced for himself and his beneficiaries the benefit of any privilege of secrecy provided by law.

The Superior Court decision (not reported) was apparently based on the provision in the Quebec Physicians and Surgeons Act,[2] which reads as follows :

> No physician may be compelled to declare what has been revealed to him in his professional character.

On appeal, the Court of King's Bench, reversing the Superior Court, held (St. Germain J. dissenting) that the person who has the interest in the privilege given to the doctor with respect to professional secrecy is the patient, and, therefore, if the latter absolves the doctor from secrecy, he (the doctor) can no longer invoke the privilege.

The dissenting judgment, following the lead given by several previous cases,[3] takes the view held in France that the doctor is neither compellable nor competent. This doctrine seems to have grown up in France as a result of the prohibitory provisions of Art. 378 of the French Penal Code which reads as follows :

> Les médecins, chirurgiens et autres officiers de santé, ainsi que les pharmaciens, les sages, femmes et toutes autres personnes dépositaires, par état ou profession, des secrets qu'on leur confie, qui hors le cas où la loi les oblige à se porter dénonciateurs, auront révélé ces secrets, seront punis d'un emprisonnement d'un mois à six mois et d'une amende de 100 fr. à 500 fr.

[23] See the problem here mooted discussed in detail by E. M. Morgan, *Instructing the Jury upon Presumptions and Burden of Proof* (1933), 47 Harv. L.R. 59. His conclusion is "that most presumptions should, where applicable at all, continue to operate unless and until the evidence persuades the trier at least that the non-existence of the presumed fact is as probable as its existence."

[1] (1935), Q.R. 59 K.B. 510.

[2] R.S.Q. 1925, c. 213, s. 60, No. 2.

[3] *Banque Canadienne Nationale* v. *Lemieux* (1929), Q.R. 48 K.B. 368; *Cyr* v. *North American Life Assurance Co.* (1934), Q.R. 72, S.C. 399.

This Article, being part of the French Criminal Law, is obviously inapplicable in the Province of Quebec.

The majority opinion seems eminently satisfactory for two reasons. In the first place, the privilege attaching to the professional confidences the doctor receives is put on the same basis as that given to what has been revealed to a member of the Bar confidentially in his professional character.[4] In the second place, it is surely against the public interest to preclude a patient from calling on his physician to testify, by a mere statement from the latter that he considers the matter confidential. Thus are avoided both the anomalous situation in which the doctor's privilege is placed on a higher plane than that of the lawyer, and also the pernicious doctrine that the doctor is the ultimate repository of the public conscience.

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BANKRUPTCY — FRAUDULENT PREFERENCE — VALIDITY OF PROVINCIAL LEGISLATION.—The problem of the overlapping jurisdiction of the Dominion and the Provinces in reference to fraudulent preferences of one creditor over another, has been dealt with by The Supreme Court of British Columbia in the case of *Gard* v. *Yates*.[1] Manson J. had before him the problem whether the British Columbia Fraudulent Preference Act, section 3,[2] could be invoked to set aside as void a transaction whereby a debtor, assumed insolvent for the purpose of the argument, returned a substantial part of his stock on hand to the vendors thereof. Counsel for the vendors argued that the provisions of the provincial statute were no longer effective, the whole field having been covered by the provisions of the Bankruptcy Act,[3] and cited as authorities *Hoffar Ltd.* v. *Canadian Credit Men's Trust Association*,[4] and *Re W. D. Trenwith*.[5]

The learned justice did not attempt to question the correctness of these two decisions but took the view that they only applied if at the time the attack was made upon the transaction as a fraudulent preference, the transferor had made an authorized assignment or was the subject of a receiving order. This had

[4] Art. 332 of the Quebec Code of Civil Procedure.
[1] [1936] 2 D.L.R. 50; 17 C.B.R. 168.
[2] R.S.B.C. 1924, c. 97.
[3] R.S.C. 1927, c. 11.
[4] (1929) 10 C.B.R. 369, 374; 40 B.C.R. 454.
[5] (1934) 15 C.B.R. 372; [1934] O.R. 326.

not been done in *Gard* v. *Yates*. In support of this opinion he cites M. A. Macdonald J.A. in the *Hoffar Case*.

> This is not to say that the Trustees cannot resort to a Provincial Act to impeach a transaction. Provincial Legislation respecting fraudulent conveyances may be resorted to. The Bankruptcy Act does not abrogate Provincial Acts simply because they deal with preferential transactions.[6]

The distinction made in the present case appears sound. Assuming that the *Hoffar* and *Trenwith* decisions are correct in holding that the enactment of sec. 64 of the Bankruptcy Act covers the whole of fraudulent preferences *in bankruptcy*, there seems no good reason for extending the rule to cases in which no bankruptcy appears. Some excerpts from the judgments in the Court of Appeal for Ontario in the *Trenwith Case*[7] would appear to make the rule apply even when no bankruptcy occurs, but such an extension is not in accord with the opinion of the same court in the previous year.[8] Moreover, the rule governing the conflict of legislation of the Dominion Parliament and a Provincial Parliament when both are *intra vires* is that the Dominion shall prevail only so far as the two statutes are in conflict.

