THE CANADIAN BAR REVIEW

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CASE AND COMMENT

CONSTITUTIONAL LAW — DOMINION LEGISLATION TAXING PERSONS INSURING WITH UNLICENSED FOREIGN COMPANIES.— *Reference re Section 16 of the Special War Revenue Act*[1] maintains the consistency of a line of decisions denying to the Dominion any effective legislative authority with respect to insurance companies, but in so doing it illustrates a tendency of courts to go to great lengths to protect a particular principle from even apparent defilement. Section 16 of the Dominion Special War Revenue Act,[2] as amended, provided for the payment of a premium tax by every person resident in Canada who insures property in Canada with any British or foreign insurance company or extra-Canadian exchange which is not authorized under the laws of the Dominion to transact the business of insurance. In considering the validity of this provision the Supreme Court of Canada, without dissent, found that it was so related to the Canadian and British Insurance Companies Act, 1932,[3] and to the Foreign Insurance Companies Act, 1932,[4] that the validity of this legislation had to be determined. It was declared to be *ultra vires*, so far as its effective provisions were concerned, and hence section 16 of the Special War Revenue Act fell with it.

The device of finding a connection between various pieces of legislation, some of which are and some of which are not before the Court, and passing on the constitutionality of the

[1] [1942] 4 D.L.R. 145 (Can.).
[2] R.S.C. 1927, c. 179, s. 16, amended 1932, c. 54, s. 1; 1940–41, c. 27, s. 4.
[3] 1932, c. 46, as amended.
[4] 1932, c. 47, as amended.

whole lot, is not new; the opinion of the Supreme Court in *Reference re Alberta Legislation*[5] is a recent example of a resort to such a tactic. In the case at bar, the employment of this technique apparently enabled the Court to omit any discussion of the legislative authority upon which the Dominion obviously relied in passing the impugned section 16, *viz.*, the Dominion taxing power. Section 91(3) of the B.N.A. Act sets out this power in the following terms: "The raising of money by any mode or system of taxation." The plenary character of this power had been emphasized in the earlier cases in which it was considered.[6] More recently, as the raising of money has become tied up with various measures of social security, there has crept into the decisions on the Dominion taxing power statements restrictive of a plenary taxing power according to the purposes for which the taxation is levied.[7] It is a relatively easy jump from such a position to the conclusion that a particular taxing measure is merely a subterfuge for an invasion of provincial legislative authority.

Such an approach has implicit in it the attempt to limit the taxing power to "pure" taxation, an incomprehensible term. "Every tax is in some measure regulatory. To some extent it interposes an economic impediment to the activity taxed as compared with others not taxed."[8] Judicial restraint where the limits of a particular legislative power are concerned is especially important in relation to taxation. Duff C.J. who delivered the judgment of the Supreme Court in the present case is himself the author of the proposition, stated in a recent case,[9] that section 91 (3) of the B.N.A. Act "is an authority to legislate in relation to the raising of money. There is no limitation in those words as respects the purpose or purposes to which the money is to be applied."[10] He said further that, subject to the qualification of colourable legislation, "an enactment the real purpose of which is to raise money by any mode or system of taxation is not examinable by the courts as to its validity by a reference to the motives by which Parliament is influenced, or the ultimate destination of the proceeds of the tax."[11] It is

[5] [1938] S.C.R. 100, [1938] 2 D.L.R. 81.

[6] *Cf. Caron* v. *The King*, [1924] A.C. 999, [1924] 4 D.L.R. 105; MacDonald, *Taxation Powers in Canada* (1941), 19 Can. Bar Rev. 75.

[7] *In re Insurance Act of Canada*, [1932] A.C. 41; *Attorney-General of Canada* v. *Attorney-General of Ontario*, [1937] A.C. 355.

[8] *Sonzinsky* v. *U.S.* (1937), 300 U.S. 506, per Stone J.

[9] *Reference re Employment and Social Insurance Act*, [1936] S.C.R. 427, in which Duff C.J. dissented.

[10] *Ibid.*, at p. 433.