The practical result of any other conclusion would be lamentable. *Gard* v. *Yates*, as well as *Canadian National Railway* v. *Provincial Bank* in Ontario, illustrates the necessity of attacking transactions when no bankruptcy has occurred. It is reassuring to know that in such cases the provincial fraudulent preference legislation is still available.

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[6] 10 C.B.R. at p. 373.

[7] See Masten J.A., 15 C.B.R. at p. 376, [1934] O.R. at p. 332, and Davis J.A., 15 C.B.R. at p. 384, [1934] O.R. at p. 343.

[8] See *Canadian National Railway* v. *Provincial Bank* (1933), 14 C.B.R. at p. 400, [1933] O.W.N. 353.

SUPREME COURT OF CANADA.

REFERENCE TO ASCERTAIN THE VALIDITY OF CERTAIN DOMINION LEGISLATION

On the 17th instant the Supreme Court of Canada delivered opinions in answer to certain questions referred to the Court by the Governor-General in Council to have it determined whether the following enactments are *ultra vires* of the Parliament of Canada:—

(1) Section 498A of the Criminal Code, as enacted by Chapter 56 of the Statutes of Canada, 1935;

(2) The Dominion Trade and Industry Commission Act, 1935, being Chapter 59 of the Statutes of Canada, 1935;

(3) The Employment and Social Insurance Act, being Chapter 38 of the Statutes of Canada, 1935;

(4) The Weekly Rest in Industrial Undertakings Act, being Chapter 14 of the Statutes of Canada, 1935; The Minimum Wages Act, being Chapter 44 of the Statutes of Canada, 1935; and The Limitation of Hours of Work Act, being Chapter 63 of the Statutes of Canada, 1935;

(5) The Natural Products Marketing Act, 1934, being Chapter 57 of the Statutes of Canada, 1934; and its amending Act, The Natural Products Marketing Act Amendment Act, 1935, being Chapter 64 of the Statutes of Canada, 1935;

(6) The Farmers' Creditors Arrangement Act, 1934, being Chapter 53 of the Statutes of Canada, 1934; and its amending Act, The Farmers' Creditors Arrangement Act Amendment Act, 1935, being Chapter 20 of the Statutes of Canada, 1935.

The answers of the Court to the questions referred are as follows:

1. *Section 498A of the Criminal Code.*

The Court is unanimously of the opinion that as to subsections (b) and (c) the enactment is not *ultra vires.*

As to subsection (a), in the opinion of the Chief Justice, Mr. Justice Rinfret, Mr. Justice Davis and Mr. Justice Kerwin, the enactment is not *ultra vires;* in the opinion of Mr. Justice Cannon and Mr. Justice Crocket that subsection is *ultra vires.*

2. *The Dominion Trade and Industry Commission Act.*

The answer is directed only to those sections of the Act upon which the Court had the benefit of argument.

As to section 14, that section, in the unanimous opinion of the Court, is *ultra vires.*

As to sections 16 and 17, these sections are, in the unanimous opinion of the Court, not *ultra vires.*

As to section 20, that section, in the unanimous opinion of the Court, is not *ultra vires* in so far as the enactments enumerated in section 2 (h) may be *intra vires.*

As to sections 18 and 19, these sections, in the unanimous opinion of the Court, are *ultra vires.*

As to sections 21 and 22, these sections (as applicable to the criminal offences created by such of the enactments enumerated in section 2 (h) as may be *intra vires*), in the unanimous opinion of the Court, are not *ultra vires*.

3. *The Employment and Social Insurance Act.*

Mr. Justice Rinfret, Mr. Justice Cannon, Mr. Justice Crocket and Mr. Justice Kerwin are of the opinion that the statute is *ultra vires;* the Chief Justice and Mr. Justice Davis are of the opinion that the statute is *intra vires.*

4. *The Weekly Rest in Industrial Undertakings Act; The Minimum Wages Act; and The Limitation of Hours of Work Act.*

The Chief Justice, Mr. Justice Davis and Mr. Justice Kerwin are of the opinion that (except as to section 6 of the Minimum Wages Act) the statutes are *intra vires;* Mr. Justice Rinfret, Mr. Justice Cannon and Mr. Justice Crocket are of the opinion that the statutes are *ultra vires.*

5. *The Natural Products Marketing Act and Amendment.*

The statute, in the unanimous opinion of the Court, is *ultra vires.*

6. *The Farmers' Creditors Arrangement Act.*

The Chief Justice, Mr. Justice Rinfret, Mr. Justice Crocket, Mr. Justice Davis and Mr. Justice Kerwin are of the opinion that the statute is *intra vires;* Mr. Justice Cannon is of the opinion that the statute, except section 17, is *ultra vires* and that section 17 is *intra vires.*

The REVIEW regrets that limitations of space in this number prevent publication of all the opinions of their lordships in answering the questions referred.

REFERENCE under the Order of His Excellency the Governor-General in Council re Section 498A of the Criminal Code.

BEFORE :

The Chief Justice and Rinfret, Cannon, Crocket, Davis, and Kerwin JJ.

Reasons of the Chief Justice, Mr. Justice Rinfret, Mr. Justice Davis and Mr. Justice Kerwin delivered by THE CHIEF JUSTICE :

Section 498A, the validity of which is in question is in these terms :

498A (1) Every person engaged in trade or commerce or industry is guilty of an indictable offence and liable to a penalty not exceeding one thousand dollars or to one month's imprisonment, or, if a corporation, to a penalty not exceeding five thousand dollars, who

(a) is a party or privy to, or assists in, any transaction of sale which discriminates, to his knowledge, against competitors of the purchaser in that any discount, rebate or allowance is granted to the purchaser over and above any discount, rebate or allowance

available at the time of such transaction to the aforesaid competitors in respect of a sale of goods of like quality and quantity;

The provisions of this paragraph shall not, however, prevent a co-operative society returning to producers or consumers, or a co-operative wholesale society returning to its constituent retail members, the whole or any part of the net surplus made in its trading operations in proportion to purchases made from or sales to the society;

(b) engages in a policy of selling goods in any area of Canada at prices lower than those exacted by such seller elsewhere in Canada, for the purpose of destroying competition or eliminating a competitor in such part of Canada;

(c) engages in a policy of selling goods at prices unreasonably low for the purpose of destroying competition or eliminating a competitor.

This section in substance declares that everybody is guilty of an indictable offence and liable to punishment in respect thereof who does any of the acts, or series of acts, denoted by subsections (a), (b) and (c). We see no good reason for denying the authority of Parliament, under subdivision 27 of section 91 of the B.N.A. Act, to pass these enactments.

Prima facie, they are enactments in relation to matters comprehended within the subject designated by the words of the 27th head of section 91, under any definition of "the criminal law". The prohibitions seem to be aimed at the prevention of practices which Parliament conceives to be inimical to the public welfare; and each of the offences is declared in explicit terms to be an indictable offence.

There is nothing in the circumstances or the operation of these provisions to show that Parliament was not exercising its powers under that subdivision. Whatever doubt may have previously existed, none can remain since the decision of the Judicial Committee in *P.A.T.A.* v. *A.G. for Canada*, [1931] A.C. 310, that, in enacting laws in relation to matters falling within the subject of the criminal law, as these words are used in section 91, Parliament is not restricted by any rule limiting the acts declared to be criminal acts to such as would appear to a court of law to be "in their own nature" criminal. The jurisdiction in relation to the criminal law is plenary; and enactments passed within the scope of that jurisdiction are not subject to review by the courts.

It is true that the term "Criminal Law" in section 91, subdivision 27, must be read subject to some qualification upon the ordinary sense of the words. When it is said that "criminal law" in section 91(27) is criminal law in its widest sense, it is not meant that by force of section 92, including subdivision 15

of that section, the provinces have no power to pass enactments which would fall within the scope of the "criminal law", as that phrase would ordinarily be understood as applied to the enactments of a legislature possessing a general competence in relation to the criminal law. People in Canada are familiar with a network of prohibitions and regulations, the violation of which is punishable by fine, and sometimes by imprisonment, under municipal by-laws passed under the authority of provincial legislative measures. It has been held in many cases that prohibitions enforceable by fine and imprisonment enacted by the provincial legislatures may be valid enactments under section 92. Notable instances are the prohibitions enacted under the local option law of Ontario which was in question in *A.G. for Ontario* v. *A.G. for Dominion*, [1896] A.C. 348; and the conditional and qualified prohibitions enforceable in the same way which were upheld in *Hodge* v. *The Queen* (1883), 9 App. Cas. 117. Then there are the groups of provincial statutes passed under the authority of section 92(1) dealing with the disqualification of voters; the disqualification of persons elected to sit and vote as members of the provincial legislatures; in which offences are created punishable by fine and imprisonment. These enactments which, in part, at least, have the purpose of securing public order, and protecting the integrity of the representative system in the provinces, would, as I have said, fall within almost any definition of criminal law.

By the introductory clause of section 91, it is 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;

which classes of subjects include the "criminal law"; and the final paragraph of that section declares, in effect, that "any matter coming within" the criminal law shall not be deemed to come within any matter 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.

Clearly, if the term "criminal law" is used in an absolutely unrestricted sense (in subdivision 27), then nothing in the nature of criminal law could be enacted under the authority of section 92. As Lord Herschell observed in the course of the argument on the reference already mentioned, in 1896, respecting the Ontario Local Option Statute, the term "criminal law" in subdivision 27 must be construed in such a way as to leave room

for the operation of enactments of a provincial legislature under section 92 of the character just adverted to. It is also well settled that the Parliament of Canada cannot acquire jurisdiction over a subject which belongs exclusively to the provinces by attaching penal sanctions to legislation which in its pith and substance is legislation in relation to that subject in its provincial aspects alone (*In re Insurance Act of Canada*, [1932] A.C. 41, at p. 53).

We do not think any of these considerations are properly applicable to the statute before us. We think there is no ground on which we can hold that the statute, on its true construction, is not what it professes to be : an enactment creating criminal offences in exercise of the powers vested in Parliament in virtue of the 27th head of section 91.

The question addressed to us should be answered in the negative.

* * *

REFERENCE under the Order of His Excellency the Governor-General in Council re the Dominion Trade and Industry Commission Act.

BEFORE :

The Chief Justice and Rinfret, Cannon, Crockett, Davis and Kerwin JJ.

Reasons of the Court delivered by THE CHIEF JUSTICE:

The sections which require consideration are sections 14, 16, 17, 18, 20, 21 and 22.