[11] *Ibid.*, at p. 434.

regrettable in view of the opinion held by the Chief Justice as to Dominion taxing power that he should have left to inference the answer to the question whether section 16 of the Special War Revenue Act was a valid exercise of such power.[12]

The invalidation of Dominion insurance legislation as well as of section 16 proceeded on the much reiterated principle that the Dominion has no authority to legislate in relation to the business of insurance within the province. *Citizens Insurance Co.* v. *Parsons*[13] was a factor in the long-continued judicial emasculation of the Dominion power to legislate in relation to the regulation of trade and commerce, although the specific point in the case concerned the validity of a provincial statute providing for uniform conditions in fire insurance policies. By the time the *P.A.T.A. Case*[14] gave some encouragement to the Dominion respecting an enlarged scope for its "trade and commerce" power, precedent pretty well foreclosed any possibility of effective Dominion regulation of the business of insurance. One avenue seemed to be left open by the Privy Council, *viz.*, the possibility of regulation of foreign insurance companies. In *Attorney-General of Canada* v. *Attorney-General of Alberta*[15] Viscount Haldane gave to the question whether the Dominion Parliament has any power to require a foreign company to take out a licence, even if the company desires to confine its business to a single province, the following reply:[16]

> . . . . . in such a case it would be within the power of the Parliament of Canada, by properly framed legislation, to impose such a restriction. It appears to them that such a power is given by the heads in s. 91, which refer to the regulation of trade and commerce and to aliens.

In *Attorney-General for Ontario* v, *Reciprocal Insurers*[17] this observation of Viscount Haldane was referred to as being to the effect "that legislation, if properly framed, requiring aliens, whether natural persons or foreign companies, to become licensed as a condition of carrying on the business of insurance in Canada, might be competently enacted by Parliament." The empty nature of this concession to Dominion power became apparent in *In re Insurance Act of Canada.*[19] In deciding against

[12] Perhaps as indicated below, he considered the question settled by *In re Insurance Act of Canada*, [1932] A.C. 41.
[13] (1881), 7 App. Cas. 96.
[14] *P.A.T.A.* v. *Attorney-General of Canada*, [1931] A.C. 310.
[15] [1916] 1 A.C. 588.
[16] *Ibid.*, at p. 597.
[17] [1924] A.C. 328.
[18] *Ibid.*, at p. 347.
[19] [1932] A.C. 41.

the Dominion, Lord Dunedin, speaking for the Privy Council, expressed the hope that this case would be "the last of the series of litigations between the Dominion and the Provinces with regard to insurance."[20]

In re Insurance Act of Canada, which was heavily relied on in the present case, decided: (1) A British or foreign insurance company licensed under provincial law could not be required to obtain a licence under Dominion legislation as a condition of doing business; (2) section 16 of the Special War Revenue Act, a provision very similar to the one considered in the case at bar, was *ultra vires*. As to the first point, the Privy Council was of opinion that "under the guise of legislation as to aliens [the Dominion sought] to intermeddle with the conduct of insurance business, a business which . . . . . has been declared to be exclusively subject to Provincial law."[21] No reference was made to the power in relation to "the regulation of trade and commerce", which was included in Viscount Haldane's observation above referred to. Perhaps it is hardly surprising that mention of it was omitted in view of the inexcusably narrow effect that the Privy Council had given to it.[22] But it was a foregone conclusion that Dominion regulatory legislation could not be based on s. 91(25) of the B.N.A. Act ("naturalization and aliens") alone.

The second branch of the decision may help to explain why Duff C.J. preferred to say nothing about the Dominion taxing power in the present case. Lord Dunedin expressed himself as follows:[23]

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

In other words, the imposition of a premium tax upon persons insuring with unlicensed British and foreign companies was a colourable or indirect attempt to regulate the insurance business, a matter withdrawn from Dominion authority. That the tax was imposed on the insured rather than upon the insurer apparently made no difference. To uphold the tax would have meant that British and foreign companies would be at a competitive disadvantage in carrying on insurance business unless they obtained a Dominion licence. Was there any reason to afford

[20] *Ibid.*, at p. 45.
[21] *Ibid.*, at p. 51.
[22] *Cf. In re The Board of Commerce Act. 1919 etc.*, [1922] 1 A.C. 191.
[23] [1932] A.C. 41, at p. 52.

them the same advantages as were enjoyed by domestic or provincial companies? Even if the answer was in the negative, the Privy Council could foresee that a tax on persons insuring with unlicensed British or foreign companies would be followed by a tax on persons insuring with unlicensed provincial companies.

The "licence" feature was hence the *crux* of the situation for the Privy Council, and the Supreme Court of Canada took the same position in *Reference re Section 16 of the Special War Revenue Act* when emphasis was laid on the registration requirements of the Dominion insurance statutes. It is beyond much question now that no "alien" legislation can be properly framed by the Dominion so as to give it some regulatory control over non-Canadian insurance companies. The matter is not one which concerns "alien" legislation at all, but "the regulation of trade and commerce," and it is this power for which an amplified scope must be obtained, not only from the standpoint of insurance regulation but from the standpoint of all those matters which in the United States and in Australia fall within the federal commerce power. It is somewhat amusing today to find that in the *Reciprocal Insurers Case* the Privy Council gave *Hammer* v. *Dagenhart*[24] as an American example of the principle that encroachment by the central legislature upon the authority of the local legislatures under the guise of exercising a federal power will be prevented. *Hammer* v. *Dagenhart* was explicitly overruled by the Supreme Court of the United States in *United States* v. *Darby*.[25] The Dominion may perhaps derive some comfort from the fact that the United States too struggled for years to get out of a constitutional straight-jacket.