As to section 14, we cannot perceive any ground for holding that the enactments of this section are necessarily incidental to the exercise of any powers of the Dominion in relation to the criminal law. Nor can the section, we think, be sustained as legislation in relation to the regulation of trade and commerce consistently with the passage quoted from the judgment of the Judicial Committee in *Snider's* case[1] in the reasons given in the judgment upon the Reference concerning the Natural Products Marketing Act. It is to be observed that this section contemplates action by the Commission and by the Governor in Council in respect of individual agreements which may relate to trade that is entirely local.

If confined to external trade and interprovincial trade, the section might well be competent under head No. 2 of section 91; and if the legislation were in substance concerned with such

[1] [1925] A. C. 396.

trade, incidental legislation in relation to local trade necessary in order to prevent the defeat of competent provisions might also be competent; but as it stands, we think this section is invalid.

As regards sections 16 and 17, it would appear that in view of the responsibilities of the Dominion Parliament in respect of the criminal law and trade and commerce, Parliament may (as seems to be suggested by the judgments of the Judicial Committee in the Board of Commerce case, [1922] 1 A.C. at p. 201, and in *P.A.T.A.* v. *A.G. for Canada,* [1931] A.C. 310, exercise a wide latitude in prosecuting investigations for ascertaining the facts with regard to fraudulent commercial practices, including adulteration; for that reason we think these two sections, 16 and 17, are *intra vires.* Subsection 3 of section 17 would seem to be reasonably ancillary to the principal provisions of the two sections.

As to sections 18 and 19, it is not necessary to pass upon the question whether or not the exclusive legislative jurisdiction of the Dominion extends to the subject of trade marks in virtue of sub-division 2 of section 91, "The regulation of trade and commerce". The so-called trade mark is not a trade mark in any proper sense of the term. The function of a trade mark is to indicate the origin of goods placed on the market, and the protection given to a trade mark is intended to be a protection to the producer or seller of his reputation in his trade. The function of the letters "C.S.", as declared by section 18(1), is something altogether different. That subsection is really an attempt to create a civil right of novel character and to vest it in the Crown in right of the Dominion. Generally speaking, except when legislating in respect of matters falling within the enumerated subjects of section 91, Parliament possesses no competence to create a civil right of a new kind which, if validly created, would be a civil right within the scope and meaning of head No. 13 of section 92. The second subsection is also objectionable as attempting to control the exercise of a civil right in the provinces.

Section 19 is merely subsidiary to section 18 and necessarily falls with it.

The first part of section 20 would appear to be unobjectionable as respects enactments mentioned in section 2(h) which may be *intra vires* of Parliament. As regards the validity of these enactments we have only heard arguments in respect of two of them; the Natural Products Marketing Act and Section 498A of the Criminal Code. We have elsewhere given our reasons

for considering the first of those *ultra vires*. As to the second of them (Section 498A of the Criminal Code) a majority of the Court hold that section to be *intra vires* in its entirety (Cannon and Crocket JJ. dissenting as to subsection (a) of that section).

As to sections 21 and 22, it would appear that authority to enact these provisions is necessarily incidental to the exercise of legislative authority in relation to the criminal offences created by the laws "prohibiting unfair trade practices" validly enacted in such of the statutes enumerated in section 2(h) as may be competent. We do not think it can be said that the authority to provide for the prosecution of criminal offences falls "strictly" within the subject "Criminal law and criminal procedure",—head 27 of the enumerated heads of section 91; but our view is that the authority to make such provision, and the authority to enact conditions in respect of the institution and the conduct of criminal proceedings is necessarily incidental to the powers given to the Parliament of Canada under head No. 27 (*P.A.T.A.* v. *A.G. for Canada*, [1931] A.C. 310, at pp. 326-7).

This reasoning would appear to apply to the question of the validity of subsection 1 of section 15 and the second part of section 20, which, accordingly, seem to be valid.

* * *

REFERENCE under the Order of His Excellency the Governor-General in Council re the Employment and Social Insurance Act.

BEFORE :

The Chief Justice and Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

Summary of the reasons of the Chief Justice and Mr. Justice Davis delivered byTHE CHIEF JUSTICE:

The aims stated in the preamble are legitimate, provided, of course, that the enactments themselves are within the ambit of the legislative powers possessed by Parliament. Reading subdivision 1 of section 91 and subdivision 3 together, the proper conclusion is that Parliament has exclusive authority to raise money by any mode or system of taxation for disposition by Parliament for any purpose for which it is competent to Parliament to apply the assets of the Dominion in virtue of subdivision 1. In effect, subdivision 1 endows the

High Court of Parliament with full discretionary authority to dispose of the public assets of the Dominion, and no other court is invested with jurisdiction to examine any purported exercise of that authority with a view to pronouncing upon its validity, subject only to the rule that the courts are always entitled to determine whether, in truth, any given enactment of Parliament professing to be an exercise of a given authority is not really an enactment of that character; but one relating to a subject over which Parliament has no jurisdiction.

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

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

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

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

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

The statute is, therefore, *intra vires*, and the answer to the question addressed to us by the Order of Reference is in the negative.

* * *

In the matter of a Reference as to whether the Parliament of Canada had legislative jurisdiction to enact the Employment and Social Insurance Act, being chapter 36 of the Statutes of Canada, 1935.

BEFORE :

The Chief Justice and Rinfret, Cannon, Crocket, Davis and Kerwin JJ.

RINFRET J. : The constitutionality of the Employment and Social Insurance Act (see ch. 38 of the Statutes of Canada 25-26 Geo. V, assented to 28th June 1935) was referred by the Governor in Council to the Supreme Court of Canada under sec. 55 of the Supreme Court Act.

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

throughout Canada will be payable and to provide for the levying of contributions from employers and workers for the maintaining of the said fund and for contributions thereto by the Dominion.

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

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

Under Part I, the Act is to be administered by a Commission consisting of three members to be called the Employment and Insurance Commission, with wide powers of investigation for assisting unemployed persons and for providing to them physical and industrial training and instruction.

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

Part III of the Act provides for Unemployment Insurance. The persons to be insured against unemployment are defined. The Act regulates the manner in which the funds required shall be collected partly from moneys provided by Parliament, partly from contributions by employed persons and by the employers

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

All questions concerning the rights of persons under the Act are to be determined by the Commission. The Commission may employ insurance officers in each regional division; and the Governor-in-Council is further authorized to designate such number of persons as are necessary in each such division to act as umpires, deputy-umpires, courts of referees, chairmen of those courts, etc., for the purpose of examining and determining all claims for benefit, with elaborate provisions for appeal.

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

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

Then come the financial provisions. The revenue from the sale of the stamps and from all contributions are to be deposited from time to time in the Bank of Canada, by the Minister of Finance, to the credit of the Commission, in an account to be called "The Unemployment Insurance Fund". And in a similar way are to be deposited the moneys provided by Parliament; and there is to be an Investment Committee of three members consisting of one member nominated by the Government, one by the Minister of Finance, and one by the Governor of the

Bank of Canada, to look after the investment of such sums standing to the credit of the Fund as are not required to meet current expenditures.

In addition to all the above officials, there will be appointed an Advisory Committee, the duties of which are to give advice and assistance to the Commission in relation to the discharge of its functions under the Act and to make reports on the financial condition of the Fund. This Committee shall consist of a Chairman and not less than four, nor more than six, other members. Further, the Commission is given authority to make regulations relating to persons working under the same employer partly in insurable employment and partly in other occupations; also for prescribing the evidence to be required as to the fulfilment of the conditions for receiving unemployment benefits; for prescribing the manner in which claims for unemployment benefit may be made, the proceedings to be followed in the consideration and examination of claims; and also regulations with respect to the references to the central or local committees, and to persons employed on night work and to penalties for the violation of any regulation.

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

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

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

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

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

(2) its exclusive power

  (a) to regulate trade and commerce,

  (b) to raise money by any mode or system of taxation,

  (c) to appropriate public money for any public purposes,

  (d) to provide for the collection of statistics; and, incidentally,

  (e) to enact criminal laws.

It is unnecessary for me to add anything to what has already been said — and so well been said — by my Lord the Chief Justice in connection with the other References made to the Court at the same time as the present one (more particularly those concerning the Natural Products Marketing Act, 1934, and the Dominion Trade and Industry Commission Act, 1935), to indicate the reasons why I think that the validity of this legislation cannot be supported as an exercise of the residuary power to make laws for the peace, order and good government of Canada, or as an exercise of the power to regulate trade and commerce.

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

The exercise of legislative power by the Parliament of Canada in regard to all matters not enumerated in Section 91 was, by more than one pronouncement of the Judicial Committee of the Privy Council, declared to be "strictly confined to such matters as are unquestionably of Canadian interest and importance" (*Attorney General for Ontario* v. *Attorney General for Canada*, [1896] A.C. 348); it will be recognized by the Courts "only after scrutiny sufficient to render it clear that circumstances are abnormal . . . . . such as cases of war or famine", [1922] 1 A.C.

p. 200; and "instances of these cases . . . . . are highly exceptional", [1923] A.C., 695; [1925] A.C., 396.

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

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

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

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

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

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

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

At the outset, let us remember the remark of Lord Coke (4 Inst. 330) that the preamble of a statute is "the key to open

the minds of the makers of the Act and the mischiefs which they intended to remedy".

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

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

It is hardly necessary to repeat that, when investigating whether an Act was competently passed by Parliament, the courts must ascertain the "true nature and character" of the enactment, its "pith and substance", and the legislation must be "scrutinized in its entirety" for the purpose of determining within which of the categories of subject-matters mentioned in Sections 91 and 92 the legislation falls (*Citizens Insurance Co.* v. *Parsons* (1881), 7 App. Cas. p. 96; *Union Colliery Company* v. *Bryden,* [1899] A.C. 580; *Great West Saddlery Company* v. *The King,* [1921] 2 A.C. 91, at p. 117; *Reciprocal Insurers Case,* [1924] A.C. at p. 337; *Toronto Electric Commissioners* v. *Snider,* [1925] A.C. 396 at p. 407).

In my humble view, the subject-matter of the Act is employment service and social insurance, not public debt and

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

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

One of the effects of the Act under submission is, in the language of Lord Haldane, in *Workmen's Compensation Board* v. *C.P.R.*, [1920] A.C. 184, "to attach statutory terms to contracts of employment", and to impose contractual duties as between employers and employees. In its immediate result, the Act creates civil rights as between the former and the latter.