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TORTS — AGENCY — MASTER AND SERVANT — MASTER'S LIABILITY FOR INJURY TO SERVANT — DEFECTIVE WORKING SYSTEM OPERATED BY INDEPENDENT CONTRACTOR.—*Marshment* v. *Borgstrom*[1] decides an important point of law respecting the common law liability of an employer for injury to his servant. The plaintiff was injured while engaged in sawing operations for the defendant owing to a defective system supplied and operated by an independent contractor under an arrangement with the defendant. The Supreme Court of Canada unanimously reversed the judgment of the Ontario Court of Appeal, under which the defendant was exonerated, and imposed lia-

[24] (1918), 247 U.S. 251.
[25] (1941), 312 U.S. 100.
[1] [1942] 4 D.L.R. 1 (Can.), reversing [1941] 4 D.L.R. 804 (Ont. C.A.).

bility since the employer had failed to discharge a personal non-delegable obligation to have proper equipment and a proper working system, so far as care and skill could secure these results.

The present judgment, in expressly stating that a master is liable for injuries caused to a servant by the defective system of work entrusted to an independent contractor, indicates clearly that the liability stated so carefully by the House of Lords (and repeated here) in *Wilsons Clyde Coal Co.* v. *English*[2] in terms of reasonable care is, in reality, a form of strict liability regardless of fault or the exercise of care by the master. Although the House of Lords were not in terms dealing with an independent contractor they did have to deal with an employee over whom, by statute, the employer had no right of control — the test of agency. In the present case the Ontario Court of Appeal were not prepared, apparently, to go beyond fault, either personal or imputed on an agency relation. There can be little doubt from the English cases prior to the *Wilsons Case* that the notion of personal fault (including imputed fault of a servant) was the prevailing understanding.[3] Granted the pernicious doctrine of common employment and realizing that it is today practically impossible to find a master personally negligent since his work is invariably handled by servants or agents, the liability for defective premises at common law would have been practically extinguished by the view of the English Court of Appeal in *Fanton* v. *Denville*,[4] which held that a master's liability in such case could only be for personal negligence in himself supplying defective working systems or in failing to exercise care in selecting a competent manager whose duty it might be to instal or operate such a system. If the manager so appointed were negligent in the installation or maintenance of the system, he being a fellow servant of the injured employee, the latter would be barred as against the employer. This decision was followed by the Ontario Court of Appeal in *Duncan* v. *Norton-Palmer Hotel Co.*,[5] and indicates not only the stifling effect of the common employment doctrine but also shows clearly that fault (either personal or in an agent) was the controlling notion. To obviate the effect of the *Fanton Case*, the House of Lords in the *Wilsons Case* laid down the idea of " personal obligation " on an employer, in a non-delegable sense,

[2] [1938] A.C. 57, [1937] 3 All E.R. 628.

[3] See *Smith* v. *Baker*, [1891] A.C. 325, 362, per Lord Herschell; *Cole* v. *de Trafford* (No. 2), [1918] 2 K.B. 523, 535, per Scrutton L.J.

[4] [1932] 2 K.B. 309.

[5] [1933] O.R. 86.

to supply equipment and a working system as good as reasonable care could make it. Clearly this could not be a liability to respond for the fault of a servant as such since the common employment rule would then operate. It was in effect a strict liability not dependent on personal fault or the fault of anyone for whom the employer was on agency grounds responsible. To reach this end the House of Lords stated that such duty was based on the contract of employment. The presence of a contract has been used by courts before to turn a liability for negligence (personal or of a servant) into a strict liability to answer for lack of reasonable care by anyone, as is shown by the cases dealing with liability to persons entering "dangerous premises" pursuant to a contract.[6] On the other hand the absence of a contract has weighed with courts in denying the liability of an occupier for the negligence of independent contractors to "invitees" without a contract.[7] The presence or absence of a contract should not be determinative, however, since it is the law that imposes the obligation (as Duff C.J. remarked in the present case) and the problem of duty and how high it should be pitched depend on many factors of policy among which the existence of a contract — invariably silent on the point — is only one. There can be no doubt that the common law doctrine of duties "arising from the contract of employment" has been coloured by the Employers' Liability Acts; and in Ontario, by reason of the Workmen's Compensation Act,[8] it is only in the cases of "farming" and "domestic or menial servants" that the defence of common employment is open and room is left for restricted or liberal extension of the *Wilsons Case*. The fact that Canadian courts had anticipated the *Wilsons Case*, as Duff C.J. demonstrated, is significant, but not as surprising as the fact that their judgments tended to be overlooked in this and other prior decisions in Ontario in favour of English precedent.