I doubt whether the contribution received from the employee can properly be described as a tax. In fact, it would seem to me to partake more of the nature of an insurance premium or of a payment for services and individual benefits which are to be returned to the employee in proportion to his payments. Be that as it may, under all circumstances, the benefits conferred on the employees by the Act are not gifts with conditions attached, which the employees are free to accept or not; the conditions attached to the benefits are made compulsory terms of all contracts in the specified employments, and I deprecate the idea that the Dominion Parliament may use its power of taxation to compel the insertion of conditions of that character in ordinary contracts between employers and employees.

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

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

For these reasons, and also for the reasons given by my brother Kerwin, with whom I entirely concur, I have come to the conclusion that the Employment and Social Insurance Act (chapter 38 of the Statutes of Canada 25-26 Geo. V) is wholly *ultra vires* of the Parliament of Canada; and I certify to the Governor-General in Council for his information my opinion that the question in relation thereto should be answered in the affirmative.

* * *

REFERENCE under the Order of His Excellency the Governor-General in Council re the—

Weekly Rest in Industrial Undertakings Act;
Minimum Wages Act; and
Limitation of Hours of Work Act.

Summary of the reasons of the Chief Justice, Mr. Justice Davis and Mr. Justice Kerwin delivered by THE CHIEF JUSTICE:

From two main considerations, the conclusion follows that legislative authority in respect of international agreements is, as regards Canada, vested exclusively in the Parliament of Canada.

First, by virtue of section 132 of the British North America Act, jurisdiction, legislative and executive, for the purpose of giving effect to any treaty obligation imposed upon Canada, or any one of the provinces of Canada, by force of a treaty between the British Empire and a foreign country, is committed to the Parliament and Government of Canada. This jurisdiction of the Dominion, the Privy Council held, in the *Aeronautics* case and in the *Radio* case (both reported in [1932] Appeal Cases) is exclusive; and consequently, under the British North America Act, the provinces have no power and never had power to legislate for the purpose of giving effect to an international agreement: that, as a subject of legislation, is excluded from the jurisdiction envisaged by section 92.

Second, as a result of the constitutional development of the last thirty years (and more particularly of the last twenty years) Canada has acquired the status of an international unit, that is to say, she has been recognized by His Majesty the King, by the other nations of the British Commonwealth of Nations, and by the nations of the world, as possessing a status enabling her to enter into, on her own behalf, international arrangements, and to incur obligations under such arrangements. These arrangements may take various forms. They may take the form of treaties, in the strict sense, between heads of states, to which His Majesty the King is formally a party. They may take, *inter alia*, the form of agreements between governments, in which His Majesty does not formally appear, Canada being represented by the Governor-General in Council or by a delegate or delegates authorized directly by him. Whatever the form of the agreement, it is now settled that, as regards Canada, it is the Canadian Government acting on its own responsibility to the Parliament of Canada which deals with the matter. If the international contract is in the form of a treaty between heads of states, His Majesty acts, as regards Canada, on the advice of His Canadian Government.

Necessarily, in virtue of the fundamental principles of our constitution, the Canadian Government in exercising these functions is under the control of Parliament. Parliament has full power by legislation to determine the conditions under which international agreements may be entered into and to provide for giving effect to them. That this authority is exclusive would seem to follow inevitably from the circumstances that the Lieutenant-Governors of the provinces do not in any manner represent His Majesty in external affairs, and that the provincial governments are not concerned with such affairs : the effect of the two decisions reported in [1932] Appeal Cases is that in all these matters the authority of Parliament is not merely paramount, but exclusive.

The first of the two cardinal questions raised by the contentions of the provinces has two branches, and may be stated thus : Has Parliament authority to legislate for carrying out a treaty or convention or agreement with a foreign country containing stipulations to which effect can only be given by domestic legislation changing the law of the Provinces (a) in matters committed by the British North America Act (in the absence of any such international agreement) to the legislatures of the Provinces exclusively, and (b) in relation to such matters where they are *ex facie* of domestic concern only and not of inter-

national concern, such, for example, (as the Provinces argue), as the matters dealt with by the conventions to which effect is given by the statutes now before us : the regulation of wages and of hours of labour?

The claim of Parliament to authority to execute legislative changes in the law of the Provinces in such matters naturally arouses concern and misgiving among the authorities charged with responsibility touching the status and rights of the provinces.

The view that the exclusive authority of Parliament extends to international treaties and agreements relating to such subjects rests on the grounds now outlined.

(1) As touching the view advanced that the subject-matter of the stipulations in the international agreements in question are of exclusively domestic and not at all of international concern, the language of section 132 is unqualified and that section would appear *prima facie* to extend to any treaty with a foreign country in relation to any subject-matter which in contemplation of the rules of constitutional law respecting the royal prerogative concerning treaties would be a legitimate subject-matter for a treaty; and there would appear to be no authority for the proposition that treaties in relation to subjects, such as the subject-matter of the statute in question, are not within the scope of that prerogative. The question whether the language of section 132 is, by necessary implication, subject to some restriction in order to preserve unimpaired radical guarantees evidenced by the B.N.A. Act as a whole, is mentioned in the next succeeding paragraph. Legislative authority to give effect to treaties within section 132 remained, of course, after the B.N.A. Act down to the enactment of the Statute of Westminster, in the Imperial Parliament, although by section 132, it also became and is vested in the Parliament of Canada; but, since the Statute of Westminster, no Act of the Imperial Parliament can have effect in Canada without the consent of Canada. The practice of modern times and, in particular, the provisions of the Covenant of the League of Nations embodied in the Treaty of Versailles, would appear to demonstrate that by common consent of the nations of the world such matters are regarded as of high international as well as of domestic concern, and proper subjects for treaty stipulation.