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EVIDENCE—OBJECTION BY MINISTER OF STATE TO PRODUCTION—PUBLIC INTEREST.—At a time when we hear much from the legal profession regarding the bureaucratic tendencies on the part of the Executive, it is rather amazing to find that the House of Lords' judgment in *Duncan* v. *Cammell, Laird & Co., Ltd.*,[1] has received so little attention. That judgment seems to

[6] *Maclenan* v. *Segar*, [1917] 2 K.B. 325.
[7] *Haseldine* v. *Daw & Son Ltd.*, [1941] 3 All E.R. 156.
[8] R.S.O. 1937, c. 204.
[1] [1942] 1 All E.R. 587.

amount to an abdication by the courts of their proper function of determining what is admissible or inadmissible evidence in leaving to the Executive an unlimited power of refusing to produce evidence on its mere say-so concerning public interest. No doubt a state of war was responsible for conceding such an extraordinary power to the Executive, but the fact that the power itself is not confined to time of war seems certainly to merit the remarks of Lord Atkin in the *Liversidge Case*[2], when he charged that the courts were becoming more executive-minded than the Executive. Despite the decision of the Privy Council in *Robinson* v. *State of South Australia*,[3] apparently the judgment of the House of Lords will be accepted as binding Canadian courts. The critical remarks of Professor Goodhart in a recent number of the *Law Quarterly Review*[4] regarding this case are reproduced here in full and we believe that if they are applicable to the English situation, they are a hundred times more applicable to the Canadian picture where we can now look forward to both Provincial and Dominion Executives refusing to produce evidence whenever it seems to be inconvenient to the Department concerned. Unlike other branches of law which can frequently be rectified by legislation, the courts, or at least the House of Lords, having of their own volition deprived themselves of an extremely important power of checking unwarranted executive action, we may be quite sure that no remedial legislation will be forthcoming to re-establish a judicial power which was only gained after a long and bitter fight. It seems, to this writer at any rate, unfortunate that the power of Canadian courts to check possible interference with the administration of justice by Dominion or Provincial Executives should be swept away by a decision of a body, no matter how august, which is totally unfamiliar with Canadian conditions.

The comments of Professor Goodhart referred to above are as follows:

> The importance of *Duncan* v. *Cammell, Laird & Co., Ltd.* [1942] 1 All E.R. 587 is marked by the fact that seven members of the House of Lords sat to hear the appeal. Moreover, the unusual course was followed of delivering only a single judgment which was prepared by the Lord Chancellor after 'consultation with and contribution from' the other learned Lords. The case involved two points: (1) in what circumstances could a Minister of State refuse to produce documents in an action between two private litigants on the ground that such production would be against the public interest, and (2) whether this objection should be treated by the Court as

[2] [1941] 58 T.L.R. 45.
[3] [1931] A.C. 704.
[4] (1942) 58 L.Q.R. 436.

conclusive, or whether there were circumstances in which the judge should himself look at the documents before ruling as to their production? It is obvious that this case raises questions of the highest constitutional importance, for if a Minister of State can refuse to produce any documents he sees fit to claim are privileged, then the powers of the Courts to do justice may be seriously curtailed if at any time the Executive should assume an arbitrary position. This is all the more serious at a time when the activities of the State are rapidly increasing, and it is engaged more and more in ordinary mercantile transactions. It is odd, therefore, that so much importance has been attached by certain commentators to *Liversidge* v. *Anderson* (1941) 58 T. L. R. 45, which concerned the construction of an Order effective only during the war, and so little to the present case which will have a permanent influence on the position of executive officers.

The importance of the case does not lie in the conclusion reached by their Lordships, for on the facts of the case there can have been little doubt that the documents were privileged. They related to the structure of the submarine *Thetis*, and therefore any disclosure of their contents might have been of value to the enemy. The only ground on which the plaintiffs sought to justify their application was that these documents had been produced before the Tribunal of Inquiry into the loss of the *Thetis*, and that reference to them had been made in the report. That inquiry had, however, been held in secret, and the reference was only to a small part of the documents. The importance of the case, therefore, does not lie in these special facts, but in the broad statement of principle contained in the Lord Chancellor's judgment.