(2) As touching the view that the legislative authority committed to the Parliament and Government of Canada by section 132 (and by the introductory clause of section 91 in relation to international matters) does not extend to matters

which would fall exclusively with in the legislative jurisdiction of the provinces, in the absence of any international obligation respecting them, it is to be observed: First, section 132 relates to obligations imposed upon any province of Canada by any treaty between the British Empire and a foreign country. Section 132 obviously contemplates the possibility of such an obligation arising as a diplomatic obligation under such a treaty, even although legislation might be necessary in order to attach to it the force of law. In such case, the Parliament and Government of Canada appear to be endowed with the necessary legislative and executive powers. This provision with regard to the obligations of the Provinces taken together with the generality of the language employed in Section 132 would seem to point rather definitely to the conclusion that the view under consideration is not tenable. Secondly, the established practice of the Parliament of Canada and the decisions of the Courts in relation to that practice do not accord with this view. Statutes giving effect to the International Waterways Treaty (1911) with the United States, and the Treaty with Japan (1913) are instances in which treaties dealing with matters of civil right within the provinces and the management of the public property of the provinces were given the force of law by Dominion Statutes. The legislation concerning the Japanese Treaty was held to be valid and to nullify a statute of the Province inconsistent with it by the Judicial Committee of the Privy Council in *Attorney-General for British Columbia* v. *Attorney General for Canada,* [1924] A.C. 203.

The jurisdiction of Parliament to enforce international obligations under agreements which are not strictly "treaties" within section 132 is co-ordinate with the jurisdiction under this last named section.

It is contended by the Provinces that the Dominion cannot, by reason merely of the existence of an international agreement (within section 132 or within the residuary clause) possess legislative authority enabling the Parliament of Canada to legislate in derogation of certain fundamental terms which, it is said, were the basis of the Union of 1867, and are expressly or impliedly embodied in the B.N.A. Act. For the purposes of the present reference, it is unnecessary to make any observation upon this contention further than what has already been said, viz., that the exclusive authority of the Dominion to give the force of law to an international agreement is not affected by the circumstance alone that, in the absence of such an agree-

ment, the exclusive legislative authority of the provinces would extend to the subject-matter of it.

The second of the cardinal questions requiring determination concerns the construction and effect of Article 405 of the Treaty of Versailles.

The draft conventions now in question were brought before the House of Commons and the Senate, received the assent of both Houses in the form of resolutions, which resolutions approved the ratification of them, and the statutes in question were passed for the purpose of giving legislative effect to their stipulations, the operative clauses of the statute being in each case preceded by a preamble in which it is recited that the draft conventions have been ratified by Canada. The procedure followed, if we put aside the provisions of Article 405, was the usual and proper procedure for engaging in and giving effect to agreements with foreign governments. The propriety of this procedure is questioned on the ground that under the special provisions of Article 405, and especially those of paragraphs 5 and 7 of the Article, it was an essential condition of the jurisdiction of Parliament to legislate for the enforcement of the conventions that the conventions should have been submitted to, and should have received the assent of, the provincial legislatures before the enactment of such legislation by Parliament. Paragraphs 5 and 7 are as follows :

> Each of the Members undertakes that it will, within the period of one year at most from the closing of the session of the Conference, or if it is impossible owing to exceptional circumstances to do so within the period of one year, then at the earliest practicable moment and in no case later than eighteen months from the closing of the session of the Conference, bring the recommendation or draft convention before the authority or authorities within whose competence the matter lies, for the enactment of legislation or other action.
>
> In the case of a draft convention, the Member will, if it obtains the consent of the authority or authorities within whose competence the matter lies, communicate the formal ratification of the convention to the Secretary-General and will take such action as may be necessary to make effective the provisions of such convention.

These paragraphs must be read together and, reading them together, it would appear that the "competence" postulated is the "competence" to enact legislation or to take other "action" contemplated by the Article.

The obligations upon consent of the competent authority or authorities to ratify and, upon like consent after ratification, "to make effective the provisions of the convention" are both

treaty obligations; and the authority or authorities competent to take legislative action where legislative action may be necessary to make the provisions of the convention effective would appear plainly to be included within the authority or authorities before whom it is provided that the draft conventions should be brought.

It follows from what has been said that this treaty obligation is an obligation within section 132 and, consequently that the authority to make it effective exclusively rests in the Parliament and Government of Canada and, therefore, that the Parliament of Canada is, at least, one of the authorities before which the convention must be brought under the terms of Article 405. The question whether the provincial legislatures are also competent authorities within the contemplation of paragraph 5 would appear to be necessarily determined by the consideration that we are constrained by the decisions of the Judicial Committee of the Privy Council (reported in [1932] Appeal Cases), already referred to, to hold that the authority of Parliament in this matter is exclusive and that the provincial legislatures are not competent to legislate for giving effect to the provisions of any international convention. . . . . Strictly, however, important as this question of the "competence" of the Provincial legislatures in the sense of Article 405, is, it is unnecessary to decide it for the purposes of this reference, as will appear from what immediately follows.

The Governor-General in Council is designated by the Treaties of Peace Act, 1919, enacted under the authority of section 132, to take all such measures as may seem to him to be necessary for the purpose of carrying out the Treaties of Peace and for giving effect to the terms of such treaties. He it was, therefore, upon whom devolved the duty of performing the obligation of Canada under Art. 405 to bring the draft conventions before the authority or authorities possessing "competence" under the Constitution of Canada. He it was also on whom devolved the duty to communicate to the League of Nations the ratification by Canada upon the assent of the competent authority or authorities. Moreover, the Parliament of Canada, as we have seen, possessing exclusive jurisdiction in relation to international agreements, the creation as well as the enforcement of them, declared, by the statutes now under examination, that the conventions in question were ratified by Canada. The executive authority, therefore, charged with the duty of acting for Canada in performing the treaty obligations of submitting the conventions to the proper constitutional authorities, and of

communicating ratification to the League of Nations upon the assent of those authorities, and His Majesty the King in Parliament have, in effect, combined in declaring that the ratification was assented to by the proper constitutional authorities of Canada in conformity with the stipulations of Article 405.

That would appear to be sufficient to constitute a diplomatic obligation binding upon Canada to observe the provisions of the conventions.

The answer to the three interrogatories addressed to this Court under this Order of Reference is, therefore, the statute being *intra vires* in each case, in the negative.

* * *

REFERENCE under the Order of His Excellency the Governor-General in Council re the Natural Products Marketing Act, 1934, and Amendment.

BEFORE :

The Chief Justice and Rinfret, Cannon, Crockett, Davis and Kerwin JJ.

Summary of the reasons of the Court delivered by

THE CHIEF JUSTICE : In effect, this statute attempts and, indeed, professes, to regulate in the provinces of Canada, by the instrumentality of a commission or commissions appointed under the authority of the statute, trade in individual commodities and classes of commodities. The powers of regulation vested in the commissions extend to external trade and matters connected therewith and to trade in matters of interprovincial concern; but also to trade which is entirely local and of purely local concern.

Regulation of individual trades, or trades in individual commodities, in this sweeping fashion, is not competent to the Parliament of Canada and such a scheme of regulation is not practicable

> in view of the distribution of legislative powers enacted by the Constitution Act, without the co-operation of the provincial legislatures,

to quote from the judgment of the Judicial Committee *In re The Board of Commerce Act,* [1922] 1 A.C. at p. 201.

The legislation, for the reasons given, is not valid as an exercise of the general authority of the Parliament of Canada

under the introductory words of section 91 to make laws "for the peace, order and good government of Canada."

The statute being *ultra vires*, the interrogatory addressed to us is answered in the affirmative.

* * *

REFERENCE under the Order of His Excellency the Governor-General re The Farmers' Creditors Arrangement Act, 1934.

BEFORE :

The Chief Justice and Rinfret, Cannon, Crocket, Davis and Kerwin, JJ.

Reasons of the Chief Justice and Rinfret, Crocket, Davis and Kerwin JJ. delivered by THE CHIEF JUSTICE:

The power to enact this statute is derived from subdivision 21 of section 91 of the B.N.A. Act, in virtue of which the exclusive legislative authority of the Parliament of Canada extends to the subject of Bankruptcy and Insolvency. The broad purpose of the statute is, in the words of the title, "to facilitate compromises and arrangements between farmers and their creditors". The provisions of the statute affect farmers who are in such a situation that they are unable to pay their debts as they fall due. It is competent to Parliament, possessing plenary authority in respect of bankruptcy and insolvency, to treat this condition of affairs as a state of insolvency. The provisions of the statute only come into operation where such a state of insolvency exists. *Prima facie*, therefore, it is, within the ordinary meaning of the words, a statute dealing with insolvency. The statute is, by its express terms, incorporated into the general system of bankruptcy legislation in force in Canada and it is not open to dispute that legislation in respect of

> compositions and arrangements is a natural and ordinary component of a system of bankruptcy and insolvency law.

It is contended on behalf of the provinces that the jurisdiction of the Dominion in relation to this subject is limited to the enactment of legislation which, at least in its broad lines, conforms to the systems of bankruptcy and insolvency legislation which had prevailed in Great Britain or in Canada down to the time of the passing of the British North America Act. We do not consider it necessary to decide upon the question whether

or not the powers vested in Parliament in relation to this subject are for all time restricted by reference to the legislative practice which obtained prior to the passing of the B.N.A. Act. The attack upon the statute was mainly directed against the provision which makes it possible to force the terms of a composition upon a secured creditor by which a secured creditor may be compelled to submit to a reduction of the debt owing to him by the insolvent.

This is not a new feature of insolvency legislation although, down to the enactment of the Companies' Creditors Arrangement Act in 1933, mortgagees had never been by legislation placed in such a position. The statute now under consideration does not in this respect differ from the Companies' Creditors Arrangement Act, and the principle of our decision on the Reference respecting that statute ([1934] S.C.R. 659) is applicable, namely, that this, although a departure from previous practice in bankruptcy or insolvency legislation, was not beyond the discretionary authority bestowed upon Parliament under head No. 21 of section 91.

The statute being *intra vires*, the interrogatory addressed to us should be answered in the negative.