The law as now definitely established is that 'a Court of law ought to uphold an objection, taken by a public department when called on to produce documents in a suit between private citizens, that, on grounds of public policy, the documents should not be produced.' This objection is unlimited and extends to all documents which a public department considers ought not to be disclosed. At the conclusion of his judgment the Lord Chancellor stated the grounds on which a Minister ought to base such a claim, but this advice is only of a hortatory character: for all practical purposes the Executive is free to refuse production of any and all documents.

As the Lord Chancellor pointed out, the present case was argued on the assumption that there was no recorded decision of the House of Lords on this point, but Lord Thankerton, apparently after the arguments were concluded, called attention to Lord Eldon's decision in *Earl v. Vass* (1822) 1 Shaw 229 which was 'very much in point.' The omission of counsel to notice this case can be explained on the ground that it is not cited in the leading English textbooks on the law of evidence. It is, however, discussed at length in § 2375 of Professor John H. Wigmore's monumental work on *Evidence*. It is unfortunate that in the present case no reference was made to his volumes for he has dealt with the question of State secrets more thoroughly than has any other writer on the subject. After pointing out that the privilege is clearly established where questions of international politics or military defence are involved, he stresses the danger of extending the rule to the purely internal affairs of the Government. 'It is urged,' he says, referring to *Beatson* v. *Skene* (1860) 5 H. & N. 838, which was cited with approval in the present case, 'that the "public interest must be considered paramount to the individual interest of a suitor in a court of justice."' As if the public interest were not involved in the administration of justice! As if the denial

of justice to a single suitor was not as much a public injury as is the disclosure of any official record!' After analysing the various cases on this point, in many of which the claim to public interest was only a fiction, the real purpose being to protect an individual, he concludes as follows: 'Rules of law much more innocent in appearance have been made to serve evil purposes upon a large scale. "No nation" (in the words of a great American jurist, Edward Livingston) "ever yet found any inconvenience from too close an inspection into the conduct of its officers; but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses which were imperceptible only because the means of publicity had not been secured".' A similar view was expressed by the Judical Committee in *Robinson* v. *State of South Australia* (No. 2) [1931] A.C. 704 where Lord Blanesburgh said (at p. 714): 'And first of all, it is, their Lordships think, now recognized that the privilege is a narrow one, most sparingly to be exercised.' The present case has established that the privilege is an unlimited one, to be exercised whenever a Minister sees fit.

The second point in the present case concerned the question whether when the objection had been duly taken, the judge should treat it as conclusive. Here the precedents were evenly divided as in some cases the judges had looked at the documents and in others they had not. In the *Robinson Case* (*supra*) the Judicial Committee ordered the Court to inspect the documents, as it felt that 'the zealous champion of Crown rights' might frequently be tempted to take a prejudical view in the matter. In the present case the House of Lords took the contrary view on the ground that 'those who are responsible for the national security must be the sole judges of what the national security requires.' This may be true during the time of war and where matters of national security are concerned, but, with all respect, is it equally true in times of peace and where the matter of public interest is concerned not with national security but, for example, with the mismanagement of a wheat marketing scheme as in the *Robinson Case*? On this point Professor Wigmore says (§ 2376): 'The truth cannot be escaped that a Court which abdicates its inherent function of determining the facts upon which the admissibility of evidence depends will furnish to designing officials too ample opportunities for abusing the privilege. The lawful limits of the privilege are extensible beyond any control, if its applicability is left to the determination of the very official whose interest it is to shield his wrongdoing under the privilege. Both principle and policy demand that the determination of the privilege shall be for the judge.'

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IMMIGRATION—DEPORTATION—WIFE UNABLE TO ACQUIRE DOMICILE SEPARATE FROM HUSBAND.—*Re Carmichael*[1] involved a habeas corpus application to quash a deportation order under the Immigration Act[2] made against a married woman who had allegedly lost Canadian domicile. The apparently novel point of the judgment dismissing the application was that there was nothing in the Act permitting a wife to acquire a domicile separate and apart from her husband.

[1] [1942] 3 D.L.R. 519 (B.C.).
[2] R.S.C. 1927, c. 93.

The Court's adherence to the ordinary rule of English law that a wife's domicile follows that of the husband can hardly be criticized in the circumstances. Conceivably it may lead to hardship which only an amendment or administrative leniency can alleviate. For example, a husband living and domiciled in Canada with his wife deserts her and establishes a domicile in another country. She is liable to deportation if she comes within any of the prohibited classes under the Immigration Act,[3] or she may be refused re-entry on returning to Canada after a short visit to a neighbouring country.

[3] *Ibid.*, s. 3.